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Friday, January 15, 2021

Presidential Documents

Title 3—

The President

Executive Order 13973 of January 8, 2021

Providing an Order of Succession Within the Environmental Protection Agency

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended, 5 U.S.C. 3345 *et seq*. (the ''Act''), it is hereby ordered as follows:

Section 1. *Order of Succession*. Subject to the provisions of section 2 of this order, and to the limitations set forth in the Act, the following officials of the Environmental Protection Agency, in the order listed, shall act as and perform the functions and duties of the office of the Administrator of the Environmental Protection Agency (Administrator) during any period in which the Administrator and the Deputy Administrator of the Environmental Protection Agency have died, resigned, or otherwise become unable to perform the functions and duties of the office of Administrator:

(a) General Counsel;

(b) Assistant Administrator, Office of Solid Waste (also known as the Assistant Administrator for the Office of Land and Emergency Management);

(c) Assistant Administrator for Toxic Substances (also known as the Assistant Administrator for the Office of Chemical Safety and Pollution Prevention);

(d) Assistant Administrator for the Office of Air and Radiation;

(e) Assistant Administrator for the Office of Water;

(f) Assistant Administrator for the Office of Enforcement and Compliance Assurance;

(g) Chief Financial Officer;

(h) Assistant Administrator for the Office of Research and Development;

(i) Assistant Administrator for the Office of International and Tribal Affairs;

(j) Assistant Administrator for the Office of Mission Support;

(k) Associate Deputy Administrator for Programs;

(l) Associate Deputy Administrator;

(m) Regional Administrator, Region VIII;

(n) Principal Deputy Assistant Administrator for the Office of Mission Support;

(o) Deputy Regional Administrator, Region VIII;

(p) Principal Deputy General Counsel; and

(q) Principal Deputy Assistant Administrator for the Office of Enforcement and Compliance Assurance.

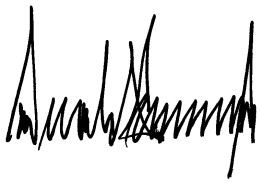
Sec. 2. *Exceptions*. (a) No individual who is serving in an office listed in section 1(a)–(q) of this order in an acting capacity shall, by virtue of so serving, act as Administrator pursuant to this order.

(b) No individual listed in section 1(a)–(q) of this order shall act as Administrator unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this order, the President retains discretion, to the extent permitted by law, to depart from this order in designating an acting Administrator.

Sec. 3. *Revocation*. Executive Order 13763 of January 13, 2017 (Providing an Order of Succession Within the Environmental Protection Agency), is hereby revoked.

Sec. 4. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 8, 2021.

[FR Doc. 2021–01094
Filed 1–14–21; 8:45 am]
Billing code 3295–F1–P

Rules and Regulations

Federal Register
Vol. 86, No. 10
Friday, January 15, 2021

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

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

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1464

[Docket ID NRCS–2019–0012]

RIN 0578–AA70

Regional Conservation Partnership Program

AGENCY: Natural Resources Conservation Service (NRCS) and the Commodity Credit Corporation (CCC), United States Department of Agriculture.

ACTION: Final rule.

SUMMARY: This final rule adopts, with minor changes, an interim rule published in the **Federal Register** on February 13, 2020. The interim rule implemented changes to RCPP that were either necessitated by the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) and changes for administrative streamlining improvements and clarifications. CCC amended this interim rule with a technical correction on March 17, 2020. NRCS received input from 65 commenters who provided 335 comments in response to the interim rule. This final rule makes permanent the provisions of the interim rule, responds to comments received, and makes further adjustments in response to some of the comments received.

DATES: Effective: January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Kari Cohen; phone: (202) 720–6037; or email: *kari.cohen@usda.gov.* Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

The 2018 Farm Bill reauthorized and amended RCPP. On February 13, 2020, an interim rule with request for comments was published in the **Federal Register** (85 FR 8131–8145) that added RCPP regulations in 7 CFR part 1464 to implement changes made by the 2018 Farm Bill. A technical correction was published in the **Federal Register** on March 17, 2020 (85 FR 15051–15052). This final rule adopts, with minor changes, the interim rule.

Discussion of RCPP (7 CFR part 1464)

RCPP, implemented under the direction of the Chief of NRCS, promotes coordination of NRCS conservation activities with partners that offer value-added contributions to address on-farm, watershed, and regional natural resource concerns. Through RCPP, NRCS seeks to co-invest with partners to implement projects that demonstrate innovative solutions to conservation challenges and provide measurable improvements and outcomes.

RCPP projects may only be carried out on agricultural or nonindustrial private forest land or associated land on which NRCS determines an eligible activity would help achieve conservation benefits. Eligible conservation activities may be implemented on public lands when those activities will benefit eligible lands as determined by NRCS and are included in the scope of an approved RCPP project.

The interim rule:

- Created a new part in the Code of Federal Regulations (CFR) to acknowledge that RCPP is now a stand-alone program, no longer subordinated to its covered programs.
- Identified three contract types for implementation of RCPP, including programmatic partnership agreements, program contracts, and supplemental agreements.
- Defined terms to address changes made by the 2018 Farm Bill, including—
  - Conservation benefits;
  - Eligible activity;
  - Eligible partner;
  - Lead partner;
  - Nonlead partner;
  - Participant;
  - Priority resource concern;
  - Project resource concern;
  - Proposal; and
  - RCPP plan of operations.
- Identified that NRCS may award up to 15 Alternative Funding Arrangement (AFA) projects, which rely on partner capacity to implement conservation activities.
- Acknowledged the reduction from three funding pools to two and directed partners to apply to either the Critical Conservation Area (CCA) or State and Multistate funding pool.
- Added provisions requiring all RCPP project partners to develop and report on their environmental outcomes.
- Expanded the scope of RCPP by including the authorities of the Conservation Reserve Program (16 U.S.C. 3831–3835) and the Watershed Protection and Flood Prevention Program (Pub. L. 83–566), excluding the Watershed Rehabilitation Program, in the definition of ''covered programs.''
- Expanded the purpose of RCPP to include protection of drinking water and ground water on eligible land.
- Allowed partnership agreements to be longer than 5 years in certain situations, as determined by NRCS, to further purposes of RCPP.
- Allowed partnership agreement renewals for a period not to exceed 5 years that in certain situations may be funded through an expedited noncompetitive process.
- Allowed a partnership agreement, or a renewal partnership agreement, to be extended one time for up to 12 months.
- Required reporting publicly at the time of selection the amount of technical assistance (TA) that will be set aside for project implementation.
- Acknowledged an obligation to provide guidance for partners on how to quantify and report project outcomes, including achievement of conservation benefits.

Summary of Comments

The interim rule 60-day comment period ended May 12, 2020. NRCS received 335 comments from 65 commenters in response to the rule. NRCS reviewed these 335 comments and categorized and summarized them according to the topics identified below. NRCS received comments on a wide variety of topics, including several comments of a general nature, most of which expressed support, as well as a few comments that were not relevant to RCPP or to the RCPP interim rule. The topics that generated the greatest response were easements, funding pools, program administration, program contracts, and proposals.

In this rule, the comments have been organized alphabetically by topic. The topics include:

- Adjusted gross income (AGI) waivers;
- Alternative funding arrangements (AFA);
- Availability of program funding (APF);
- Easements;
- Eligibility;
- Funding pools;
- Partner contributions;
- Program administration;
- Program contracts;
- Programmatic partnership agreements;
- Proposals;
- RCPP activity types;
- Renewals; and
- Supplemental agreements.

Adjusted Gross Income Waivers

Comment: NRCS received comment expressing concern about reporting requirements necessary to receive an AGI eligibility determination from the Farm Service Agency (FSA). Comment also expressed concern that the AGI waiver process may harm the ability of small farms to receive conservation assistance and suggested adding more detail on the process and criteria for granting AGI waivers.

Response: AGI eligibility determination processes are not within the purview of NRCS or this rulemaking. However, NRCS recently published a National Bulletin (NB 440–20–26) which indicated that an RCPP lead partner may request a waiver of the applicability of AGI at the RCPP project level during the initial Partnership Project Agreement (PPA) negotiation only. If granted, producers participating in RCPP through individual contracts or agreements will not be required to file AGI paperwork or have AGI determinations made by FSA. If the RCPP lead partner does not request or receive a project-level waiver of the applicability of AGI, a producer may seek a waiver of the AGI limitation upon receiving an AGI determination. No changes are made in the final rule in response to this issue.

Alternative Funding Arrangements

Comment: NRCS received comment requesting clarification that NRCS retains administrative responsibility for conservation compliance, AGI, and payment limitation determinations, tenant rights, producer appeals, civil rights, and other similar responsibilities.

Additionally, comment requested that NRCS:

- Remove the parenthetical about roads, dams, and irrigation facilities used to describe the types of infrastructure upon which an AFA could focus;
- Provide guidance on AFA goals;
- Only use AFAs in limited circumstances and apply stringent criteria;
- Support AFA irrigation projects and provide incentives for projects that would benefit fish and other aquatic species, particularly in overallocated basins;
- Administer AFA projects through grant agreements; and
- Expand the indirect costs eligible for reimbursement under AFA projects.

Response: NRCS will define responsibilities in the APF announcements and AFA partnership agreements, while still maintaining flexibility. NRCS will identify which responsibilities must remain with NRCS.

This final rule removes the parenthetical from § 1464.25. RCPP infrastructure projects relate to conservation activities that significantly address resource concerns but require greater investment than a single producer can make. NRCS's goal for AFA projects is to fund proposals that are consistent with RCPP purposes but are more effectively and efficiently carried out through lead partner efforts than through NRCS's conservation delivery system. AFA criteria are published as part of funding announcements when AFA funding is made available. AFAs are ''programmatic instruments'' that provide NRCS with the ability to balance the flexibility of grants or other agreement mechanisms with statutorily mandated responsibilities regarding NRCS roles. For all RCPP projects, including AFAs, the statutory limitation on administrative costs prohibits use of RCPP funding for a partner's indirect costs. Other than removing the parenthetical noted above, there are no other changes made in the final rule in response to this issue.

Availability of Program Funding (APF)

Comment: NRCS received comment expressing support for the existing APF and requesting that NRCS:

- Clarify its intent to cover project management costs;
- Provide written feedback for projects that are not selected; and
- Follow procedures of lead public entities when possible to promote efficiency.

Comment also included request for additional funding and flexibility for TA, including TA-only projects or projects focused on conservation planning.

Response: RCPP projects are collaborative, and NRCS works with each partner to develop procedural flexibility to help deliver conservation assistance effectively in the project area. While partners provide significant contribution to project costs, NRCS focuses on the technical and financial resources necessary to implement conservation activities and covers much of the project costs. For projects that are not selected, NRCS provides feedback to partners to help them develop more competitive proposals for future submission. NRCS strongly supports conservation planning and technical assistance delivery in its program implementation efforts, including RCPP, and selects proposals that most effectively delivery conservation outcomes. No changes are made in the final rule in response to these issues. With respect to TA-only type projects, the Farm Bill makes clear that all RCPP projects are intended to generate conservation benefits and report on conservation outcomes, therefore, RCPP should prioritize on-the-ground conservation activities plus the TA required to get that conservation on the ground. NRCS has an extensive Conservation Technical Assistance program that provides such support to its partners.

Easements

Buy-Protect-Sell (BPS) Transactions

Comment: NRCS received comment related to BPS easement transactions, including support for the availability of BPS transactions under RCPP and requesting the extension of such flexibility to U.S.-held easements. Comment also:

(a) Recommended that NRCS consider as eligible BPS projects that encompass land purchased on an interim basis by State or county governments to improve land access by Historically Underserved (HU) producers;

(b) Addressed easement deed terms, recommending that NRCS make the minimum deed terms available as soon as possible and provide full flexibility in the use of entity-written deed terms; and

(c) Recommended that the entity match follow ACEP–ALE flexibility, which allows a landowner's donation of easement value to constitute all of the nonfederal match requirements.

Response: Based on the ACEP definition, BPS transactions are unique transactions that require the transfer of an easement to an eligible entity and do not include the United States as the ultimate easement holder. ACEP land eligibility is limited to private and

Tribal lands. In contrast, RCPP land eligibility includes certain public lands, and NRCS may allow States and local government agencies to enter into a BPS transaction under RCPP. NRCS will announce any authorizations for such transactions through an APF.

NRCS has posted the minimum deed terms to provide a full range of options for US-held and entity-held easements. The minimum deed terms provide eligible entities with maximum flexibility to use their own terms while NRCS ensures that RCPP purposes and requirements are met. NRCS will also maintain easement compensation flexibility under the final rule. Future APFs will provide information on the best approach for leveraging Federal funding and partner efforts.

No changes are made in the final rule in response to these issues.

U.S.-Held Easement Compensation

Comment: NRCS received comment about the range of easement types available under RCPP, expressing support for the flexibility and requesting that NRCS avoid competition between RCPP U.S.-held agricultural land easements and other farm protection programs. Comment also addressed the easement valuation structure identified in the APF, opposing the use of tiered easement compensation based upon level of U.S.-held RCPP easement protection. Comment also recommended that NRCS consider landowner charitable donation of easement value and landowner management activities on an easement as part of the partner's contribution.

Response: The three tiers of compensation paid to landowners enrolling in a U.S.-held RCPP easement were established to emphasize the partnership nature of RCPP and to ensure that RCPP would not compete with other NRCS easement programs. While partner contributions are encouraged to compensate landowners fully for enrollment of less restrictive easement types, landowner donations of easement value or associated management costs cannot be counted as partner contribution. Doing so would reduce the incentive for partners to provide assistance to producers. For example, when RCPP reimburses a producer for up to 75 percent of the cost of implementing a conservation practice, the remaining 25 percent is the producer's responsibility. If the producer solely pays for the 25 percent share, it is not considered a partner contribution. A partner contribution only occurs if the partner assists the producer with the cost of the practice. NRCS will continue to encourage greater partner investment in project success through the competitive tiering of easement compensation. No changes are made in the final rule in response to these issues.

Eligibility

Comment: NRCS received comment about land eligibility in general, including support for the eligibility of certain public agricultural lands and some suggesting expansion of such eligibility to all public land. Comment also supported the eligibility of lands owned by non-governmental organizations, while other comment recommended that eligibility be expanded to include forest land under threat from grazing by ungulates.[1] Commenters also expressed appreciation for the consistency of land eligibility between the CSP and RCPP interim rules and urged NRCS to be flexible in determining whether such land is under the ''effective control'' of the producer.

Response: NRCS appreciates comments regarding land eligibility with respect to lands owned by public and non-governmental entities. The RCPP activity type informs whether or not public land or land owned by a non-governmental entity is eligible given existing public trust protections and related restrictions and the relationship of those protections and restrictions to addressing resource concerns. As a result, NRCS believes that the current parameters best reflect the scope of land eligibility. No changes are made in the final rule in response to these issues.

Funding Pools

Critical Conservation Areas

Comment: NRCS received comments related to Critical Conservation Areas (CCAs), including recommending that NRCS:

(a) Add excess water as a concern for the Mississippi River basin;

(b) Consolidate the Columbia River basin and the California Bay Delta into a single CCA;

(c) Add water source protection to all eight CCAs;

(d) Add soil health or soil quality as a priority resource concern for all eight CCAs;

(e) Allow CCA projects to include areas outside of a CCA;

(f) Continue Conservation Assessment and Ranking Tool (CART) use;

(g) Expand CCAs to include New England;

(h) Identify a new CCA focusing on coral reefs in the Pacific Islands Areas and the Caribbean Area;

(i) Identify a new CCA focusing on the Puget Sound;

(j) Continue the CCA in the Chesapeake Bay Watershed;

(k) Update CCAs to cover all 50 states; and

(l) Clarify that if a proposal is within a CCA it will only receive priority if it both achieves conservation benefits and addresses the CCA's primary resource concern.

Response: While lands outside a CCA can influence resource concerns within a critical conservation area, NRCS identified CCA boundaries to provide clear demarcation. This final rule clarifies that lands outside of a CCA are not eligible for proposals or applications in a CCA. The regulation is also amended to reflect that NRCS will give priority to proposals in CCAs that both (1) achieve conservation benefits and (2) address at least one of a CCA's priority resource concerns.

NRCS appreciates the comments related to CART and suggestions regarding RCPP and water resource, soil health, and soil quality. Regarding proposed changes to the eight designated CCAs, the Secretary identifies CCAs, including whether an existing CCA will be re-designated. NRCS is working with the Office of the Secretary to determine whether the current designation status of CCAs, including the re-designation of current CCAs or new CCAs, should be undertaken. No changes are made in the final rule in response to these issues.

Other

Comment: NRCS received comment related to funding pools that did not address CCAs. Comment expressed concern that the National funding pool was eliminated and suggested that State Conservationists should be the selecting official for the State and Multi-State funding pool.

Response: The 2018 Farm Bill mandated removal of the National funding pool. NRCS provides State Conservationists with advisory allocations to guide the State's ranking process. However, the Chief makes all final selections. No changes are made in the final rule in response to these issues.

Renewals

Comment: NRCS received support for the renewal process though some comment critiqued its competitive nature due to limited funds. Comment recommended that a renewal demonstrate the continued need for the project and requested that NRCS post renewal criteria prior to requesting renewal applications. Comment alternatively recommended funding all

[1] Ungulates are hooved mammals.

renewal requests that qualify, even if it must be done at a reduced rate.

Response: Renewals of partnership agreements do not compete with new proposals, but criteria are needed so that NRCS only renews those partnership agreements that represent the best investment of additional RCPP resources. To do so, NRCS uses screening questions to determine if a project has met or exceeded the original objectives, alongside other factors—including available funding and project diversity (geographic and type)—to determine which projects will be offered renewal.

Partner Contributions

Comment: NRCS received comment recommending:

(a) Increased practice payments to encourage producer participation in RCPP projects;

(b) Clarification that RCPP funding can be stacked with any other source of funding;

(c) Clarification that partners may reduce their contributions if NRCS provides an award amount less than the partner's proposal request;

(d) Landowner donations (for example, related to practice implementation) be allowed as partner contributions if they are based on verifiable expenses; and

(e) A flexible structure for partner contributions that match overall objectives of individual projects.

Comment also supported NRCS setting partner contribution goals (for example, at least 1:1), allowing partner contribution expenditures after award announcement, and the explicit addition of in-kind contributions as allowable partner contributions. Comment also expressed misplaced concerns that RCPP requires the partner contribution match to be made in cash.

Response: NRCS proportionally reduces expected partner contributions when the NRCS award is less than the amount requested, unless negotiated differently by the parties. NRCS will not consider landowner expenses to be partner contributions because the purpose is to stimulate assistance to producers. NRCS will continue to clarify contribution requirements in APFs. No changes are made in the final rule in response to these issues.

Program Administration

Evaluation Criteria

Comment: NRCS received comment recommending use of the following criteria when evaluating proposals for their conservation impact or outcomes, including suggestions that metrics should be used for partnership renewals; use of honeybees and other pollinators; use of practices to support native vegetation; and implementation of a drought contingency plan. Comment also recommended that NRCS:

(a) Identify selection criteria for partnership agreements, including whether there is the availability of alternative funding arrangements, in each APF;

(b) Use a simplified evaluation process;

(c) Consult with partners on all aspects of distributing RCPP financial assistance;

(d) Utilize fully AFAs;

(e) Work with local working groups as part of the proposal ranking criteria;

(f) Provide more certainty on reimbursement of real costs of both project implementation and proposal development;

(g) Work with the lead partner to rank and select priority projects;

(h) Involve the lead partner in program contract selection and development;

(i) Provide equal treatment for small, midsize, and large farms;

(j) Provide an option to forego a public and open enrollment process;

(k) Amend the ''priority resource concern'' definition in § 1464.3 to highlight soil health as critical to water quality, aquifer recharge, carbon sequestration and water retention; and

(l) Use caution applying ''innovation'' criteria since it is difficult to apply to flood damage reduction projects.

Response: RCPP encourages flexible and streamlined delivery of conservation assistance to producers. To maximize its flexibility and set it apart from other NRCS programs, evaluation criteria used to assess proposals are developed at the APF level. Moving forward, NRCS will consider the evaluation criteria proposed by commenters in developing APFs and, in doing so, will involve partners, stakeholders, and local working groups. Of note, NRCS believes that including scientific conclusions about the role of soil health in the definition of priority resource concern is not congruent with the concept that identifying priority resource concerns depends on the needs of the CCA, rather than a broad, national objective. No changes are made in the final rule in response to these issues.

General

Comment: NRCS received comment requesting that NRCS:

(a) Clarify roles and responsibilities of conservation partners and Technical Service Providers (TSPs) from the time of application through the implementation phases;

(b) Simplify the proposal application, ranking, and implementation processes (for example, maintain the adjustment of terms option);

(c) Require in regulation that there be a communication plan between NRCS and the lead partner to facilitate the entire RCPP project;

(d) Specify the reporting requirements for both NRCS and RCPP partners;

(e) Clarify when contract type will be determined in the application process;

(f) Provide detail on the documentation and planning of technical assistance and contributions;

(g) Acknowledge source water protection as a goal, and;

(h) Publish a ''plan for comment'' that outlines how NRCS will track and report expenditures towards source water protection.

Response: NRCS appreciates feedback intended to improve processes and delivery. Proposal application questions are specific to each funding announcement and are created as part of the funding announcement development process. To ensure that projects are feasible and meet program goals and objectives, technical experts provide input into question development and are involved throughout the evaluation and ranking process.

Programmatic partnership agreements specify the responsibilities and expectations of both NRCS and the lead partner from project implementation to close. In addition, per § 1464.2, NRCS has designated an RCPP coordinator for each State, whose role is to guide and assist partners through program implementation. Because the existing process provides ample opportunity for communication between NRCS and the lead partner, no change is made to the regulation to require a communication plan.

NRCS tracks and documents technical assistance internally. NRCS will provide partners a semiannual report that contains the status of each pending and obligated contract under each project and an annual report describing how NRCS used that fiscal year's TA.

RCPP funds associated with RCPP producer contracts in a source water protection (SWP) area as modeled by the Environmental Protection Agency are counted towards the 10 percent of funds that statute requires to be utilized for source water protection. This final rule adjusted the rule language to incorporate SWP as a priority.

Historically Underrepresented (HU) Groups

Comment: NRCS received comment recommending that NRCS incorporate into the final rule benchmarks related to participation by HU groups to reflect the importance and increasing engagement of women who participate in RCPP, and to ensure that RCPP does not inadvertently favor large landowners. Comment also recommended adding language to identify HU groups as a priority in the proposal procedures (§ 1464.20), ranking and proposal selection (§ 1464.21), and partnership agreement (§ 1464.22) sections of the final rule.

Response: Consistent with the 2018 Farm Bill, NRCS gives priority consideration to RCPP proposals that provide outreach to, and engagement of, HU groups. (HU groups, as specified in the RCPP authorizing legislation, include beginning farmers or ranchers, socially disadvantaged farmers or ranchers, limited resource farmers or ranchers, and veteran farmers and ranchers. NRCS has and will continue to provide program-specific outreach to HU groups at the national, State, and local levels. These efforts are often tailored to the needs of the service area, with targeted efforts for HU producers. Gender is not a covered HU group, which is specified in the authorizing legislation; however, NRCS encourages the participation of all producers who are eligible.

This final rule encourages further HU producer and landowner enrollment, including requiring partnership agreements to denote any authorizations for higher payment rates, advance payment options, or other methods for encouraging HU participation. Changes are made in the final rule in response to these issues.

Outcomes Measuring and Reporting

Comment: NRCS received comment requesting that the rule be updated to require partners to assess the conservation progress of their RCPP projects ''in a quantified form to the extent practicable.'' Comment further recommended the use of existing metrics for outcomes measurement, and also suggested that NRCS provide partners with geospatial data on new and existing practices to help facilitate outcomes measurement and reporting. Additionally, comment expressed concern that outcomes activities will further burden already strained NRCS staff capacity. Lastly, comment requested dedicated NRCS funding for monitoring conservation practices implemented as part of RCPP projects.

Response: The 2018 Farm Bill requires NRCS to gather quantitative data regarding conservation benefits, as set forth in the requirements of APFs. RCPP lead partners are required, to the extent practicable, to report on the conservation environmental outcomes of their projects. Reporting on economic, financial, and social outcomes is optional but encouraged. NRCS is committed to collaborating with lead partners to ensure that their reporting of outcomes help NRCS evaluate the value of RCPP investments. No changes are made in the final rule in response to these issues.

Payment

Comment: NRCS received comment suggesting a per-producer payment limit of $450,000 under RCPP, consistent with payment limitations under EQIP. Comment also suggested that NRCS base payment rates on real, local costs using prevailing wages or the regional Consumer Price Index.

Response: Payment limitations, such as those set forth in 7 CFR parts 1466 (EQIP) and 1470 (CSP) are established by statute. RCPP does not have a statutory payment limitation. NRCS plans to have activity-level limitations on producer contracts to ensure wider availability of funding. These limitations will be identified in partnership agreements and posted on NRCS State websites. No changes are made in the final rule in response to these issues.

Staff Support

Comment: NRCS received comment supporting increased NRCS staffing to focus on RCPP projects and communicate with partners, including strong support for the 2018 Farm Bill's requirement, as reflected in the interim rule, that each State identify an RCPP Coordinator.

Comment emphasized the need for designated program staff (including increasing staff where program workload was high) and urged that NRCS further support the RCPP State Coordinators by developing job descriptions for the new role and providing adequate time needed to fulfill the responsibilities. Comment also requested that states provide additional local, technical contacts for RCPP projects to ensure program goals are achieved and urged process efficiencies that allow NRCS technical partners, such as conservation districts, to implement projects without incurring NRCS staff time.

Additionally, NRCS received comment expressing concern about NRCS' dependence on partners and TSP, citing insufficient NRCS staffing at the state and local levels. Comment also requested that NRCS delegate authority to State and regional entities to carry out contract deliverables.

Response: NRCS has designated State RCPP coordinators. NRCS appreciates comments expressing concern about NRCS staffing capacity and NRCS' ability to meet and customer service needs in States with heavy workloads. No changes are made in the final rule in response to these issues.

Technical and Software Upgrades

Comment: NRCS received comment recommending that NRCS involve partners in implementing tools such as CART, ensure that all technology be in operation prior to accepting applications so that the process does not change midstream, and clarify how applicants will be selected for different program contract types. Comment additionally recommended including a standardized set of application questions and consistent reporting requirements, and that these be communicated to potential partners earlier in the process. Comment also expressed an interest in ensuring CART remain size-neutral.

Response: NRCS has and will continue to develop and improve our business tools, such as CART, including evaluating how to remain size-neutral. NRCS does not intend to change application procedures over the course of an application period, though it will continue to refine the process for future application periods. The process for matching an applicant with an RCPP contract depends on the nature of the specific programmatic agreement. No changes are made in this final rule in response to these issues.

Technical Service Providers

Comment: NRCS received comment about RCPP's use of TSPs, including that NRCS do more to encourage the use of TSPs and allow technical assistance to be provided by entities other than NRCS-certified TSPs.

Response: Requirements about delivery of technical services through TSPs is covered in 7 CFR part 652. The TSP regulation identifies the requirements for a producer to be reimbursed for the cost of hiring a TSP to obtain technical services related to an NRCS conservation program, including RCPP, and such a TSP must be certified by NRCS. The TSP regulation also identifies that NRCS may obtain additional assistance in its delivery of technical assistance through a procurement contract or cooperative agreements. Since the solicitation

methods used for those contract or agreement types ensure that NRCS obtains assistance from qualified TSPs, the TSP regulations specify that such TSPs do not also need to be certified under 7 CFR part 652. For more information, visit the NRCS TSP website at *https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/technical/tsp/*. No changes are made in the final rule in response to these issues.

Program Contracts

Comment: NRCS received comment requesting clarification as to whether RCPP contracts can serve to meet existing compliance and enforcement requirements. Comment also encouraged separate contracts for easements on agricultural land, a focus on co-operators' needs and resources rather than program requirements, and that NRCS provide a visual depiction as to how the new contracting method will be efficient and independent. Comment also expressed support for skipping an eligible application on a ranking list if the remaining funding is insufficient to fund that application or for other limited circumstances that would warrant not selecting applications strictly according to rank order.

Response: Conservation activities funded under RCPP, as with other NRCS voluntary conservation programs, can address resource concerns that meet a producer's compliance requirements, provided that the producer is not under an administrative order or other compulsory enforcement process related to the producer's failure to meet those requirements. NRCS will provide informational materials to partners about the new contracting methods as requested. No changes to the rule were needed to address these issues.

Programmatic Partnership Agreements

Comment: Comment praised approval of salary expenses in PPAs and the ability to make selections out of rank order for critical projects. Comment also suggested that more clarification is needed in the rule on expenses incurred prior to PPA completion, how and when funding will become available, how funds for project management can be requested, who measures success in TA and FA activities, and how partnerships can be terminated.

Respondents suggested that NRCS should:

(a) Publicly report on its TA expenditures under PPAs;

(b) Require lead partners to periodically assess conservation benefits;

(c) Increase PPA length beyond 5 years if needed; and

(d) Establish that lead partners will be required to follow all applicable laws, rules, and guidelines expected of NRCS when awarding contracts.

Response: The RCPP statute specifies the terms for PPAs and no change is needed to address agreement duration in this rule. The AFAs provide detail as to the ability to receive payment for pre-PPA expenses. The terms and conditions associated with terminating a PPA are specified in the PPA itself. The regulation addresses the consequences should NRCS determine that PPA termination is necessary. No changes are made in the final rule in response to these issues.

Proposals

Comment: NRCS received comment about several aspects of APFs, recommending that the RCPP regulation include similar detail as APFs regarding proposal requirements and the evaluation process beyond the four overarching pillars. Comment also requested language:

(a) Addressing circumstances under which ''associated'' non-agricultural lands would be eligible for RCPP;

(b) Defining ''eligible activities'' more clearly;

(c) Providing information about the percentages of project funding that will be available for FA versus TA; and

(d) Providing clear guidance on what can and cannot count as direct or in-kind partner contribution.

Further, NRCS received comment:

(a) Requesting clarity regarding ''innovation'' and ''flexibility'';

(b) Identifying that limiting the percentage of funding that can be allocated using discretionary prioritization factors would increase transparency;

(c) Requesting that the RCPP Portal be active at the beginning of the application process; and

(d) Recommending language for the regulation to reflect conservation benefits as a proposal requirement.

Response: The funding announcement process and timeline, including the application questions and criteria, are published as part of each funding announcement. This process provides the greatest program flexibility regarding the diversity of partner capabilities, resource concerns, and other program goals. The criteria are made public and provide transparency about how NRCS is focusing its RCPP implementation. The circumstances about eligible activities, associated non-agricultural lands, and TA and FA percentages will be addressed in upcoming APFs.

Similarly, APFs include more information about ''innovation,'' selection criteria, and weightings as these terms relate to program priorities. Establishing funding percentages or limitations in the regulation would reduce NRCS's ability to tailor APFs to critical resource concerns. In response to comment, this rule revises § 1464.20(b) to focus proposal priorities on conservation benefits. No other changes are made in the final rule in response to these issues.

RCPP Activity Types

Rental Contract Duration

Comment: NRCS received comment recommending that RCPP rental contracts should be for 10 years, as that is the duration authorized under the Conservation Reserve Program (CRP).

Response: NRCS uses RCPP land rental contracts to focus on short-term, targeted rental needs in the context of a larger RCPP project, unlike the longer-term purpose of CRP rental contracts. RCPP rental contracts are focused on actions such as incentivizing adoption of an innovative cropping system or to transition to an organic production system and thus are short term (3 years). No change was made in response to this comment.

Other

Comment: NRCS received comment covering a variety of RCPP activity types. For practice innovation related to land management contracts, comment recommended:

(a) Simplifying the process for adding interim conservation practice standards;

(b) Including practices focused on water recycling, the recycling of liquid waste, and the adoption of advanced nutrient recovery technology;

(c) Allowing a flexible fallow program to be eligible; and

(d) Allowing different practices and approaches to be used in the same RCPP project and not limit practices in RCPP project awards.

For rental contracts, comment recommended:

(a) Clarifying the availability and eligibility of land-rental practices (from CRP), especially for longer contracts and practices;

(b) Concern about not applying the Conservation Reserve Enhancement Program (CREP) authority for riparian buffers;

(c) Having project partners add a farmer mentor component to projects utilizing the short-term land rental option; and

(d) Clarifying whether the use of CRP authorities (16 U.S.C. 3831–3835) includes CREP.

For easement agreements, comment recommended:

(a) Expanding the reach of entity-held easements by allowing other land, including forested land, wetlands, and riparian areas, as it appeared to the commenter that the interim rule decoupled requirements specific to NRCS's Healthy Forests Reserve Program (HFRP); and

(b) Authorizing payments to producers participating in a project that addresses water quantity concerns and that would encourage conversion from irrigated to dryland farming.

Comment expressed support for the interim rule's inclusion of expanding Public Law 83–566 activities nationwide within RCPP. Finally, comment recommended that NRCS continue to allow for greater flexibility in RCPP activity types.

Response: NRCS will maintain the integrity of its RCPP practices to ensure wise use of Federal funds while supporting innovation. CREP is a component of CRP (administered by FSA), and CREP agreements are partnership agreements with state governments. NRCS believes that CREP-style agreements would be redundant to the RCPP partnership agreement and would not aid in meeting RCPP goals efficiently.

NRCS expanded the availability of both U.S.-held and entity-held easements to the full extent of the RCPP land eligibility criteria, and therefore the types of easements identified by the comment are already available. In addition, the 2018 Farm Bill expanded the availability of Public Law 83–566 authority nationwide, and NRCS has entered into PPAs that utilize the Public Law 83–566 authority beyond CCAs.

HFRP land eligibility criteria differs from RCPP criteria. RCPP forest land eligibility is limited to non-industrial private forest land, while HFRP eligibility encompasses commercial forest land as well.

No changes are made in the final rule in response to these issues.

Supplemental Agreements

Comment: Comment expressed support for the addition of supplemental agreements to the interim rule and recommended clarifying that NRCS consult with the lead partner when entering into a supplemental agreement with a non-lead partner and provide fuller discussion and clarification of the use of supplemental agreements.

Response: A supplemental agreement is a flexible vehicle for obligating RCPP funding to an eligible partner or third party to carry out authorized RCPP activities. Supplemental agreements are used generally to award TA funding, to implement watershed or public works projects, or to implement an entity-held easement agreement. As a condition of supplemental agreement(s), NRCS and a partner may negotiate documentation requirements for payment, based on agreement deliverables and activities. Supplemental agreements will require additional reporting beyond that required of the overall project's lead partner. No changes are made in the final rule in response to this issue.

Notice and Comment, Paperwork Reduction Act, and Effective Date

In general, the Administrative Procedure Act (APA, 5 U.S.C. 553) requires that a notice of proposed rulemaking be published in the **Federal Register** and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation, except when the rule involves a matter relating to public property, loans, grants, benefits, or contracts. This final rule involves matters relating to benefits and therefore is exempt from the APA requirements. Further, the regulations to implement the programs of chapter 58 of title 16 of the U.S. Code, as specified in 16 U.S.C. 3846, and the administration of those programs, are:

- To be made as an interim rule effective on publication, with an opportunity for notice and comment,
- Exempt from the Paperwork Reduction Act (44 U.S.C. ch. 35), and
- To use the authority under 5 U.S.C. 808 related to Congressional review and any potential delay in the effective date.

For major rules, the Congressional Review Act requires a delay in the effective date of 60 days after publication to allow for Congressional Review. This rule is a major rule under the Congressional Review Act, as defined by 5 U.S.C. 804(2). The authority in 5 U.S.C. 808 provides that when an agency finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, that the rule may take effect at such time as the agency determines. Due to the nature of the rule, the mandatory requirements of the 2018 Farm Bill, and the need to implement the regulations expeditiously to provide RCPP assistance to producers, NRCS and CCC find that full notice and public procedure are contrary to the public interest. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act of 1996, NRCS and CCC are not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Therefore, this rule is effective on the date of publication in the **Federal Register**. At the same time, NRCS and CCC note that this final rule reflects consideration of the comments that were provided in response to the interim rule.

Executive Orders 12866, 13563, 13771, and 13777

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' established a federal policy to alleviate unnecessary regulatory burdens on the American people.

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

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' requires that in order to manage the private costs required to comply with federal regulations for every new significant or economically significant regulation issued, the new costs must be offset by the elimination of at least two prior regulations. This rule involves transfer payments and does not rise to the level required to comply with Executive Order 13771.

OMB guidance in M–17–21, dated April 5, 2017, specifies that ''transfer rules'' are not covered by Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' Transfer rules are Federal spending regulatory actions that cause only income transfers between taxpayers and program beneficiaries. Therefore, this is considered a transfer rule and is not covered by Executive Order 13771.

Cost Benefit Analysis

RCPP is a voluntary collaborative program that provides financial and technical assistance to partner organizations to help agricultural producers plan and implement conservation activities to address natural resource concerns on private or Tribal agricultural, nonindustrial private forest and certain associated lands. RCPP was first authorized by Congress in the 2014 Farm Bill. To date, 375 projects have been selected across the U.S. and Puerto Rico leveraging $1 billion in NRCS technical and financial assistance with approximately $1.3 billion in partner contributions.

Under the 2014 Farm Bill, conservation activities were undertaken through partnership agreements (between NRCS and a lead partner) and contracts or agreements with eligible landowners, entities, and individuals under one or more covered programs (EQIP, CSP, ACEP, HFRP, and Pub. L. 83–566). EQIP, CSP, and ACEP each contributed seven percent of their annual funding toward RCPP partnership projects. In addition, the 2014 Farm Bill provided $100 million annually in direct RCPP mandatory funding.

The 2018 Farm Bill reauthorized RCPP with significant changes to how RCPP is funded. Specifically, the contributions from ''covered programs'' are eliminated as a funding source and ''covered program contracts'' are replaced with RCPP contracts and programmatic partnership agreements.

The 2018 Farm Bill repeals the seven percent reserved resources from the covered programs, provides $300 million in annual mandatory CCC funding, and establishes RCPP standalone contracts. Federal transfers under the 2014 Farm Bill totaled slightly more than $1 billion for FY2014 through 2018, or $200 million on an annual basis. The $300 million in mandatory annual funding increases RCPP funding by approximately $100 million annually, taking into account the past contribution of the ''covered programs'' for fiscal years 2014 through 2018.

The 2018 Farm Bill also changed the ''funding pool'' structure by streamlining from three pools to two pools and providing 50 percent of funds to a CCA pool and 50 percent of funds to a state and multi-state pool. It also allows project renewals and creates new programmatic authorities and expectations for the administration of agreements with partners. In addition, application and renewal processes are simplified to encourage participation by both producers and project partners. To ensure that only the most successful of projects qualify for renewal on a non-competitive basis, NRCS has identified in this rule that a partner has met or exceeded the objectives of the original project in order to be considered for renewal.

Estimates of costs, benefits, and transfers of RCPP on an annual basis are reported in Table 1. Given a 3 percent discount rate, the projected annualized real cost to producers of accessing RCPP is $204,258 and the projected annualized real transfers are $289 million. Conservation benefits from RCPP are difficult to quantify at a national scale but have been described by studies at an individual project or watershed or local scale as it relates the different types of conservation practices implemented.

TABLE 1—RCPP ANNUAL ESTIMATED COSTS, BENEFITS AND TRANSFERS [a]

Category	Annual estimate
Costs [b]	$204,258.
Benefits	Qualitative.
Transfers	$289,000,000.

[a] All estimates are discounted at 3 percent to 2019 $ except for the participant access cost, which is nominal.

[b] Imputed cos[t] of applicant time to gain access to RCPP.

Most of this rule's impact consists of transfer payments from the Federal Government to producers or to partners for the benefit of producers. The conservation benefits of RCPP financial and technical assistance funding delivered to date have been directly comparable to that provided by covered programs (EQIP, CSP, ACEP, etc.), and similar benefits are expected from RCPP funding under the 2018 Farm Bill.

Additionally, conservation benefits of partner contributions and collaboration in RCPP projects are expected to magnify the benefits of RCPP funding over each project's life, offsetting initial delays in obligation and implementation. NRCS will discuss methods to quantify the incremental benefits obtained from RCPP with lead partners, but due to the 5-year life of a typical RCPP project, only limited data are available at this time to support this conclusion. Therefore, NRCS and partners may use various mechanisms such as modeling to predict long-term outcomes. Despite these data limitations, RCPP is expected to positively affect natural resource concerns—through both the $300 million in funding provided annually by Congress and by the leverage of partner contributions.

Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to the substantive comments NRCS received on the interim rule, NRCS invited public comments on how to make the rule easier to understand. NRCS has incorporated these recommendations for improvement where appropriate. NRCS responses to public comment are described in more detail above.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because no law requires that a proposed rule be published for this rulemaking initiative.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the NRCS regulations for compliance with NEPA (7 CFR part 650). The 2018 Farm Bill requires minor changes to NRCS conservation programs, and there are no changes to the basic structure of the programs. The analysis has determined that there will not be a significant impact to the human environment and as a result, an environmental impact statement (EIS) is not required to be prepared (40 CFR1501.5 and 1501.6). While OMB has designated this rule as ''economically significant'' under Executive Order 12866, ''. . . economic or social effects are not intended by themselves to require preparation of an environmental impact statement'' (40 CFR 1502.16(b)), when not interrelated to natural or physical environmental effects. The Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) were available for review and comment for 30 days from the date of publication of this interim rule in the **Federal Register**. NRCS considered this input and determined that there was not

any new information provided that was relevant to environmental concerns or bore on the proposed action or its impacts that warranted an environmental impact statement or revising the current available RCPP EA and FONSI.

Executive Order 12372

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

Executive Order 12988

This rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to be exhausted, consistent with 7 U.S.C. 6912(e).

Executive Order 13132

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

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule does not have significant Tribal implications that require Tribal consultations. Moreover, OTR states that NRCS has adhered to the spirit and intent of Executive Order 13175. Tribal consultation for this rule was included in the two 2018 Farm Bill Tribal consultation held on May 1, 2019, at the National Museum of the American Indian, in Washington, DC, and on June 26–28, 2019, in Sparks, NV. For the May 1, 2019, Tribal consultation, the portion of the Tribal consultation relative to this rule was conducted by Bill Northey, USDA Under Secretary for the Farm Production and Conservation mission area, as part of the Title II session. There were no specific comments from Tribes on the RCPP rule during the Tribal consultation. If a tribe requests additional consultation, NRCS will work with OTR to ensure that meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by legislation.

Separate from Tribal consultation, communication and outreach efforts are in place to assure that all producers, including Tribes (or their members), are provided information about the regulation changes. Specifically, NRCS obtains input through Tribal Conservation Advisory Councils. A Tribal Conservation Advisory Council may be an existing Tribal committee or department and may also constitute an association of member Tribes organized to provide direct consultation to NRCS at the State, regional, and national levels to provide input on NRCS rules, policies, programs, and impacts on Tribes. Tribal Conservation Advisory Councils provide a venue for agency leaders to gather input on Tribal interests. Additionally, NRCS held discussions subsequent to the interim rule publication with Indian Tribes and Tribal entities to continue discussions about the 2018 Farm Bill conservation programs implementation, obtain input about how to improve Tribal and Tribal member access to NRCS conservation assistance, and make any appropriate adjustments to the regulations that will foster such improved access.

Unfunded Mandates

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

Federal Assistance Programs

The title and number of the Federal Domestic Assistance Programs in the Catalog of Federal Domestic Assistance to which this rule applies:

10.932—Regional Conservation Partnership Program.

E-Government Act Compliance

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

List of Subjects in 7 CFR Part 1464

Agricultural operations, Conservation payments, Conservation practices, Eligible activities, Environmental credits, Forestry management, Natural resources, Resource concern, Soil and water conservation, Wildlife.

Accordingly, the interim rule amending 7 CFR part 1464, which was published at 85 FR 8131 on February 13, 2020, including the technical correction published at 85 FR 15051 on March 17, 2020, is adopted as a final rule with the following changes:

PART 1464—REGIONAL CONSERVATION PARTNERSHIP PROGRAM

■ 1. The authority citation for part 1464 continues to read as follows:

Authority: 15 U.S.C. 714b and 714c; 16 U.S.C. 3871 *et seq.*

■ 2. In § 1464.3, amend the definition of ''Priority resource concern'' by revising paragraphs (1) and (2) to read as follows:

§ 1464.3 Definitions.

* * * * *

Priority resource concern * * *

(1) Water quality improvement, including source water protection, through measures such as reducing erosion, promoting sediment control, or addressing nutrient management activities affecting large bodies of water of regional, national, or international significance;

(2) Water quantity improvement, including protection or improvement relating to:

* * * * *

■ 3. In § 1464.20 revise paragraphs (b)(1) and (2) as follows:

§ 1464.20 Proposal procedures.

* * * * *

(b) * * *

(1) The scope of the proposed project, including one or more conservation benefits that the project must achieve;

(2) A plan for monitoring, evaluating, and reporting on progress made toward achieving the project's conservation objectives;

* * * * *

■ 4. Amend § 1464.21 by:

■ a. In paragraph (b)(5), removing the word ''or'' and add the word ''and'' in its place;

■ b. In paragraph (b)(7), removing the word ''or'';

■ c. Redesignating paragraph (b)(8) as paragraph (b)(9);

■ d. Adding new paragraph (b)(8); and

■ e. Adding paragraph (c)(4).

The additions read as follows.

§ 1464.21 Ranking consideration and proposal selection.

* * * * *

(b) * * *

(8) To a significant extent involve—

(i) Historically underserved producers;

(ii) A community-based organization comprising, representing, or exclusively working with historically underserved producers;

(iii) Developing an innovative conservation approach or technology specifically targeting historically underserved producers' unique needs and limitations; or

(iv) An 1890 or 1994 land grant institution (7 U.S.C. 3222 *et seq.*), Hispanic-serving institution (20 U.S.C. 1101a), or other minority-serving institution, such as an historically Black college or university (20 U.S.C. 1061), a tribally controlled college or university (25 U.S.C. 1801), or Asian American and Pacific Islander-serving institution (20 U.S.C. 1059g); or

* * * * *

(c) * * *

(4) Lands outside of a CCA are not eligible for consideration under the CCA funding pool, even where such land may influence resource concerns within the CCA.

■ 5. Amend § 1464.22 by:

■ a. Redesignating paragraphs (d)(11) and (12) as paragraphs (d)(12) and (13);

■ d. Adding new paragraph (d)(11).

The addition reads as set forth below.

§ 1464.22 Partnership agreements.

* * * * *

(d) * * *

(11) Provide a detailed description of how the lead partner will facilitate participation of historically underserved producers (including through advance payment options, increased payment rates, outreach activities, or other methods for increasing participation by historically underserved producers) if the proposal received increased ranking priority as described in § 1464.21(b)(8);

* * * * *

§ 1464.25 [Amended]

■ 6. In § 1466.25 amend paragraph (b)(2) by removing the parenthetical phrase ''(such as roads, dams, and irrigation facilities)''.

■ 7. In § 1464.30, add paragraph (d)(4) to read as follows:

§ 1464.30 Application for program contracts and selecting applications for funding.

* * * * *

(d) * * *

(4) Lands outside of a CCA are not eligible for applications in the CCA, even where conservation efforts on such land may influence resource concerns within the CCA.

Kevin Norton,

Acting Chief, Natural Resources Conservation Service.

Robert Stephenson,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2021–00300 Filed 1–12–21; 4:15 pm]

BILLING CODE 3410–16–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[NRC–2020–0033]

RIN 3150–AK46

Non-Substantive Amendments to Adjudicatory Proceeding Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is confirming the effective date of January 19, 2021, for the direct final rule that was published in the **Federal Register** on November 5, 2020. This direct final rule revised and clarified the agency's rules of practice and procedure to reflect current Atomic Safety and Licensing Board Panel practice, Commission case law, and a decision of the Supreme Court of the United States and to enhance consistency within the NRC's regulations.

DATES: *Effective date:* The effective date of January 19, 2021, for the direct final rule published November 5, 2020 (85 FR 70435), is confirmed.

ADDRESSES: Please refer to Docket ID NRC–2020–0033 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0033. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is

mentioned in the **SUPPLEMENTARY INFORMATION** section.

• *Attention:* The Public Document Room (PDR), where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ian Irvin, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–287–9193, email: *2020_Part_2_Rulemaking@usnrc.onmicrosoft.com.*

SUPPLEMENTARY INFORMATION: On November 5, 2020 (85 FR 70435), the NRC published a direct final rule amending its regulations in part 2 of title 10 of the *Code of Federal Regulations* to reflect current Atomic Safety and Licensing Board Panel practice, Commission case law, and a decision of the Supreme Court of the United States and to enhance consistency within the NRC's regulations. In the direct final rule, the NRC stated that, if no significant adverse comments were received, then the direct final rule would become effective on January 19, 2021. The NRC received one, out of scope comment on the direct final rule. Therefore, the direct final rule will become effective as scheduled.

Dated January 11, 2021.

For the Nuclear Regulatory Commission.

Cindy K. Bladey,

Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2021–00824 Filed 1–14–21; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 13

[NRC–2018–0293; 3150–AK25]

Adjustment of Civil Penalties for Inflation for Fiscal Year 2021

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to adjust the maximum Civil Monetary Penalties it can assess under statutes enforced by the agency. These changes are mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The NRC is amending its regulations to adjust the maximum civil monetary penalty for a violation of the Atomic Energy Act of 1954, as amended, or any regulation or order issued under the Atomic Energy Act from $303,471 to $307,058 per violation, per day. Additionally, the NRC is amending provisions concerning program fraud civil penalties by adjusting the maximum civil monetary penalty under the Program Fraud Civil Remedies Act from $11,665 to $11,803 for each false claim or statement.

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

ADDRESSES: Please refer to Docket ID NRC–2018–0293 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

• *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2018–0293. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.

• NRC's PDR: Attention: The Public Document Room (PDR), where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Eric Michel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–0932; email: *Eric.Michel2@nrc.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA) to allow for regular adjustment for inflation of civil monetary penalties (CMPs), maintain the deterrent effect of such penalties and promote compliance with the law, and improve the collection of CMPs by the Federal government (Pub. L. 101–410, 104 Stat. 890; 28 U.S.C. 2461 note). Pursuant to this authority, and as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–34, 110 Stat. 1321–373), the NRC increased via rulemaking the CMP amounts for violations of the Atomic Energy Act of 1954, as amended (AEA) (codified at § 2.205 of title 10 of the *Code of Federal Regulations* (10 CFR)) and Program Fraud Civil Remedies Act (codified at § 13.3) on four occasions between 1996 and 2008.[1]

On November 2, 2015, Congress amended the FCPIAA through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Improvements Act) (Sec. 701, Pub. L. 114–74, 129 Stat. 599). The 2015 Improvements Act required that the head of each agency perform an initial ''catch-up'' adjustment via rulemaking, adjusting the CMPs enforced by that agency according to the percentage change in the Consumer Price Index (CPI) between the month of October 2015 and the month of October of the calendar year when the CMP amount was last established by Congress. The NRC performed this catch-up rulemaking on July 1, 2016 (81 FR 43019).

The 2015 Improvements Act also requires that the head of each agency

[1] Adjustment of Civil Penalties for Inflation, (73 FR 54671; Sept. 23, 2008); Adjustment of Civil Penalties for Inflation, (69 FR 62393; Oct. 26, 2004); Adjustment of Civil Penalties for Inflation; Miscellaneous Administrative Changes, (65 FR 59270; Oct. 4, 2000); Adjustment of Civil Monetary Penalties for Inflation, (61 FR 53554; Oct. 11, 1996). An adjustment was not performed in 2012 because the FCPIAA at the time required agencies to round their CMP amounts to the nearest multiple of $1,000 or $10,000, depending on the size of the CMP amount, and the 2012 adjustments based on the statutory formula were small enough that no adjustment resulted.

continue to adjust CMP amounts, rounded to the nearest dollar, on an annual basis. Specifically, each CMP is to be adjusted based on the percentage change between the CPI for the previous month of October, and the CPI for the month of October in the year preceding that. The NRC most recently adjusted its civil penalties for inflation according to this statutory formula on January 15, 2020 (85 FR 2281), and corrected on February 20, 2020 (85 FR 9661). This year's adjustment is based on the increase in the CPI from October 2019 and October 2020.

II. Discussion

Section 234 of the AEA limits civil penalties for violations of the AEA to $100,000 per day, per violation (42 U.S.C. 2282). However, as discussed in Section I, ''Background,'' of this document, the NRC has increased this amount several times since 1996 per the FCPIAA, as amended. Using the formula in the 2015 Improvements Act, the $303,471 amount last established in January 2020 will increase by 1.182 percent, resulting in a new CMP amount of $307,058. This is based on the increase in the CPI from October 2019 (257.346) to October 2020 (260.388). Therefore, the NRC is amending § 2.205 to reflect a new maximum CMP under the AEA in the amount of $307,058 per day, per violation. This represents an increase of $3,587.

Monetary penalties under the Program Fraud Civil Remedies Act were established in 1986 at $5,000 per claim (Pub. L. 99–509, 100 Stat. 1938; 31 U.S.C. 3802). The NRC also has adjusted this amount (currently set at $11,665) multiple times pursuant to the FCPIAA, as amended, since 1996. Using the formula in the 2015 Improvements Act, the $11,665 amount last established in January 2020 will also increase by 1.182 percent, resulting in a new CMP amount of $11,803. Therefore, the NRC is amending § 13.3 to reflect a new maximum CMP amount of $11,803 per claim or statement. This represents an increase of $138.

As permitted by the 2015 Improvements Act, the NRC may apply these increased CMP amounts to any penalties assessed by the agency after the effective date of this final rule (January 15, 2021), regardless of whether the associated violation occurred before or after this date (Pub. L. 114–74, 129 Stat. 600; 28 U.S.C. 2461 note). The NRC assesses civil penalty amounts for violations of the AEA based on the class of licensee and severity of the violation, in accordance with the NRC Enforcement Policy, which is available under ADAMS Accession No. ML19352E921.

III. Rulemaking Procedure

The 2015 Improvements Act expressly exempts this final rule from the notice and comment requirements of the Administrative Procedure Act, by directing agencies to adjust CMPs for inflation ''notwithstanding section 553 of title 5, United States Code'' (Pub. L. 114–74, 129 Stat. 599; 28 U.S.C. 2461 note). As such, this final rule is being issued without prior public notice or opportunity for public comment, with an effective date of January 15, 2021.

IV. Section-by-Section Analysis

§ 2.205 Civil penalties.

This final rule revises paragraph (j) by replacing ''$303,471'' with ''$307,058.''

§ 13.3 Basis for civil penalties and assessments.

This final rule revises paragraphs (a)(1)(iv) and (b)(1)(ii) by replacing ''$11,665'' with ''$11,803.''

V. Regulatory Analysis

This final rule adjusts for inflation the maximum CMPs the NRC may assess under the AEA and under the Program Fraud Civil Remedies Act of 1986. The formula for determining the amount of the adjustment is mandated by Congress in the FCPIAA, as amended by the 2015 Improvements Act (codified at 28 U.S.C. 2461 note). Congress passed this legislation on the basis of its findings that the power to impose monetary civil penalties is important to deterring violations of Federal law and furthering the policy goals of Federal laws and regulations. Congress has also found that inflation diminishes the impact of these penalties and their effect. The principal purposes of this legislation are to provide for adjustment of civil monetary penalties for inflation, maintain the deterrent effect of civil monetary penalties, and promote compliance with the law. Therefore, these are the anticipated impacts of this rulemaking. Direct monetary impacts fall only upon licensees or other persons subjected to NRC enforcement for violations of the AEA and regulations and orders issued under the AEA (§ 2.205), or those licensees or persons subjected to liability pursuant to the provisions of the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801–3812) and the NRC's implementing regulations (10 CFR part 13).

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to regulations for which a Federal agency is not required by law, including the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), to publish a general notice of proposed rulemaking (5 U.S.C. 604). As discussed in this notice under Section III., ''Rulemaking Procedure,'' the NRC has determined that this final rule is exempt from the requirements of 5 U.S.C. 553(b) and notice and comment need not be provided. Accordingly, the NRC also determines that the requirements of the Regulatory Flexibility Act do not apply to this final rule.

VII. Backfit and Issue Finality

The NRC has not prepared a backfit analysis for this final rule. This final rule does not involve any provision that would impose a backfit, nor is it inconsistent with any issue finality provision, as those terms are defined in 10 CFR chapter I. As mandated by Congress, this final rule increases CMP amounts for violations of already-existing NRC regulations and requirements. This final rule does not modify any licensee systems, structures, components, designs, approvals, or procedures required for the construction or operation of any facility.

VIII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883).

IX. National Environmental Policy Act

The NRC has determined that this final rule is the type of action described as a categorical exclusion in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

X. Paperwork Reduction Act

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

XI. Congressional Review Act

This final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information; Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 13

Administrative practice and procedure, Claims, Fraud, Organization and function (Government agencies), Penalties.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; 28 U.S.C. 2461 note; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 2 and 13:

PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 2 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note.

Section 2.205(j) also issued under 28 U.S.C. 2461 note.

§ 2.205 [Amended]

■ 2. In § 2.205 amend paragraph (j) by removing the amount ''$303,471'' and adding in its place the amount ''$307,058''.

PART 13—PROGRAM FRAUD CIVIL REMEDIES

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

Authority: 31 U.S.C. 3801 through 3812; 44 U.S.C. 3504 note.

Section 13.3 also issued under 28 U.S.C. 2461 note.

Section 13.13 also issued under 31 U.S.C. 3730.

§ 13.3 [Amended]

■ 4. In § 13.3, amend paragraphs (a)(1)(iv) and (b)(1)(ii) by removing the amount ''$11,665'' and adding in its place the amount ''$11,803''.

Dated December 28, 2020.

For the Nuclear Regulatory Commission.

Catherine Haney,

Acting Executive Director for Operations.

[FR Doc. 2021–00127 Filed 1–14–21; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[EERE–2017–BT–TP–0047]

RIN 1904–AE18

Energy Conservation Program: Test Procedures for Small Electric Motors and Electric Motors; Correction

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule; correction.

SUMMARY: The U.S. Department of Energy (''DOE'') recently published a final rule amending the test procedures for small electric motors and electric motors. This correction republishes an amendment from that final rule that could not be incorporated into the Code of Federal Regulations (''CFR'') due to an inaccurate amendatory instruction. Neither the error nor the correction in this document affect the substance of the rulemaking or any conclusions reached in support of the final rule.

DATES: *Effective Date:* February 3, 2021.

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–4563. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: On January 4, 2021, DOE published a final rule amending the test procedures for small electric motors and electric motors. 86 FR 4. This document corrects the regulatory text instruction for appendix B to subpart B of part 431. In FR Doc. 2020–27662 appearing on page 4, in the **Federal Register** of Monday, January 4, 2021, the following correction is made:

Appendix B to Subpart B of Part 431—Uniform Test Method for Measuring Nominal Full Load Efficiency of Electric Motors [Corrected]

On page 22, in the first column, amendatory instruction 6.e., ''Redesignating Sections 4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, and 4.8 as Sections 3, 3.1, 3.2, 3.4, 3.5, 3.6, 3.7, and 3.8 respectively;'' is corrected to read ''Redesignating Sections 4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, and 4.8 as Sections 3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, and 3.8 respectively;''.

Signing Authority

This document of the Department of Energy was signed on January 8, 2021, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 8, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–00510 Filed 1–14–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Parts 609 and 611

RIN 1910–AA54

Policies and Procedures for Loan Guarantees for Projects That Employ Innovative Technologies and for Direct Loans Under the Advanced Technology Vehicles Manufacturing Program

AGENCY: Loan Programs Office, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) Loan Programs Office (LPO) establishes amended policies and procedures for the issuance of DOE loan guarantees pursuant to the Title XVII

Program and funding awards and loans pursuant to the Advanced Technology Vehicles Manufacturing Program in accordance with the Executive order of September 30, 2020, entitled ''Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries''. The rule will establish revised policies and procedures for receiving, evaluating, and approving applications for loan guarantees, funding awards and loans from DOE. The rule will refine the definition of ''Eligible Project'' and address the use of Preliminary Term sheets and conditional commitments, as well as the payment of costs and fees by non-Federal third parties.

DATES: This rule is effective on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. John Lushetsky, Senior Advisor, Loan Programs Office, Loan Guarantee Program, U.S. Department of Energy LP 10, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–2678, or by email to: *john.lushetsky@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction and Background
II. Discussion of Final Rule
III. Regulatory Review

I. Introduction and Background

DOE issues this final rule to update regulations in accordance with the requirements of Executive Order 13953, ''Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries,'' 85 FR 62539 (Sept. 30, 2020). Executive Order 13953 establishes policy pertaining to lending activities by LPO pursuant to Title XVII of the Energy Policy Act of 2005, *as amended* (42 U.S.C. 16511, *et seq.*) (''Title XVII''), and Section 136 of the Energy Independence and Security Act of 2007, *as amended* (42 U.S.C. 17013) (the ''ATVM Statute''), as they apply to ''Critical Minerals,'' ''Critical Minerals Production,'' and related activities, including activities related to minerals more broadly. Executive Order 13953 requires that DOE update the relevant regulation in accordance with the policy presented in the Executive order.

II. Discussion of Final Rule

Executive Order 13953 requires that DOE LPO establish amended policies and procedures for the issuance of DOE loan guarantees, in order to provide financial support to eligible projects that will support a domestic supply chain for critical minerals and critical minerals production. The rule will establish revised policies and procedures for receiving, evaluating, and approving applications for loan guarantees from DOE. The rule will revise the definition of Eligible Project, for both the Title XVII and ATVM Programs, consistent with E.O. 13953 and address the use of Preliminary Term sheets and conditional commitments, as well as the payment of costs and fees by non-Federal third parties. These changes will facilitate the accessibility and availability of loan guarantees from DOE to potential applicants in both the critical minerals space, as well as traditional innovative projects. These changes also will allow for the use of Preliminary Term sheets between DOE and potential applicants in the critical minerals space and other innovative projects. The use of Preliminary Term Sheets will aid potential applicants in obtaining their offtake agreements, while negotiating with DOE for a potential loan guarantee, subject to conditions required by DOE. The final rule will also clarify that payment by non-Federal third parties of costs and fees associated with a loan guarantee will be permissible, where necessary, to support the applicant. As required by Executive Order 13953, these changes will make DOE loan guarantees more available and accessible to critical minerals projects.

III. Regulatory Review

A. Executive Order 12866

This final rule is not a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (October 4, 1993). The rule revises the definition of Eligible Project consistent with E.O. 13953 and clarifies DOE's procedures for the review of applications to LPO for loan guarantees under the Title XVII Program and funding awards and loans under the ATVM Program.

B. Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' See 82 FR 9339 (January 30, 2017). E.O. 13771 states that the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 states that it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' The order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Finally, on March 28, 2017, the President signed Executive Order 13783, entitled ''Promoting Energy Independence and Economic Growth.'' Among other things, E.O. 13783 requires the heads of agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review does not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth elsewhere in that order.

DOE concludes that this final rule is consistent with the directives set forth in these Executive orders. This final rule is expected to be an E.O. 13771 deregulatory action. The provisions in this final rule, as described in section II, revise the definition of Eligible Project consistent with E.O. 13953 and establish amended policies and procedures for the issuance of DOE loan guarantees,

funding awards and loans in accordance with Executive Order 13953 and for receiving, evaluating, and approving applications for loan guarantees from DOE.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Because a notice of proposed rulemaking is not required for this action pursuant to 5 U.S.C. 553, or any other law, no regulatory flexibility analysis has been prepared for this final rule.

In addition, DOE notes that the rule would clarify DOE's policies and procedures for processing applications for loan guarantees, funding awards, and loans, and would not impose a burden on applicants, including small entities. Specifically, these changes will facilitate the accessibility and availability of loan guarantees, funding awards, and loans from DOE to potential applicants in the critical minerals space, as well as for traditional innovative projects. The changes also will allow for the use of Preliminary Term sheets between DOE and potential applicants in the critical minerals space and for other innovative projects. The use of Preliminary Term Sheets will aid potential applicants in obtaining their offtake agreements, while negotiating with DOE for a potential loan guarantee, subject to conditions required by DOE. The final rule will clarify that payment by non-Federal third parties of costs and fees associated with a loan guarantee will be permissible, where necessary, to support the applicant.

D. Paperwork Reduction Act

The final rule would impose no new information or record keeping requirements. Accordingly, Office of Management and Budget (OMB) clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*). The information collection necessary to administer DOE loan guarantees for projects that employ innovative technologies under 10 CFR part 609 is subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* The information collection provisions of this part were previously approved by OMB under OMB Control No. 1910–5134.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. National Environmental Policy Act

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

F. Executive Order 13132

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

G. Executive Order 12988

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

H. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)). The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.* UMRA sections 202 and 205 do not apply to this action because they apply only to rules for which a general notice of proposed rulemaking is published. Nevertheless, DOE has determined that this final rule does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of $100 million or more in any one year by the private sector.

I. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999, 5 U.S.C. 601 note, requires Federal agencies to issue a Family Policymaking Assessment for any rulemaking that may affect family well-being. While this final rule will apply to individuals who may be members of a family, the rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed the final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Administrative Procedure Act

In accordance with 5 U.S.C. 553(b), the Administrative Procedure Act, DOE generally publishes a proposed rule and solicits public comment on it before issuing the rule in final. DOE also generally provides at least a 30-day delay in effective date for final rules pursuant to 5 U.S.C. 553(d). This rulemaking, as a matter relating to loans, is exempt from the requirement to publish a notice of proposed rulemaking under 5 U.S.C. 553(a)(2). In addition, Executive Order 13953 specifically directs DOE to consider LPO loan guarantees, funding awards, and loans involving critical minerals projects and supply chains, and such projects that otherwise satisfy the requirements of Title XVII and the ATVM Statute are already accepted, and deemed to be, ''Eligible Projects'' by DOE under applicable law and regulations.

M. Congressional Notification

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

N. Approval of the Office of the Secretary

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

List of Subjects

10 CFR Part 609

Administrative practice and procedure, Energy, Loan programs, Reporting and recordkeeping requirements.

10 CFR Part 611

Administrative practice and procedure, Loan programs-energy, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on December 31, 2020, by Steven E. Winberg, Acting Under Secretary of Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the Federal Register.

Signed in Washington, DC, on December 31, 2020.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE amends parts 609 and 611 of chapter II of title 10 of the Code of Federal Regulations as set forth below:

■ 1. Part 609 is revised to read as follows:

PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

Sec.
609.1 Purpose and scope.
609.2 Definitions and interpretation.
609.3 Solicitations.
609.4 Submission of applications.
609.5 Programmatic, technical, and financial evaluation of applications.
609.6 Term sheets and conditional commitments.
609.7 Closing on the loan guarantee agreement.
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Authority: 42 U.S.C. 16511–16514.

§ 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and approving applications for loan guarantees to support Eligible Projects under section 1703 of the Energy Policy Act of 2005 (Act).

(b) This part applies to all Applications, Conditional Commitments, and Loan Guarantee Agreements.

(c) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

(d) This part incorporates the policies set forth in Executive Order 13953 (''Executive Order Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries,'' dated September

20, 2020), and Executive Order 13817 (''A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,'' dated December 20, 2017), as amended.

§ 609.2 Definitions and interpretation.

(a) *Definitions.* When used in this part the following words have the following meanings.

Act means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514), as amended.

Administrative Cost of Issuing a Loan Guarantee means the total of all administrative expenses that DOE incurs during:

(i) The evaluation of an Application for a loan guarantee;

(ii) The negotiation and offer of a Term Sheet;

(iii) The negotiation of a Loan Guarantee Agreement and related documents, including the issuance of a Guarantee; and

(iv) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

Applicant means a Person, including a prospective Borrower or Project Sponsor, that submits an Application to DOE.

Application means a written submission of materials responsive to a Solicitation that satisfies § 609.4.

Application Fee means the fee or fees required to be paid by an Applicant in connection with submission of an Application and specified in a Solicitation. The Application Fee does not include the Credit Subsidy Cost.

Attorney General means the Attorney General of the United States.

Borrower means any Person that enters into a Loan Guarantee Agreement with DOE and issues Guaranteed Obligations.

Cargo Preference Act means the Cargo Preference Act of 1954, 46 U.S.C. 55305, as amended.

Commercial Technology means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is offered by DOE. A technology is in general use if it is being used in three or more facilities that are in commercial operation in the United States for the same general purpose as the proposed project, and has been used in each such facility for a period of at least five years. The five-year period for each facility shall start on the in-service date of the facility employing that particular technology or, in the case of a retrofit of a facility to employ a particular technology, the date the facility resumes commercial operation following completion and testing of the retrofit. For purposes of this section, facilities that are in commercial operation include projects that have been the recipients of a loan guarantee from DOE under this part.

Conditional Commitment means a Term Sheet offered by DOE and accepted by the offeree of the Term Sheet, all in accordance with § 609.6(c); provided, that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and provided, further, that the Secretary may not delegate this authority to terminate a Conditional Commitment.

Contracting Officer means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

Credit Subsidy Cost has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990, which is the net present value, at the time the Loan Guarantee Agreement is executed, of the following estimated cash flows, discounted to the point of disbursement:

(i) Payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; less

(ii) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender, or other Holder of an option included in the Loan Guarantee Agreement.

Davis-Bacon Act means the statute referenced in section 1702(k) of the Act.

DOE means the United States Department of Energy.

Eligible Lender means either:

(i) Any Person formed for the purpose of, or engaged in the business of, lending money that, as determined by DOE in each case, is:

(A) Not debarred or suspended from participation in a Federal Government contract or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR part 180);

(B) Not delinquent on any Federal debt or loan;

(C) Legally authorized and empowered to enter into loan guarantee transactions authorized by the Act and this part;

(D) Able to demonstrate experience in originating and servicing loans for commercial projects similar in size and scope to the Eligible Project, or able to procure such experience through contracts acceptable to DOE; and

(E) Able to demonstrate experience as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience, or able to procure such experience through contracts acceptable to DOE; or

(ii) The Federal Financing Bank.

Eligible Project means a project that:

(i) Is located in the United States at one location, except that the project may be located at two or more locations in the United States if the project is comprised of installations or facilities employing a single New or Significantly Improved Technology that is deployed pursuant to an integrated and comprehensive business plan. An Eligible Project in more than one location is a single Eligible Project;

(ii) Deploys a New or Significantly Improved Technology; and

(iii) Satisfies all applicable requirements of section 1703 of the Act, the applicable Solicitation, and this part. For purposes of this paragraph (iii):

(A) Eligible Projects may include manufacturing, recycling, processing, reprocessing, remediation, or reuse of materials, components, or subcomponents involving critical minerals, critical minerals production, or the supply chain for such materials, as set forth in Executive Order 13953 (''Executive Order Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries,'' dated September 20, 2020), and Executive Order 13817 (''A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,'' dated December 20, 2017), *as amended,* to the extent such critical minerals-related activities are eligible under section 1703 of the Act; and

(B) Some avoidance, reduction, or sequestration of air pollutants or anthropogenic emissions of greenhouse gases by a proposed project, or facilitated by such project, where applicable, shall be deemed to satisfy the requirement of section 1703(a)(1).

Equity means cash contributed to the permanent capital stock (or equivalent) of the Borrower or the Eligible Project by the shareholders or other owners of the Borrower or the Eligible Project. Equity does not include proceeds from the non-guaranteed portion of a Guaranteed Obligation, proceeds from any other non-guaranteed loan or obligation, or the value of any government assistance or support.

Facility Fee means the fee, to be paid in the amount and in the manner provided in the Term Sheet, to cover the Administrative Cost of Issuing a Loan Guarantee for the period from the Borrower's acceptance of the Term Sheet through issuance of the Guarantee.

Federal Financing Bank means an instrumentality of the United States Government created by the Federal Financing Bank Act of 1973, under the general supervision of the Secretary of the Treasury.

Guarantee means the undertaking of the United States of America, acting through the Secretary pursuant to Title XVII of the Energy Policy Act of 2005, to pay in accordance with the terms thereof, principal and interest of a Guaranteed Obligation.

Guaranteed Obligation means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

Holder means any Person that holds a promissory note made by the Borrower evidencing the Guaranteed Obligation (or his designee or agent).

Intercreditor Agreement means any agreement or instrument (or amendment or modification thereof) among DOE and one or more other Persons providing financing or other credit arrangements to the Borrower or an Eligible Project) or that otherwise provides for rights of DOE in respect of a Borrower or in respect of an Eligible Project, in each case in form and substance satisfactory to DOE.

Loan Agreement means a written agreement between a Borrower and an Eligible Lender containing the terms and conditions under which the Eligible Lender will make a loan or loans to the Borrower for an Eligible Project.

Loan Guarantee Agreement means a written agreement that, when entered into by DOE and a Borrower, and, if applicable, an Eligible Lender, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal of, and interest on, specified Guaranteed Obligations, subject to the terms and conditions specified in the Loan Guarantee Agreement.

New or Significantly Improved Technology means a technology, or a defined suite of technologies, concerned with the production, consumption, or transportation of energy and that is not a Commercial Technology, and that has either:

(i) Only recently been developed, discovered, or learned; or

(ii) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

OMB means the Office of Management and Budget in the Executive Office of the President.

Person means any natural person or any legally constituted entity, including a state or local government, tribe, corporation, company, voluntary association, partnership, limited liability company, joint venture, and trust.

Preliminary Term Sheet means the principal terms upon which DOE and the Applicant have agreed to in writing that will serve as the basis for a Loan Agreement or Loan Guarantee Agreement, following a determination by DOE that such Application adequately describes an Eligible Project, or a project that has a reasonable likelihood of becoming an Eligible Project, consistent with § 609.4(a)).

Project Costs mean those costs, including escalation and contingencies, that are to be expended or accrued by a Borrower and are necessary, reasonable, customary, and directly related to the design, engineering, financing, construction, startup, commissioning, and shakedown of an Eligible Project, as specified in § 609.10(a). Project Costs do not include costs for the items set forth in § 609.10(b).

Project Sponsor means any Person that assumes substantial responsibility for the development, financing, and structuring of an Eligible Project and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, the Borrower, or the Applicant.

Risk-Based Charge means a charge that, together with the principal and interest on the guaranteed loan, or at such other times as DOE may determine, is payable on specified dates during the term of a Guaranteed Obligation.

Secretary means the Secretary of Energy or a duly authorized designee or successor in interest.

Solicitation means an announcement that DOE is accepting Applications that is widely disseminated to the public on the DOE website or otherwise.

Term Sheet means a written offer for the issuance of a loan guarantee, executed by the Secretary (or a DOE official authorized by the Secretary to execute such offer), delivered to the offeree, that sets forth the detailed terms and conditions under which DOE and the Applicant will execute a Loan Guarantee Agreement.

United States means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and any territory or possession of the United States of America.

(b) *Interpretations.* This part shall be interpreted using the following guidelines.

(1) The word ''discretion'' when used with reference to DOE, including the Secretary, means ''sole discretion.''

(2) Defined terms in the singular shall include the plural and vice versa, and the masculine, feminine, or neuter gender shall include all genders.

(3) The word ''or'' is not exclusive.

(4) References to laws by name or popular name are references to the version of such law appearing in the United States Code and include any amendment, supplement, or modification of such law, and all regulations, rulings, and other laws promulgated thereunder.

(5) References to information or documents required or allowed to be submitted to DOE mean information or documents that are marked as provided in 10 CFR 600.15(b). A document or information that is not marked as provided in 10 CFR 600.15(b) will not be considered as having been submitted to or received by DOE.

(6) A reference to a Person includes such Person's successors and permitted assigns.

(7) The words ''include,'' ''includes,'' and ''including'' are not limiting and mean include, includes and including ''without limitation'' and ''without limitation by specification.''

(8) The words ''hereof,'' ''herein,'' and ''hereunder'' and words of similar import refer this part as a whole and not to any particular provision of this part.

§ 609.3 Solicitations.

DOE may invite the submission of Applications for loan guarantees for Eligible Projects pursuant to a Solicitation.

(a) Each Solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that Solicitation;

(2) The place for submission of Applications;

(3) The name and address of the DOE representative whom a potential Applicant may contact to receive further information and a copy of the Solicitation;

(4) The form, format, and page limits applicable to the Application;

(5) The amount of the Application Fee and any other fees that will be required;

(6) The programmatic, technical, financial, and other factors that DOE will use to evaluate response submissions, and their relative weightings in that evaluation; and

(7) Such other information as DOE may deem appropriate.

(b) Using procedures as may be announced by DOE a potential Applicant may request a meeting with DOE to discuss its potential Application. At its discretion, DOE may meet with a potential Applicant, either in person or electronically, to discuss its potential Application. DOE may provide a potential Applicant with a preliminary response regarding whether its proposed Application may constitute an Eligible Project. DOE's responses to questions from potential Applicants and DOE's statements to potential Applicants are pre-decisional and preliminary in nature. Any such responses and statements are subject in their entirety to any final action by DOE with respect to an Application submitted in accordance with § 609.4.

§ 609.4 Submission of applications.

(a) In response to a Solicitation, an Applicant must meet all requirements and provide all information specified in this part and the Solicitation in the manner and on or before the date specified in the Solicitation. DOE may direct that Applications be submitted in more than one part; provided, that the parts of such Application, taken as a whole, satisfy the requirements of paragraph (d) of this section and this part. In such event, subsequent parts of an Application may be filed only after DOE invites an Applicant to make an additional submission. If DOE directs that Applications be submitted in more than one part, the initial part of an Application shall contain information sufficient for DOE to determine that the project proposed by an Applicant will be, or may reasonably become, an Eligible Project, and to evaluate such project's readiness to proceed. If there have been any material amendments, modifications, or additions made to the information previously submitted by an Applicant, the Applicant shall provide a detailed description thereof, including any changes in the proposed project's financing structure or other terms, promptly upon request by DOE. Where DOE has directed that an Application be submitted in parts, DOE may provide for payment of the Application Fee in parts.

(b) An Applicant may submit only one Application for one proposed project using a particular technology. An Applicant may not submit an Application or Applications for multiple Eligible Projects using the same technology. An Applicant may submit Applications for multiple proposed projects using different technologies. For purposes of this paragraph (b), the term Applicant shall include the Project Sponsor and any subsidiaries or affiliates of the Project Sponsor.

(c) The open application period shall be rolling, and DOE may accept Applications at any time.

(d) An Application must include, at a minimum, the following information and materials:

(1) A completed Application form signed by an individual with full authority to bind the Applicant, including the commitments and representations made in each part of the Application;

(2) The applicable Application Fee;

(3) A description of how, and to what measurable extent, the proposed project avoids, reduces, or sequesters air pollutants and/or anthropogenic emissions of greenhouse gases at any level, including how to measure and verify those effects; there is not a minimum threshold of avoidance, reduction, or sequestration of air pollutants and/or anthropogenic emissions of greenhouse gases that a proposed project must show to be accepted so long as some reduction is reasonably demonstrated;

(4) A description of the nature and scope of the proposed project (with preliminary information where appropriate), including:

(i) Key project milestones;

(ii) Location or locations of the proposed project;

(iii) Identification and commercial feasibility of the New or Significantly Improved Technology to be deployed;

(iv) How the Applicant intends to deploy such New or Significantly Improved Technology in the proposed project; and

(v) How the Applicant intends to assure, to the extent possible, the further commercial availability of the New or Significantly Improved Technology in the United States;

(5) An explanation of how the proposed project qualifies as a project within the category or categories of projects referred to in the Solicitation;

(6) A detailed estimate of the total Project Costs together with a description of the methodology and assumptions used;

(7) A detailed description of the engineering and design contractor(s), construction contractor(s), and equipment supplier(s);

(8) The construction schedules for the proposed project, including major activity and cost milestones;

(9) A description of the material terms and conditions of the development and construction contracts to include the performance guarantees, performance bonds, liquidated damages provisions, and equipment warranties;

(10) A detailed description of the operations and maintenance provider(s), the proposed project operating plan, estimated staffing requirements, parts inventory, major maintenance schedule, estimated annual downtime, and performance guarantees and related liquidated damage provisions, if any;

(11) A description of the management plan of operations to be employed in carrying out the proposed project, and information concerning the management experience of each officer or key person associated with the proposed project;

(12) A detailed description of the proposed project decommissioning, deconstruction, and disposal plan, and the anticipated costs associated therewith;

(13) An analysis of the market for any product (including but not limited to electricity and chemicals) to be produced by, or services to be provided by, the proposed project, including relevant economics justifying the analysis, and copies of:

(i) Any contracts, or draft contracts reflecting the current state of actual negotiations between relevant parties, for the sale of such products or the provision of such services; or

(ii) Any other assurance of the revenues to be generated from sale of such products or provision of such services;

(14) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity and debt, and the liability of parties associated with the proposed project over the term of the Loan Guarantee Agreement;

(15) A copy of all material agreements, whether entered into or proposed, relevant to the investment, design, engineering, financing, construction, startup commissioning, shakedown, operations, and maintenance of the proposed project;

(16) A copy of the financial closing checklist for the equity and debt to the extent available;

(17) The Applicant's business plan on which the proposed project is based and Applicant's financial model with respect to the proposed project for the proposed term of the Guaranteed Obligations, including, as applicable, pro forma income statements, balance sheets, and cash flows. All such

information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(18) Financial statements for the three immediately preceding fiscal years of the Applicant (or such shorter period as the Applicant has been in existence) that have been audited by an independent certified public accounting firm, including all associated certifications, notes and letters to management, as well as interim financial statements and notes for the current fiscal year for the Applicant and all other Persons the credit of which is material to the success of the transactions described in the Application;

(19) A copy of all legal opinions, and other material reports, analyses, and reviews related to the proposed project that have been delivered prior to submission of any part of the Application;

(20) An engineering report prepared by an engineer with experience in the industry and familiarity with similar projects. The report should address the proposed project's siting and permitting arrangements, engineering and design, contractual requirements, environmental compliance, testing, commissioning and operations, and maintenance;

(21) A credit history of the Applicant and each Project Sponsor;

(22) A preliminary credit assessment for the proposed project without a loan guarantee from a nationally recognized rating agency for projects where the estimated total Project Costs exceed $25 million. For proposed projects where the total estimated Project Costs are $25 million or less and where conditions justify, in the sole discretion of the Secretary, DOE may require such an assessment;

(23) A list showing the status of and estimated completion date of Applicant's required applications for Federal, state, and local permits, authorizations or approvals to site, construct, and operate the proposed project;

(24) A report containing an analysis of the potential environmental impacts of the proposed project that will enable DOE to—

(i) Assess whether the proposed project will comply with all applicable environmental requirements; and

(ii) Undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(25) A listing and description of the assets of or to be utilized for the benefit of the proposed project, and of any other asset that will serve as collateral pledged in respect of the Guaranteed Obligations, including appropriate data as to the value of such assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(26) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guaranteed Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based; and

(27) If proposed project assets or facilities are or will be jointly owned by the Applicant and one or more other Persons, each of which owns an undivided ownership interest in such proposed project assets or facilities, a description of the Applicant's rights and obligations in respect of its undivided ownership interest in such proposed project assets or facilities.

(e) During the Application evaluation process pursuant to § 609.5, DOE may request additional information, potentially including a preliminary credit rating or credit assessment, with respect to the proposed project.

(f) DOE will not consider any part of any Application or the Application as a whole complete unless the Application Fee (or the required portion of the Application Fee related to a particular part of the Application) has been paid. An Application Fee paid in connection with one Application is not transferable to another Application. Except in the discretion of DOE, no portion of the Application Fee is refundable.

(g) DOE has no obligation to evaluate an Application that is not complete, and may proceed with such evaluation, or a partial evaluation, only in its discretion.

(h) Unless an Applicant requests an extension and such an extension is granted by DOE in its discretion, an Application may be rejected if it is not complete within four years from the date of submission (or date of submission of the first part thereof, in the case of Applications made in more than one part).

(i) Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory to DOE to pay the fees and expenses charged by the independent consultants and outside legal counsel.

(j) Following a determination by DOE that an Application or, if applicable, the initial part of an Application, adequately describes an Eligible Project, or a project that may reasonably become an Eligible Project, DOE may offer a Preliminary Term Sheet to be utilized by an Applicant for the purpose of obtaining its third party contracts or offtake agreements, or for any other lawful purpose that may reasonably assist an Applicant in obtaining the information or conditional agreements required to complete an Application, subject to any terms and conditions required by DOE and applicable law. DOE may issue a Preliminary Term Sheet only if it determines that an Applicant has shown in an Application or, if applicable, the initial part of an Application, a reasonable likelihood of being able to satisfy the requirements of the Act and enter into a Conditional Commitment, but for the lack of a Preliminary Term Sheet. The Applicant shall be responsible for payment of any fees assessed or costs incurred by DOE that are associated with the issuance of the Preliminary Term Sheet. Notwithstanding any provision of a Preliminary Term Sheet to the contrary, the issuance of a Preliminary Term Sheet shall impose no obligation on DOE to proceed with an Application, or to enter into a Conditional Commitment, which matters shall be governed exclusively by the Act and the requirements set forth in § 609.5. Further, DOE may, in its sole discretion, terminate or rescind a Preliminary Term Sheet should an Applicant fail to meet any of the terms and conditions required therein.

(k) At any time in the lending process, the Secretary of Energy may exercise his deviation authority under § 609.16 to make such deviations from this part as he may deem to be in the best interests of DOE, where such deviation supports program objectives and the special circumstances stated in any deviation request are clearly in the best interests of the Government.

(l) DOE shall respond, in writing, to any inquiry by an Applicant about the status of its Application within ten (10) business days of receipt of such request.

§ 609.5 Programmatic, technical, and financial evaluation of applications.

(a) In reviewing completed Applications, and in prioritizing and selecting those as to which a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, any

applicable Solicitation, and this part. Applications will be considered in a competitive process, *i.e.* each Application will be evaluated against other Applications responsive to the Solicitation. At any time, DOE may request additional information or supporting documentation from an Applicant. Applications will be denied if:

(1) The proposed project is not an Eligible Project, however, DOE may provide an Applicant with a reasonable opportunity to correct or amend any Application in order to meet the conditions for an Eligible Project;

(2) The applicable technology is not ready to be deployed commercially in the United States, cannot yield a commercially viable product or service in the use proposed in the Application, does not have the potential to be deployed in other commercial projects in the United States, or is not or will not be available for further commercial use in the United States;

(3) The Person proposed to issue the loan or purchase other debt obligations constituting the Guaranteed Obligations is not an Eligible Lender;

(4) The proposed project is for demonstration, research, or development;

(5) Significant Equity for the proposed project will not be provided by the date of issuance of the Guaranteed Obligations, or such later time as DOE in its discretion may determine; or

(6) The proposed project does not present a reasonable prospect of repayment of the Guaranteed Obligations.

(b) If an Application has not been denied pursuant to paragraph (a) of this section, DOE will evaluate the proposed project based on the criteria set forth in the Act, any applicable Solicitation, and the following:

(1) To what measurable extent the proposed project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases, as applicable, or contributes to the avoidance, reduction or sequestration of air pollutants or anthropogenic emissions of greenhouse gases;

(2) To what extent the technology to be deployed in the proposed project—

(i) Is ready to be deployed commercially in the United States, can be replicated, yields a commercially viable product or service in the use proposed in the proposed project, has potential to be deployed in other commercial projects in the United States, and is or will be available for further commercial use in the United States; and

(ii) Constitutes an important improvement in technology, as compared to available Commercial Technologies, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, as applicable;

(3) To what extent the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace in the United States;

(4) The extent to which the level of proposed support in the Application is consistent with a reasonable prospect of repayment of the Guaranteed Obligations by considering, among other factors:

(i) The extent to which the requested amount of the loan guarantee, the requested amount of Guaranteed Obligations and, if applicable, the expected amount of any other financing or credit arrangements, are reasonable relative to the nature and scope of the proposed project;

(ii) The total amount and nature of the Project Costs and the extent to which Project Costs are to be funded by Guaranteed Obligations; and

(iii) The feasibility of the proposed project and likelihood that it will produce sufficient revenues to service its debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(5) The likelihood that the proposed project will be ready for full commercial operations in the time frame stated in the Application;

(6) The amount of Equity committed and to be committed to the proposed project by the Borrower, the Project Sponsor, and other Persons;

(7) Whether there is sufficient evidence that the Borrower will diligently implement the proposed project, including initiating and completing the proposed project in a timely manner;

(8) Whether and to what extent the Applicant will rely upon other Federal and non–Federal Government assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the proposed project and how such assistance will impact the proposed project;

(9) The levels of safeguards provided to the Federal Government in the event of default through collateral, warranties, and other assurance of repayment described in the Application, including the nature of any anticipated intercreditor arrangements;

(10) The Applicant's, or the relevant contractor's, capacity and expertise to operate the proposed project successfully, based on factors such as financial soundness, management organization, and the nature and extent of corporate and individual experience;

(11) The ability of the proposed Borrower to ensure that the proposed project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(12) The levels of market, regulatory, legal, financial, technological, and other risks associated with the proposed project and their appropriateness for a loan guarantee provided by DOE;

(13) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the proposed project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the proposed project; and

(14) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) After DOE completes its review and evaluation of a proposed project pursuant to paragraph (b) of this section and this part, DOE will notify the Applicant in writing of its determination whether to proceed with due diligence and negotiation of a Term Sheet in accordance with § 609.6. DOE will proceed only if it determines that the proposed project is highly qualified and suitable for a Guarantee. Upon written confirmation from the Applicant that it desires to proceed, DOE and the Applicant will commence negotiations.

(d) DOE shall provide all Applicants with a reasonable opportunity to correct or amend any Application in order to meet the criteria set forth in this part or any other conditions required by DOE, prior to any denial of such Application. A determination by DOE not to proceed with a proposed project following evaluation pursuant to paragraph (b) of this section shall be final and non-appealable, but shall not prejudice the Applicant or other affected Persons from applying for a Guarantee in respect of a different proposed project pursuant to another, separate Application. Prior to DOE's denial of any Application, DOE shall advise the Applicant in writing, not less than ten (10) business days prior to the effective date of such denial, and set forth the reasons for such proposed denial along with a list of items that may be corrected or amended by the Applicant in order to satisfy the requirements that would create an Eligible Application, if such items can be corrected or appropriately amended. If requested by any Applicant, DOE shall meet with such Applicant in order

to address questions or concerns raised by the Applicant.

§ 609.6 Term sheets and conditional commitments.

(a) DOE, after negotiation of a Term Sheet with an Applicant, may offer such Term Sheet to an Applicant or such other Person that is an affiliate of the Applicant and that is acceptable to DOE. DOE's offer of a Term Sheet shall be in writing and signed by the Contracting Officer. DOE's negotiation of a Term Sheet imposes no obligation on the Secretary to offer a Term Sheet to the Applicant.

(b) DOE shall terminate its negotiations of a Term Sheet if it has not offered a Term Sheet in respect of an Eligible Project within four years after the date of the written notification set forth in § 609.5(c), unless extended in writing in the discretion of the Contracting Officer.

(c) If and when the offeree specified in a Term Sheet satisfies all terms and conditions for acceptance of the Term Sheet, including written acceptance thereof and payment of all fees specified in § 609.11(f) and therein to be paid at or prior to acceptance of the Term Sheet, the Term Sheet shall become a Conditional Commitment. Each Conditional Commitment shall include an expiration date no more than two years from the date it is issued, unless extended in writing in the discretion of the Contracting Officer. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement.

(d) If, subsequent to execution of a Conditional Commitment, the financing arrangements of the Borrower, or in respect of an Eligible Project, change from those described in the Conditional Commitment, the Applicant shall promptly provide updated financing information in writing to DOE. All such updated information shall be deemed to be information submitted in connection with an Application and shall be subject to § 609.4(b). Based on such updated information, DOE may take one or more of the following actions:

(1) Determine that such changes are not material to the Borrower, the Eligible Project or DOE;

(2) Amend the Conditional Commitment accordingly;

(3) Postpone the expected closing date of the associated Loan Guarantee Agreement; or

(4) Terminate the Conditional Commitment.

§ 609.7 Closing on the loan guarantee agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) Prior to or on the closing date of a Loan Guarantee Agreement, DOE will ensure that:

(1) One of the following has occurred:

(i) An appropriation for the Credit Subsidy Cost has been made;

(ii) The Secretary has received from the Borrower payment in full for the Credit Subsidy Cost and deposited the payment into the Treasury; or

(iii) A combination of one or more appropriations under paragraph (b)(1)(i) of this section and one or more payments from the Borrower under paragraph (b)(1)(ii) of this section has been made that is equal to the Credit Subsidy Cost;

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Applicant the remainder of the Facility Fee referred to in § 609.11(b);

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the Guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States;

(6) Each holder of the Guaranteed Obligations is an Eligible Lender, and the servicer of the Guaranteed Obligations meets the servicing performance requirements of § 609.9(b);

(7) DOE has determined the principal amount of the Guaranteed Obligations expected to be issued in respect of the Eligible Project, as estimated at the time of issuance, will not exceed 80 percent of the Project Costs of the Eligible Project;

(8) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by the Contracting Officer and all other applicable contractual, statutory, and regulatory requirements have been satisfied or waived by the Contracting Officer. If the counterparty to the Conditional Commitment has not satisfied all such terms and conditions on or prior to the closing date of the Loan Guarantee Agreement, the Secretary may, in his discretion, set a new closing date, or terminate the Conditional Commitment; and

(9) Where the total Project Costs for an Eligible Project are projected to exceed $25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be $25 million or less, the Secretary may, on a case-by-case basis, require a credit rating. If a credit rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

§ 609.8 Loan guarantee agreement.

(a) Only a Loan Guarantee Agreement executed by the Contracting Officer can obligate DOE to issue a Guarantee in respect of Guaranteed Obligations.

(b) DOE is not bound by oral representations.

(c) Each Loan Guarantee Agreement shall contain the following requirements and conditions, and shall not be executed until the Contracting Officer determines that the following requirements and conditions are satisfied:

(1) The Federal Financing Bank shall be the only Eligible Lender in transactions where DOE guarantees 100 percent (but not less than 100 percent) of the principal and interest of the Guaranteed Obligations issued under a Loan Guarantee Agreement.

(i) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market; and

(ii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market.

(2) The Borrower shall be obligated to make full repayment of the principal and interest on the Guaranteed Obligations and other debt of a Borrower over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the Eligible Project's major physical assets, as calculated in accordance with U.S. generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligations must be repaid pro rata, and on the same amortization schedule, with the guaranteed portion.

(3) If any financing or credit arrangement of the Borrower or relating

to the Eligible Project, other than the Guaranteed Obligations, has an amortization period shorter than that of the Guaranteed Obligations, DOE shall have determined that the resulting financing structure allocates to DOE a reasonably proportionate share of the default risk, in light of:

(i) DOE's share of the total debt financing of the Borrower;

(ii) Risk allocation among the credit providers to the Borrower; and

(iii) Internal and external credit enhancements.

(4) The loan guarantee does not finance, either directly or indirectly tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code.

(5) The principal amount of the Guaranteed Obligations, when combined with funds from other sources committed and available to the Borrower, shall be sufficient to pay for expected Project Costs (including adequate contingency amounts), the applicable items specified in § 609.10(b), and otherwise to carry out the Eligible Project.

(6) There shall be a reasonable prospect of repayment by the Borrower of the principal of and interest on the Guaranteed Obligations and all of its other debt obligations.

(7) The Borrower shall pledge collateral or surety determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations. Such collateral or security may include Eligible Project assets and assets not related to the Eligible Project.

(8) The Loan Guarantee Agreement and related documents shall include detailed terms and conditions that DOE deems necessary and appropriate to protect the interests of the United States in the case of default, including ensuring availability of all relevant intellectual property rights, technical data including software, and technology necessary for DOE or any Person selected by DOE, to complete, operate, convey, and dispose of the defaulted Borrower or the Eligible Project.

(9) The Guaranteed Obligations shall not be subordinate to other financing. Guaranteed Obligations are not subordinate to other financing if the lien on property securing the Guaranteed Obligations, together with liens that are pari passu with such lien, if any, take priority or precedence over other charges or encumbrances upon the same property and must be satisfied before such other charges are entitled to participate in proceeds of the property's sale. In DOE's discretion, Guaranteed Obligations may share a lien position with other financing.

(10) There is satisfactory evidence that the Borrower will diligently pursue the Eligible Project and is willing, competent, and capable of performing its obligations under the Loan Guarantee Agreement and the loan documentation relating to its other debt obligations.

(11) The Borrower shall have paid all fees and expenses due to DOE or the U.S. Government, including such amount of the Credit Subsidy Cost as may be due and payable from the Borrower pursuant to the Conditional Commitment, upon execution of the Loan Guarantee Agreement.

(12) The Borrower, any Eligible Lender, and each other relevant party shall take, and be obligated to continue to take, those actions necessary to perfect and maintain liens on collateral in respect of the Guaranteed Obligations.

(13) DOE or its representatives shall have access to the offices of the Borrower and the Eligible Project site at all reasonable times in order to monitor the—

(i) Performance by the Borrower of its obligations under the Loan Guarantee Agreement; and

(ii) Performance of the Eligible Project.

(14) DOE and Borrower have reached an agreement regarding the information that will be made available to DOE and the information that will be made publicly available.

(15) The Borrower shall have filed applications for or obtained any required regulatory approvals for the Eligible Project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, state, and local regulatory requirements.

(16) The Borrower shall have no delinquent Federal debt.

(17) The Project Sponsors have made or will make a significant Equity investment in the Borrower or the Eligible Project, and will maintain control of the Borrower or the Eligible Project as agreed in the Loan Guarantee Agreement.

(18) The Loan Guarantee Agreement and related agreements shall include such other terms and conditions as DOE deems necessary or appropriate to protect the interests of the United States.

(d) The Loan Guarantee Agreement shall provide that, in the event of a default by the Borrower:

(1) Interest on the Guaranteed Obligations shall accrue at the rate stated in the Loan Guarantee Agreement or the Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when such Guaranteed Obligations are funded through the Federal Financing Bank, DOE shall not be required to pay any premium, default penalties, or prepayment penalties; and

(2) The holder of collateral pledged in respect of the Guaranteed Obligations shall be obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery.

(e)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.9. Such latter Eligible Lender shall be required to assume all servicing, monitoring, and reporting requirements as provided in the Loan Guarantee Agreement. Any transfer of the servicing, monitoring, and reporting functions shall be subject to the prior written approval of DOE.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the Guaranteed Obligations, shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guaranteed Obligations. Any contractual agent approved by the Secretary to perform this function may transfer or assign this responsibility only with the Secretary's prior written approval.

(f) Each Loan Guarantee Agreement shall require the Borrower to make representations and warranties, agree to covenants, and satisfy conditions precedent to closing and to each disbursement that, in each case, relate to its compliance with the Davis-Bacon Act and the Cargo Preference Act.

(g) The Applicant, the Borrower, or the Project Sponsor must estimate, calculate, record, and provide to DOE any time DOE requests such information and at the times provided in the Loan Guarantee Agreement all costs incurred in the design, engineering, financing, construction, startup, commissioning, and shakedown of the Eligible Project in accordance with generally accepted accounting principles and practices.

§ 609.9 Lender servicing requirements.

(a) When reviewing and evaluating a proposed Eligible Project, all Eligible Lenders (other than the Federal Financing Bank) shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating, and disbursing a loan made by it without a Federal guarantee.

(b) Loan servicing duties shall be performed by an Eligible Lender, DOE, or another qualified loan servicer approved by DOE. When performing its servicing duties, the loan servicer shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, monitoring the satisfaction of all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement, or related documents;

(2) During the operational phase, monitoring and servicing the Guaranteed Obligations and collection of the outstanding principal and accrued interest as well as undertaking to ensure that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) Until the Guaranteed Obligation has been repaid, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or its other debt obligations.

§ 609.10 Project costs.

(a) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility;

(3) Costs of equipment purchases, including a reasonable reserve of spare parts to the extent required;

(4) Costs to provide facilities and services related to safety and environmental protection;

(5) Costs of financial, legal, and other professional services, including services necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) Costs of issuing Eligible Project debt, such as fees, transaction, and costs referred to in paragraph (a)(5) of this section, and other customary charges imposed by Eligible Lenders;

(7) Costs of necessary and appropriate insurance and bonds of all types including letters of credit and any collateral required therefor;

(8) Costs of design, engineering, startup, commissioning, and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the Eligible Project;

(10) To the extent required by the Loan Guarantee Agreement and not intended or available for any cost referred to in paragraph (b) of this section, costs of funding any reserve fund, including without limitation, a debt service reserve, a maintenance reserve, and a contingency reserve for cost overruns during construction; provided that proceeds of a Guaranteed Loan deposited to any reserve fund shall not be removed from such fund except to pay Project Costs, to pay principal of the Guaranteed Loan, or otherwise to be used as provided in the Loan Guarantee Agreement;

(11) Capitalized interest necessary to meet market requirements and other carrying costs during construction; and

(12) Other necessary and reasonable costs, including, without limitation, previously acquired real estate, equipment, or other materials, and any engineering, construction, make-ready, design, permitting, or other work completed on an existing facility or project.

(b) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non–Eligible Project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying an innovative technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the Eligible Project, as determined by DOE;

(7) Expenses incurred after startup, commissioning, and shakedown of the facility, or, in DOE's discretion, any portion of the facility that has completed startup, commissioning, and shakedown;

(8) Borrower-paid Credit Subsidy Costs, the Administrative Cost of Issuing a Loan Guarantee, and any other fee collected by DOE; and

(9) Operating costs.

§ 609.11 Fees and charges.

(a) Unless explicitly authorized by statute, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for the Credit Subsidy Cost, the Application Fee, the Facility Fee, the Guarantee Fee, the maintenance fee, and any other fees charged by or paid to DOE relating to the Act or any Guarantee thereunder. An applicant may, at any time, use non-Federal monies to pay the Credit Subsidy Cost or DOE fees.

(b) DOE may charge Applicants a non-refundable Facility Fee, with a portion being payable on or prior to the date on which the Applicant executes the Commitment Letter and the remainder being payable on or prior to the closing date for the Loan Guarantee Agreement.

(c) In order to encourage and supplement private lending activity DOE may collect from Borrowers for deposit in the United States Treasury a non-refundable Risk–Based Charge which, together with the interest rate on the Guaranteed Obligation that LPO determines to be appropriate, will take into account the prevailing rate of interest in the private sector for similar loans and risks. The Risk–Based Charge shall be paid at such times and in such manner as may be determined by DOE, but no less frequently than once each year, commencing with payment of a pro-rated payment on the date the Guarantee is issued. The amount of the Risk-Based Charge will be specified in the Loan Guarantee Agreement.

(d) DOE may collect a maintenance fee to cover DOE's administrative expenses, other than extraordinary expenses, incurred in servicing and monitoring a Loan Guarantee Agreement. The maintenance fee shall accrue from the date of execution of the Loan Guarantee Agreement through the date of payment in full of the related Guaranteed Obligations. If DOE determines to collect a maintenance fee, it shall be paid by the Borrower each year (or portion thereof) in advance in the amount specified in the applicable Loan Guarantee Agreement.

(e) In the event a Borrower or an Eligible Project experiences difficulty relating to technical, financial, or legal matters or other events (*e.g.,* engineering failure or financial workouts), the Borrower shall be liable as follows:

(1) If such difficulty requires DOE to incur time or expenses beyond those customarily expended to monitor and administer performing loans, DOE may collect an extraordinary expenses fee from the Borrower that will reimburse

DOE for such time and expenses, as determined by DOE; and

(2) For all fees and expenses of DOE's independent consultants and outside counsel, to the extent that such fees and expenses are elected to be paid by DOE notwithstanding the provisions of paragraphs (f) and (g) of this section.

(f) Each Applicant, Borrower, or Project Sponsor, as applicable, shall be responsible for the payment of all fees and expenses charged by DOE's independent consultants and outside legal counsel in connection with an Application, Conditional Commitment, or Loan Guarantee Agreement, as applicable. Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory to DOE to pay the fees and expenses charged by the independent consultants and outside legal counsel. Appropriate provisions regarding payment of such fees and expenses shall also be included in each Term Sheet and Loan Guaranty Agreement or, upon a determination by DOE, in other appropriate agreements.

(g) Notwithstanding payment by Applicant, Borrower, or Project Sponsor, all services rendered by an independent consultant or outside legal counsel to DOE in connection with an Application, Conditional Commitment, or Loan Guarantee Agreement shall be solely for the benefit of DOE (and such other creditors as DOE may agree in writing). DOE may require, in its discretion, the payment of an advance retainer to such independent consultants or outside legal counsel as security for the collection of the fees and expenses charged by the independent consultants and outside legal counsel. In the event an Applicant, Borrower, or Project Sponsor fails to comply with the provisions of such payment agreement, DOE in its discretion, may stop work on or terminate an Application, a Conditional Commitment, or a Loan Guarantee Agreement, or may take such other remedial measures in its discretion as it deems appropriate.

(h) DOE shall not be financially liable under any circumstances to any independent consultant or outside counsel for services rendered in connection with an Application, Conditional Commitment, or Loan Guarantee Agreement except to the extent DOE has previously entered into an express written agreement to pay for such services.

§ 609.12 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of principal and interest of Guaranteed Obligations pursuant to Guarantees issued in accordance with the Act and this part. The issuance by DOE of a Guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such Guarantee; and that, but for fraud or material misrepresentation by the Holder, such Guarantee shall be legal, valid, binding, and enforceable against DOE in accordance with its terms.

§ 609.13 Default, demand, payment, and foreclosure on collateral.

(a) If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Holder may make written demand for payment upon the Secretary in accordance with the terms of the applicable Guarantee. If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Secretary shall notify the Attorney General.

(b) Subject to the terms of the applicable Guarantee, the Secretary shall make payment within 60 days after receipt of written demand for payment from the Holder, provided that the demand for payment complies in all respects with the terms of the applicable Guarantee. Interest shall accrue to the Holder at the rate stated in the promissory note evidencing the Guaranteed Obligation, without giving effect to the Borrower's default in making a required payment of principal or interest on the applicable Guarantee Obligation or any other default by the Borrower, until the Guaranteed Obligation has been fully paid by DOE. Payment by the Secretary on the applicable Guarantee does not change Borrower's obligations under the promissory note evidencing the Guaranteed Obligation, Loan Guarantee Agreement, Loan Agreement, or related documents, including an obligation to pay default interest.

(c) Following payment by the Secretary pursuant to the applicable Guarantee, upon demand by DOE, the Holder shall transfer and assign to the Secretary (or his designee or agent) the promissory note evidencing the Guaranteed Obligation, all rights and interests of the Holder in the Guaranteed Obligation, and all rights and interests of the Holder in respect of the Guaranteed Obligation, except to the extent that the Secretary determines that such promissory note or any of such rights and interests shall not be transferred and assigned to the Secretary. Such transfer and assignment shall include, without limitation, all of the liens, security, and collateral rights of the Holder (or his designee or agent) in respect of the Guaranteed Obligation.

(d) Following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, the Secretary is authorized to protect and foreclose on the collateral, take action to recover costs incurred by, and all amounts owed to, the United States as a result of the defaulted Guarantee Obligation, and take such other action necessary or appropriate to protect the interests of the United States. In respect of any such authorized actions that involve a judicial proceeding or other judicial action, the Secretary shall act through the Attorney General. The foregoing provisions of this paragraph (d) shall not relieve the Secretary from its obligations pursuant to any applicable Intercreditor Agreement. Nothing in this paragraph (d) shall limit the Secretary from exercising any rights or remedies pursuant to the terms of the Loan Guarantee Agreement.

(e) The cash proceeds received as a result of any foreclosure on the collateral, or other action, shall be distributed in accordance with the Loan Guarantee Agreement (subject to any applicable Intercreditor Agreement).

(f) The Loan Guarantee Agreement shall provide that cash proceeds received by the Secretary (or his designee or agent) as a result of any foreclosure on the collateral or other action shall be applied in the following order of priority:

(1) Toward the pro rata payment of any costs and expenses (including unpaid fees, fees and expenses of counsel, contractors and agents, and liabilities and advances made or incurred) of the Secretary, the Attorney General, the Holder, a collateral agent, or other responsible person of any of them (solely in their individual capacities as such and not on behalf of or for the benefit of their principals), incurred in connection with any authorized action following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, or as otherwise permitted under the Loan Agreement or Loan Guarantee Agreement;

(2) To pay all accrued and unpaid fees due and payable to the Secretary, the Attorney General, the Holder, a collateral agent, or other responsible

person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(3) To pay all accrued and unpaid interest due and payable to the Secretary, the Attorney General, the Holder, a collateral agent, or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(4) To pay all unpaid principal of the Guaranteed Obligation;

(5) To pay all other obligations of the Borrower under the Loan Guarantee Agreement, the Loan Agreement, and related documents that are remaining after giving effect to the preceding provisions and are then due and payable; and

(6) To pay to the Borrower, or its successors and assigns, or as a court of competent jurisdiction may direct, any cash proceeds then remaining following the application of all payment described in paragraphs (f)(1) through (5) of this section.

(g) No action taken by the Holder or its agent or designee in respect of any collateral will affect the rights of any person, including the Secretary, having an interest in the Guaranteed Obligations or other debt obligations, to pursue, jointly or severally, legal action against the Borrower or other liable persons, for any amounts owing in respect of the Guaranteed Obligation or other applicable debt obligations.

(h) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with exercise of rights as a lien holder or recovery of deficiencies due under the Guaranteed Obligation, the Secretary may take such action as he determines to be appropriate under the circumstances.

(i) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, the Secretary from purchasing any collateral or Holder's or other Person's interest in the Eligible Project upon foreclosure of the collateral.

(j) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower and the United States.

(k) The Holder and the Secretary may agree to a formal or informal plan of reorganization in respect of the Borrower, to include a restructuring of the Guaranteed Obligation and other applicable debt of the Borrower on such terms and conditions as the Secretary determines are in the best interest of the United States.

§ 609.14 Preservation of collateral.

(a) If the Secretary exercises his right under the Loan Guarantee Agreement to require the holder of pledged collateral to take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the collateral, the Secretary shall, subject to compliance with the Antideficiency Act, 31 U.S.C. 1341 *et seq.,* reimburse the holder of such collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.13, no party may waive or relinquish, without the consent of the Secretary, any such collateral to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as he determines are required or appropriate, taking into account the term of any applicable Intercreditor Agreement, to care for, preserve, protect or maintain collateral pledged in respect of Guaranteed Obligations. The cost of such contracts may be charged to the Borrower.

§ 609.15 Audit and access to records.

Each Loan Guarantee Agreement and related documents shall provide that:

(a) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the Eligible Project as are necessary, including the Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all Eligible Project assets and non-Eligible Project assets pledged in respect of the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all Eligible Project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals, and all other documents and records relating to the Borrower or the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the Eligible Project; and

(b) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the Borrower, Eligible Lender, or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender. or DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

§ 609.16 Deviations.

(a) Whenever permitted by applicable law, the Secretary may authorize deviations from the requirements of this part upon:

(1) Either receipt from the Applicant, Borrower, or Project Sponsor, as applicable, of—

(i) A written request that the Secretary deviate from one or more requirements; and

(ii) A supporting statement briefly describing one or more justifications for such deviation; or

(iii) A determination by the Secretary in his discretion to undertake a deviation;

(2) A finding by the Secretary that such deviation supports program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government; and

(3) If the waiver would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents, DOE shall consult with OMB and the Secretary of the Treasury.

(b) If a deviation under this section results in an increase in the applicable Credit Subsidy Cost, such increase shall be funded either by additional fees paid by the Borrower or on behalf of the Borrower by any third party or, if an appropriation is available, by means of an appropriations act. The Secretary has discretion to determine how the cost of a deviation is funded. The Secretary may waive, alter, or amend, through a deviation, all or any part of the Application Fee, the Facility Fee, the Guarantee Fee, the maintenance fee, and any other fees associated with any Application, or allow for alternative plans to pay such fees over time or through any other means agreed upon by DOE and the Applicant.

PART 611—ADVANCED TECHNOLOGY VEHICLES MANUFACTURING ASSISTANCE PROGRAM

■ 2. The authority citation for part 611 continues to read as follows:

Authority: Pub. L. 110–140 (42 U.S.C. 17013), Pub. L. 110–329.

■ 3. Section 611.2 is revised to read as follows:

§ 611.2 Definitions.

The definitions contained in this section apply to provisions contained in both this subpart and subpart B of this part.

Adjusted average fuel economy means a harmonic production weighted average of the combined fuel economy of all vehicles in a fleet, which were subject to CAFE.

Advanced technology vehicle means a passenger automobile or light truck that meets—

(1) The Bin 5 Tier II emission standard established in regulations issued by the Administrator of the Environmental Protection Agency under section 202(i) of the Clean Air Act (the Act) (42 U.S.C. 7521(i)), as of the date of application, or a lower-numbered Bin emission standard;

(2) Any new emission standard in effect for fine particulate matter prescribed by the Administrator under the Act (42 U.S.C. 7401 *et seq.*), as of the date of application; and

(3) At least 125 percent of the harmonic production weighted average combined fuel economy, for vehicles with substantially similar attributes in model year 2005.

Agreement means the contractual loan arrangement between DOE and a Borrower for a loan made by and through the Federal Financing Bank with the full faith and credit of the United States Government on the principal and interest.

Applicant means a party that submits a substantially complete application pursuant to this part.

Application means the compilation of the materials required by this part to be submitted to DOE by an Applicant. One Application can include requests for one or more loans and one or more projects. However, an Application covering more than one project must contain complete and separable information with respect to each project.

Automobile is used as that term is defined in 49 CFR part 523.

Borrower means an Applicant that receives a loan under the program under this part.

CAFE means the Corporate Average Fuel Economy program of the Energy Policy and Conservation Act, 49 U.S.C. 32901 *et seq.*

Combined fuel economy means the combined city/highway miles per gallon values, as are reported in accordance with section 32904 of title 49, United States Code. If CAFE compliance data is not available, the combined average fuel economy of a vehicle must be demonstrated through the use of a peer-reviewed model.

DOE or *Department* means the United States Department of Energy.

Eligible Facility means a manufacturing facility in the United States that produces qualifying advanced technology vehicles, or qualifying components.

Eligible Project means:

(1) Reequipping, expanding, or establishing a manufacturing facility in the United States to produce qualifying advanced technology vehicles, or qualifying components; or

(2) Engineering integration performed in the United States for qualifying advanced technology vehicles and qualifying components; or

(3) Manufacturing, recycling, processing, reprocessing, remediation, or reuse of materials, components, or subcomponents involving critical minerals, critical minerals production, or the supply chain for such materials, as set forth in Executive Order 13953 (''Executive Order Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries,'' dated September 20, 2020), and Executive Order 13817 (''A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,'' dated December 20, 2017), as amended.

Engineering integration costs are the costs of engineering tasks relating to—

(1) Incorporating qualifying components into the design of advanced technology vehicles; and

(2) Designing tooling and equipment and developing manufacturing processes and material suppliers for production facilities that produce qualifying components or advanced technology vehicles.

Equivalent vehicle means a light-duty vehicle of the same vehicle classification as specified in 10 CFR part 523.

Financially viable means a reasonable prospect that the Applicant will be able to make payments of principal and interest on the loan as and when such payments become due under the terms of the loan documents, and that the Applicant has a net present value that is positive, taking all costs, existing and future, into account.

Grantee means an entity awarded a grant made pursuant to section 136 of the Energy Independence and Security Act of 2007 and this part.

Light-duty vehicle means passenger automobiles and light trucks.

Light truck is used as that term is defined in 49 CFR part 523.

Loan Documents mean the Agreement and all other instruments, and all documentation among DOE, the Borrower, and the Federal Financing Bank evidencing the making, disbursing, securing, collecting, or otherwise administering the loan [references to loan documents also include comparable agreements, instruments, and documentation for other financial obligations for which a loan is requested or issued].

Model year is defined as that term is defined in 49 U.S.C. 32901.

Passenger automobile is used as that term is defined in 49 CFR part 523.

Qualifying components means components that the DOE determines are:

(1) Designed for advanced technology vehicles; and

(2) Installed for the purpose of meeting the performance requirements of advanced technology vehicles; or

(3) Involving critical minerals, as set forth in Executive Order 13953 (''Executive Order Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries,'' dated September 20, 2020), and Executive Order 13817 (''A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,'' dated December 20, 2017), as amended, as a component of advanced technology vehicles.

Secretary means the United States Secretary of Energy.

Security means all property, real or personal, tangible or intangible, required by the provisions of the Loan Documents to secure repayment of any indebtedness of the Borrower under the Loan Documents.

[FR Doc. 2020–29278 Filed 1–14–21; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 217

[Docket R–1703]

RIN 7100–AF77

Regulatory Capital Rule: Eligible Retained Income; Correction

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; correcting amendments.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is correcting changes to the definition of eligible retained income in the capital rule. This definition is used for calculating limitations on capital distributions and discretionary bonus payments and was adopted in an interim final rule published on March 18, 2020, and as a final rule published on October 8, 2020.

DATES: This correction is effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Benjamin McDonough, Associate General Counsel, (202) 452–2036; Mark Buresh, Senior Counsel, (202) 452–5270; or Andrew Hartlage, Counsel, (202) 452–6483, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. Users of Telecommunications Device for the Deaf (TDD) only, call (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Board of Governors of the Federal Reserve System (Board) is issuing this correction to the definition of eligible retained income in the capital rule, 12 CFR part 217. This definition is used for calculating limitations on capital distributions and discretionary bonus payments and was adopted as an interim final rule published on March 18, 2020 (ERI interim final rule),[1] and as a final rule published on October 8, 2020 (ERI final rule).[2] In the ERI interim final rule, the Board, together with the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC, and together with the Board and the OCC, the agencies), revised the definition of eligible retained income at section __.11(a)(2)(i) of the capital rule on an interim basis and sought comment on the revisions. In the ERI final rule, the agencies adopted these changes to the definition of eligible retained income, introduced through the ERI interim final rule, without change.

On March 20, 2020, the Board published in the **Federal Register** a final rule, effective May 18, 2020, implementing the stress capital buffer requirement in the capital rule (SCB final rule), which revised section 217.11 of the Board's capital rule generally. The SCB final rule revised the definition of eligible retained income in section 217.11 of the Board's capital rule in a manner inconsistent with the the Board's intent in the ERI interim final rule and the ERI final rule. The Board is issuing this notice to correct the definition of eligible retained income so that it is consistent with the definition established by the ERI interim final rule and affirmed by the ERI final rule.

List of Subjects in 12 CFR Part 217

Administrative practice and procedure; Banks, banking; Capital; Federal Reserve System; Holding companies.

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the Supplementary Information, chapter II of title 12 of the Code of Federal Regulations is amended as follows:

PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS (REGULATION Q)

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–1, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371, 5371 note; and Pub. L. 116–136, 134 Stat. 281.

■ 2. Section 217.11 is amended by revising paragraph (a)(2)(i) to read as follows:

§ 217.11 Capital conservation buffer, countercyclical capital buffer amount, and GSIB surcharge.

(a) * * *

(2) * * *

(i) *Eligible retained income.* The eligible retained income of a Board-regulated institution is the greater of:

(A) The Board-regulated institution's net income, calculated in accordance with the instructions to the FR Y–9C or Call Report, as applicable, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(B) The average of the Board-regulated institution's net income, calculated in accordance with the instructions to the FR Y–9C or Call Report, as applicable, for the four calendar quarters preceding the current calendar quarter.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021–00906 Filed 1–14–21; 8:45 am]

BILLING CODE 6210–01–P

[1] Regulatory Capital Rule: Eligible Retained Income, 85 FR 15909 (March 20, 2020).

[2] Regulatory Capital Rule and Total Loss-Absorbing Capacity Rule: Eligible Retained Income, 85 FR 63423 (October 8, 2020). The final rule is effective January 1, 2021.

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1002

Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this Advisory Opinion (AO) to address regulatory uncertainty regarding Regulation B, which implements the Equal Credit Opportunity Act, as it applies to certain aspects of special purpose credit programs designed and implemented by for-profit organizations to meet special social needs. Specifically, this AO clarifies the content that a for-profit organization must include in a written plan that establishes and administers a special purpose credit program under Regulation B. In addition, this AO clarifies the type of research and data that may be appropriate to inform a for-profit organization's determination that a special purpose credit program is needed to benefit a certain class of persons.

DATES: This advisory opinion is effective on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher Davis, Attorney-Advisor; Office of Fair Lending and Equal Opportunity, at *CFPB_FairLending@cfpb.gov* or 202–435–7000. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The Bureau is issuing this AO through the procedures for its Advisory Opinions Policy.[1] Refer to those procedures for more information.

I. Advisory Opinion

A. Background

Congress enacted the Equal Credit Opportunity Act (ECOA or the Act) in 1974, initially prohibiting discrimination in credit on the basis of

[1] 85 FR 77987 (Dec. 3, 2020).

sex or marital status.[2] Two years later, Congress expanded the prohibition against discrimination in credit transactions to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Federal Consumer Credit Protection Act.[3] At the same time, under section 701(c) of the ECOA, Congress clarified that it does not constitute discrimination under the Act for a creditor to ''refuse to extend credit offered pursuant to'' ''any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the [Bureau].''[4]

By permitting the consideration of a prohibited basis such as race, national origin, or sex in connection with a special purpose credit program, Congress protected a broad array of programs ''specifically designed to prefer members of economically disadvantaged classes'' and ''to increase access to the credit market by persons previously foreclosed from it.''[5] Congress provided examples of such programs—*e.g.,* government sponsored housing credit subsidies for the aged or the poor and programs offering credit to a limited clientele such as credit union programs and educational loan programs.[6]

The Board of Governors of the Federal Reserve System (Board)—which exercised rulemaking authority under the ECOA at the time—promulgated regulations implementing the Act's special purpose credit program provision.[7] In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress transferred primary rulemaking authority over the ECOA to the Bureau,[8] which subsequently republished the Board's existing regulations without material change.[9] The Bureau has addressed special purpose credit programs in a previous edition of *Supervisory Highlights*[10] and a blog,[11] explaining that special purpose credit programs may be one tool available to creditors to ''meet the credit needs of underserved communities.''[12]

In recent months, stakeholders have expressed interest in developing special purpose credit programs but have also raised questions about how to do so in a manner consistent with Regulation B, indicating that regulatory uncertainty may inhibit broader creation of these programs by creditors. Many comments to the Bureau's recent *Request for Information on the Equal Credit Opportunity Act and Regulation B*[13] from a variety of external stakeholders, including both consumer and civil rights advocates and industry representatives, indicate that special purpose credit programs may be one way to promote fair and responsible access to credit, but that there is a need for further guidance on compliant implementation of these programs.

The Bureau is issuing this AO to address this regulatory uncertainty in the hope that broader creation of special purpose credit programs by creditors will help expand access to credit among disadvantaged groups and will better address special social needs that exist today. Bureau stakeholders have called attention to the problem of unmet credit needs among minority communities and the role that discrimination may have played in creating and exacerbating those deficits. Research from the Federal Reserve Bank of New York has shown that inequities in credit availability and in the terms and conditions of credit appear to have led to income inequality.[14] For consumers who own a home, moreover, home equity represents a significant share of household net worth,[15] but Home Mortgage Disclosure Act (HMDA) data show that in 2019, Black, Hispanic White, and Asian borrowers had notably higher mortgage loan denial rates than non-Hispanic White borrowers, continuing a trend from years prior.[16] For example, the denial rates for conventional home-purchase loans were 16.0 percent for Black borrowers, 10.8 percent for Hispanic White borrowers, and 8.6 percent for Asian borrowers; in contrast, denial rates for such loans were 6.1 percent for non-Hispanic White borrowers.[17] Black and Hispanic White borrowers were also more likely to have higher-priced conventional and nonconventional loans in 2019.[18]

According to some studies, these types of racial and ethnic differences in access to credit perpetuate wealth inequality.[19] The Board's 2019 Survey of Consumer Finances, for example, indicates that the typical White family has $188,200 in median family wealth, which is eight times the wealth of the typical Black family ($24,100), and five times the wealth of the typical Hispanic family ($36,100).[20] Other families—including Asian families—also ''have lower wealth than White families.''[21] The economic fallout from the ongoing COVID–19 pandemic appears to be exacerbating these racial and ethnic disparities in wealth.[22]

Bureau stakeholders have also noted that racial and ethnic disparities in access to credit extend beyond the mortgage market. For example, a report from the Board documented disparities in both mortgage and non-mortgage credit denials among White, Black, and Hispanic credit applicants.[23]

[2] *See* Public Law 93–495, sec. 701(a), 88 Stat. 1500, 1521 (1974).

[3] *See* ECOA Amendments Act, Public Law 94–239, sec. 701(a), 90 Stat. 251, 251 (1976).

[4] *See* Public Law 94–239, sec. 701(c)(3), 90 Stat. 251, 251 (1976).

[5] S. Rept. 94–589, 94th Cong., 2nd Sess., at 7, *reprinted in* 1976 U.S.C.C.A.N. 403, 409.

[6] *See id.*

[7] *See* 42 FR 1242 (Jan. 6, 1977).

[8] *See* Public Law 111–203, tit. X, sec. 1085, 124 Stat. 1376, 2084.

[9] 76 FR 79442 (Dec. 21, 2011) (promulgating 12 CFR pt. 1002 & supp. I).

[10] *See* 81 FR 46652, 46656 (July 18, 2016).

[11] *See* Susan M. Bernard and Patrice Alexander Ficklin, *Expanding Access to Credit to Underserved Communities* (July 31, 2020), *https://www.consumerfinance.gov/about-us/blog/expanding-access-credit-underserved-communities/.*

[12] *See id.*

[13] 85 FR 46600 (Aug. 3, 2020).

[14] Fed. Reserve Bank of N.Y., *Credit, Income and Inequality* (June 2020), at 1 *https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr929.pdf* (''[C]redit-constrained individuals often have limited wealth, and their exclusion from credit can hinder economic mobility and fuel persistent income inequality.'').

[15] U.S. Census Bureau, *Gaps in the Wealth of Americans by Household Type* (Aug. 27, 2019), *https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html?utm_campaign=20190827msacos1ccstors&utm_medium=email&utm_source=govdelivery%.*

[16] Consumer Fin. Prot. Bureau, *Data Point: 2019 Mortgage Market Activity and Trends* (June 2020), at 36, *https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf.*

[17] *See id.*

[18] *See id.* at 47.

[19] *See, e.g.,* Fed. Reserve Bank of N.Y., *supra* note 14.

[20] Board of Governors of the Fed. Reserve Sys., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), *https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm#fig1.*

[21] *Id.*

[22] *See, e.g.,* Fed. Reserve Bank of N.Y., *Double Jeopardy: COVID–19's Concentrated Health and Wealth Effects in Black Communities* (Aug. 2020), *https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses* (''Black businesses experienced the most acute decline, with a 41 percent drop. Latinx business owners fell by 32 percent and Asian business owners dropped by 26 percent. In contrast, the number of white business owners fell by 17 percent.''); Fed. Reserve Bank of Minn., *COVID–19 and Indian Country: Early snapshot reveals disproportionate economic exposure and uncertainty* (Apr. 10, 2020), *https://www.minneapolisfed.org/article/2020/covid-19-and-indian-country-early-snapshot-reveals-disproportionate-economic-exposure-and-uncertainty.*

[23] Board of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S.*

Continued

Specifically, White credit applicants reported being denied for credit—including, but not limited to, mortgage credit—at a rate of 17.3 percent; Black credit applicants reported being denied for credit at a rate of 41.3 percent; and Hispanic credit applicants reported being denied for credit at a rate of 34.6 percent.[24] In the small business lending context, a report by the Board showed that ''[o]n average, Black- and Hispanic-owned firm applicants received approval for smaller shares of the financing they sought compared to White-owned small businesses that applied for financing. This same report noted that larger shares of Black-, Hispanic-, and Asian-owned firm applicants did not receive any of the financing they applied for—38%, 33%, and 24%, respectively—compared to 20% of White-owned business applicants.'' [25]

In recent months, multiple financial institutions have publicly committed to making billions of dollars available to addressing racial wealth disparities.[26] Bureau stakeholders have indicated that investments in special purpose credit programs may allow for better expansion of credit access to underserved communities.

B. Coverage

This AO applies solely to certain aspects of special purpose credit programs (*i.e.,* those described in part I.C below) designed and implemented by for-profit organizations to meet special social needs under the Regulation B requirements identified below. This AO does not apply to any credit assistance program expressly authorized by Federal or State law for the benefit of an economically disadvantaged class of persons, or to any credit assistance program offered by a not-for-profit organization, as defined under section 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons.[27] This AO has no application to any other circumstance and does not offer a legal interpretation of any other provisions of law.

C. Applicable Regulatory Provisions

It is not discrimination under the ECOA for a creditor to refuse to extend credit offered pursuant to a legally compliant special purpose credit program.[28] Regulation B, which implements the ECOA, sets forth compliance standards and general rules for special purpose credit programs. A for-profit organization that offers or participates in a special purpose credit program to meet special social needs must establish and administer the special purpose credit program pursuant to a ''written plan'' that identifies the class of persons the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program.[29] In addition, a for-profit organization that offers or participates in a special purpose credit program to meet special social needs must establish and administer the special purpose credit program to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.[30]

Regulation B is clear that a special purpose credit program qualifies as such only where the program was established and is administered so as not to discriminate against an applicant on any prohibited basis.[31] All program participants may be required, however, to share one or more common characteristics (for example, race, national origin, or sex) so long as the program is not established and is not administered with the purpose of evading the requirements of the ECOA or Regulation B.[32] If participants in a special purpose credit program are required to possess one or more common characteristics and if the program otherwise satisfies the applicable requirements of Regulation B, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.[33]

The Bureau does not determine whether individual programs qualify for special purpose credit status.[34] The creditor administering or offering the special purpose credit program must make these decisions regarding the status of its program.[35] It follows that a creditor may initiate a special purpose credit program without the approval of the Bureau.

D. Legal Analysis

1. Written Plan

A for-profit organization must establish and administer a special purpose credit program pursuant to a written plan.[36] The plan must contain information that supports the need for the program, including:

- The class of persons that the program is designed to benefit;
- The procedures and standards for extending credit pursuant to the program;
- Either (i) the time period during which the program will last or (ii) when the program will be reevaluated to

Households in 2016, at 33–34 (May 2017), *https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf.*

[24] *See id.* at 34.

[25] Fed. Reserve, *Report on Minority-Owned Firms* (Dec. 2019), *https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf.*

[26] *See, e.g.,* Press Release, BMO, *BMO Commits $5 Billion to Advance Inclusive Economic Recovery in the U.S.* (Nov. 10, 2020), *https://newsroom.bmo.com/2020-11-10-BMO-Commits-5-Billion-to-Advance-Inclusive-Economic-Recovery-in-the-U-S;* Press Release, Am. Express, American Express Announces $1 Billion Action Plan to Promote Racial, Ethnic and Gender Equity for Colleagues, Customers and Communities (Oct. 29, 2020), *https://about.americanexpress.com/all-news/news-details/2020/American-Express-Announces-1-Billion-Action-Plan-to-Promote-Racial-Ethnic-and-Gender-Equity-for-Colleagues-Customers-and-Communities/default.aspx;* Press Release, JPMorgan Chase & Co., *JPMorgan Chase Commits $30 Billion to Advance Racial Equity* (Oct. 8, 2020), *https://www.jpmorganchase.com/news-stories/jpmc-commits-30-billion-to-advance-racial-equity;* Press Release, Citigroup Inc., *Citi Launches More Than $1 Billion in Strategic Initiatives to Help Close the Racial Wealth Gap* (Sept. 23, 2020), *https://www.citigroup.com/citi/news/2020/200923a.htm;* Press Release, Huntington Bancshares, *Huntington Announces $20 Billion Community Plan to Help Boost Economic Opportunity Throughout its Seven-state Footprint* (Sept. 1, 2020), *http://huntington-ir.com/ne/news/hban09012020.pdf;* Press Release, PNC, *PNC Commits More Than $1 Billion To Help End Systemic Racism and Support Economic Empowerment of African Americans and Low- And Moderate-Income Communities* (June 18, 2020), *https://pnc.mediaroom.com/2020-06-18-PNC-Commits-More-Than-1-Billion-To-Help-End-Systemic-Racism-And-Support-Economic-Empowerment-Of-African-Americans-And-Low-And-Moderate-Income-Communities;* Press Release, U.S. Bank, *U.S. Bank to rebuild in Minneapolis; Announces multiple investments and initiatives to address social and economic inequities* (June 5, 2020), *https://www.usbank.com/newsroom/stories/us-bank-to-rebuild-in-minneapolis-announces-multiple-investments-and-initiatives-to-address-social-and-economic-inequities.html;* Press Release, Bank of Am., *Bank of America Announces $1 Billion/4-Year Commitment to Support Economic Opportunity Initiatives* (June 2, 2020), *https://newsroom.bankofamerica.com/press-releases/bank-america-announces-four-year-1-billion-commitment-supporting-economic.*

[27] *See* 12 CFR 1002.8(a)(2), (3).

[28] 15 U.S.C. 1691(c).

[29] 12 CFR 1002.8(a)(3)(i).

[30] 12 CFR 1002.8(a)(3)(ii).

[31] 12 CFR 1002.8(b)(2); *see, e.g., United States* v. *Am. Future Sys., Inc.,* 743 F.2d 169, 180 (3d Cir. 1984) (explaining that a creditor is ''prohibited from discriminating on the basis of race, sex or marital status in a credit program designed to extend credit to the group of persons between the ages of 18 and 21'').

[32] 12 CFR 1002.8(b)(2).

[33] 12 CFR 1002.8(c).

[34] *See* Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–1.

[35] *See id.*

[36] *See* 12 CFR 1002.8(a)(3)(i).

determine if there is a continuing need for it; and

• A description of the analysis the organization conducted to determine the need for the program.[37]

Each of these required components is discussed in further detail below. For-profit organizations that draft written plans containing the necessary elements as set forth in Regulation B and herein will satisfy the requirement of 12 CFR 1002.8(a)(3)(i).

a. Class of Persons

The class of persons that a special purpose credit program is designed to benefit must consist of those ''who would otherwise be denied credit or would receive it on less favorable terms.'' [38] A written plan must explain whether the class of persons will be required to demonstrate a financial need and/or share a common characteristic.[39] Such a class could be defined with or without reference to a characteristic that is otherwise a prohibited basis under the ECOA. For example, if need is determined in accordance with part I.D.2 below, a for-profit organization's written plan might identify a class of persons as minority residents of low-to-moderate income census tracts, residents of majority-Black census tracts, operators of small farms in rural counties, minority- or woman-owned small business owners, consumers with limited English proficiency, or residents living on tribal lands.

b. Procedures and Standards

A written plan must also set forth the procedures and standards for extending credit pursuant to the special purpose credit program.[40] Those procedures and standards must be designed to increase the likelihood that a class of persons ''who would otherwise be denied credit'' will receive credit pursuant to the program, or that a class of persons who ''would receive [credit] on less favorable terms'' will receive credit on more favorable terms pursuant to the program.[41] To accomplish these goals a creditor may, for example, introduce a new product or service, modify the terms and conditions or certain eligibility requirements for an existing product or service, or modify policies and procedures related to certain loss mitigation programs, such as loan modifications. For example, a creditor may offer a new small business loan product for woman-owned businesses by relaxing its customary standard of requiring three years of experience in the industry to one year, if the creditor has determined that this requirement would probably prevent woman-owned businesses from qualifying for small business financing. The written plan must describe the procedures and standards adopted and explain how they will increase credit availability with respect to the identified class of persons. If the class of persons the program is designed to benefit will be required to share a common characteristic, the written plan may also explain whether the organization will request and consider information that would otherwise be prohibited under the ECOA.[42]

c. Program Duration/Reevaluation

The written plan must provide ''a specific period of time for which the program will last'' or ''contain a statement regarding when the program will be reevaluated to determine if there is a continuing need for it.'' [43] If an organization opts for the latter approach, reevaluation could be made contingent on a certain set of circumstances or simply a set date. The written plan could also adopt a combined approach—for example, the special purpose credit program could end on a set date, or when a pre-established origination volume has been reached, whichever occurs earlier. If an organization extends the program beyond what is set forth in its written plan, it must document the terms of that extension in order to ensure the program continues to be administered pursuant to a written plan.

d. Description of Analysis

A special purpose credit program must be ''established and administered'' [44] to benefit a class of people who would otherwise be denied credit or would receive it on less favorable terms, as determined by a ''broad analysis,'' [45] and it must be ''established and administered *pursuant to* a written plan.'' [46] The Official Interpretations to Regulation B further provide that a written plan ''must contain information that supports the need for the particular program.'' [47] Thus, a for-profit organization's written plan must describe or incorporate the analysis that supports the need for the program.

2. Determination of Need for a Special Purpose Credit Program

a. Permissible Sources of Data and Research

In designing a special purpose credit program, a for-profit organization must determine that the program will benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms. This determination can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies.[48] The Official Interpretations to Regulation B provide two examples: First, ''a creditor might design new products to reach consumers who would not meet, or have not met, its traditional standards of creditworthiness due to such factors as credit inexperience or the use of credit sources that may not report to consumer reporting agencies''; and second, ''a bank could review [HMDA] data along with demographic data for its assessment area and conclude that there is a need for a special purpose credit program for low-income minority borrowers.'' [49]

For-profit organizations may rely on a wide range of research or data to analyze whether a special purpose credit program is needed to benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms.[50] A for-profit organization's analysis might consider research or data that are already in the public domain. The Official Interpretations to Regulation B cite HMDA data as one example.[51] In the case of small business lending, the Small Business Administration or the Board's Small Business Credit Surveys are possible sources of information. Other governmental or academic reports and studies exploring the historical and societal causes and effects of discrimination may also be considered. Finally, the for-profit organization's own data or research—if available—may be a helpful source for conducting an

[37] 12 CFR 1002.8(a)(3)(i)–(ii); Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–6.

[38] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

[39] *See* 12 CFR 1002.8(b)(2), (d).

[40] 12 CFR 1002.8(a)(3)(i).

[41] *See* 12 CFR 1002.8(a)(3)(ii).

[42] *See* 12 CFR 1002.8(b)(2), (c).

[43] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–6.

[44] 12 CFR 1002.8(a)(3)(ii).

[45] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

[46] 12 CFR 1002.8(a)(3)(i) (emphasis added).

[47] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–6.

[48] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

[49] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

[50] The Official Interpretations to Regulation B expressly provide that a for-profit organization is permitted to conduct a ''*broad* analysis.'' 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5 (emphasis added).

[51] Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

analysis to determine if there is a need for a special purpose credit program.

b. Nexus to the Organization's Customary Credit Standards

While a for-profit organization may permissibly rely on a broad range of research or data—including historical and societal information—in determining whether a special purpose credit program is needed, the organization's analysis must show how ''a class of people [] would otherwise be denied credit or would receive it on less favorable terms'' under *the organization's* customary credit standards.[52] The for-profit organization must be able to show a connection between the research or data informing its analysis and the fact that, under the organization's customary standards of creditworthiness, a class of persons probably would not receive credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit. For example, a creditor who identifies a class of certain applicants who do not have sufficient savings to meet mortgage loan requirements (or who receive such loans on less favorable terms) could offer such applicants down payment assistance funds pursuant to a special purpose credit program. In this example, the creditor could demonstrate that under its own standards of creditworthiness, *e.g.,* either (1) ''insufficient cash'' is listed as a principal reason for the denial of similar mortgage loan applications among the identified class of applicants frequently enough to indicate that they probably would not receive credit; or (2) requirements regarding minimum amounts of cash to close or liquid assets will probably impair credit access for the identified class of applicants.[53]

c. Requests For and Use of Information

Lastly, the Bureau notes that pursuant to Regulation B, ''[i]f participants in a special purpose credit program . . . are required to possess one or more common characteristics (for example, race, national origin, or sex) and if the program otherwise satisfies the requirements of [Regulation B], a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.'' [54] If no special purpose credit program has yet been established, however, a creditor may use statistical methods to estimate demographic characteristics but it cannot request demographic information that it is otherwise prohibited from collecting, even to determine whether there is a need for such a program. Moreover, while a for-profit organization may rely on a broad swath of research and data to determine the need for a special purpose credit program—including the organization's own lending data—it may not violate Regulation B's prohibitions on the collection of demographic information exclusively to conduct this preliminary analysis before establishing a special purpose credit program.[55]

Once a special purpose credit program has been established, a creditor may then request and consider information regarding common characteristic(s) if needed to determine the applicant's eligibility for the program. For example, if a creditor establishes a special purpose credit program that requires that an applicant resides in an area that is designated as a low-to-moderate income census tract and is Black, Hispanic, or Asian, a creditor could request race or ethnicity information from applicants to confirm eligibility for the program.

II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the ECOA and Regulation B, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws.[56]

By operation of the ECOA section 706(e), no provision of the ECOA imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[57]

As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[58] Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[59] The Bureau also has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[60]

Pursuant to the Congressional Review Act,[61] the Bureau will submit a report containing this interpretive rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

III. Signing Authority

The Director of the Bureau, Kathleen L. Kraninger, having reviewed and approved this document, is delegating the authority to electronically sign this document to Grace Feola, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

Dated: December 21, 2020.

Grace Feola,

Federal Register Liaison, Bureau of Consumer Financial Protection.

[FR Doc. 2020–28596 Filed 1–14–21; 8:45 am]

BILLING CODE 4810–AM–P

[52] 12 CFR 1002.8(a)(3)(ii).

[53] The fact that a for-profit organization identifies a need for a special purpose credit program based on an analysis of its own data does not, by itself, create an inference or presumption that the organization has engaged in unlawful credit discrimination. Of course, the adoption of a special purpose credit program does not absolve a creditor of its ordinary obligations under the ECOA and Regulation B; the Bureau strongly encourages creditors to evaluate their fair lending risk using an effective compliance management system. Finally, Regulation B does not require a creditor to show that a special purpose credit program is established and administered to extend credit to a class of persons who *definitely* would not receive such credit or would receive it on less favorable terms than other applicants—the regulation only requires a showing that the class of persons ''*probably*'' would not receive such credit or would receive it on less favorable terms. 12 CFR 1002.8(a)(3)(ii) (emphasis added).

[54] 12 CFR 1002.8(c); *see also* Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.6, ¶ 6(b)–1 (''In a special purpose credit program, a creditor may consider a prohibited basis to determine whether the applicant possesses a characteristic needed for eligibility.'').

[55] *See* 12 CFR 1002.5(b), 1002.6(b).

[56] 12 U.S.C. 5512(b)(1). The relevant provisions of the ECOA and Regulation B form part of Federal consumer financial law. 12 U.S.C. 5481(12)(D), (14).

[57] 15 U.S.C. 1691e(e).

[58] 5 U.S.C. 553(b).

[59] 5 U.S.C. 603(a), 604(a).

[60] 44 U.S.C. 3501–3521.

[61] 5 U.S.C. 801 *et seq.*

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1083

Civil Penalty Inflation Adjustments

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is adjusting for inflation the maximum amount of each civil penalty within the Bureau's jurisdiction. These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). The inflation adjustments mandated by the Inflation Adjustment Act serve to maintain the deterrent effect of civil penalties and to promote compliance with the law.

DATES: This final rule is effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Willie Williams, Paralegal Specialist; Rachel Ross, Attorney-Advisor, Office of Regulations, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act of 1990,[1] as amended by the Debt Collection Improvement Act of 1996 [2] and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act),[3] directs Federal agencies to adjust for inflation the civil penalty amounts within their jurisdiction not later than July 1, 2016, and then not later than January 15 every year thereafter.[4] Each agency was required to make the 2016 one-time catch-up adjustments through an interim final rule published in the **Federal Register**. On June 14, 2016, the Bureau published its interim final rule (IFR) to make the initial catch-up adjustments to civil penalties within the Bureau's jurisdiction.[5] The June 2016 IFR created a new part 1083 and in 1083.1 established the inflation-adjusted maximum amounts for each civil penalty within the Bureau's jurisdiction.[6] The Bureau finalized the IFR on January 31, 2019.[7]

The Inflation Adjustment Act also requires subsequent adjustments to be made annually, not later than January 15, and notwithstanding section 553 of the Administrative Procedure Act (APA).[8] The Bureau annually adjusted its civil penalty amounts, as required by the Act, through rules issued in January 2017, January 2018, January 2019, and January 2020.[9]

Specifically, the Act directs Federal agencies to adjust annually each civil penalty provided by law within the jurisdiction of the agency by the ''cost-of-living adjustment.'' [10] The ''cost-of-living adjustment'' is defined as the percentage (if any) by which the Consumer Price Index for all-urban consumers (CPI–U) for the month of October preceding the date of the adjustment, exceeds the CPI–U for October of the prior year.[11] The Director of the Office of Management and Budget (OMB) is required to issue guidance (OMB Guidance) every year by December 15 to agencies on implementing the annual civil penalty inflation adjustments. Pursuant to the Inflation Adjustment Act and OMB Guidance, agencies must apply the multiplier reflecting the ''cost-of-living adjustment'' to the current penalty amount and then round that amount to the nearest dollar to determine the annual adjustments.[12] The adjustments are designed to keep pace with inflation so that civil penalties retain their deterrent effect and promote compliance with the law.[13]

For the 2021 annual adjustment, the multiplier reflecting the ''cost-of-living adjustment'' is 1.01182.[14]

II. Adjustment

Pursuant to the Inflation Adjustment Act and OMB Guidance, the Bureau multiplied each of its civil penalty amounts by the ''cost-of-living adjustment'' multiplier and rounded to the nearest dollar.[15] The new penalty amounts that apply to civil penalties assessed after January 15, 2021, are as follows:

Law	Penalty description	Penalty amounts established under 2020 final rule	OMB ''Cost-of-Living Adjustment'' multiplier	New penalty amount
Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)(A).	Tier 1 penalty	$5,883	1.01182	$5,953
Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)(B).	Tier 2 penalty	29,416	1.01182	29,764
Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)(C).	Tier 3 penalty	1,176,638	1.01182	1,190,546
Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1717a(a)(2).	Per violation	2,050	1.01182	2,074

[1] Public Law 101–410, 104 Stat. 890.

[2] Public Law 104–134, sec. 31001(s)(1), 110 Stat. 1321, 1321–373.

[3] Public Law 114–74, sec. 701, 129 Stat. 584, 599.

[4] Section 1301(a) of the Federal Reports Elimination Act of 1998, Public Law 105–362, 112 Stat. 3293, also amended the Inflation Adjustment Act by striking section 6, which contained annual reporting requirements, and redesignating section 7 as section 6, but did not alter the civil penalty adjustment requirements; 28 U.S.C. 2461 note.

[5] 81 FR 38569 (June 14, 2016). Although the Bureau was not obligated to solicit comments for the interim final rule, the Bureau invited public comment and received none.

[6] *See* 12 CFR 1083.1.

[7] 84 FR 517 (Jan. 31, 2019).

[8] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note. As discussed in guidance issued by the Director of the Office of Management and Budget (OMB), the APA generally requires notice, an opportunity for comment, and a delay in effective date for certain rulemakings, but the Inflation Adjustment Act provides that these procedures are not required for agencies to issue regulations implementing the annual adjustment. *See* Memorandum to the Exec. Dep'ts & Agencies from Russell T. Vought, Director, Office of Mgmt. & Budget at 4 (Dec. 23, 2020), *available at https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[9] 82 FR 3601 (Jan. 12, 2017); 83 FR 1525 (Jan. 12, 2018); 84 FR 517 (Jan. 31, 2019); 85 FR 2012 (Jan. 14, 2020).

[10] Inflation Adjustment Act sections 4 and 5, codified at 28 U.S.C. 2461 note.

[11] Inflation Adjustment Act sections 3 and 5, codified at 28 U.S.C. 2461 note.

[12] Inflation Adjustment Act section 5, codified at 28 U.S.C. 2461 note; *see also* Memorandum to the Exec. Dep'ts & Agencies from Russell T. Vought, Director, Office of Mgmt. & Budget (Dec. 23, 2020), *available at https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[13] *See* Inflation Adjustment Act section 2, codified at 28 U.S.C. 2461 note.

[14] Memorandum to the Exec. Dep'ts & Agencies from Russell T. Vought, Director, Office of Mgmt. & Budget (Dec. 23, 2020), *available at https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[15] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note.

Law	Penalty description	Penalty amounts established under 2020 final rule	OMB "Cost-of-Living Adjustment" multiplier	New penalty amount
Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1717a(a)(2).	Annual cap	2,048,915	1.01182	2,073,133
Real Estate Settlement Procedures Act, 12 U.S.C. 2609(d)(1).	Per failure	96	1.01182	97
Real Estate Settlement Procedures Act, 12 U.S.C. 2609(d)(1).	Annual cap	192,768	1.01182	195,047
Real Estate Settlement Procedures Act, 12 U.S.C. 2609(d)(2)(A).	Per failure, where intentional	193	1.01182	195
SAFE Act, 12 U.S.C. 5113(d)(2)	Per violation	29,707	1.01182	30,058
Truth in Lending Act, 15 U.S.C. 1639e(k)(1)	First violation	11,767	1.01182	11,906
Truth in Lending Act, 15 U.S.C. 1639e(k)(2)	Subsequent violations	23,533	1.01182	23,811

III. Procedural Requirements

A. Administrative Procedure Act

Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Bureau finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[16] The adjustments to the civil penalty amounts are technical and non-discretionary, and they merely apply the statutory method for adjusting civil penalty amounts. These adjustments are required by the Inflation Adjustment Act. Moreover, the Inflation Adjustment Act directs agencies to adjust civil penalties annually notwithstanding section 553 of the APA,[17] and OMB Guidance reaffirms that agencies need not complete a notice-and-comment process before making the annual adjustments for inflation.[18] For these reasons, the Bureau has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. The amendments therefore are adopted in final form.

Section 553(d) of the APA generally requires publication of a final rule not less than 30 days before its effective date, except (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.[19] At minimum, the Bureau believes the annual adjustments to the civil penalty amounts in § 1083.1(a) fall under the third exception to section 553(d). The Bureau finds that there is good cause to make the amendments effective on January 15, 2021. The amendments to § 1083.1(a) in this final rule are technical and non-discretionary, and they merely apply the statutory method for adjusting civil penalty amounts and follow the statutory directive to make annual adjustments each year. Moreover, the Inflation Adjustment Act directs agencies to adjust the civil penalties annually notwithstanding section 553 of the APA,[20] and OMB Guidance reaffirms that agencies need not provide a delay in effective date for the annual adjustments for inflation.[21]

B. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[22]

C. Paperwork Reduction Act

The Bureau has determined that this final rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[23]

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Bureau will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule taking effect. The Office of Information and Regulatory Affairs (OIRA) has designated this rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

IV. Signing Authority

The Deputy Associate Director for Research, Markets and Regulations, Dan S. Sokolov, having reviewed and approved this document, is delegating the authority to electronically sign this document to Grace Feola, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

List of Subjects in 12 CFR Part 1083

Administrative practice and procedure, Consumer protection, Penalties.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends 12 CFR part 1083, as set forth below:

PART 1083—CIVIL PENALTY ADJUSTMENTS

■ 1. The authority citation for part 1083 continues to read as follows:

Authority: 12 U.S.C. 2609(d); 12 U.S.C. 5113(d)(2); 12 U.S.C. 5565(c); 15 U.S.C. 1639e(k); 15 U.S.C. 1717a(a); 28 U.S.C. 2461 note.

■ 2. Section 1083.1 is revised to read as follows:

§ 1083.1 Adjustment of civil penalty amounts.

(a) The maximum amount of each civil penalty within the jurisdiction of the Consumer Financial Protection Bureau to impose is adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. 2461 note), as follows:

[16] 5 U.S.C. 553(b)(B).

[17] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note.

[18] Memorandum to the Exec. Dep'ts & Agencies from Russell T. Vought, Director, Office of Mgmt. & Budget (Dec. 23, 2020), *available at https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[19] 5 U.S.C. 553(d).

[20] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note.

[21] Memorandum to the Exec. Dep'ts & Agencies from Russell T. Vought, Director, Office of Mgmt. & Budget (Dec. 23, 2020), *available* at *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[22] 5 U.S.C. 603(a), 604(a).

[23] 44 U.S.C. 3501–3521.

Law	Penalty description	Adjusted maximum civil penalty amount
12 U.S.C. 5565(c)(2)(A)	Tier 1 penalty	$5,953
12 U.S.C. 5565(c)(2)(B)	Tier 2 penalty	29,764
12 U.S.C. 5565(c)(2)(C)	Tier 3 penalty	1,190,546
15 U.S.C. 1717a(a)(2)	Per violation	2,074
15 U.S.C. 1717a(a)(2)	Annual cap	2,073,133
12 U.S.C. 2609(d)(1)	Per failure	97
12 U.S.C. 2609(d)(1)	Annual cap	195,047
12 U.S.C. 2609(d)(2)(A)	Per failure, where intentional	195
12 U.S.C. 5113(d)(2)	Per violation	30,058
15 U.S.C. 1639e(k)(1)	First violation	11,906
15 U.S.C. 1639e(k)(2)	Subsequent violations	23,811

(b) The adjustments in paragraph (a) of this section shall apply to civil penalties assessed after January 15, 2021, whose associated violations occurred on or after November 2, 2015.

Dated: January 12, 2021.

Grace Feola,

Federal Register Liaison, Bureau of Consumer Financial Protection.

[FR Doc. 2021–00925 Filed 1–14–21; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1046; Product Identifier 2018–CE–049–AD; Amendment 39–21371; AD 2020–26–16]

RIN 2120–AA64

Airworthiness Directives; Piper Aircraft, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Piper Aircraft, Inc. (Piper) Models PA–28–151, PA–28–161, PA–28–181, PA–28–235, PA–28R–180, PA–28R–200, PA–28R–201, PA–28R–201T, PA–28RT–201, PA–28RT–201T, PA–32–260, PA–32–300, PA–32R–300, PA–32RT–300, and PA–32RT–300T airplanes. This AD was prompted by a report of a wing separation caused by fatigue cracking in a visually inaccessible area of the lower main wing spar cap. This AD requires calculating the factored service hours for each main wing spar to determine when an inspection is required, inspecting the lower main wing spar bolt holes for cracks, and replacing any cracked main wing spar. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 16, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 16, 2021.

ADDRESSES: For service information identified in this final rule, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, Florida 32960; phone: (772) 567–4361; website: *https://www.piper.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1046.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1046; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Dan McCully, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5548; fax: (404) 474–5605; email: *william.mccully@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Piper Models PA–28–140, PA–28–150, PA–28–151, PA–28–160, PA–28–161, PA–28–180, PA–28–181, PA–28–235, PA–28R–180, PA–28R–200, PA–28R–201, PA–28R–201T, PA–28RT–201, PA–28RT–201T, PA–32–260, and PA–32–300 airplanes. The NPRM published in the **Federal Register** on December 21, 2018 (83 FR 65592). The NPRM was prompted by a fatal accident involving wing separation on a Piper Model PA–28R–201 airplane. An investigation revealed a fatigue crack in a visually inaccessible area of the lower main wing spar cap. The NPRM included other model airplanes with similar wing spar structures as the Model PA–28R–201. Based on airplane usage history, the FAA determined that only those airplanes with higher risk for fatigue cracks (airplanes with a significant history of operation in flight training or other high-load environments) should be subject to the inspection requirements proposed in the NPRM.

Because airplanes used in training and other high-load environments are typically operated for hire and have inspection programs that require 100-hour inspections, the FAA determined the number of 100-hour inspections an airplane has undergone would be the best indicator of the airplane's usage history. Accordingly, the FAA developed a factored service hours formula based on the number of 100-hour inspections completed on the airplane.

In the NPRM, the FAA proposed to require a review of the airplane maintenance records to determine the number of 100-hour inspections and the application of the factored service hours formula to identify when an airplane meets the criteria for the proposed eddy current inspection of the lower main wing spar bolt holes. The FAA also proposed to require inspecting the lower main wing spar bolt holes for cracks once a main wing spar exceeds the specified factored service hours and

replacing any main wing spar when a crack is indicated. The maintenance records review to determine the factored service hours proposed in the NPRM would only apply when an airplane has either accumulated 5,000 or more hours time-in-service (TIS); has had either main wing spar replaced with a serviceable (more than zero hours TIS) main wing spar; or has missing and/or incomplete maintenance records.

The FAA issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Piper Models PA–28–151, PA–28–181, PA–28–235, PA–28R–180, PA–28R–200, PA–28R–201, PA–28R–201T, PA–28RT–201, PA–28RT–201T, PA–32–260, PA–32–300, PA–32R–300, PA–32RT–300, and PA–32RT–300T airplanes. The SNPRM published in the **Federal Register** on June 3, 2020 (85 FR 34121). The SNPRM was prompted by comments received on the NPRM and further analysis by the FAA. The FAA determined that some additional airplane models are likely affected by the unsafe condition and should be included in the applicability, while other models that are not affected should be removed from the applicability. Consequently, in the SNPRM, the FAA proposed to revise the applicability and the estimated cost associated with the proposed AD actions. The SNPRM also clarified the language in the applicability and some of the proposed actions. In addition, the SNPRM no longer allowed replacement of the wing spar with a used part. The FAA determined replacement of the wing spar with a part of unknown operational history would not ensure an acceptable level of safety. After the NPRM was published, Piper issued a service bulletin that contains procedures for the eddy current inspection. The SNPRM proposed to require using the eddy current inspection contained in that service bulletin instead of the inspection procedure in the appendix to the NPRM.

The FAA developed a flow chart that may assist operators in complying with this AD. The flow chart may be found at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1046.

The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final AD

Comments

The FAA received comments on the SNPRM from 42 commenters. The majority of the commenters were individuals. The remaining commenters included Piper, governmental agencies such as the National Transportation Safety Board (NTSB) and the Civil Aviation Safety Authority of Australia (CASA), and organizations such as the Aircraft Owners and Pilots Association (AOPA), the General Aviation and Manufacturer's Association (GAMA), the Experimental Aircraft Association (EAA), and the Piper Flying Association. The following presents the comments received on the SNPRM and the FAA's response to each comment.

A. Supportive Comments

The NTSB and two individual commenters supported the AD without any recommended changes. Three other individual commenters supported the AD but requested changes discussed below.

B. Requests for Additional Information

CASA requested information on whether a bolt hole eddy current inspection would have detected the crack in the 1993 accident airplane.

The FAA agrees to provide the requested information. Because it was located slightly beyond the detectable range of a bolt hole eddy current inspection, the crack in the 1993 accident airplane would not have been detected by an eddy current inspection of the bolt holes. Although the airplane had previously undergone dye penetrant inspection of the bolt holes, the crack would not have been detectable under that method either due to its location beyond the bolt hole perimeter and beneath the web doubler.[1] The 1993 accident disclosed evidence of a fatigue crack initiation in a wing spar similar to that of the 2018 accident aircraft, N106ER (the accident that prompted this AD). In addition to having high hours TIS, the fatigue crack was very near the inspection location addressed by this AD. As such, the FAA included the 1993 accident in the risk analysis process for this AD.

CASA and an individual commenter requested information comparing the failures in the 1987 and 1993 accidents with the failure of N106ER (the accident that prompted this AD). CASA specifically asked whether these wing spars failed at the same outer bolt hole location.

The FAA agrees to provide additional information. Both airplanes in question (N8191V, the 1987 accident; and N2093A, the 1993 accident) experienced wing separations at the outboard bolt holes of the lower spar cap. The NTSB Metallurgist's Factual Report in the 1987 accident, Materials Laboratory Report No. 87–89, dated August 17, 1987, found that fatigue had initiated at two locations on the lower surface of the left wing spar cap near the forward most outboard, spar to carry through, bolt hole. The report further found the fatigue had propagated completely through the forward flange and partially into the aft flange and spar web.[2] The Metallurgist's Factual Report in the 1993 accident, Report No. 93–34, dated December 15, 1993, found that the lower cap was fractured through the most outboard pair of bolts connecting the spar and carry-through.[3] The FAA notes that the NTSB Final Report for the 1993 accident states the investigation could not determine whether an uncracked wing would have failed.[4]

CASA and an individual commenter requested information on the inspection method used to detect cracks on aircraft N104ER. CASA asked whether the inspection method described in Piper Service Bulletin No. 1345, dated March 27, 2020 (Piper SB No. 1345), was used. The individual commenter asked whether bolt hole eddy current is the most suitable method if it was used on N104ER and did not reveal the cracks that caused the wing failure.

The FAA agrees to provide the requested information. Aircraft N104ER was used in the investigation of the 2018 accident due to the similarities in structure and operational use to the accident aircraft. The initial high frequency eddy current inspection of N104ER was conducted by a local FAA-approved repair station contracted by the owner. The FAA could not determine why the inspection conducted by the FAA-approved repair station did not detect cracks because this inspection did not involve the investigative team. Also, the inspection occurred prior to the development of the inspection procedures required by this AD. The investigative team conducted a second high frequency eddy current inspection, in the development of the

[1] The supporting materials for NTSB accident NYC93FA140 are available in the NTSB Docket at *https://dms.ntsb.gov/pubdms/search/hitlist.cfm?docketID=4323&CFID=1643539&CFTOKEN=74133c21c3cf3d72-C9941D08-5056-942C-92883A7C17DB9FF3.*

[2] Report No. 87–89 is available in the NTSB Docket for NTSB accident FTW87FA088 at *https://dms.ntsb.gov/pubdms/search/document.cfm?docID=475398&docketID=62694&mkey=96975.*

[3] Report No. 93–34 is available in the NTSB Docket for NTSB accident NYC93FA140 at *https://dms.ntsb.gov/pubdms/search/document.cfm?docID=487590&docketID=4323&mkey=38586.*

[4] The NTSB Aviation Accident Final Report for NTSB accident NYC93FA140 is available on the NTSB's website at *https://app.ntsb.gov/pdfgenerator/ReportGeneratorFile.ashx?EventID=20001211X13212&AKey=1&RType=Final&IType=FA.*

inspection procedures required by the AD, with the wings removed, which detected a crack. The team conducted an additional high frequency eddy current inspection after reinstalling the wings to validate the inspection process, which confirmed the presence of a crack.[5]

Another commenter requested information on the methodology used by the FAA for identifying specific wing loads, the applied stress locations, and their influence on fatigue life, and the rationale for selecting those aircraft within 95 percent of the baseline load case for the applicability.

The FAA agrees to provide the requested information. The methodology used by the FAA for identifying specific wing loads for gust, maneuvering, and landing loads comes from 14 CFR part 23 (Amdt 63) Subpart C-Structure and Advisory Circular 23–13A Fatigue, Fail-Safe, and Damage Tolerance Evaluation of Metallic Structure for Normal, Utility, Acrobatic, and Commuter Category Airplanes.

A subsequent analysis calculated damage factors using variables for each of the various PA–28/32 models. The variables include maximum design weight (W_{max}), maximum design cruising speed (V_{cmax}), spar cross section properties, and spanwise center of pressure location for each loading category mentioned above. The results for each model/load category are divided by the PA–28R–201 (accident aircraft model) results. Any model with a damage factor ratio greater than 0.94 is included in the effectivity of this AD.

The 0.94 factor cutoff was arrived at by observing a natural break in the resulting damage factor numbers and the Palmgren–Miner linear damage hypothesis or Miner's Rule. This theory shows that a linear decrease in stress (damage factor in this case) results in an exponential increase in fatigue life. The FAA believes this level of risk is appropriate for the purpose of this one-time inspection. The applied stress location is at the lower spar cap attachment to the fuselage carry through channel, outboard row of fasteners. This is the location of the fatigue failure on the accident airplane.

C. Comments Regarding the FAA's Justification of the Unsafe Condition

Piper and GAMA requested the AD be withdrawn because the completed NTSB investigation invalidates the FAA's basis for issuing an AD. These commenters asserted that, based on the NTSB's findings, the operator's failure to follow existing maintenance requirements was responsible for the accident involving N106ER.

The FAA disagrees that the NTSB's investigation invalidates the FAA's basis for issuing this AD. The spar surface is not visually accessible during routine inspections required by existing maintenance requirements, because the lower spar cap is obscured by the installation of the web doubler on the upper surface and the wing skin on the lower surface. Therefore, a well-developed crack may only be visually detected after the spar crack progresses into the doubler. The claim that an operator may fail to detect a crack that had progressed to an extent that caused cracking in the overlying web doubler only serves to reinforce the need for detecting fatigue cracks in the spar before they reach a critical nature.

D. Comments Regarding Applicability

Piper, AOPA, EAA, and several individual commenters requested the FAA revise the applicability of the AD because it is still too broad and includes models not representative of the accident airplane.

EAA requested the FAA ensure that only the appropriate aircraft, in general, are subject to the AD. Piper and AOPA asserted that the AD should not include Models PA–28–151, PA–28–181, PA–32R–300, and PA–32RT–300T airplanes. In support, Piper stated that the PA–28–151, PA–28–181, and PA–32R–300 models have ''stress per g'' measurements that do not meet the 95 percent threshold established by the FAA for comparison to the accident airplane. CASA and eight individual commenters questioned why the proposed AD applies to the Model PA–28–151 when that model is structurally similar to the Model PA–28–161, which the FAA proposed to remove from the applicability in the SNPRM. Two individual commenters requested the AD apply to the Model PA–28–161, because of the longer wing structure. Piper and three individual commenters stated the PA–32R–300 and certain PA–32–300 models do not share the same wing construction and installation details as the accident airplane model.

The FAA disagrees with removing Models PA–28–151, PA–28–181, and PA–32R–300 from the applicability of the AD. The FAA used the following load cases, provided by Piper, for comparison to the accident airplane: Gust damage factor, maneuver damage factor, and landing damage factor. The included models each had one or more load cases that exceed 94 percent of the baseline Model PA–28R–201. Several models had individual load cases exceeding 100 percent of the baseline value.

The FAA partially agrees with the comments regarding the similarity between the Model PA–28–151 and the Model PA–28–161. In determining pertinent load cases, the FAA used factors such as maximum gross takeoff weight and maximum cruise speed in combination with structural considerations. In the SNPRM, the FAA proposed to remove Model PA–28–161 from the applicability based on initial load calculations based on a maximum gross takeoff weight of 2,240 lbs. Additional analysis indicated that the maximum gross takeoff weight is not uniform among all Model PA–28–161 variants, and that some variants are certificated to a maximum gross takeoff weight that brings the gust damage factor load case to above 94 percent of the baseline. Accordingly, this AD applies to the Model PA–28–161.

The FAA disagrees with removing the Model PA–32R–300 and certain Model PA–32–300 airplanes from the applicability based on wing construction.

Although the FAA acknowledges the differing wing structures among some models, that structure was taken into consideration during loads analysis in terms of inertia calculations for the each cross section.

E. Comments Regarding the Compliance Time

An individual commenter expressed concern that the FAA's factored service hours did not align with the compliance time in Piper SB No. 1345. The commenter stated that Piper's compliance time of 5,000 hours TIS is simpler and a more conservative approach to safety.

The FAA partially agrees. While using hours TIS is a simpler approach, it would create the possibility of requiring an unnecessary inspection long before any fatigue crack might be expected to form. The FAA established 5,000 factored service hours as a method of delaying or eliminating inspection requirements for many personal use, lower risk airplanes. This AD will require an inspection within 100 hours TIS after reaching 5,000 factored service hours.

Another commenter requested the FAA determine the compliance time based on an estimate of the number of airplanes that will need to be inspected and the number of qualified eddy current inspectors, to allow sufficient time for all airplanes in the fleet to be

[5] The supporting materials for NTSB accident ERA18FA120 are available in the NTSB Docket at *https://dms.ntsb.gov/pubdms/search/hitlist.cfm?docketID=62694&CFID=95094&CFTOKEN=b616b3892cb482f1-5B544A63-5056-942C-92C71C2E6BFF1D97.*

inspected. The commenter stated it is unacceptable for airplanes to be grounded for a significant amount of time because of an insufficient number of eddy current inspectors or equipment.

The FAA disagrees that a change to the compliance time is necessary. The FAA anticipates that less than 50 percent of applicable airplanes will have accumulated the 5,000 TIS necessary for the logbook review. The FAA also anticipates that the majority of those airplanes will not need an inspection after the logbook review. Calculating the number of qualified and available eddy current inspectors would be too speculative, as it is largely based on current demand.

One commenter requested that the FAA convert the AD into an emergency AD so that data from the inspections can be collected as soon as possible.

Considering the number of known failures, the severity of the outcome, and number of cracks detected during the investigation, the FAA determined that an emergency AD was not necessary. The FAA did not change this AD based on these comments.

F. Comments Regarding the Requirements Proposed in the SNPRM Request To Allow Replacement of the Spar With a Used Spar

The Piper Flying Association and four individual commenters requested the FAA change the proposed requirement to install a new (zero hours TIS) spar if cracks were detected. These commenters stated that any spar that has passed the eddy current inspection is an airworthy spar and should be allowed as a replacement spar. Two of the commenters noted that the unavailability of new spars would effectively ground aircraft that fail the eddy current inspection.

The FAA agrees and has revised this AD to allow the installation of a used (more than zero hours TIS) wing spar that has passed the eddy current inspection.

An individual commenter requested the FAA compel Piper to restore availability of replacement parts.

The FAA disagrees. As a federal agency, the FAA is responsible for all directives, policies, and mandates issued under its authority. The FAA does not have the authority to require a manufacturer to produce new parts.

Requests for Information About the Service Bulletin

An individual commenter asked how operators can record compliance with the AD when the required service bulletin does not apply to all of the models in the AD. Another individual commenter asked why the AD only incorporates part of the instructions in Piper SB No. 1345.

The FAA's regulations specify that when there is a conflict between an AD and a service document incorporated by reference in the AD, operators must follow the requirements of the AD. See 14 CFR 39.27. Since this AD differs from Piper SB No. 1345, as described in the Differences Between this AD and the Service Information section, the AD only requires the inspection method portion of Piper SB No. 1345.

Requests for Different Inspection Methods

An individual commenter suggested guided wave technology as a better, less intrusive, and less expensive inspection method. Another individual commenter suggested using dye penetrant inspection without bolt removal as a less aggressive method for early detection, even if it meant more frequent inspections.

The FAA disagrees. The FAA, Piper, and the NTSB considered several inspection options. Guided wave is not a preferred method for this AD due to accessibility issues and the need to detect longitudinal, as opposed to circumferential, cracks. To be detectable using a dye penetrant or fluorescent penetrant method, a crack that initiated at a wing spar attach bolt hole would have had to propagate through the web doubler and beyond the perimeter of the washer(s). A crack of that size would have already dangerously compromised the strength of the spar cap.

The FAA did not change this AD based on these comments.

Requests for Different Repair Options

An individual commenter observed that if one wing indicates fatigue cracks, then replacing both wings may be warranted, since the opposite wing would have experienced the same usage history.

The FAA partially agrees. Fatigue cracking in one wing would warrant an increased level of concern for the opposite wing. However, the FAA determined that replacement of both wings is not required when only one wing has failed the inspection. Certain factors that can accelerate the initiation of a fatigue crack on one wing may not be present on the opposite wing (for example, prior damage from operations or maintenance).

Another individual commenter requested the FAA consider a cold working process (split sleeve cold expansion) on the bolt holes to minimize future fatigue cracking.

The FAA partially agrees. Piper provided the FAA with cold working data in support of a proposed repair and fatigue mitigation process for the wing spars. Cold working has been considered and may be investigated further should the inspection reports received as a result of this AD indicate that such action is required.

One individual commenter suggested using different washers, adjusting the bolt torque to the lowest value of the acceptable range, and installing a doubler plate to alleviate stress concentrations.

The FAA disagrees. Load transfer into the spar cap does not rely on a washer to help evenly transfer the load. A larger washer would not lower the stress concentration as the critical geometry is the fastener diameter and the edge distance associated with the diameter, not the washer size. Staying within the torque values for the bolt will not alleviate the loading in the bolt enough to decrease the stress concentration and could lead to further issues such as the bolt being under torqued, which would worsen the fatigue life. A doubler repair has been considered and may be investigated further should the inspection reports received as a result of this AD indicate that such action is required.

An additional individual commenter asked if changing the outer holes to the next smaller size would result in a more favorable stress distribution.

The FAA disagrees. While a smaller hole may decrease the load in the fastener, the gain is offset by the increase in stress concentration.

The FAA has not changed the AD based on these comments.

Request for Safe Life

An individual commenter suggested establishing a life limit as a solution based on a comparison of any safe life analysis conducted by Piper with the known fatigue failures.

The FAA partially agrees. Fatigue safe life has been considered and may be pursued as an option should the inspection reports received as a result of this AD indicate that further action is required. Because this AD is interim in nature and intended to gather fleet condition data based on these comparisons, this AD does not contain repetitive or terminating actions.

The FAA did not make any changes to this AD based on this comment.

Request To Revise the Reporting Information

Piper requested the FAA revise the inspection results form to include Piper's mailing address.

The FAA agrees and has added Piper's mailing address to the inspection results form.

G. Comments Previously Addressed in the SNPRM

AOPA, EAA, and several individuals submitted comments that were substantially the same as comments the FAA received on the NPRM. These comments pertain to issues such as the FAA's decision to issue the AD as interim action, whether the FAA should issue a special airworthiness information bulletin or airworthiness concern sheet instead of an AD, how the FAA determined the AD applicability, whether the FAA should issue this AD considering the cost and risk associated with the removal and reinstallation of the airplane wings/bolts, alternatives for instances where maintenance records were missing or incomplete, how to count 100-hour inspections, the FAA's hourly labor rate, the estimated number of hours for the eddy current inspection, and indirect costs. The FAA previously addressed each of these comments in the SNPRM.

H. Out of Scope Comments

The FAA also received and reviewed a few comments that stated the commenter's viewpoint without a suggestion specific to the AD or otherwise did not make a request the FAA can act on. These comments are outside the scope of this AD.

Other Changes to the Final AD

The FAA removed two serial-numbered airplanes from the applicability that were included in the SNPRM because those airplanes were previously inspected using the current procedures and witnessed by the FAA. The FAA determined those airplanes are not subject to the unsafe condition addressed by this AD. The FAA also added language to clarify the procedures for when a wing is not installed on the airplane and clarified some of the language in the examples and figures.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes and the changes described previously, this AD is adopted as proposed in the SNPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Piper Service Bulletin No. 1345, dated March 27, 2020 (Piper SB No. 1345). This service bulletin specifies procedures for doing an eddy current inspection and instructions to report the results of the inspection to Piper and to replace the wing, wing spar, or spar section as necessary. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

The FAA reviewed Piper Service Bulletin No. 886, dated June 8, 1988; and Piper Service Bulletin SB 978A, dated August 6, 1999. These service bulletins contain procedures for determining initial and repetitive inspection times based on the aircraft's usage and visually inspecting the wing lower spar caps and the upper wing skin adjacent to the fuselage and forward of each main spar for cracks. The FAA also reviewed Piper Service Letter No. 997, dated May 14, 1987, which contains procedures for replacing airplane wings.

Differences Between This AD and the Service Information

Piper SB No. 1345 specifies doing the eddy current inspection upon reaching 5,000 hours TIS; however, this AD requires using the factored service hours to identify the airplanes at the highest risk of developing fatigue cracks. Piper SB No. 1345 also specifies using its feedback form to report the eddy current inspection results, but this AD requires the use of a different form attached as appendix 1.

Interim Action

The FAA considers this AD to be an interim action. The inspection reports will provide the FAA additional data for determining the number of cracks present in the fleet. After analyzing the data, the FAA may take further rulemaking action.

Costs of Compliance

The FAA estimates that this AD affects 5,440 airplanes of U.S. registry. There are 10,881 airplanes of U.S. registry with a model and serial number shown in table 1 to paragraph (c) of this AD. Based on a sample survey, the FAA estimates that 50 percent of those U.S.-registered airplanes will have reached the qualifying 5,000 hours TIS necessary to do the required logbook review.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Review airplane maintenance records and calculate factored service hours.	3 work-hours × $85 per hour = $255.	Not applicable	$255	$1,387,200

The FAA estimates the following costs to do the eddy current inspection. Because some airplanes are only used non-commercially and will not accumulate the specified factored service hours in the life of the airplane, the FAA has no way of determining the number of airplanes that might need this inspection:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Gain access to the left-hand (LH) and right-hand (RH) inspection areas.	2 work-hours × $85 per hour = $170	$20	190
Do eddy current inspections of the LH and RH lower main wing spar.	1 work-hour contracted service × $600 = $600	N/A	600
Restore aircraft	2 work-hours × $85 per hour = $170	N/A	170

ON-CONDITION COSTS—Continued

Action	Labor cost	Parts cost	Cost per product
Report inspection results to the FAA and Piper Aircraft, Inc.	1 work-hour × $85 per hour = $85	N/A	85

The FAA estimates the following costs to do any necessary replacements that would be required based on the results of the inspection. The agency has no way of determining the number of aircraft that might need this replacement:

ON-CONDITION REPLACEMENT COSTS

Action	Labor cost	Parts cost	Cost per product
Replace main wing spar	80 work-hours × $85 per hour = $6,800 per wing spar.	$5,540	$12,340 per wing spar.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–26–16 Piper Aircraft, Inc.: Amendment 39–21371; Docket No. FAA–2018–1046; Product Identifier 2018–CE–049–AD.

(a) Effective Date

This airworthiness directive (AD) is effective February 16, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Piper Aircraft, Inc. (Piper) airplanes, certificated in any category, with a model and serial number shown in table 1 to paragraph (c) of this AD, and that meet at least one of the criteria in paragraphs (c)(1), (2), or (3) of this AD.

Note 1 to the introductory text of paragraph (c): An owner/operator with at least a private pilot certificate may do the aircraft maintenance records review to determine the applicability as specified in paragraph (c) of this AD.

(1) Has accumulated 5,000 or more hours time-in-service (TIS); or

(2) Has had either main wing spar replaced with a serviceable (more than zero hours TIS) main wing spar; or

(3) Has missing and/or incomplete maintenance records.

BILLING CODE 4910–13–P

Table 1 to paragraph (c)

Model	Serial Numbers
PA-28-151	All serial numbers
PA-28-161	All serial numbers except 2842006
PA-28-181	All serial numbers
PA-28-235	All serial numbers
PA-28R-180	All serial numbers
PA-28R-200	All serial numbers except 28R-7235151
PA-28R-201	All serial numbers except 2844029, 2844030, 2844081, 2844125, 2844136, 2844147 through 2844151, 28R-7737078, 28R-7737142, 28R-7837108, 28R-7837125, and 28R-7837257
PA-28R-201T	All serial numbers
PA-28RT-201	All serial numbers
PA-28RT-201T	All serial numbers
PA-32-260	All serial numbers
PA-32-300	All serial numbers
PA-32R-300	All serial numbers
PA-32RT-300	All serial numbers except 32R-7985004
PA-32RT-300T	All serial numbers

BILLING CODE 4910–13–C

(d) Subject

Joint Aircraft System Component (JASC) Code 5711, Wing Spar.

(e) Unsafe Condition

This AD was prompted by a report of a wing separation caused by fatigue cracking in a visually inaccessible area of the main wing lower spar cap. The FAA is issuing this AD to detect and correct fatigue cracks in the lower main wing spar cap bolt holes. The unsafe condition, if not addressed, could result in the wing separating from the fuselage in flight.

(f) Compliance

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

(g) Definitions

(1) ''TIS'' has the same meaning as the definition of ''time in service'' in 14 CFR 1.1.

(2) For purposes of this AD, ''factored service hours'' refers to the calculated quantity of hours using the formula in paragraph (h)(2) of this AD, which accounts for the usage history of the airplane.

(h) Review Airplane Maintenance Records and Calculate Factored Service Hours for Each Main Wing Spar

(1) Within 30 days after the effective date of this AD, review the airplane maintenance records and determine the number of 100-hour inspections completed on the airplane since new and any record of wing spar replacement(s).

(i) For purposes of this review, count any inspection conducted to comply with the 100-hour requirement of 14 CFR 91.409(b) pertaining to carrying persons for hire, such as in-flight training environments, even if the inspection was entered in the maintenance records as an ''annual'' inspection or as an ''annual/100-hour'' inspection. If the purpose of an inspection was to comply with § 91.409(b), then it must be counted. To determine the purpose of an inspection, note the repeating intervals between inspections, *i.e.,* less than 10 months between, and typically 90–110 flight hours. An inspection entered as a ''100-hour'' inspection but done solely for the purpose of meeting the requirement to complete an annual inspection, or those otherwise not required by § 91.409(b), need not be counted. For operators utilizing a progressive inspection program, count the completion of each § 91.409(b) 100-hour interval as one inspection.

(ii) If a main wing spar has been replaced with a new (zero hours TIS) main wing spar, count the number of 100-hour inspections from the time of installation of the new main wing spar.

(iii) If a main wing spar has been replaced with a serviceable main wing spar (more than zero hours TIS) or the airplane maintenance records are missing or incomplete, the wing history cannot be determined. Perform the eddy current inspection as specified in paragraph (i) of this AD.

(iv) The actions required by paragraph (h)(1) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a)(1) through (4), and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

(2) Before further flight after completing the action in paragraph (h)(1) of this AD, calculate the *factored service hours* for each main wing spar using the formula in figure 1 to paragraph (h)(2) of this AD. Thereafter, after each annual inspection and 100-hour inspection, recalculate/update the *factored service hours* for each main wing spar until the main wing spar has accumulated 5,000 or more *factored service hours.*

BILLING CODE 4910–13–P

N is the number of 100-hour inspections; and T is the total hours TIS of the airplane.

$$(N \times 100) + \frac{[T-(N \times 100)]}{17} = \text{Factored Service Hours}$$

Figure 1 to paragraph (h)(2)

(3) An example of determining factored service hours for an airplane with no 100-hour inspections is as follows: The airplane maintenance records show that the airplane has a total of 12,100 hours TIS, and only annual inspections have been done. None of the annual inspections were done for purposes of compliance with § 91.409(b). Both main wing spars are original factory installed. In this case, N = 0 and T = 12,100. Use those values in the formula as shown in figure 2 to paragraph (h)(3) of this AD. In the example in figure 2 to paragraph (h)(3) of this AD), the eddy current inspection would not be required because the factored service hours are less than 5,000 hours.

If the number of 100-hour inspections is 0 and the total hours TIS of the airplane is 12,100 hours, then your formula would be:

$$(0 \times 100) + \frac{[12{,}100 - (0 \times 100)]}{17} = 711 \text{ Factored Service Hours}$$

Figure 2 to paragraph (h)(3)

BILLING CODE 4910–13–C

(4) An example of determining factored service hours for an airplane with both 100-hour and annual inspections is as follows: The airplane was originally flown for personal use, then for training for a period of time, then returned to personal use. The airplane maintenance records show that the airplane has a total of 10,600 hours TIS, and fifty-five 100-hour inspections for purposes of compliance with § 91.409(b) have been done. Both main wing spars are original factory installed. In this case, N = 55 and T = 10,600. Use those values in the formula shown in figure 3 to paragraph (h)(4) of this AD. First, calculate commercial use time by multiplying (N × 100). Next, subtract that time from the total time, and divide that quantity by 17. Add the two quantities to determine total factored service hours. In the example in figure 3 to paragraph (h)(4) of this AD), the eddy current inspection would be required because the factored service hours are more than 5,000 hours.

If the number of 100-hour inspections is 55 and the total hours TIS of the airplane is 10,600 hours, then your formula would be:

$$(55 \times 100) + \frac{[10{,}600 - (55 \times 100)]}{17} =$$

$$(5{,}500) + \frac{[10{,}600-(5{,}500)]}{17} =$$

$$(5{,}500) + 300 = 5{,}800 \text{ Factored Service Hours}$$

Figure 3 to paragraph (h)(4)

(i) Eddy Current Inspect

Within the compliance time specified in either paragraph (i)(1) or (2) of this AD, as applicable, eddy current inspect the inner surface of the two lower outboard bolt holes on the lower main wing spar cap for cracks. If the wing is installed, use steps 1 through 3 or, if the wing is not installed, use step 3 in the Instructions of Piper Aircraft, Inc. Service Bulletin No. 1345, dated March 27, 2020 (Piper SB No. 1345). Although Piper SB No. 1345 specifies NAS 410 Level II or Level III certification to perform the inspection, this AD allows Level II or Level III qualification standards for inspection personnel using any inspector criteria approved by the FAA.

Note 2 to the introductory text of paragraph (i): Advisory Circular 65–31B contains FAA-approved Level II and Level III qualification standards criteria for inspection personnel doing nondestructive test (NDT) inspections.

(1) Within 100 hours TIS after complying with paragraph (h) of this AD or within 100 hours TIS after a main wing spar accumulates 5,000 factored service hours, whichever occurs later; or

(2) For airplanes with an unknown number of factored service hours on a main wing spar, within the next 100 hours TIS after the effective date of this AD or within 60 days after the effective date of this AD, whichever occurs later.

(j) Replace the Main Wing Spar

If a crack is found during an inspection required by paragraph (i) of this AD, before further flight, replace the main wing spar with a new (zero hours TIS) main wing spar or with a serviceable (more than zero hours TIS) main wing spar that has passed the eddy current inspection required by paragraph (i) of this AD.

(k) Install New Bolts

Before further flight after completing the actions required by paragraph (i) or (j) of this AD, install new bolts by following step 6 of Piper Aircraft, Inc. Service Bulletin No. 1345, dated March 27, 2020.

(l) Report Inspection Results

Within 30 days after completing an inspection required by paragraph (i) of this AD, using Appendix 1, ''Inspection Results Form,'' of this AD, report the inspection results to the FAA at the Atlanta ACO Branch and to Piper Aircraft. Submit the report to the FAA and Piper using the contact information found on the form in appendix 1 of this AD.

(m) Special Flight Permit

A special flight permit may only be issued to operate the airplane to a location where the inspection requirement of paragraph (i) of this AD can be performed. This AD prohibits a special flight permit if the inspection reveals a crack in a main wing spar.

(n) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

(o) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (p) of this AD.

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

(p) Related Information

For more information about this AD, contact Dan McCully, Aviation Safety Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5548; fax: (404) 474–5605; email: *william.mccully@faa.gov.*

(q) Material Incorporated by Reference

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

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

(i) Piper Service Bulletin No. 1345, dated March 27, 2020.

(ii) [Reserved]

(3) For Piper Aircraft, Inc. service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero

Beach, Florida 32960; phone: (772) 567–4361; website: *https://www.piper.com.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

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

BILLING CODE 4910–13–P

Appendix 1 to AD 2020-26-16

Inspection Results Form

Email completed form to:
9-ASO-ATLCOS-Reporting@faa.gov
and
customer.service@piper.com

SUBJECT line: Docket No. FAA-2018-1046

Or mail to: Federal Aviation Administration
Atlanta ACO Branch, AIR-7A1
1701 Columbia Avenue
College Park, GA 30337
and
Piper Certification Office
2926 Piper Drive
Vero Beach, FL 32960

Include photos if applicable

Aircraft Model No.: **PA-**	Serial Number:
Aircraft Total Hours Time-In-Service (TIS):	Registration Number:
Factored Service Hours Left-Hand (LH) Wing:	Right-Hand (RH) Wing:
(If both wings are factory installed original, these numbers should be the same)	
Inspection Results	
LH Wing Spar Fwd Accepted ☐ Rejected ☐	RH Wing Spar Fwd Accepted ☐ Rejected ☐
LH Wing Spar Aft Accepted ☐ Rejected ☐	RH Wing Spar Aft Accepted ☐ Rejected ☐
Inspector Comments (observed damage, condition of hole, etc)	

Inspector Information

Name (print): _____ Signature: _____

Certificate No.: _____ Date: _____

BILLING CODE 4910–13–C

Issued on December 30, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2021–00044 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0887; Airspace Docket No. 20–ACE–22]

RIN 2120–AA66

Amendment Class E Airspace; Elkhart, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace extending upward from 700 feet above the surface at Elkhart-Morton County Airport, Elkhart, KS. This action is the result of an airspace review caused by the decommissioning of the Elkhart non-directional beacon (NDB).

DATES: Effective 0901 UTC, April 22, 2021. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Elkhart-Morton County Airport, Elkhart, KS, to support instrument flight rule operations at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 67325; October 22, 2020) for Docket No. FAA–2020–0887 to amend the Class E airspace extending upward from 700 feet above the surface at Elkhart-Morton County Airport, Elkhart, KS. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 amends the Class E airspace extending upward from 700 feet above the surface at Elkhart-Morton County Airport, Elkhart, KS, by removing the Elkhart NDB an associated extensions from the airspace legal description.

This action is due to an airspace review caused by the decommissioning of the Elkhart NDB which provided navigational information to the instrument procedures at this airport. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ACE KS E5 Elkhart, KS [Amended]

Elkhart-Morton County Airport, KS
(Lat. 37°00′03″ N, long. 101°52′48″W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Elkhart-Morton County Airport.

Issued in Fort Worth, Texas, on January 4, 2021.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2021–00020 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0872; Airspace Docket No. 20–AGL–33]

RIN 2120–AA66

Amendment of Class E Airspace; Prairie Du Chien, WI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace extending upward from 700 feet above the surface at Prairie Du Chien Municipal Airport, Prairie Du Chien, WI. This action is the result of an airspace review caused by the decommissioning of the Waukon VHF omnidirectional range (VOR) navigation aid as part of the VOR Minimum Operational Network (MON) Program. The geographic coordinates of the airport are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, April 22, 2021. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Prairie Du Chien Municipal Airport, Prairie Du Chien, WI, to support instrument flight rule operations at this airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 67315; October 22, 2020) for Docket No. FAA–2020–0872 to amend the Class E airspace extending upward from 700 feet above the surface at Prairie Du Chien Municipal Airport, Prairie Du Chien, WI. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 amends the Class E airspace extending upward from 700 feet above the surface to within a 6.6-mile (decreased from a 9.3-mile) radius of Prairie Du Chien Municipal Airport, Prairie Du Chien, WI; removes the Waukon VORTAC and associated extension; adds an extension 1 mile each side of the 110° bearing from the airport extending from the 6.6-mile radius to 6.8 miles east of the airport; adds an extension 1 mile each side of the 140° bearing from the airport extending from the 6.6-mile radius to 10.4 miles southeast of the airport; adds an extension 1 mile each side of the 320° bearing from the airport extending from the 6.6-mile radius to 10.6 miles northwest of the airport; and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is the result of an airspace review caused by the decommissioning of the Waukon VOR, which provided navigation information for the instrument procedures this airport, as part of the VOR MON Program.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is

certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

AGL WI E5 Prairie Du Chien, WI [Amended]

Prairie Du Chien Municipal Airport, WI (Lat. 43°01′09″ N, long. 91°07′25″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Prairie Du Chien Municipal Airport, and within 1 mile each side of the 110° bearing from the airport extending from the 6.6-mile radius to 6.8 miles east of the airport, and within 1 mile each side of the 140° bearing from the airport extending from the 6.6-mile radius to 10.4 miles southeast of the airport, and within 1 mile each side of the 320° bearing from the airport extending from the 6.6-mile radius to 10.6 miles northwest of the airport.

Issued in Fort Worth, Texas, on January 4, 2021.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2021–00022 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA–2019–0451; Amdt. No. 91–362]

RIN 2120–AL30

Special Flight Authorizations for Supersonic Aircraft

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

ACTION: Final rule.

SUMMARY: In consideration of the continuing development of a new generation of supersonic aircraft, FAA is modernizing the procedure for requesting a special flight authorization to operate in excess of Mach 1 over land in the United States. The renewed interest in development of supersonic airplanes caused FAA to review its application procedures that allow for flight tests of these aircraft. This final rule modifies the criteria for applying for these authorizations and moves the material from an appendix to a regulation to make it easier to find and understand. Outside the context of special flight authorizations under this final rule, the FAA continues generally to prohibit civil supersonic flight over land in the United States.

DATES: Effective February 16, 2021.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''How To Obtain Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions concerning this action, contact: Sandy Liu, Office of Environment and Energy, AEE–100, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (240) 267–4748; email *sandy.liu@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44715 Controlling aircraft noise and sonic boom. Under that section, FAA is charged with prescribing regulations to measure and abate aircraft noise. This regulation is within the scope of that authority since it provides for certain operations of new supersonic aircraft in approved areas where the environmental impact of the operations has been assessed.

I. Overview of Final Rule

This rulemaking amends the administrative requirements for a special flight authorization originally published as appendix B to part 91, Authorizations to exceed Mach 1 (§ 91.817), of title 14 of the Code of Federal Regulations (14 CFR). This rulemaking is intended to streamline the application procedure for these special flight authorizations by clarifying the information that is needed for submission and specifying the program office within FAA that processes the applications. This rule sets forth the application criteria in a more user-friendly format. FAA is adopting the rule largely as it was proposed, with some minor changes to the regulatory text, as discussed in Section IV and the accompanying preamble discussion.

II. Background

In a notice of proposed rulemaking (NPRM) titled Special Flight Authorizations for Supersonic Aircraft (84 FR 30961, June 28, 2019), FAA proposed to modernize the procedures for requesting special flight authorizations that are needed to accomplish testing and development of new supersonic aircraft. The NPRM provided a brief history of FAA's regulation of civil supersonic aircraft beginning in the 1970s with the introduction of the Concorde, including the history of the application procedure for special flight authorizations that is the subject of this rulemaking.

FAA is clarifying the application procedure for requesting a special flight authorization to fly faster than Mach 1 following increased interest by industry to develop such aircraft. The revisions adopted here do not change the general prohibition against overland supersonic flight in the United States that has been in place since 1973 (14 CFR 91.817). This rule replaces the procedure described in part 91, appendix B, with regulatory text that clearly describes the

application process and criteria. The new regulation provides clarity, includes noise testing as another reason for which an authorization may be issued, and requires one additional piece of information to be provided in an application, which is discussed below. This rule does not introduce any new FAA policy or change the intent of the original application process.

Recognizing the renewed interest of the aviation industry in developing supersonic aircraft, Congress instructed FAA in Section 181 of the FAA Reauthorization Act of 2018 (Pub. L. 115–254, Oct. 5, 2018) to assume a leadership role in the development of international policies, regulations, and standards that facilitate the safe and efficient operation of such aircraft. Section 181 further directed FAA to undertake reforms of its regulations regarding civil supersonic aircraft.

FAA's first step in response to Section 181 was to propose changes to the special flight authorization application process. The second step was FAA's publication of an NPRM that proposes landing and takeoff noise limits under 14 CFR part 36 for the first group of supersonic aircraft expected to be presented for certification (85 FR 20431, Apr. 13, 2020). The relationship between the two rulemakings is minimal. An aircraft developer would eventually use the final rule adopted here to test aircraft under development at supersonic speed. Eventually, a developer might further use the authorization procedure adopted here for flight tests to demonstrate compliance with certain supersonic noise criteria when those criteria are eventually adopted. The part 36 NPRM, by contrast, included only subsonic standards for new supersonic aircraft and addressed the noise limits for landing and takeoff. Because landing and takeoff do not occur at supersonic speeds, a special flight authorization under this final rule would be unnecessary to test for landing and takeoff noise levels of supersonic aircraft, just as subsonic aircraft do not require such special permission to accomplish part 36 testing.

Neither this final rule nor the part 36 noise limit NPRM alters the general prohibition on supersonic flight over land in the United States found in § 91.817.

Summary of the NPRM

This modernization of the authorization process for certain civil supersonic flights is intended to simplify and clarify the process for applicants interested in obtaining an authorization to perform supersonic aircraft development testing.

In the proposed rule, FAA identified three areas intended to improve provisions that comprised appendix B. The first designated the proposed office in FAA to which applicants are to send applications and direct questions. The second proposed to gather the scattered application requirements into a list, and present them according to modern regulatory formatting standards. As part of this effort, FAA proposed also to correct the regulatory text for consistency throughout the new section. Third, FAA proposed the addition of a new reason for flight testing to accommodate future noise certification actions.

The NPRM invited interested persons to participate in the rulemaking by submitting written comments, data, or views. It also invited comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposal.

III. Discussion of Public Comments

FAA received a total of 206 comments on the NPRM: 43 comments generally supported the NPRM, 45 generally opposed the NPRM, and 118 are considered outside the scope of the rule. The majority of comments from the public focused on the current routing of aircraft under the NextGen program, or expressed general annoyance regarding aircraft noise, and did not include any comments specific to the proposal updating the application procedure.

A. General Environmental Concerns Regarding Civil Supersonic Flight

Approximately 77 commenters included some combination of general concerns about the possible environmental effects of supersonic airplanes—whether they were about the noise anticipated from new supersonic airplanes, the effect of supersonic operations on the atmosphere, or both. Some commenters generally cited the Concorde model airplanes as an example. Those opposing the rule, including two municipalities, stated their opposition to the addition of supersonic airplanes, citing detrimental environmental effects, but did not comment on the changes proposed for the application procedure.

In response, FAA emphasizes that the proposed rule would not have allowed supersonic flights to occur on a regular basis in the United States. The regulation that generally prohibits civil airplanes from operating at speeds in excess of Mach 1 over land in the United States (14 CFR 91.817) has been in effect since 1973, and no change to that regulation was proposed.

Rather, the proposed rule focused on the administrative application process for special flight authorizations to exceed Mach 1 for certain reasons, and for flight in limited areas that would be determined in advance. The rule does not in and of itself authorize the operation of any specific airplane over any particular area; rather, any flights authorized under the rule could only occur upon receiving FAA authorization after completion of the application process and considerable regulatory prerequisites, including analyses of the environmental impacts on the area over which an applicant proposes to operate, as required by law. Neither these regulatory prerequisites nor the assessments of environmental impacts were the subject of FAA's proposed changes. Comments that suggested changes to the required assessments were beyond the scope of this rulemaking.

The special flight authorizations that are the subject of this rulemaking have been available since the FAA adopted the supersonic prohibition in 1973. This rulemaking only presents an update of the administrative application process, without affecting FAA's underlying duty to assess the environmental impact of any flight it authorizes, whether under the National Environmental Policy Act (NEPA) or the requirements imposed by the regulation itself.

B. The National Environmental Policy Act (NEPA)

Paragraph (b) of appendix B to part 91 directed applicants generally to submit ''all information requested by the Administrator'' necessary for the Administrator to make a determination under the National Environmental Policy Act (NEPA).[1] In the proposed rule, FAA tried to provide applicants with better clarity by adding the text in proposed § 91.818(c)(2)(i)–(iii) to suggest the form that such information might take to support FAA's NEPA determination. Specifically, the proposed language gave as examples an Environmental Impact Statement (EIS) for the proposed flight area, an EIS previously prepared for the proposed flight area, or another statement or finding of environmental impact for the proposed flight test area, such as an Environmental Assessment (EA).

In the final rule, FAA revises § 91.818(c)(2) to remove these suggestions, because they proved to be a source of confusion among

[1] The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*)

commenters, as discussed below. The proposed language providing more detail about what an applicant could submit was not intended to imply that FAA would forego independently evaluating the information or closely examining the environmental impacts on a proposed test area in determining whether to grant a particular special flight authorization. The language was also not intended to imply shifting the burden of complying with NEPA to the applicant rather than FAA.

NEPA requires Federal agencies to consider the environmental impacts of their actions in their decision-making processes. Specifically, an agency must determine whether the action it is considering (in this case, whether to issue a special flight authorization allowing one or more supersonic flights) constitutes a ''major Federal action significantly affecting the quality of the human environment'' (*i.e.,* whether a proposed action would have significant environmental impact). FAA makes this determination in accordance with Council on Environmental Quality (CEQ) regulations,[2] which provide the procedural requirements for Federal agency compliance with NEPA.

CEQ regulations include, at 40 CFR 1506.5, the option for agencies to seek necessary information from applicants to support the agency's required environmental review of proposed Federal actions under NEPA.[3] That analysis may require varying amounts and types of data to make the determination whether approval of the underlying request would result in significant environmental impacts.

In order to complete that analysis in a timely fashion, FAA benefits from applicants' providing as much of the information as they can, in accordance with 40 CFR 1506.5.[4] That information may be incorporated into an EA or EIS that is developed subject to FAA supervision, or it may provide the basis for FAA to apply a categorical exclusion of the action from further NEPA review.[5]

Nothing in the special flight authorization regulation, however, either requires or permits applicants for special flight authorizations to determine what level of NEPA review is required or whether issuance of a special flight authorization would have significant environmental impacts. Those determinations are FAA's alone.

Further, FAA's finding under NEPA regarding the significance of environmental effects is not dispositive of the application under consideration. The NEPA analysis informs FAA's decision on whether to grant a special flight authorization for supersonic flight over a certain area, and the NEPA analysis must be completed before a decision to grant a special flight authorization. However, the NEPA determination (regarding significance of the environmental effects of granting the authorization) is distinct from the Administrator's findings on the application as a whole. The circumstances behind each application will be unique. Under § 91.818(c)(1) of the final rule, the application is denied if the Administrator finds that such action is necessary to protect or enhance the environment.

Because both the NEPA determination referenced in § 91.818(c)(2) and the substantive finding that can be made under § 91.818(c)(1) are environmental in nature, the final rule is revised to guard against the risk of the two being conflated. Specifically, § 91.818(c)(2) as adopted focuses more expressly on supporting the NEPA significance determination, which better distinguishes the purpose of paragraph (c)(2) from the purpose of an Administrator finding made under paragraph (c)(1) of that section.

Boom Technology (Boom) submitted a comment regarding streamlining the NEPA process in the context of special flight authorizations. Boom initially presents two factual conclusions. Boom's first conclusion is that FAA would be unlikely to identify any significant sonic boom noise impacts for individual supersonic flight test programs under the FAA's threshold of significance for noise impacts in its NEPA procedures (FAA Order 1050.1). Boom's second conclusion is that the FAA programmatically could examine all supersonic test flight campaigns covering all applicants in a single year without the impacts triggering the FAA's threshold of significance for noise. Boom supports these conclusions with metrics from previous flights of the SpaceX Falcon Heavy landings and operations of the Concorde. Based on its conclusion that impacts of special flight authorizations would never reach FAA's threshold of significance for noise impacts, either individually or cumulatively on an annual basis, Boom proposes a series of qualifying criteria that, if met, should lead FAA to presume no significant impacts exist.

FAA finds that this proposal fails for two reasons. First, as Boom acknowledged, FAA may use supplemental metrics when evaluating noise, and gives special consideration to certain types of noise-sensitive areas where the standard significance threshold may not adequately capture environmental effects. Although FAA uses all available methods to increase efficiency in its environmental review process, and in appropriate individual circumstances could make a finding of no significant impact for some or even most special flight authorizations, it cannot prejudge the outcome of individual applications submitted under this regulation, or their effects if considered cumulatively on an annual basis.

Second, Boom's proposal to create criteria that, if satisfied, create a presumption that no significant effects will occur appears to be consistent with establishing a categorical exclusion under 40 CFR 1501.4. Categorical exclusions are categories of actions that in ordinary circumstances do not have significant individual or cumulative impacts on the quality of the human environment. However, although Boom suggested that the Administrator could use this rulemaking to establish that the collective level of noise generated by all foreseeable test activities is not environmentally significant if conducted pursuant to these particular conditions, categorical exclusions must be identified in agency NEPA procedures and are subject to the requirements for public review and review by CEQ as specified in 40 CFR 1507.3. Moreover, the anecdotal evidence offered by Boom related to flights of other aircraft that were not subject to § 91.817 would not be sufficient to establish a categorical exclusion under NEPA with respect to supersonic flights requested in a special flight authorization. The establishment of ''parameters'' relating to the NEPA review of supersonic flight tests would require an analysis of part 91 operations in order to justify a categorical exclusion, and the supporting documentation would need to go through the public process required for all changes to FAA's NEPA procedures

[2] 40 CFR parts 1500 through 1508 (2020).

[3] The CEQ regulations were updated in July 2020, while this final rule was in process. *See* 85 FR 43304 (July 16, 2020). The revised CEQ regulations became effective on September 14, 2020.

[4] The regulation states that ''an agency may require an applicant to submit environmental information for possible use by the agency in preparing an environmental document.'' The regulation does not allow the agency to use such information without considerable additional analysis and verification.

[5] FAA's NEPA procedures, as set forth in FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures* (July, 2015), do not currently have a categorical exclusion that would be applicable to applications for special flight authorizations. Accordingly, current FAA policy would not allow application of a categorical exclusion. However, as discussed further below, FAA might be able to establish an applicable categorical exclusion, but only after following appropriate procedures.

as set forth in Order 1050.1F. Although at some point in the future FAA might undertake the necessary analysis and public review process to establish such a categorical exclusion, absent a change to Order 1050.1F, FAA currently must individually consider the potential environmental impacts of requested special flight authorizations.

Boom also commented on an aspect of the proposed standard for special flight authorization operations outside the test area—in particular, that the operation does not cause a measurable sonic boom overpressure outside the test area. While that topic is discussed below, Boom's characterization of it in the context of NEPA is relevant here. Boom indicated that the standard (unchanged from appendix B) ''goes far beyond what is required under the National Environmental Policy Act, as allowance of measurable overpressure is not necessarily a major Federal action 'significantly affecting the quality of the human environment' as interpreted under agency guidance under Order 1050.1F . . .'' Boom inaccurately combined the scope of the regulation governing the consideration and approval of special flight authorizations itself with the process tool of NEPA and FAA Order 1050.1F, which describes FAA's NEPA policy and procedures. Further, Boom does not accurately reflect the definition of a major Federal action as defined by the CEQ regulations and FAA, relying on concepts actually related to significance of effects of a Federal action. The overpressure measurement standard is a specific factor set forth in the regulation that considers the effect of the proposed flights and is relevant for substantive approval purposes under the regulation. While this information may also be considered in NEPA analysis, it does not dictate that analysis, nor does it affect the process that FAA follows to reach a finding regarding significance of impacts under NEPA.

The Center for Biological Diversity (CBD) made several arguments with regard to NEPA requirements in its comment. In part, the CBD read the proposed rule to ''suggest that preparation of an EA will fulfill FAA's duties'' under NEPA. The CBD also commented that the list of examples in proposed § 91.818(c)(2) suggesting the form of information an applicant could provide ''oversimplifies the NEPA review process'' for FAA. As stated at the beginning of this discussion, FAA agrees that the submission of information by an applicant (whether to support an EIS, EA, categorical exclusion, or other materials) does not itself satisfy NEPA requirements, which remains FAA's duty. Further, FAA did not intend for the applicant's submission, whatever form it may take, to represent the completion of the NEPA process. That process involves, where appropriate, public outreach, FAA's objective evaluation of any information prepared by the applicant, as well as the exercise of independent judgment as to whether the NEPA process can be concluded with a finding of no significant impact, or whether it requires preparation of an environmental impact statement.

The CBD concluded that, ''Because Special Flight Authorizations for Supersonic Aircraft are major federal actions, an application for such authorization would trigger the need to prepare an EIS.'' This conclusion is based on CBD's reading of the 1970 preamble that accompanied the adoption of the supersonic prohibition. FAA disagrees that the 1970 rule presumed that all supersonic flights were likely to create significant environmental impacts under NEPA and therefore require FAA to produce an EIS. While an application for a special flight authorization is a major Federal action subject to NEPA review, the specific facts associated with such an application determine what level of NEPA review is required. CBD presupposes a universal outcome regarding the proper level of NEPA review, disregarding the fact-specific nature of this determination.

The proposed addition of the form of information to be submitted by applicants caused some commenters to misunderstand the FAA's intent, and is an indication that the proposed regulatory changes were not helpful. Accordingly, FAA has removed proposed § 91.818(c)(2)(i) through (iii) from the final rule. This final rule revises the language in § 91.818(c)(2) to modernize it consistent with the recently revised CEQ regulations and the NEPA practice as it has developed since appendix B was first promulgated. The revised language clarifies that the information needed to support any particular application will be considered by FAA in its determination of whether the environmental impacts of the special flight authorization are significant. The provision of this information and the subsequent development of the appropriate level of environmental documentation will be carried out in accordance with the CEQ regulations and FAA procedures in the most recent version of FAA Order 1050.1.

C. Application Approval Process

In proposed paragraph (a) of § 91.818, the FAA sought to locate into a more-user friendly format the application requirements previously scattered throughout appendix B to part 91. Specifically, proposed § 91.818(a)(6) would require a ''description of the flight area requested by the applicant, including any environment analysis required under paragraph (c) of this section.'' This requirement was unchanged from appendix B.

GE Aviation and Boom suggested that FAA adopt an expedited application approval process under certain circumstances. As a means to this expedited approval, both commenters suggested that a pre-approved set of parameters could form the basis for these approvals. GE Aviation suggested automatic approval when an applicant can show ''that there have been no meaningful changes in the expected environmental impacts.'' Noting what it considered a recognized lack of significant environmental impact (discussed above), Boom stated that a predefined set of parameters would provide certainty and reduce costs for manufacturers as well as reduce the burden on the FAA.

FAA is not adopting the suggested expedited application approval process. First, the FAA does not find that pre-approved circumstances can be determined, because there are several factors FAA considers for each application for supersonic testing, including performance of the particular aircraft. Second, the time-sensitive nature of environmental considerations can make prior determinations unreliable without reassessment at the time of each application, and could cause the FAA to fail in its environmental responsibilities. Under FAA policy, environmental assessments or EISs are not presumed valid indefinitely; after three years, a written reevaluation must be prepared. (See FAA Order 1050.1F.) However, FAA would accept previous environmental analyses of a proposed flight area as long as the material remains current and relevant, or has been updated by an applicant to meet those requirements. Third, FAA intends with this rulemaking to consider all applications uniformly. While the actual number of applications for authorization has been limited, FAA experience is that incomplete information submitted by an applicant has caused delays in the authorization approval process.

While FAA is not changing the requirement in § 98.818(a)(6), FAA has revised it slightly from the proposed

rule to clarify that the requirement calls for information that supports analyses rather than the analyses themselves.

D. Test Area Selections

The term ''designated test area'' in appendix B created confusion for prospective applicants that interpreted the phrase to mean that designated test areas already exist, when they in fact do not. Rather, the term was used to refer to the proposed test area described (designated) in an application. FAA proposed eliminating this phrase and replacing it with § 91.818(a)(6) requiring an applicant to describe its requested test area in its application. Description of the proposed test area is one consideration in determining the acceptability of the application overall.

Several commenters stated that the final rule should provide more flexibility for test area selections to allow more than one operator to use a test area, and to support the development of test areas outside of military operation areas (MOAs). GE Aviation, Aerospace Industries Association (AIA), General Aviation Manufacturer's Association (GAMA), Supersonic Flight Alliance (SSFA), AeroTEC, and Boom suggested that FAA allow multiple manufacturers to use the same flight test area, as opposed to limiting areas to a single flight test campaign. Generally, the commenters stated that doing so would provide safer and more effective testing, and cost-saving benefits to industry and FAA. Lockheed Martin Corporation (Lockheed) suggested establishing dedicated supersonic flight test areas. Additionally, Boom, SSFA, and AeroTEC expressed the general need for supersonic test areas outside of MOAs, citing concerns such as crowded airspace within MOAs and lack of available MOAs for civil flight testing. The Town of Milton, Massachusetts, stated that test sites should not be determined by industry applicants and urged FAA to limit test sites to MOAs.

To support current industry development efforts, FAA provides supersonic flight test applicants with the broadest opportunity to request an appropriate flight test area, consistent with the applicable regulations and environmental impacts. FAA emphasizes that the regulation does not limit a flight test area to use by one applicant. As stated in the NPRM, nothing about the application process should be read to impede more than one prospective supersonic operator from seeking to use the same area or sharing the costs of the environmental studies that may be required (85 FR 30961, at 30964). FAA does expect, however, that each operator intending to share the use of, or the costs associated with requesting, a test area will need to submit its own application with all of the information required for the processing of the application. In the case of a test area that has been previously approved under another application, the next applicant will need to submit information that includes a description of the (same) requested test area and the required environmental information.

The final rule does not include suggestions from commenters for the FAA to establish ''dedicated'' test areas or a ''civilian supersonic corridor'' without proposed users or without a specific application. The regulation requires an applicant to show the probable impact of the applicant's requested operations over a proposed test area. There can be no proper determination of any environmental impact on a test area without a proposal from an operator that includes the timing, duration, and expected noise impacts of the operator's planned flights. A change in this fundamental nature of the process would require additional rulemaking and analysis.

Moreover, the final rule, as is the case under the existing regulation, does not limit proposed test areas to MOAs. Several commenters disagreed with what they perceived to be FAA's assumption that applicants will only test within existing MOAs. The commenters note that MOAs may not be suitable for civil supersonic testing and that applicants may develop their own supersonic test areas. The commenters' concern might reflect a misunderstanding stemming from the Paperwork Reduction Act (PRA) statement that was published as part of the NPRM (*see* 84 FR 30965–66). FAA is required to estimate the information collection burden involved in complying with a regulation. FAA's only historical data for special flight authorization came from applications proposing to use MOAs as test areas. FAA was thus unable to estimate any reliable information collection impact on future applicants for anything other than using a MOA that has underlying environmental data already available. But the use of MOAs as part of the required PRA statements supporting this rulemaking was not an indication that the rule prevents an applicant from choosing other areas. The choice of test area remains with each applicant after assessing its financial considerations and business needs.

Finally, nothing in the regulation prevents a group of operators from sharing the costs of establishing a test area. As a matter of implementation, there must be a ''first'' applicant that submits all of the required information for FAA to make the first determination about an area based on the proposed flights. Subsequent applicants could use the same information, and include any differences that apply to the subsequent applicant, such as duration of the authorization, number of flights, or probable impact. The need for each operator individually to apply for and receive an authorization remains unchanged from the current requirements. No changes are being made to the requirement to describe the test areas based on these comments.

E. Conducting Noise Testing During Supersonic Flight

FAA proposed the measurement of noise characteristics in § 91.818(a)(8)(v) as an additional reason to conduct a supersonic flight. The new provision allows for the FAA to issue a special flight authorization for flights in excess of Mach 1 when measuring the noise characteristics of an aircraft for compliance with noise certification requirements, including conducting a noise test during supersonic flight. Appendix B addressed only flights necessary to comply with airworthiness certification testing, not noise tests. This change is forward-looking, as there are no standards for assessing noise at supersonic speed at this time. This limited expansion will facilitate noise certification testing for future supersonic aircraft when such noise standards are adopted. On April 13, 2020, FAA issued an NPRM proposing noise certification standards for a certain class of new supersonic airplanes under part 36 (85 FR 20431), but those proposed standards are only for subsonic landing and takeoff. No special flight authorization would be needed to conduct the tests for subsonic noise compliance (landing and takeoff), as that noise is proposed to be measured in the same manner as subsonic aircraft.

GE Aviation commented that the rule should address the full set of circumstances for requesting a special flight authorization, including requirements for testing airworthiness and operational capabilities. FAA notes that the proposed change allows an additional reason to request testing. The rule has always required applicants to specify the reason particular tests need to be conducted from the list provided in the regulation. FAA has not proposed to remove any of the general reasons from appendix B that an operator may have to test an airplane, including airworthiness testing.

Accordingly, the provision is adopted as proposed.

F. Overocean Testing

FAA proposed maintaining the requirement for an applicant to show why its test cannot be accomplished by flight over the ocean. The placement of this application requirement in appendix B often caused it to be overlooked as a prerequisite. The proposed rule placed the same overocean requirement in new § 91.818(a)(9) with minor modification to state that an ''applicant must indicate why its intended operation cannot be safely or properly accomplished over the ocean at a distance ensuring that no sonic boom overpressure reaches any land surface in the United States.'' The addition of the last phrase aligns the rule with the requirement in § 91.817(b) that restricts supersonic operation of aircraft, including over the ocean, unless there are flight limitations to ensure that no sonic boom could impact the U.S. shoreline.

1. Alternatives to Overocean Testing

Commenters who are not in favor of the overocean testing requirement suggested alternatives. GE Aviation stated that there should be a provision and process to allow supersonic flight testing to move from over the ocean to over land and should involve various stages of modeling, along with testing and validation through flights over the ocean. Lockheed expressed appreciation for clarifying the applicability of the overocean provision, but suggested that an applicant provide FAA with the results of prior test modeling activity, which would then be used to shape an overwater validation test activity as a precursor to overland test operations. The SSFA and AeroTEC suggested that the collection of noise data over ground terrain would provide better quality data than over water. An individual commenter suggested adding the word ''efficiently'' to the regulatory text of § 91.818(a)(9), but did not provide any supporting explanation. An individual from Louisiana suggested that testing be done ''over the Pacific Ocean or large bodies of water around 70 miles off the coast,'' but provided no support for the specificity of this suggestion.

FAA recognizes that there may be valid reasons why an applicant cannot conduct an overocean test properly. The provision in appendix B allowed for this possibility, as does the provision adopted in § 91.818(a)(9), which simply restates that an applicant needs to explain why overocean testing would not work. Furthermore, the rule does not restrict the submission of modeling data as support for an application if an applicant chooses to use it. FAA notes that if all supersonic operation is conducted over water outside U.S. airspace and at a distance that ensures no sonic boom effect on land, there is no need to even request a special flight authorization. It is only when supersonic flight over land is requested that an application need be submitted, in which case the applicant needs to explain why it cannot be accomplished over the ocean, in order to avoid unnecessary noise exposure on the ground.

2. Economic Reasonableness

Boom raised economic concerns with the overocean provision. Boom stated that FAA's 1970s-era economic rationale for the prohibition on supersonic overland flight and application process for overland testing is not valid because it was based on a market assessment of supersonic aircraft that did not materialize. Boom also stated that the overocean requirement is not economically reasonable because testing supersonic aircraft over the ocean would require manufacturers located farther from the U.S. coastline to incur enormous expenses to set up additional test facilities with closer proximity to the ocean. Boom added that ''for such an enormous expense, the public may be spared a few dozen half-second disturbances per year.''

The FAA notes that the determination made in the 1970s that no level of sonic boom is acceptable over land still applies and is not based exclusively on economics. Furthermore, the FAA is not persuaded that a re-evaluation of the reasonableness of the overocean testing provisions is warranted simply because the anticipated size of the commercial fleet has not materialized. Neither Boom nor any other commenters provided any data or persuasive argument indicating that the overocean testing requirement has been a primary reason for, or even a contributing factor to, why the estimated commercial fleet of supersonic airplanes never materialized. Rather, Boom's comment suggests that the requirement could pose a financial obstacle to Boom's particular business plans, not that the regulation in general is economically unreasonable.

3. Miscellaneous Overocean Provision Comments

In addition to its economic reasonableness position, Boom stated that it ''believes that a requirement to justify the safety benefits of conducting a supersonic operation over land could erode safety,'' for which Boom hypothesized situations of production flight tests and the availability of diversion airports. Boom requested that FAA ''remove the requirement to show that the test could not be safely accomplished over the ocean'' in part because the showing ''will never be decisive'' and that a ''rejection based on an inadequate safety justification could lead to a tragic loss of life.''

FAA disagrees with Boom that there is no economic or other justifiable basis for the requirement. The provision for overocean testing reinforces the principal purpose underlying appendix B to part 91, to protect humans and the environment in the United States from the effects of sonic booms. The appendix establishes as a ''default'' the position that supersonic flight testing be conducted over the ocean rather than on land where sonic booms would impact the surface environment. The appendix and this rule provide applicants with an avenue to conduct supersonic test flights over land if they are able to explain why testing cannot be safely or properly conducted over the ocean.

Three other commenters submitted suggestions to clarify the overocean provision. AIA and GAMA suggested that FAA clarify that a special flight authorization is not required if a test can be performed over the ocean at a distance ensuring that no sonic boom overpressure reaches any land surface in the United States. GE Aviation made the same comment but used ''application'' rather than ''authorization.'' As stated previously, no special flight authorization is required if the supersonic portion of any flight is conducted over the ocean at a distance ensuring that no sonic boom will reach land in the United States. The Town of Milton suggested that FAA require overocean supersonic testing in such a manner that no sonic boom overpressure reaches land before any testing over land is authorized. However, FAA recognizes that there may be situations where testing may not be safely or properly accomplished over the ocean, such as there being no effective way to measure noise on flights over water, including any noise impact that might be discernable on land.

For the reasons discussed, FAA adopts the overocean testing provision as proposed.

G. Operation Outside a Test Area

FAA proposed a new § 91.818(b) to maintain the provisions in section 2(b) of appendix B that allow an applicant to request supersonic non-test flights outside of a test area. The prerequisites for this supersonic operation are considerable and are discussed below.

1. Foreseeable Operating Conditions Outside of a Test Area

Proposed § 91.818(b)(3) would maintain the requirement of appendix B section 2(b) that a supersonic non-test flight applicant show—as part of a prior test conducted inside a test area—that ''[t]he conditions and limitations determined by that test present all foreseeable operating conditions and are effective on all flights conducted under an authorization.''

Aerion, GE Aviation, AIA, and GAMA stated that this requirement is unreasonable because it is not possible to predict all conditions under which an aircraft may operate. Aerion noted that the appendix B requirement originated before reliable sonic boom prediction technologies existed. All four commenters suggested replacing § 91.818(b)(3) with a standard based on currently available sonic boom prediction and control technology.

In general, the phrases ''conditions and limitations'' and ''operating conditions,'' as they are commonly applied to any flight authorization, do not require operators or FAA to predict every conceivable operating condition that may occur. FAA clarifies that ''all foreseeable operating conditions'' refers to the reasonable expected conditions under which the aircraft would be operated, and is not meant to require a prediction of every possible condition.

2. Measurable Sonic Boom Overpressure Outside of a Test Area

The application for operation outside a test area also includes a requirement that allows for such flights when it conservatively can be shown that ''no measurable sonic boom overpressure'' will reach the surface. FAA proposed to retain this provision as § 91.818(b)(2). FAA stresses that the requirement to show ''no measureable sonic boom overpressure'' applies only to flights outside of a test area, and *not* as an application for operations in a requested test area under proposed § 91.818(a)(8)(iv).

Several commenters, including prospective supersonic airframe and engine manufacturers, stated that the provision should be eliminated because it is overly restrictive and outdated. Aerion stated that the provision ''was originally adopted in the 1970s out of an abundance of caution based on the relatively undeveloped state of sonic boom technology at that time.'' Aerion added that sonic boom prediction and control technology has advanced to the point where it is possible to make accurate predictions of the location and intensity of sonic booms. Aerion and GE Aviation noted that the provision does not recognize the possibility for a sonic boom to be produced that is barely noticeable on the ground, but can still be detected by scientific measurement, such as a small pressure disturbance. SSFA and AeroTEC referenced NASA's supersonic flight tests that show overpressure wave remnants at ground level that do not have the sharp-edged characteristic of a sonic boom. Boom indicated that the standard (unchanged from appendix B) ''goes far beyond what is required under the National Environmental Policy Act, as allowance of measurable overpressure is not necessarily a major Federal action 'significantly affecting the quality of the human environment' as interpreted under agency guidance under Order 1050.1F.'' [6]

Other commenters also supported the elimination of the provision. Both AIA and GAMA read the phrase ''no measurable sonic boom'' to be an absolute prohibition on supersonic operations, finding it overly restrictive and something ''that an applicant would be unable to guarantee during a test flight.'' The Town of Milton, Massachusetts, stated that FAA should remove § 91.818(b) in its entirety because no aircraft can satisfy the ''no overpressure'' provision, adding that it should be replaced by a new regulation only after supersonic testing demonstrates no measurable sonic boom overpressure.

New Frontier Aerospace is the only commenter that supported retaining the provision, stating that it foresees the need to apply for the § 91.818(b) operating allowance in order to conduct extensive testing of an aircraft, and that the removal of this provision could have a serious impact on its aircraft that is still in development.

In the NPRM, FAA stated that it is not seeking to propose alternatives to this provision as a means to approve routine civil supersonic flight, but simply seeks comment on whether the provision as written retains any current value. However, several commenters submitted alternatives. New Frontier Aerospace suggested that in place of ''no measureable sonic boom'' it would be beneficial to provide a specific numeric limitation for overpressure or noise levels. Aerion stated that the provision should be replaced with a standard based on currently available sonic boom prediction control technology. Other commenters (GE Aviation, AIA, and GAMA) suggested a more appropriate standard than ''no measurable sonic boom overpressure'' would be to ensure that no significant impacts on the environment or communities result from granting an authorization.

The scope of the provision, both as it appears in the appendix and in the proposed rule, appears to be a continued source of confusion for some commenters. The section in the appendix that was proposed as § 91.818(b) sets the ''no measurable sonic boom overpressure'' criterion only for civil supersonic flights that would take place *outside a test area.* Several commenters seemed to presume inaccurately that this standard would be applied to all applications for special flight authorizations, even those that would be within a test area. The requirement to show conservatively that no measurable sonic boom overpressure reaches the surface does not apply to test flights that are authorized to be conducted in an approved test area. An operator with an authorization to flight test at supersonic speeds for one of the permissible purposes set forth in § 91.818(a)(8) may potentially (subject to the conditions and limitations of its authorization) operate a flight that results in sonic boom overpressures reaching the surface inside the test area, as expected. Accordingly, FAA disagrees that the standard is overly restrictive. It restricts sonic boom overpressures from reaching the surface when flights are conducted outside of test areas, consistent with the overall intent of the regulations to prohibit routine or non-test supersonic flights over land. FAA emphasizes, though, that in accordance with § 91.818(a)(7) no sonic boom overpressures are allowed to reach the surface outside of the test area. Moreover, as required by § 91.818(a)(6) and (c), the operator must provide FAA with the information necessary for the agency to assess the environmental impacts resulting from such flights.

Further, commenters' recommendations either to replace the ''no measurable sonic boom overpressure'' standard with a specific perceived decibel level or to remove it entirely go beyond the scope of what FAA proposed and the intent of this rulemaking, which is to modernize the administrative process for applying for the special flight authorization. The noise levels recommended by some commenters are relative to existing noise levels applicable to subsonic aircraft and would not be appropriate for measuring noise levels of aircraft flying at supersonic speeds. There are no accepted means of measuring supersonic noise, nor are there any

[6] The inclusion of NEPA language and FAA Order 1050.1F in Boom's comment on measurable sonic boom overpressure were addressed above in the NEPA comment disposition.

noise limits that have been deemed acceptable as a community standard, whether expressed in decibels or as sonic overpressure. Establishing supersonic noise levels for operations outside a test area would need to be accomplished in a future rulemaking and supported by appropriate data.

None of the commenters suggested anything more than a future expectation that non-test flights might need to occur. FAA fully expects that, at some point, flights outside a test area would need to occur. But FAA does not have a reasonable expectation of what might be needed, since there have been no application for flights within a test area designated by an applicant and approved by FAA (where prior measurements would have to occur), nor applications that describe a test area that may need to be exceeded. After more testing occurs, and development has progressed to require such flights, more modern standards for measuring supersonic noise events and their impacts may have developed as well. At that time, the industry and FAA will be better positioned to suggest supportable changes to the rule on flights outside a test area. For these reasons, the suggestions that compare computer simulations of unrealized aircraft to the noise of the current subsonic fleet are not considered a sufficient basis to change the standard for flights outside a test area at this time, and no such changes were proposed.

Eliminating the ''no measurable sonic boom overpressure'' regulatory text is also not appropriate in this rulemaking. The provision was adopted in the 1970s as a kind of relief valve to the prohibition in § 91.817, based on the principle that a supersonic flight with no measureable overpressure (shown during previous flights in a valid test area) should not summarily be prohibited. In that sense, the circumstances have not changed, and there is no current data to support either eliminating the rule or determining a level of acceptable measurable sonic boom overpressure other than zero, which would be necessary before flights outside a test area could be considered. FAA will continue to review advances in technology that affect noise values produced by supersonic airplanes and the evaluation of those noise events. Accordingly, as the provision represents a safeguard from unknown sonic boom effects that may be unrelated to aircraft testing, no change to the rule is supported by the comments, and § 91.818(b) is adopted as proposed.

H. Necessary To Protect or Enhance the Environment

FAA proposed § 91.818(c)(1) to provide that an authorization will not be granted ''if the Administrator finds that such action is necessary to protect or enhance the environment.'' This provision maintains the requirement stated in section 1(d) of appendix B. Commenters (GE Aviation, GAMA, and AIA) generally opposed this provision and read it to suggest that the Administrator would be required or able to deny an authorization because approving such flights would not lead to an enhancement of the environment. GE Aviation suggested that § 91.818(c)(1) instead state that an application would not be denied if an applicant demonstrates that the flights would not have a significant impact on the environment.

FAA notes that this language has been in the regulation since its adoption in the 1970s. Under this provision, the Administrator may consider adverse environmental impacts that would come from granting any particular flight authorization. The provision does not create a presumption that any particular application and grant would have to demonstrate a positive impact on the environment, as suggested by commenters. Commenters provided no indication that the authorizations that have been approved thus far have included or required any such demonstration of environmental enhancement. Therefore, the provision is adopted as proposed.

I. Using Software for Predictive Analysis

Commenters provided general suggestions that the rule should specifically allow applicants to use software programs for predictive analyses in applications for special flight authorizations. In response, FAA notes that nothing in the existing or proposed rule prohibits an applicant from using such prediction and control technologies to supplement its application for a special flight authorization. Further, FAA supports applicants using existing software tools to predict the location and intensity of sonic boom ground impacts as supporting data in their test flight authorization applications, as they are available and apply to an applicant's specific circumstances. No change in the rule is made based on these comments.

J. NAS Concerns

AOPA expressed concerns with the safe integration of supersonic aircraft into the National Airspace System (NAS), particularly with ''see and avoid.'' AOPA also commented that FAA should carefully review any applications for overland flight below 18,000 feet altitude, and conduct a safety risk assessment of how supersonic airplane design may impact speed restrictions below 10,000 feet and the effectiveness of sense and avoid systems.

Most of AOPA's considerations center around anticipation of eventual routine operation of supersonic aircraft in the same airspace as smaller, slower airplanes. This rule does not grant authorizations to exceed Mach 1 in airspace where the flights would negatively impact the safety of the NAS or persons on the ground without notice. This rule is limited to the application for an authorization to exceed Mach 1 during test flights over a specific area to be determined in each application. The impact on routine aviation operations would be a factor in analyzing the proposed flight area. Many of the considerations expressed by AOPA speak to characteristics of individual airplane designs that would not be available for evaluation before the aircraft actually fly or are presented for certification. No change to the proposed regulation was suggested in this comment.

K. Miscellaneous Comments

The Information Technology and Innovation Foundation suggested that FAA lift the supersonic ban based on speed and replace it with a set of noise standards to provide clarity for manufacturers that are developing supersonic airplanes. FAA notes that the NPRM specifically mentioned that the proposed revisions did not affect the general prohibition on supersonic flight. As also noted, FAA took the first step in developing noise standards for new supersonic airplanes in its April 2020 NPRM proposing changes to 14 CFR part 36. The comment is considered beyond the scope of this rulemaking.

IV. Changes From the Proposed Rule

In the final rule, FAA made the following changes from the proposed rule:

1. Section 91.818(a)(6) was revised to say ''environmental information'' rather than ''environmental analysis'' to avoid confusion about the nature of the material being submitted.

2. In § 91.818(c)(2), the subordinate paragraphs describing the types of information that might be submitted by an applicant were removed to prevent confusion over what information and what format would be acceptable. Other language in the paragraph was added to

clarify FAA's responsibilities under NEPA, as noted above in the disposition of comments.

V. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. In addition, DOT rulemaking procedures in subpart B of 49 CFR part 5 instruct DOT agencies to issue a regulation upon a reasoned determination that benefits exceed costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, FAA has determined that this final rule: (1) Has benefits that justify its costs, (2) is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, (3) is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (4) will not have a significant economic impact on a substantial number of small entities; (5) will not create unnecessary obstacles to the foreign commerce of the United States; and (6) will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

A. Regulatory Evaluation

This rule amends the administrative requirements for a special flight authorization originally published in appendix B to 14 CFR part 91, Authorizations to exceed Mach 1 (§ 91.817). This rule supports innovation in the development of new civil supersonic aircraft by streamlining existing regulations. This rule streamlines the application procedure for special flight authorizations by clarifying the information needed for submission, and specifying the program office within FAA that processes the applications. This rule sets forth the application criteria in a more user-friendly format. FAA is adopting this rule largely as it was proposed, with some minor changes to the regulatory text, as discussed in Section IV and the accompanying preamble discussion.

As noted above, FAA provides a new reason for part 91 special flight authorizations—to measure the noise characteristics of an aircraft for compliance with noise certification requirements, including conducting noise testing during supersonic flight. This provision is beneficial as it anticipates the addition of future part 36 noise certification requirements for supersonic aircraft. Including the provision now will ensure the availability of testing as an option and that it is not overlooked when the part 36 standards are established.

Since there are no substantive changes to the requirements for these special flight authorizations, this rule would not have additional costs. The rule provides increased clarity for applicants and may reduce the number of follow-up requests for additional information between FAA and applicants.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure such proposals are given serious consideration. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As noted in the Regulatory Evaluation section, this final rule will not have additional costs. Therefore, this final rule would not have a significant economic impact on a substantial number of firms. Therefore, as provided in section 605(b), the head of FAA certifies that this rulemaking would not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

FAA has assessed the potential effect of this final rule and has determined that it will have a legitimate domestic objective, in that it will provide increased clarity and information to applicants as to the requirements for special flight authorizations to test supersonic aircraft. This rule will not operate in a manner as to affect foreign trade directly and, therefore, will have little or no effect on foreign trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such

a mandate is deemed to be a ''significant regulatory action.'' FAA currently uses an inflation-adjusted value of $155.0 million in lieu of $100 million.

This rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

This final rule contains the following amendments to the existing information collection requirements for OMB Control Number 2120–0005. As discussed in the NPRM, the original estimated annual number of responses (applications) was high, 20 annually, and the annual time burden (hours per response) was low, 14 hours. The changes to both the number of annual responses and the hours per request is not a result of any of the changes described in this rulemaking, but reflects a change in the understanding of both the number of applicants expected, and the requirements for environmental information between the original collection request and now. With limited PRA comment responses, FAA submits the following changes due to agency discretion/experience of this information collection to OMB for its review and approval.

Summary: Authorization to exceed Mach 1 over land.

Use: To authorize supersonic airplane test flights at approved sites.

Respondents (including number of): Three producers of civil supersonic airplanes.

Frequency: Three applications in a three-year period.

Annual Burden Estimate: One application annually.

FAA estimates fully burdened labor cost to be about $200 per hour, making the annual cost $200 × 40 = $8,000. This estimate is based on the assumption that an applicant will not need to develop a new environmental document for the Administrator's NEPA determination. FAA assumes that applicants would qualify to use airspace in U.S. military test ranges where supersonic flights already occur and a NEPA document already exists.

Individuals and organizations may send comments on the information collection requirement to the address listed in the **ADDRESSES** section at the beginning of this preamble by March 16, 2021. Comments also should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for FAA, New Executive Building, Room 10202, 725 17th Street, NW, Washington, DC 20503.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. FAA has determined that this rulemaking action updating the application process for special flight authorizations qualifies for the categorical exclusion identified in paragraph 5–6.6 and involves no extraordinary circumstances.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). FAA has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, International Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action will not have an effect on international regulatory cooperation.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This final rule is considered an E.O. 13771 deregulatory action. Details on the streamlining effects of this rule can be found in the rule's regulatory evaluation.

VII. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visit FAA's Regulations and Policies web page at *http://www.faa.gov/regulations_policies/* or
3. Access the Government Printing Office's web page at http://www.gpo.gov/fdsys/.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or

advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 91

Aircraft, Aviation safety, Noise control, Reporting and recordkeeping requirements.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for Part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

§ 91.817 [Amended]

■ 2. In § 91.817(a) and (b)(2), remove the words ''under appendix B of this part'' and add in their place the words ''in accordance with § 91.818''.

■ 3. Add § 91.818 to read as follows:

§ 91.818 Special flight authorization to exceed Mach 1.

For all civil aircraft, any operation that exceeds Mach 1 may be conducted only in accordance with a special flight authorization issued to an operator in accordance with the requirements of this section.

(a) *Application.* Application for a special flight authorization to exceed Mach 1 must be made to the FAA Office of Environment and Energy for consideration by the Administrator. Each application must include:

(1) The name of the operator;

(2) The number and model(s) of the aircraft to be operated;

(3) The number of proposed flights;

(4) The date range during which the flight(s) would be conducted;

(5) The time of day the flight(s) would be conducted. Proposed night operations may require further justification for their necessity;

(6) A description of the flight area requested by the applicant, including any environmental information required to be submitted pursuant to paragraph (c) of this section;

(7) All conditions and limitations on the flight(s) that will ensure that no measurable sonic boom overpressure will reach the surface outside of the proposed flight area; and

(8) The reason(s) that operation at a speed greater than Mach 1 is necessary. A special flight authorization to exceed Mach 1 may be granted only for operations that are intended to:

(i) Show compliance with airworthiness requirements;

(ii) Determine the sonic boom characteristics of an aircraft;

(iii) Establish a means of reducing or eliminating the effects of sonic boom, including flight profiles and special features of an aircraft;

(iv) Demonstrate the conditions and limitations under which speeds in excess of Mach 1 will not cause a measurable sonic boom overpressure to reach the surface; or

(v) Measure the noise characteristics of an aircraft to demonstrate compliance with noise requirements imposed under this chapter, or to determine the limits for operation in accordance with § 91.817(b).

(9) For any purpose listed in paragraph (a)(8) of this section, each applicant must indicate why its intended operation cannot be safely or properly accomplished over the ocean at a distance ensuring that no sonic boom overpressure reaches any land surface in the United States.

(b) *Operation outside a test area.* An applicant may apply for an authorization to conduct flights outside a test area under certain conditions and limitations upon a conservative showing that:

(1) Flight(s) within a test area have been conducted in accordance with an authorization issued for the purpose specified in paragraph (a)(8)(iv) of this section;

(2) The results of the flight test(s) required by paragraph (b)(1) of this section demonstrate that a speed in excess of Mach 1 does not cause a measurable sonic boom overpressure to reach the surface; and

(3) The conditions and limitations determined by the test(s) represent all foreseeable operating conditions and are effective on all flights conducted under an authorization.

(c) *Environmental findings.* (1) No special flight authorization will be granted if the Administrator finds that such action is necessary to protect or enhance the environment.

(2) The Administrator is required to consider the potential environmental impacts resulting from the issuance of an authorization for a particular flight area pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C 4321 *et seq.*), all applicable regulations implementing NEPA, and related Executive orders and guidance. Accordingly, each applicant must provide information that sufficiently describes the potential environmental impact of any flight in excess of Mach 1, including the effect of a sonic boom reaching the surface in the proposed flight area, to enable the FAA to determine whether such impacts are significant within the meaning of NEPA.

(d) *Issuance.* An authorization to operate a civil aircraft in excess of Mach 1 may be issued only after an applicant has submitted the information described in this section and the Administrator has taken the required action regarding the environmental findings described in paragraph (c) of this section.

(e) *Duration.* (1) An authorization to exceed Mach 1 will be granted for the time the Administrator determines necessary to conduct the flights for the described purposes.

(2) An authorization to exceed Mach 1 is effective until it expires or is surrendered.

(3) An authorization to exceed Mach 1 may be terminated, suspended, or amended by the Administrator at any time the Administrator finds that such action is necessary to protect the environment.

(4) The holder of an authorization to exceed Mach 1 may request reconsideration of a termination, amendment, or suspension issued under paragraph (e)(3) of this section within 30 days of notice of the action. Failure to request reconsideration and provide information why the Administrator's action is not appropriate will result in permanent termination of the authorization.

(5) Findings made by and actions taken by the Administrator under this section do not affect any certificate issued under chapter 447 of Title 49 of the United States Code.

Appendix B to Part 91—[Removed and Reserved]

■ 4. Remove and reserve appendix B to part 91.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f), 44701(a)(5), and 44715, on January 4, 2021.

Steve Dickson,

Administrator.

[FR Doc. 2021–00113 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1141

[Docket No. FDA–2019–N–3065]

RIN 0910–AI39

Tobacco Products; Required Warnings for Cigarette Packages and Advertisements; Delayed Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; delay of effective date.

SUMMARY: As required by an order issued by the U.S. District Court for the Eastern District of Texas, this action delays the effective date of the final rule (''Tobacco Products; Required Warnings for Cigarette Packages and Advertisements''), which published on March 18, 2020. The new effective date is January 14, 2022.

DATES: The effective date of the rule amending 21 CFR part 1141 published at 85 FR 15638, March 18, 2020, is delayed until January 14, 2022.

FOR FURTHER INFORMATION CONTACT: Courtney Smith, Office of Regulations, Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993–0002, 1–877–287–1371, email: *AskCTPRegulations@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 18, 2020, the Food and Drug Administration (FDA or Agency) issued a final rule establishing new cigarette health warnings for cigarette packages and advertisements. The final rule implements a provision of the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) (Pub. L. 111–31) that requires FDA to issue regulations requiring color graphics depicting the negative health consequences of smoking to accompany new textual warning label statements. The Tobacco Control Act amends the Federal Cigarette Labeling and Advertising Act of 1965 (Pub. L. 89–92) to require each cigarette package and advertisement to bear one of the new required warnings. The final rule specifies the 11 new textual warning label statements and accompanying color graphics. Pursuant to section 201(b) of the Tobacco Control Act, the rule was published with an effective date of June 18, 2021, 15 months after the date of publication of the final rule.

On April 3, 2020, the final rule was challenged in the U.S. District Court for the Eastern District of Texas.[1] On May 8, 2020, the Court granted a joint motion to govern proceedings in that case and postpone the effective date of the final rule by 120 days.[2] On December 2, 2020, the same Court granted a new motion by Plaintiffs in the same case to postpone the effective date of the final rule by an additional 90 days.[3] The new effective date of the final rule is January 14, 2022. Pursuant to the court order, any obligation to comply with a deadline tied to the effective date of the final rule is similarly postponed, and those obligations and deadlines are now tied to the postponed effective date.

To the extent that 5 U.S.C. 553 applies to this action, the Agency's implementation of this action without opportunity for public comment, effective immediately upon publication today in the **Federal Register**, is based on the good cause exception in 5 U.S.C. 553(b)(B). Seeking public comment is impracticable, unnecessary, and contrary to the public interest. The 90-day postponement of the effective date, until January 14, 2022, is required by court order in accordance with the court's authority to postpone a rule's effective date pending judicial review (5 U.S.C. 705). Seeking prior public comment on this postponement would have been impracticable, as well as contrary to the public interest in the orderly issue and implementation of regulations.

Dated: January 6, 2021.

Stephen M. Hahn,

Commissioner of Food and Drugs.

Dated: January 8, 2021.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–00703 Filed 1–14–21; 8:45 am]

BILLING CODE 4164–01–P

[1] *R.J. Reynolds Tobacco Co. et al.* v. *United States Food and Drug Administration et al.,* No. 6:20–cv–00176 (E.D. Tex. filed April 3, 2020).

[2] *R.J. Reynolds Tobacco Co. et al.,* No. 6:20–cv–00176 (E.D. Tex. May 8, 2020) (order granting joint motion and establishing schedule), Doc. No. 33.

[3] *R.J. Reynolds Tobacco Co. et al.,* No. 6:20–cv–00176 (E.D. Tex. May 8, 2020) (order granting Plaintiffs' motion and postponing effective date), Doc. No. 80.

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 585

Hong Kong-Related Sanctions Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is adding regulations to implement a July 14, 2020, Hong Kong-related Executive order. OFAC intends to supplement these regulations with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance, general licenses, and statements of licensing policy.

DATES: This rule is effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website (*www.treasury.gov/ofac*).

Background

On July 14, 2020, the President, invoking the authority of, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (IEEPA), issued Executive Order (E.O.) 13936 of July 14, 2020, ''The President's Executive Order on Hong Kong Normalization'' (85 FR 43413, July 17, 2020).

In E.O. 13936, the President determined that, pursuant to section 202 of the United States-Hong Kong Policy Act of 1992, the Special Administrative Region of Hong Kong (Hong Kong) is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China (PRC or China) under the particular United States laws and provisions thereof set out in E.O. 13936. The President stated that in late May 2020, the National People's Congress of China announced its intention to unilaterally and arbitrarily impose national security legislation on Hong Kong. He indicated that this announcement was China's latest in a series of actions that have

increasingly denied autonomy and freedoms that China promised to the people of Hong Kong under the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration). The President detailed that China has since imposed national security legislation on Hong Kong, under which, *inter alia,* the people of Hong Kong may face life in prison for what China considers to be acts of secession or subversion of state power, and the right to trial by jury may be suspended. The President therefore determined that the situation with respect to Hong Kong constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States and declared a national emergency to deal with that threat.

OFAC is issuing the Hong Kong-Related Sanctions Regulations, 31 CFR part 585 (the ''Regulations''), to implement E.O. 13936, pursuant to authorities delegated to the Secretary of the Treasury in E.O. 13936. A copy of E.O. 13936 appears in appendix A to this part.

The Regulations are being published in abbreviated form at this time for the purpose of providing immediate guidance to the public. OFAC intends to supplement this part 585 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance, general licenses, and statements of licensing policy. The appendix to the Regulations will be removed when OFAC supplements this part with a more comprehensive set of regulations.

Public Participation

Because the Regulations involve a foreign affairs function, the provisions of E.O. 12866 of September 30, 1993, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), and the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, as well as the provisions of E.O. 13771 of January 30, 2017, ''Reducing Regulation and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017), are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the Regulations are contained in 31 CFR part 501 (the ''Reporting, Procedures and Penalties Regulations''). Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects in 31 CFR Part 585

Administrative practice and procedure, Banks, banking, Blocking of assets, Foreign trade, Hong Kong, Penalties, Reporting and recordkeeping requirements, Sanctions, Services.

For the reasons set forth in the preamble, the Department of the Treasury's Office of Foreign Assets Control adds part 585 to 31 CFR chapter V to read as follows:

PART 585—HONG KONG-RELATED SANCTIONS REGULATIONS

Subpart A—Relation of This Part to Other Laws and Regulations

Sec.
585.101 Relation of this part to other laws and regulations.

Subpart B—Prohibitions

585.201 Prohibited transactions.
585.202 Effect of transfers violating the provisions of this part.
585.203 Holding of funds in interest-bearing accounts; investment and reinvestment.
585.204 Expenses of maintaining blocked tangible property; liquidation of blocked property.
585.205 Exempt transactions.

Subpart C—General Definitions

585.300 Applicability of definitions.
585.301 Blocked account; blocked property.
585.302 Effective date.
585.303 Entity.
585.304 Financial, material, or technological support.
585.305 [Reserved]
585.306 Interest.
585.307 Licenses; general and specific.
585.308 OFAC.
585.309 Person.
585.310 Property; property interest.
585.311 Transfer.
585.312 United States.
585.313 United States person; U.S. person.
585.314 U.S. financial institution.

Subpart D—Interpretations

585.401 [Reserved]
585.402 Effect of amendment.
585.403 Termination and acquisition of an interest in blocked property.
585.404 Transactions ordinarily incident to a licensed transaction.
585.405 Setoffs prohibited.
585.406 Entities owned by one or more persons whose property and interests in property are blocked.

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

585.501 General and specific licensing procedures.
585.502 [Reserved]
585.503 Exclusion from licenses.
585.504 Payments and transfers to blocked accounts in U.S. financial institutions.
585.505 Entries in certain accounts for normal service charges.
585.506 Provision of certain legal services.
585.507 Payments for legal services from funds originating outside the United States.
585.508 Emergency medical services.
585.509 Official business of the United States Government.

Subpart F—Reports

585.601 Records and reports.

Subpart G—Penalties and Findings of Violation

585.701 Penalties and Findings of Violation.

Subpart H—Procedures

585.801 Procedures.
585.802 Delegation of certain authorities of the Secretary of the Treasury.

Subpart I—Paperwork Reduction Act

585.901 Paperwork Reduction Act notice.
Appendix A to Part 585—Executive Order 13936 of July 14, 2020

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); E.O. 13936, 85 FR 43413, July 17, 2020.

Subpart A—Relation of This Part to Other Laws and Regulations

§ 585.101 Relation of this part to other laws and regulations.

This part is separate from, and independent of, the other parts of this chapter, with the exception of part 501 of this chapter, the recordkeeping and reporting requirements and license application and other procedures of which apply to this part. Actions taken pursuant to part 501 of this chapter with respect to the prohibitions contained in this part are considered actions taken pursuant to this part. Differing foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter. No license or authorization contained in or issued pursuant to those other parts authorizes any transaction prohibited by this part. No license or authorization contained in or issued pursuant to any other provision of law or regulation authorizes any transaction prohibited by

this part. No license or authorization contained in or issued pursuant to this part relieves the involved parties from complying with any other applicable laws or regulations.

Note 1 to § 585.101. This part has been published in abbreviated form for the purpose of providing immediate guidance to the public. OFAC intends to supplement this part with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance, general licenses, and statements of licensing policy.

Subpart B—Prohibitions

§ 585.201 Prohibited transactions.

(a) All transactions prohibited pursuant to Executive Order (E.O.) 13936 of July 14, 2020 are prohibited pursuant to this part.

(b) All transactions prohibited pursuant to any further Executive orders issued pursuant to the national emergency declared in E.O. 13936 are prohibited pursuant to this part.

Note 1 to § 585.201. The names of persons designated or identified as blocked pursuant to E.O. 13936, or listed in, designated, or identified as blocked pursuant to any further Executive orders issued pursuant to the national emergency declared in E.O. 13936, whose property and interests in property therefore are blocked pursuant to this section, are published in the **Federal Register** and incorporated into OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) using the following identifier formulation: ''[HK–E.O.[E.O. number pursuant to which the person's property and interests in property are blocked]].'' The SDN List is accessible through the following page on OFAC's website: *www.treasury.gov/sdn.* Additional information pertaining to the SDN List can be found in appendix A to this chapter. *See* § 585.406 concerning entities that may not be listed on the SDN List but whose property and interests in property are nevertheless blocked pursuant to this section.

Note 2 to § 585.201. The International Emergency Economic Powers Act (50 U.S.C. 1701–1706), in Section 203 (50 U.S.C. 1702), authorizes the blocking of property and interests in property of a person during the pendency of an investigation. The names of persons whose property and interests in property are blocked pending investigation pursuant to this section also are published in the **Federal Register** and incorporated into the SDN List using the following identifier formulation: for E.O. 13936 and any further Executive orders issued pursuant to the national emergency declared in E.O. 13936: ''[BPI–HK–E.O.[E.O. number pursuant to which the person's property and interests in property are blocked pending investigation]]''.

Note 3 to § 585.201. Sections 501.806 and 501.807 of this chapter describe the procedures to be followed by persons seeking, respectively, the unblocking of funds that they believe were blocked due to mistaken identity, or administrative reconsideration of their status as persons whose property and interests in property are blocked pursuant to this section.

§ 585.202 Effect of transfers violating the provisions of this part.

(a) Any transfer after the effective date that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interest in property blocked pursuant to § 585.201, is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or interest in property.

(b) No transfer before the effective date shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or any interest in, any property or interest in property blocked pursuant to § 585.201, unless the person who holds or maintains such property, prior to that date, had written notice of the transfer or by any written evidence had recognized such transfer.

(c) Unless otherwise provided, a license or other authorization issued by OFAC before, during, or after a transfer shall validate such transfer or make it enforceable to the same extent that it would be valid or enforceable but for the provisions of this part and any regulation, order, directive, ruling, instruction, or license issued pursuant to this part.

(d) Transfers of property that otherwise would be null and void or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void or unenforceable as to any person with whom such property is or was held or maintained (and as to such person only) in cases in which such person is able to establish to the satisfaction of OFAC each of the following:

(1) Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property is or was held or maintained (and as to such person only);

(2) The person with whom such property is or was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization issued pursuant to this part and was not so licensed or authorized, or, if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained; and

(3) The person with whom such property is or was held or maintained filed with OFAC a report setting forth in full the circumstances relating to such transfer promptly upon discovery that:

(i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license, or other directive or authorization issued pursuant to this part;

(ii) Such transfer was not licensed or authorized by OFAC; or

(iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained.

(e) The filing of a report in accordance with the provisions of paragraph (d)(3) of this section shall not be deemed evidence that the terms of paragraphs (d)(1) and (2) of this section have been satisfied.

(f) Unless licensed pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property or interest in property blocked pursuant to § 585.201.

§ 585.203 Holding of funds in interest-bearing accounts; investment and reinvestment.

(a) Except as provided in paragraph (e) or (f) of this section, or as otherwise directed or authorized by OFAC, any U.S. person holding funds, such as currency, bank deposits, or liquidated financial obligations, subject to § 585.201 shall hold or place such funds in a blocked interest-bearing account located in the United States.

(b)(1) For purposes of this section, the term *blocked interest-bearing account* means a blocked account:

(i) In a federally insured U.S. bank, thrift institution, or credit union, provided the funds are earning interest at rates that are commercially reasonable; or

(ii) With a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), provided the funds are invested in a money market fund or in U.S. Treasury bills.

(2) Funds held or placed in a blocked account pursuant to paragraph (a) of this section may not be invested in instruments the maturity of which exceeds 180 days.

(c) For purposes of this section, a rate is commercially reasonable if it is the rate currently offered to other depositors on deposits or instruments of comparable size and maturity.

(d) For purposes of this section, if interest is credited to a separate blocked account or subaccount, the name of the account party on each account must be the same.

(e) Blocked funds held in instruments the maturity of which exceeds 180 days at the time the funds become subject to § 585.201 may continue to be held until maturity in the original instrument, provided any interest, earnings, or other proceeds derived therefrom are paid into a blocked interest-bearing account in accordance with paragraph (a) or (f) of this section.

(f) Blocked funds held in accounts or instruments outside the United States at the time the funds become subject to § 585.201 may continue to be held in the same type of accounts or instruments, provided the funds earn interest at rates that are commercially reasonable.

(g) This section does not create an affirmative obligation for the holder of blocked tangible property, such as real or personal property, or of other blocked property, such as debt or equity securities, to sell or liquidate such property. However, OFAC may issue licenses permitting or directing such sales or liquidation in appropriate cases.

(h) Funds subject to this section may not be held, invested, or reinvested in a manner that provides financial or economic benefit or access to any person whose property and interests in property are blocked pursuant to § 585.201, nor may their holder cooperate in or facilitate the pledging or other attempted use as collateral of blocked funds or other assets.

§ 585.204 Expenses of maintaining blocked tangible property; liquidation of blocked property.

(a) Except as otherwise authorized, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or contract entered into or any license or permit granted prior to the effective date, all expenses incident to the maintenance of tangible property blocked pursuant to § 585.201 shall be the responsibility of the owners or operators of such property, which expenses shall not be met from blocked funds.

(b) Property blocked pursuant to § 585.201 may, in the discretion of OFAC, be sold or liquidated and the net proceeds placed in a blocked interest-bearing account in the name of the owner of the property.

§ 585.205 Exempt transactions.

(a) *Personal communications.* The prohibitions contained in this part do not apply to any postal, telegraphic, telephonic, or other personal communication that does not involve the transfer of anything of value.

(b) *Official business.* The prohibitions contained in § 585.201(a) do not apply to transactions for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof.

Note 1 to paragraph (b). *See* § 585.509 for a general license authorizing transactions for the conduct of the official business of the United States Government not otherwise exempt.

Subpart C—General Definitions

§ 585.300 Applicability of definitions.

The definitions in this subpart apply throughout the entire part.

§ 585.301 Blocked account; blocked property.

The terms *blocked account* and *blocked property* shall mean any account or property subject to the prohibitions in § 585.201 held in the name of a person whose property and interests in property are blocked pursuant to § 585.201, or in which such person has an interest, and with respect to which payments, transfers, exportations, withdrawals, or other dealings may not be made or effected except pursuant to a license or other authorization from OFAC expressly authorizing such action.

Note 1 to § 585.301. *See* § 585.406 concerning the blocked status of property and interests in property of an entity that is directly or indirectly owned, whether individually or in the aggregate, 50 percent or more by one or more persons whose property and interests in property are blocked pursuant to § 585.201.

§ 585.302 Effective date.

(a) The term *effective date* refers to the effective date of the applicable prohibitions and directives contained in this part, and with respect to a person whose property and interests in property are blocked pursuant to § 585.201, the earlier of the date of actual or constructive notice that such person's property and interests in property are blocked.

(b) For the purposes of this section, c*onstructive notice* is the date that a notice of the blocking of the relevant person's property and interests in property is published in the **Federal Register**.

§ 585.303 Entity.

The term *entity* means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization.

§ 585.304 Financial, material, or technological support.

The term *financial, material, or technological support* means any property, tangible or intangible, including currency, financial instruments, securities, or any other transmission of value; weapons or related materiel; chemical or biological agents; explosives; false documentation or identification; communications equipment; computers; electronic or other devices or equipment; technologies; lodging; safe houses; facilities; vehicles or other means of transportation; or goods. ''Technologies'' as used in this definition means specific information necessary for the development, production, or use of a product, including related technical data such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals, or other recorded instructions.

§ 585.305 [Reserved]

§ 585.306 Interest.

Except as otherwise provided in this part, the term *interest,* when used with respect to property (*e.g.,* ''an interest in property''), means an interest of any nature whatsoever, direct or indirect.

§ 585.307 Licenses; general and specific.

(a) Except as otherwise provided in this part, the term *license* means any license or authorization contained in or issued pursuant to this part.

(b) The term *general license* means any license or authorization the terms of which are set forth in subpart E of this part or made available on OFAC's website: *www.treasury.gov/ofac.*

(c) The term *specific license* means any license or authorization issued pursuant to this part but not set forth in subpart E of this part or made available on OFAC's website: *www.treasury.gov/ofac.*

Note 1 to § 585.307. *See* § 501.801 of this chapter on licensing procedures.

§ 585.308 OFAC.

The term *OFAC* means the Department of the Treasury's Office of Foreign Assets Control.

§ 585.309 Person.

The term *person* means an individual or entity.

§ 585.310 Property; property interest.

The terms *property* and *property interest* include money, checks, drafts, bullion, bank deposits, savings

accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership, or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.

§ 585.311 Transfer.

The term *transfer* means any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property. Without limitation on the foregoing, it shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the making of any payment; the setting off of any obligation or credit; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition; the exercise of any power of appointment, power of attorney, or other power; or the acquisition, disposition, transportation, importation, exportation, or withdrawal of any security.

§ 585.312 United States.

The term *United States* means the United States, its territories and possessions, and all areas under the jurisdiction or authority thereof.

§ 585.313 United States person; U.S. person.

The term *United States person* or *U.S. person* means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

§ 585.314 U.S. financial institution.

The term *U.S. financial institution* means any U.S. entity (including its foreign branches) that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or other extensions of credit, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent. It includes depository institutions, banks, savings banks, trust companies, securities brokers and dealers, futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans, and U.S. holding companies, U.S. affiliates, or U.S. subsidiaries of any of the foregoing. This term includes those branches, offices, and agencies of foreign financial institutions that are located in the United States, but not such institutions' foreign branches, offices, or agencies.

Subpart D—Interpretations

§ 585.401 [Reserved]

§ 585.402 Effect of amendment.

Unless otherwise specifically provided, any amendment, modification, or revocation of any provision in or appendix to this part or chapter or of any order, regulation, ruling, instruction, or license issued by OFAC does not affect any act done or omitted, or any civil or criminal proceeding commenced or pending, prior to such amendment, modification, or revocation. All penalties, forfeitures, and liabilities under any such order, regulation, ruling, instruction, or license continue and may be enforced as if such amendment, modification, or revocation had not been made.

§ 585.403 Termination and acquisition of an interest in blocked property.

(a) Whenever a transaction licensed or authorized by or pursuant to this part results in the transfer of property (including any property interest) away from a person whose property and interests in property are blocked pursuant to § 585.201, such property shall no longer be deemed to be property blocked pursuant to § 585.201, unless there exists in the property another interest that is blocked pursuant to § 585.201, the transfer of which has not been effected pursuant to license or other authorization.

(b) Unless otherwise specifically provided in a license or authorization issued pursuant to this part, if property (including any property interest) is transferred or attempted to be transferred to a person whose property and interests in property are blocked pursuant to § 585.201, such property shall be deemed to be property in which such person has an interest and therefore blocked.

§ 585.404 Transactions ordinarily incident to a licensed transaction.

Any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized, except:

(a) An ordinarily incident transaction, not explicitly authorized within the terms of the license, by or with a person whose property and interests in property are blocked pursuant to § 585.201; or

(b) An ordinarily incident transaction, not explicitly authorized within the terms of the license, involving a debit to a blocked account or a transfer of blocked property.

§ 585.405 Setoffs prohibited.

A setoff against blocked property (including a blocked account), whether by a U.S. bank or other U.S. person, is a prohibited transfer under § 585.201 if effected after the effective date.

§ 585.406 Entities owned by one or more persons whose property and interests in property are blocked.

Persons whose property and interests in property are blocked pursuant to § 585.201 have an interest in all property and interests in property of an entity in which such persons directly or indirectly own, whether individually or in the aggregate, a 50 percent or greater interest. The property and interests in property of such an entity, therefore, are blocked, and such an entity is a person whose property and interests in property are blocked pursuant to § 585.201, regardless of whether the name of the entity is incorporated into

OFAC's Specially Designated Nationals and Blocked Persons List (SDN List).

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

§ 585.501 General and specific licensing procedures.

For provisions relating to licensing procedures, *see* part 501, subpart E, of this chapter. Licensing actions taken pursuant to part 501 of this chapter with respect to the prohibitions contained in this part are considered actions taken pursuant to this part. General licenses and statements of licensing policy relating to this part also may be available through the Hong Kong-Related Sanctions page on OFAC's website: *www.treasury.gov/ofac.*

§ 585.502 [Reserved]

§ 585.503 Exclusion from licenses.

OFAC reserves the right to exclude any person, property, transaction, or class thereof from the operation of any license or from the privileges conferred by any license. OFAC also reserves the right to restrict the applicability of any license to particular persons, property, transactions, or classes thereof. Such actions are binding upon actual or constructive notice of the exclusions or restrictions.

§ 585.504 Payments and transfers to blocked accounts in U.S. financial institutions.

Any payment of funds or transfer of credit in which a person whose property and interests in property are blocked pursuant to § 585.201 has any interest that comes within the possession or control of a U.S. financial institution must be blocked in an account on the books of that financial institution. A transfer of funds or credit by a U.S. financial institution between blocked accounts in its branches or offices is authorized, provided that no transfer is made from an account within the United States to an account held outside the United States, and further provided that a transfer from a blocked account may be made only to another blocked account held in the same name.

Note 1 to § 585.504. *See* § 501.603 of this chapter for mandatory reporting requirements regarding financial transfers. *See also* § 585.203 concerning the obligation to hold blocked funds in interest-bearing accounts.

§ 585.505 Entries in certain accounts for normal service charges.

(a) A U.S. financial institution is authorized to debit any blocked account held at that financial institution in payment or reimbursement for normal service charges owed it by the owner of that blocked account.

(b) As used in this section, the term *normal service charges* shall include charges in payment or reimbursement for interest due; cable, telegraph, internet, or telephone charges; postage costs; custody fees; small adjustment charges to correct bookkeeping errors; and, but not by way of limitation, minimum balance charges, notary and protest fees, and charges for reference books, photocopies, credit reports, transcripts of statements, registered mail, insurance, stationery and supplies, and other similar items.

§ 585.506 Provision of certain legal services.

(a) The provision of the following legal services to or on behalf of persons whose property and interests in property are blocked pursuant to § 585.201 is authorized, provided that any receipt of payment of professional fees and reimbursement of incurred expenses must be authorized pursuant to § 585.507, which authorizes certain payments for legal services from funds originating outside the United States; via specific license; or otherwise pursuant to this part:

(1) Provision of legal advice and counseling on the requirements of and compliance with the laws of the United States or any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part;

(2) Representation of persons named as defendants in or otherwise made parties to legal, arbitration, or administrative proceedings before any U.S. federal, state, or local court or agency;

(3) Initiation and conduct of legal, arbitration, or administrative proceedings before any U.S. federal, state, or local court or agency;

(4) Representation of persons before any U.S. federal, state, or local court or agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons; and

(5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.

(b) The provision of any other legal services to or on behalf of persons whose property and interests in property are blocked pursuant to § 585.201, not otherwise authorized in this part, requires the issuance of a specific license.

(c) U.S. persons do not need to obtain specific authorization to provide related services, such as making filings and providing other administrative services, that are ordinarily incident to the provision of services authorized by this section. Additionally, U.S. persons who provide services authorized by this section do not need to obtain specific authorization to contract for related services that are ordinarily incident to the provision of those legal services, such as those provided by private investigators or expert witnesses, or to pay for such services. *See* § 585.404.

(d) Entry into a settlement agreement or the enforcement of any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in property blocked pursuant to § 585.201 is prohibited unless licensed pursuant to this part.

Note 1 to § 585.506. Pursuant to part 501, subpart E, of this chapter, U.S. persons seeking administrative reconsideration or judicial review of their designation or the blocking of their property and interests in property may apply for a specific license from OFAC to authorize the release of certain blocked funds for the payment of professional fees and reimbursement of incurred expenses for the provision of such legal services where alternative funding sources are not available.

§ 585.507 Payments for legal services from funds originating outside the United States.

(a) *Professional fees and incurred expenses.* (1) Receipt of payment of professional fees and reimbursement of incurred expenses for the provision of legal services authorized pursuant to § 585.506(a) to or on behalf of any person whose property and interests in property are blocked pursuant to § 585.201 is authorized from funds originating outside the United States, provided that the funds do not originate from:

(i) A source within the United States;

(ii) Any source, wherever located, within the possession or control of a U.S. person; or

(iii) Any individual or entity, other than the person on whose behalf the legal services authorized pursuant to § 585.506(a) are to be provided, whose property and interests in property are blocked pursuant to any part of this chapter or any Executive order or statute.

(2) Nothing in this paragraph (a) authorizes payments for legal services using funds in which any other person whose property and interests in property are blocked pursuant to § 585.201, any other part of this chapter, or any Executive order or statute has an interest.

(b) *Reports.* (1) U.S. persons who receive payments pursuant to paragraph (a) of this section must submit annual reports no later than 30 days following the end of the calendar year during which the payments were received providing information on the funds received. Such reports shall specify:

(i) The individual or entity from whom the funds originated and the amount of funds received; and

(ii) *If applicable:*

(A) The names of any individuals or entities providing related services to the U.S. person receiving payment in connection with authorized legal services, such as private investigators or expert witnesses;

(B) A general description of the services provided; and

(C) The amount of funds paid in connection with such services.

(2) The reports, which must reference this section, are to be submitted to OFAC using one of the following methods:

(i) *Email (preferred method): OFAC.Regulations.Reports@treasury.gov;* or

(ii) *U.S. mail:* OFAC Regulations Reports, Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Freedman's Bank Building, Washington, DC 20220.

§ 585.508 Emergency medical services.

The provision and receipt of nonscheduled emergency medical services that are prohibited by this part are authorized.

§ 585.509 Official business of the United States Government.

All transactions prohibited by this part that are for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof are authorized.

Subpart F—Reports

§ 585.601 Records and reports.

For provisions relating to required records and reports, see part 501, subpart C, of this chapter. Recordkeeping and reporting requirements imposed by part 501 of this chapter with respect to the prohibitions contained in this part are considered requirements arising pursuant to this part.

Subpart G—Penalties and Findings of Violation

§ 585.701 Penalties and Findings of Violation.

(a) The penalties available under section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (IEEPA), as adjusted annually pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note) or, in the case of criminal violations, as adjusted pursuant to 18 U.S.C. 3571, are applicable to violations of the provisions of this part.

(b) OFAC has the authority, pursuant to IEEPA, to issue Pre-Penalty Notices, Penalty Notices, and Findings of Violation; impose monetary penalties; engage in settlement discussions and enter into settlements; refer matters to the United States Department of Justice for administrative collection; and, in appropriate circumstances, refer matters to appropriate law enforcement agencies for criminal investigation and/or prosecution. For more information, see appendix A to part 501 of this chapter, which provides a general framework for the enforcement of all economic sanctions programs administered by OFAC, including enforcement-related definitions, types of responses to apparent violations, general factors affecting administrative actions, civil penalties for failure to comply with a requirement to furnish information or keep records, and other general civil penalties information.

Subpart H—Procedures

§ 585.801 Procedures.

For license application procedures and procedures relating to amendments, modifications, or revocations of licenses; administrative decisions; rulemaking; and requests for documents pursuant to the Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a), see part 501, subpart E, of this chapter.

§ 585.802 Delegation of certain authorities of the Secretary of the Treasury.

Any action that the Secretary of the Treasury is authorized to take pursuant to Executive Order 13936, and any further Executive orders issued pursuant to the national emergency declared therein, may be taken by the Director of OFAC or by any other person to whom the Secretary of the Treasury has delegated authority so to act.

Subpart I—Paperwork Reduction Act

§ 585.901 Paperwork Reduction Act notice.

For approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) of information collections relating to recordkeeping and reporting requirements, licensing procedures, and other procedures, see § 501.901 of this chapter. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

Appendix A to Part 585—Executive Order 13936 of July 14, 2020

Executive Order 13936 of July 14, 2020

The President's Executive Order on Hong Kong Normalization

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the United States-Hong Kong Policy Act of 1992 (Pub. L. 102–393), the Hong Kong Human Rights and Democracy Act of 2019 (Pub. L. 116–76), the Hong Kong Autonomy Act of 2020, signed into law July 14, 2020, the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, determine, pursuant to section 202 of the United States-Hong Kong Policy Act of 1992, that the Special Administrative Region of Hong Kong (Hong Kong) is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China (PRC or China) under the particular United States laws and provisions thereof set out in this order. In late May 2020, the National People's Congress of China announced its intention to unilaterally and arbitrarily impose national security legislation on Hong Kong. This announcement was merely China's latest salvo in a series of actions that have increasingly denied autonomy and freedoms that China promised to the people of Hong Kong under the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration). As a result, on May 27, 2020, the Secretary of State announced that the PRC had fundamentally undermined Hong Kong's autonomy and certified and reported to the Congress, pursuant to sections 205 and 301 of the United States-Hong Kong Policy Act of 1992, as amended, respectively, that Hong Kong no longer warrants treatment under United States law in the same manner as United States laws were applied to Hong Kong before July 1, 1997. On May 29, 2020, I directed the heads of executive departments and agencies (agencies) to begin the process of eliminating policy exemptions under United States law that give Hong Kong differential treatment in relation to China.

China has since followed through on its threat to impose national security legislation on Hong Kong. Under this law, the people of Hong Kong may face life in prison for what China considers to be acts of secession or subversion of state power—which may include acts like last year's widespread anti-government protests. The right to trial by jury

may be suspended. Proceedings may be conducted in secret. China has given itself broad power to initiate and control the prosecutions of the people of Hong Kong through the new Office for Safeguarding National Security. At the same time, the law allows foreigners to be expelled if China merely suspects them of violating the law, potentially making it harder for journalists, human rights organizations, and other outside groups to hold the PRC accountable for its treatment of the people of Hong Kong.

I therefore determine that the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States. I hereby declare a national emergency with respect to that threat.

In light of the foregoing, I hereby determine and order:

Section 1. It shall be the policy of the United States to suspend or eliminate different and preferential treatment for Hong Kong to the extent permitted by law and in the national security, foreign policy, and economic interest of the United States.

Sec. 2. Pursuant to section 202 of the United States-Hong Kong Policy Act of 1992 (22 U.S.C. 5722), I hereby suspend the application of section 201(a) of the United States-Hong Kong Policy Act of 1992, as amended (22 U.S.C. 5721(a)), to the following statutes:

(a) section 103 of the Immigration Act of 1990 (8 U.S.C. 1152 note);

(b) sections 203(c), 212(l), and 221(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1153(c), 1182(l), and 1201(c), respectively);

(c) the Arms Export Control Act (22 U.S.C. 2751 *et seq.*);

(d) section 721(m) of the Defense Production Act of 1950, as amended (50 U.S.C. 4565(m));

(e) the Export Control Reform Act of 2018 (50 U.S.C. 4801 *et seq.*); and

(f) section 1304 of title 19, United States Code.

Sec. 3. Within 15 days of the date of this order, the heads of agencies shall commence all appropriate actions to further the purposes of this order, consistent with applicable law, including, to:

(a) Amend any regulations implementing those provisions specified in section 2 of this order, and, consistent with applicable law and executive orders, under IEEPA, which provide different treatment for Hong Kong as compared to China;

(b) amend the regulation at 8 CFR 212.4(i) to eliminate the preference for Hong Kong passport holders as compared to PRC passport holders;

(c) revoke license exceptions for exports to Hong Kong, reexports to Hong Kong, and transfers (in-country) within Hong Kong of items subject to the Export Administration Regulations, 15 CFR parts 730–774, that provide differential treatment compared to those license exceptions applicable to exports to China, reexports to China, and transfers (in-country) within China;

(d) consistent with section 902(b)(2) of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Pub. L. 101–246), terminate the export licensing suspensions under section 902(a)(3) of such Act insofar as such suspensions apply to exports of defense articles to Hong Kong persons who are physically located outside of Hong Kong and the PRC and who were authorized to receive defense articles prior to the date of this order;

(e) give notice of intent to suspend the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders (TIAS 98–121);

(f) give notice of intent to terminate the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons (TIAS 99–418);

(g) take steps to end the provision of training to members of the Hong Kong Police Force or other Hong Kong security services at the Department of State's International Law Enforcement Academies;

(h) suspend continued cooperation undertaken consistent with the now-expired Protocol Between the U.S. Geological Survey of the Department of the Interior of the United States of America and Institute of Space and Earth Information Science of the Chinese University of Hong Kong Concerning Scientific and Technical Cooperation in Earth Sciences (TIAS 09–1109);

(i) take steps to terminate the Fulbright exchange program with regard to China and Hong Kong with respect to future exchanges for participants traveling both from and to China or Hong Kong;

(j) give notice of intent to terminate the agreement for the reciprocal exemption with respect to taxes on income from the international operation of ships effected by the Exchange of Notes Between the Government of the United States of America and the Government of Hong Kong (TIAS 11892);

(k) reallocate admissions within the refugee ceiling set by the annual Presidential Determination to residents of Hong Kong based on humanitarian concerns, to the extent feasible and consistent with applicable law; and

(l) propose for my consideration any further actions deemed necessary and prudent to end special conditions and preferential treatment for Hong Kong.

Sec. 4. All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(a) Any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, or the Secretary of the Treasury, in consultation with the Secretary of State:

(i) To be or have been involved, directly or indirectly, in the coercing, arresting, detaining, or imprisoning of individuals under the authority of, or to be or have been responsible for or involved in developing, adopting, or implementing, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region;

(ii) to be responsible for or complicit in, or to have engaged in, directly or indirectly, any of the following:

(A) Actions or policies that undermine democratic processes or institutions in Hong Kong;

(B) actions or policies that threaten the peace, security, stability, or autonomy of Hong Kong;

(C) censorship or other activities with respect to Hong Kong that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Hong Kong, or that limit access to free and independent print, online or broadcast media; or

(D) the extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong or other gross violations of internationally recognized human rights or serious human rights abuse in Hong Kong;

(iii) to be or have been a leader or official of:

(A) An entity, including any government entity, that has engaged in, or whose members have engaged in, any of the activities described in subsections (a)(i), (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C) of this section; or

(B) an entity whose property and interests in property are blocked pursuant to this order.

(iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this section;

(v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this section; or

(vi) to be a member of the board of directors or a senior executive officer of any person whose property and interests in property are blocked pursuant to this section.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

Sec. 5. I hereby determine that the making of donations of the types of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 4 of this order would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by section 4 of this order.

Sec. 6. The prohibitions in section 4(a) of this order include:

(a) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 4(a) of this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 7. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 4(a) of this order, as well as immediate family members of such aliens, or aliens determined by the Secretary of State to be employed by, or acting as an agent of, such aliens, would be detrimental to the interest of the United States, and the entry of such persons into the United States, as immigrants and nonimmigrants, is hereby suspended. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions). The Secretary of State shall have the responsibility of implementing this section pursuant to such conditions and procedures as the Secretary has established or may establish pursuant to Proclamation 8693.

Sec. 8. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 9. Nothing in this order shall prohibit transactions for the conduct of the official business of the Federal Government by employees, grantees, or contractors thereof.

Sec. 10. For the purposes of this order:

(a) The term ''person'' means an individual or entity;

(b) the term ''entity'' means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization;

(c) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) The term ''immediate family member'' means spouses and children of any age.

Sec. 11. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to section 4 of this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 4 of this order.

Sec. 12. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including adopting rules and regulations, and to employ all powers granted to me by IEEPA as may be necessary to implement this order. The Secretary of the Treasury may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury. All departments and agencies of the United States shall take all appropriate measures within their authority to implement this order.

Sec. 13. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to submit recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 14. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) The authority granted by law to an executive department or agency; or

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

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

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

Sec. 15. If, based on consideration of the terms, obligations, and expectations expressed in the Joint Declaration, I determine that changes in China's actions ensure that Hong Kong is sufficiently autonomous to justify differential treatment in relation to the PRC under United States law, I will reconsider the determinations made and actions taken and directed under this order.

DONALD J. TRUMP,
THE WHITE HOUSE,
June 11, 2020.

Dated: January 12, 2021.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2021–00926 Filed 1–14–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 240

[COE–2020–0005]

RIN 0710–AB07

General Credit for Flood Control

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule removes the U.S. Army Corps of Engineers' part titled General Credit for Flood Control. Each removed section of this part is out-of-date as current policy and procedures on this subject can be found in internal documents. Therefore, this part can be removed from the Code of Federal Regulations (CFR).

DATES: This rule is effective on January 15, 2021.

ADDRESSES: Department of the Army, U.S. Army Corps of Engineers, ATTN: CECW–P (Ms. Amy Frantz), 441 G Street NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Frantz at (202) 761–0106 or by email at *Amy.K.Frantz@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This final rule removes from the CFR 33 CFR part 240, General Credit for Flood Control. The rule was initially published in the **Federal Register** on November 18, 1987 (52 FR 44113). The regulation established guidelines and procedures for Department of the Army application of the provisions of section 104 of Public Law 99–662. Section 104 authorizes and directs the development of guidelines which include criteria for determining whether work carried out by local interests is compatible with a project for flood control. This legislative authority also provides that benefits and costs of compatible work will be considered in the economic evaluation of the Federal project. This authority provides a basis for non-Federal interests to undertake local work to alleviate flood damages in the period preceding authorization of a Federal project with assurance that they will not adversely affect the project's economic feasibility. The regulation provides general policy and procedures on the application of section 104 and credit criteria for projects. It was published, at that time, in the **Federal Register** to aid public accessibility. The solicitation of public comment for this removal is unnecessary because the rule is out-of-date, and otherwise covers internal agency operations that have no public compliance component or adverse public impact. For current public accessibility purposes, updated internal agency policy on this topic may be found in Engineer Regulation (ER) 1165–2–208, ''In-Kind Contribution Credit Provisions of Section 221 (a)(4) of the Flood Control Act of 1970, as amended'' (available at *https://www.publications.usace.army.mil/Portals/76/Publications/Engineer Regulations/ER_1165-2-208.pdf*).

This rule removal is being conducted to reduce confusion for the public as well as for the Corps regarding the current policy which governs the Corps' general credit for flood control. Because the regulation does not place a burden on the public, its removal does not

provide a reduction in public burden or costs.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' do not apply. This removal supports a recommendation of the DoD Regulatory Reform Task Force.

List of Subjects in 33 CFR Part 240

Flood control, Intergovernmental relations.

PART 240—[REMOVED]

■ Accordingly, for the reasons stated in the preamble and under the authority of 5 U.S.C. 301, the Corps removes 33 CFR part 240.

Approved by:

R.D. James,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2020–28125 Filed 1–14–21; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 263

[COE–2019–0005]

RIN 0710–AA93

Continuing Authorities Programs

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule removes the U.S. Army Corps of Engineers' part titled Continuing Authorities Programs. Each removed section of this part is out-of-date and covers internal agency operations that have no public compliance component or adverse public impact. Current policy and procedures on this subject can be found in internal documents. Therefore, this part can be removed from the Code of Federal Regulations (CFR).

DATES: This rule is effective on January 15, 2021.

ADDRESSES: Department of the Army, U.S. Army Corps of Engineers, ATTN: CECW–P (Ms. Amy Frantz), 441 G Street NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Frantz at (202) 761–0106 or by email at *Amy.K.Frantz@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This final rule removes from the CFR 33 CFR part 263, Continuing Authorities Programs. The rule was initially published in the **Federal Register** on November 3, 1975 (40 FR 51134), and amended on December 30, 1976 (41 FR 56943). The regulation provided policies and procedures for seven legislative authorities under which the Secretary of the Army, acting through the Chief of Engineers, was authorized to plan, design and construct certain types of water resource improvements without specific Congressional authorization. The Continuing Authorities Program is used to plan and implement projects of limited size, scope and complexity in an accelerated manner compared to traditional USACE projects. Three new authorities have been authorized since publication of the regulation and an updated internal agency policy reflects changes in cost share limits and program limits for all ten existing authorities. The rule was published, at that time, in the **Federal Register** to aid public accessibility. For current public accessibility purposes, the implementation procedures for the authorities listed in this regulation are currently covered under Engineer Pamphlet (EP) 1105–2–58, ''Continuing Authorities Program,'' dated March 1, 2019 (available at *https://www.publications.usace.army.mil/Portals/76/EP_1105-2-58.pdf?ver=2019-04-30-105428-920*). The solicitation of public comment for this removal is unnecessary because the rule is out-of-date and covers internal agency operations that have no public compliance component or adverse public impact.

This rule removal is being conducted to reduce confusion for the public as well as for the Corps regarding the current policy which governs the Corps' Continuing Authorities Program. Because the regulation does not place a burden on the public, its removal does not provide a reduction in public burden or costs.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' do not apply. This removal supports a recommendation of the DoD Regulatory Reform Task Force.

List of Subjects in 33 CFR Part 263

Flood control, Navigation (water), Seashores, Water resources.

PART 263—[REMOVED]

■ Accordingly, for the reasons stated in the preamble and under the authority of 5 U.S.C. 301, the Corps removes 33 CFR part 263.

Approved by:

R.D. James,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2020–28126 Filed 1–14–21; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 276

[COE–2019–0006]

RIN 0710–AA95

Water Resources Policies and Authorities: Application of Section 134a of Public Law 94–587

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule removes the U.S. Army Corps of Engineers' part regarding water resources policies and authorities. This part is obsolete as the regulation authority expired December 31, 1977. Therefore, this part can be removed from the Code of Federal Regulations (CFR).

DATES: This rule is effective on January 15, 2021.

ADDRESSES: Department of the Army, U.S. Army Corps of Engineers, ATTN: CECW–P (Ms. Amy Frantz), 441 G Street NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Frantz at (202) 761–0106 or by email at *Amy.K.Frantz@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This final rule removes from the CFR 33 CFR part 276, Water Resources Policies and Authorities: Application of Section 134a of Public Law 94–587. The rule was initially published in the **Federal Register** on February 15, 1977 (42 FR 9175). The regulation authorized and directed implementation of a procedure for certification of a locally constructed flood control element/component that is compatible with a specific, potential Federal Project under study. Section 134a provided that local interests could proceed to construct such certified compatible improvements at local expense with the understanding that such improvements could be expected to be included in the scope of the Federal project, if later authorized, both for the purposes of analyzing the costs and benefits of the project and assessing the local participation in the costs of such project. Cost assignable to that part

of the local improvement that would constitute an integral part of a prospective Federal plan would be eligible to be recommended for credit toward required local cooperation. It was published, at that time, in the **Federal Register** to aid public accessibility. The solicitation of public comment for this removal is unnecessary because the rule is obsolete. The regulation authority ceased to be in effect after December 31, 1977, in accordance with Section 134a of Public Law 94–587.

This rule removal is being conducted to reduce confusion for the public as well as for the Corps regarding a regulation that is no longer in use as the authority is no longer in effect. The removal of the regulation will ensure the Corps' regulations comply with current authorities. In an effort to reduce the number of regulations the Corps has promulgated, the removal of an obsolete regulation is appropriate. Because the regulation does not place a burden on the public, its removal does not provide a reduction in public burden or costs.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' do not apply. This removal supports a recommendation of the DoD Regulatory Reform Task Force.

List of Subjects in 33 CFR Part 276

Flood control, Intergovernmental relations.

PART 276—[REMOVED]

■ Accordingly, for the reasons stated in the preamble and under the authority of 5 U.S.C. 301, the Corps removes 33 CFR part 276.

Approved by:

R.D. James,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2020–28130 Filed 1–14–21; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 279

[COE–2020–0011]

RIN 0702–AA97

Resource Use: Establishment of Objectives

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule removes the U.S. Army Corps of Engineers' part titled Resource Use: Establishment of Objectives. Each removed section of this part is redundant of or otherwise covers internal agency operations that have no public compliance component or adverse public impact. Current policy and procedures on this subject can be found in internal documents. Therefore, this part can be removed from the Code of Federal Regulations (CFR).

DATES: This rule is effective on January 15, 2021.

ADDRESSES: Department of the Army, U.S. Army Corps of Engineers, ATTN: CECW–P (Ms. Patricia Mutschler), 441 G Street NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Mutschler at (202) 761–4744 or by email at *Patricia.L.Mutschler@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This final rule removes from the CFR 33 CFR part 279, Resource Use: Establishment of Objectives. The rule was initially published in the **Federal Register** on April 4, 1978 (43 FR 14014). The regulation provided policy and guidance for establishing resource use objectives for all Civil Works water resource projects during Phase I/Phase II post-authorization studies and reevaluation of completed projects. Resource use objectives, as defined in the regulation, are clearly written statements, specific to a given project, which specify the attainable options for resource use as determined from study and analysis of resource capabilities and public needs (opportunities and problems). It was published, at that time, in the **Federal Register** to aid public accessibility. The solicitation of public comment for this removal is unnecessary because the rule is redundant of or otherwise covers internal agency operations that have no public compliance component or adverse public impact. For current public accessibility purposes, implementation guidance and procedures for the establishment of resource use objectives related to the formulation of recommended plans for water resources development projects are now found in Engineer Regulation 1105–2–100, ''Planning Guidance Notebook'' (available at *https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf*); and Engineer Regulation and Pamphlet 1130–2–550, ''Recreation Operations and Maintenance Guidance and Procedures, Chapter 3'' (available at *https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1130-2-550.pdf* and *https://www.publications.usace.army.mil/Portals/76/Publications/EngineerPamphlets/EP_1130-2-550.pdf*). In addition, environmental evaluation is required under the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321–4347), and is implemented by the Corps pursuant to 33 CFR part 230.

This rule removal is being conducted to reduce confusion for the public as well as for the Corps regarding the current policy which governs the Corps' establishment of resource use objectives. Because the regulation does not place a burden on the public, its removal does not provide a reduction in public burden or costs.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' do not apply. This removal supports a recommendation of the DoD Regulatory Reform Task Force.

List of Subjects in 33 CFR Part 279

Natural resources, Water resources.

PART 279—[REMOVED]

■ Accordingly, for the reasons stated in the preamble and under the authority of 5 U.S.C. 301, the Corps removes 33 CFR part 279.

Approved by:

R.D. James,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2020–28127 Filed 1–14–21; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

[Docket ID: NPS–2018–0001; NPS–GLCA–27587; PPIMGLCAS1; PPMPSAS1Z.YP0000]

RIN 1024–AD93

Glen Canyon National Recreation Area; Motor Vehicles

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service amends its special regulations for Glen Canyon National Recreation Area to manage the use of motor vehicles on and off park roads. The rule requires a permit to operate a motor vehicle off roads in selected locations, designates routes and areas where motor vehicles may be used off roads, and allows the superintendent to establish closures and restrictions based upon specific criteria. The rule also allows certain types of off-road vehicles on some paved and unpaved roads in the recreation area. Unless provided for by special regulation, operating a motor vehicle off roads within areas of the National Park System is prohibited.

DATES: This rule is effective on February 16, 2021 except for the provisions in § 7.70(f)(2) and the permit requirements in Table 1 to § 7.70(f)(3)(ii) which are effective April 15, 2021.

ADDRESSES: The comments received on the proposed rule and an economic analysis are available on *www.regulations.gov* in Docket ID: NPS–2018–0001.

FOR FURTHER INFORMATION CONTACT: William Shott, Superintendent, Glen Canyon National Recreation Area, P.O. Box 1507, Page, Arizona 86040, by phone at 928–608–6205, or by email at *GLCA_Superintendent@nps.gov.*

SUPPLEMENTARY INFORMATION:

Purpose and Significance of Glen Canyon National Recreation Area

Congress established Glen Canyon National Recreation Area (the recreation area) in 1972 ''to provide for the public outdoor recreation use and enjoyment of Lake Powell and lands adjacent thereto in the states of Arizona and Utah and to preserve the scenic, scientific, and historic features contributing to the public enjoyment of the area.'' 16 U.S.C. 460dd.

The recreation area encompasses 1,254,117 acres in northern Arizona and southeastern Utah and constitutes a substantial part of the outstanding public lands of the Colorado Plateau. The recreation area offers a natural diversity of rugged water- and wind-carved canyons, buttes, mesas, and other outstanding physiographic features. The recreation area allows for a variety of recreational opportunities, including on- and off-road motor vehicle use and contains Lake Powell, the second-largest human-made lake in North America, which provides the opportunity to recreate in a natural environment and access remote backcountry areas. Evidence of 11,000 years of human occupation and use of resources in the recreation area provides a continuing story of the prehistoric, historic, and present-day affiliation of humans and their environment.

Authority To Promulgate Regulations

The National Park Service (NPS) manages the recreation area under the NPS Organic Act (54 U.S.C. 100101 *et seq.*), which gives the NPS broad authority to regulate the use of the park areas under its jurisdiction. The Organic Act authorizes the Secretary of the Interior, acting through the NPS, to ''prescribe such regulations as the Secretary considers necessary or proper for the use and management of [National Park] System units.'' 54 U.S.C. 100751(a). In the recreation area's enabling act, Congress directed the Secretary of the Interior to ''administer, protect, and develop the recreation area in accordance with the [Organic Act], and with any other statutory authority available to him for the conservation and management of natural resources.'' 16 U.S.C. 460dd-3.

Executive Order 11644, Use of Off-Road Vehicles on the Public Lands, was issued in 1972 and amended by Executive Order 11989 in 1977. Executive Order 11644 required federal agencies to issue regulations designating specific areas and routes on public lands where the use of off-road vehicles (ORVs) may be allowed. The NPS implemented these Executive Orders by promulgating a regulation at 36 CFR 4.10 (Travel on park roads and designated routes). Under 36 CFR 4.10, the use of motor vehicles off established roads is not permitted unless routes and areas are designated for off-road motor vehicle use by special regulation. Under 36 CFR 4.10(b), such routes and areas ''may be designated only in national recreation areas, national seashores, national lakeshores and national preserves.'' This final rule designates routes where motor vehicles may be used off roads in the recreation area in compliance with 36 CFR 4.10 and Executive Orders 11644 and 11989.

Current Motor Vehicle Use in the Recreation Area

Off-Road Motor Vehicles

The use of motor vehicles to reach off-road destinations in Glen Canyon predates the establishment of the recreation area in 1972. After Lake Powell began to fill behind the Glen Canyon Dam in 1963, the public began driving off road to access the new lake for recreational activities. ORV use continued following the establishment of the recreation area in 1972. ORV use is currently occurring in four general locations within the recreation area:

- *Lone Rock Beach* is open to conventional motor vehicles, off-highway vehicles, and street-legal all-terrain vehicles. The speed limit at Lone Rock Beach is 15 mph.
- *Lone Rock Beach Play Area* is located on a hill above and to the southwest of Lone Rock Beach. This 180-acre area is enclosed by a fence and open to unrestricted, high-intensity ORV use. This area is a place where ORV operators can challenge themselves, develop riding skills, operate at high speeds, and perform jumps and hill climbs. There is no speed limit in the play area.
- *Accessible Shoreline Areas* provide public access by conventional motor vehicles to the Lake Powell shoreline for the purposes of recreation (fishing, swimming, boating, etc.). The public is allowed to depart the road and drive to the shoreline and park in designated ORV areas. There are 13 accessible shoreline areas (Blue Notch, Bullfrog North and South, Copper Canyon, Crosby Canyon, Dirty Devil, Farley Canyon, Neskahi, Paiute Canyon, Red Canyon, Stanton Creek, Warm Creek, White Canyon, and Hite Boat Ramp). Three shoreline areas (Bullfrog North and South, Crosby Canyon, and Warm Creek) are closed to ORVs in the superintendent's compendium. ORVs are not allowed at Nokai Canyon and Paiute Farms, but these areas are accessed occasionally by ORVs.
- *Ferry Swale* is an area in the Arizona portion of the recreation area with approximately 54 miles of unauthorized routes that have been created by users over time.

On-Road Motor Vehicle Use

A comprehensive planning process begun by the NPS after the establishment of the recreation area resulted in a General Management Plan (GMP) that was published in 1979. The GMP designated a system of paved and unpaved roads open to vehicle travel and closed several existing unpaved roads in the backcountry. The paved

and unpaved network of roads identified in the GMP is open to motor vehicle travel, subject to restrictions on the types of vehicles that are allowed on specific roads. These roads are referred to in the rule as ''GMP roads.'' Driving a motor vehicle off any paved or unpaved GMP road is considered off-road motor vehicle use and is prohibited except on designated routes and in designated areas. All other user-created routes and linear disturbances within the recreation area are closed to public motor vehicle travel.

The Orange Cliffs Special Management Unit is located in the northeast portion of the recreation area. This Unit adjoins Canyonlands National Park, is similar in physiography, and has many of the same management issues as the Canyonlands Maze District. The Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area Backcountry Management Plan (NPS 1995) and the accompanying environmental assessment (NPS 1993) consist of an inter-park management plan developed to increase consistency and protection for visitors to both the Maze District of Canyonlands and the Orange Cliffs in Glen Canyon. The backcountry management plan was predicated on the GMP, which states that the Orange Cliffs Special Management Unit is to be ''maintained as a critical backdrop for Canyonlands National Park and as a major vantage point for spectacular views into the park.'' The Orange Cliffs Special Management Unit is managed ''to maintain a relatively primitive, undeveloped atmosphere'' and to provide ''year-round access to Panorama Point'' (NPS 1979).

Off-Road Vehicle Management Plan/ Final Environmental Impact Statement

The NPS has been managing ORV use in the recreation area for several decades. Although the NPS had implemented ORV management plans for various parts of the recreation area in 1981 (for Lone Rock Beach) and 1988 (for 20 accessible shoreline areas on Lake Powell), past planning efforts did not comply with the NPS regulation at 36 CFR 4.10 that requires a special regulation to designate routes and areas for ORV use. In 2005, the NPS was challenged in federal court over its compliance with Executive Orders 11644 and 11989, and 36 CFR 4.10(b) *(Friends of the Earth, Bluewater Network Division v. United States Department of the Interior*, Case 1:05-cv-02302–RCL). Under the terms of the 2008 settlement agreement between the parties to that litigation, the NPS prepared an Off-Road Vehicle Management Plan/Draft Environmental Impact Statement (DEIS). In compliance with the settlement agreement, the NPS also developed interim ORV plans for the accessible shoreline areas, Lone Rock Beach, and Lone Rock Play Area. In January 2017, the NPS completed an Off-Road Vehicle Management Plan/ Final Environmental Impact Statement (FEIS). On August 15, 2018, the Regional Director for the Intermountain Region signed a Record of Decision (ROD) identifying the preferred alternative in the FEIS (Alternative E: Mixed Use) as the selected alternative. The FEIS and the ROD have superseded all previous ORV management plans for the recreation area.

A detailed history of prior NPS management of on- and off-road vehicle use can be found in the FEIS, which can be viewed together with the ROD at *https://parkplanning.nps.gov/glca-orvplan* by clicking on the link entitled ''Document List''. The FEIS analyzes the issues and environmental impacts of five alternatives for the management of on- and off-road motor vehicle use in the recreation area. Major issues analyzed in the FEIS include social and economic issues, human health and safety, wildlife, natural soundscapes, wilderness, and visitor use and experience. Impacts associated with each of the alternatives are described in the FEIS.

Final Rule

This rule establishes a special regulation pursuant to 36 CFR 4.10(b) to manage ORV use in the recreation area. The rule implements the selected alternative (Alternative E: Mixed Use) for the recreation area identified in the ROD. The selected alternative provides the largest range of experiences for visitors and enhances experiences of different user groups, such as motor vehicle users and those who seek a more primitive camping experience. The selected alternative is designed to protect resources while enhancing the visitor experience by identifying and designating specific areas capable of ORV use while prohibiting ORV use in areas where resources and values may be at risk.

Types of Motor Vehicles

In order to effectively manage the use of motor vehicles in the recreation area, the rule creates definitions to distinguish among a range of vehicle types. Under Executive Order 11644, an ORV means any motor vehicle designed for or capable of cross-country travel on or immediately over natural terrain. Under this broad definition, an ORV may be a truck, an all-terrain vehicle (ATV), a sedan, a dirt bike, or any other motor vehicle that is capable of off-road travel. Among ORVs, the rule distinguishes between conventional motor vehicles, off-highway vehicles (OHVs), and street-legal ATVs, as follows:

- *Conventional motor vehicle* means any motor vehicle that is designed primarily for operation on streets and highways, and that is licensed and registered for interstate travel. Automobiles, vans, highway motorcycles (including a dual-sports motorcycle licensed for use on a highway), sport utility vehicles (SUVs), recreational vehicles (RVs), pickup trucks, and buses are examples of conventional motor vehicles.
- *OHV* means any motor vehicle—excluding snowmobiles and hovercraft—that is designed primarily for off-road travel and is not licensed and registered for interstate travel. ATVs (excluding street legal ATVs, as defined below), dirt bikes, sand rails, side-by-sides, and dune buggies are examples of OHVs.
- *Street-legal ATV* means an ATV that qualifies under Arizona or Utah motor vehicle and traffic code to be operated on state roads and highways. Under current Arizona and Utah law, dune buggies, sand rails, go-karts, and rock crawlers cannot be licensed as street legal.

Under these definitions, conventional motor vehicles do not include OHVs or street-legal ATVs. The rule allows certain types of ORVs (conventional motor vehicles, OHVs, or street-legal ATVs) to operate in designated ORV areas, on designated ORV routes, and on paved and unpaved roads identified in the GMP.

Adoption of Non-Conflicting State Motor Vehicle Laws

Existing NPS regulations at 36 CFR 4.2 adopt state traffic and vehicle laws to manage the use of motor vehicles within NPS-administered areas, unless specifically addressed by NPS regulations. The rule implements specific regulations governing the use of ORVs in the recreation area, and allows the superintendent to impose additional closures, restrictions, or conditions to resolve visitor safety or resource protection concerns that are not addressed by state law. All other issues (*e.g.* license, registration, vehicle requirements, inspection, insurance) related to the use of motor vehicles in the recreation area will continue to be governed by the adopted laws and

regulations of Arizona or Utah.[1] Operators of conventional motor vehicles, OHVs, and street-legal ATVs will continue to be responsible for complying with all applicable Utah and Arizona statutes and regulations pertaining to the lawful operation of those vehicles. This rule allows OHVs to operate on most unpaved GMP roads. Because OHVs are not licensed or registered for operation on roads in Utah and Arizona in the same manner as street-legal ATVs or conventional motor vehicles, they are not subject to state licensing, registration, insurance, and equipment requirements that apply to street-legal vehicles when operated on GMP roads. Operators of OHVs on GMP roads must comply, however, with all applicable state and federal traffic requirements (*e.g.,* speed limits, rules of the road) that apply to street-legal vehicles. The FEIS lists OHV operator and vehicle requirements for Arizona and Utah, as of January 13, 2017. These requirements are subject to change and the FEIS may not include all requirements.

Permit Program

The rule requires a special use permit to operate a motor vehicle off GMP roads in the recreation area. The permit requirement will not begin until 90 days after the effective date of the rule. This will give the NPS sufficient time to use public outreach and education to help establish the details of the permit program so that NPS staff and visitors are prepared for its implementation. Permits will be required for all designated ORV locations except for designated routes in Middle Moody Canyon, East Gypsum Canyon, Imperial Valley, and Gunsight Springs. The NPS will issue a decal with each permit that must be affixed to each vehicle in a manner and location determined by the superintendent. Decals will be required for each ORV operating in a designated ORV area or on a designated ORV route in the recreation area where a permit is required. Families will be able submit a single application for permits for multiple vehicles that are registered to members of that family. Annual permits will be valid for one calendar year from the date of issuance; shorter term permits will also be available and valid from the date of issuance for the stated duration of the permit.

Permit applications (NPS Form 10–933, ''Application for Special Use Permit—Vehicle/Watercraft Use'') will be available on the recreation area's website and at headquarters (691 Scenic View Drive, Page, AZ 86040), recreation area visitor centers, and at other locations designated by the superintendent to facilitate compliance with the program and for the convenience of the visitor. The permit and decal will be issued after the applicant reads educational materials and acknowledges that he or she has read, understood, and agrees to abide by the rules governing ORV use in the recreation area and the terms and conditions of the permit. Visitors will be able to submit permit applications online through the recreation area's website; through the mail to the following address: Glen Canyon National Recreation Area, P.O. Box 1507, Page, AZ 86040–1507; or in person at headquarters or an entrance station. After the NPS processes completed permit applications, it will mail or provide in person a permit to the applicant with instructions and educational materials, including a decal to be affixed to each permitted ORV. Violating the terms or conditions of any permit will be prohibited and may result in the suspension or revocation of the permit and the denial of future permits.

To the extent practicable, the NPS intends to recover the costs of administering this permit program under 54 U.S.C. 103104 (Recovery of costs associated with special use permits). In order to obtain a special use permit to operate a motor vehicle off roads in the recreational area, the NPS may require operators to pay a fee to allow the NPS to recover these costs. The NPS may also offset costs with revenues from fees collected under the Federal Lands Recreation Enhancement Act (16 U.S.C. 6801–6814). The NPS will develop the details about fee collection during the 90-day delayed implementation period for the permit requirement. This will be a transparent process involving the public so that all stakeholders understand how the NPS will use fees to offset the costs of administering the permit program.

Designated ORV Routes and Areas

The rule prohibits ORV use other than on GMP roads in the recreation area, except on NPS-designated ORV routes and areas. The rule designates Lone Rock Beach and Lone Rock Play Area, 21 miles of ORV routes in Ferry Swale, and 14 accessible shoreline ORV areas. One of the 13 shoreline areas identified in the interim ORV plans will be closed (Warm Creek) and two new shoreline areas will be opened (Nokai Canyon and Paiute Farms). The rule contains management prescriptions for each location, including seasons when ORVs are allowed, speed limits, quiet hours, and the types of ORVs that are allowed. These locations will be identified on maps located at headquarters (691 Scenic View Drive, Page, AZ 86040), visitor contact stations, and on the recreation area's website. Certain locations within some designated ORV areas are designated as vehicle-free zones to provide a different camping experience for those who prefer to be separated from motor vehicle use. All locations designated for ORV use will be posted with appropriate signs that include applicable rules and regulations. The lakeside boundary of accessible shoreline areas that are designated for ORV use will fluctuate with the level of Lake Powell, but the remaining (land-side) boundary of such areas will remain fixed.

Operational and Vehicle Requirements

To provide for the safety of ORV operators at the Lone Rock Beach Play Area, the rule requires the display of a solid red or orange safety flag that is a minimum of six by 12 inches in size and that is attached to either:

- The ORV so that the safety flag is at least eight feet above the surface level of the ground, or
- The protective headgear of the operator of a motorcycle or dirt bike so that the safety flag is at least 18 inches above the top of the operator's head.

To reduce the degree and geographic extent of impacts from vehicle noise on soundscapes in the recreation area, the rule implements a 96 dBA noise limit on all vehicles. Noise level will be measured by NPS staff using the SAE J1287 standard. Enforcement of this standard may include courtesy checks, checkpoints, and individual contacts. Measurements will be taken using certified equipment and protocols as is done with traffic radar. The rule requires motor vehicles to have a functioning muffler system. These requirements are in addition to state motor vehicle and operator requirements that are adopted by 36 CFR 4.2.

Travel on GMP Roads

The rule will continue to allow conventional motor vehicles on all paved and unpaved GMP roads in the

[1] The NPS adopts non-conflicting state traffic and vehicle laws. See 36 CFR 4.2. This includes state requirements that apply to ORVs. The responses to public comments 4 and 6 discuss the interplay between this rule and state law. This rule imposes one requirement that is not present under current Utah law—that motor vehicles must not exceed 96 dBA at the tailpipe. This limit is consistent with industry recommendations (all vehicles are currently manufactured to meet that limit), the laws of several states including Arizona, Colorado and California, and requirements on U.S. Forest Service lands that adopt those state noise emission standards (see 36 CFR 261.15(d)).

recreation area. Street-legal ATVs are allowed to operate on paved GMP roads except for roads in the Lees Ferry Developed Area, including the Lees Ferry Access Road. OHVs and street-legal ATVs are allowed to operate on most unpaved GMP roads. OHVs and street-legal ATVs are allowed on approximately 8 miles of the Poison Spring Loop in the Orange Cliffs Special Management Unit. The Superintendent may allow OHVs and street-legal ATVs on the upper portion of the Flint Trail (another unpaved GMP road), subject to further evaluation and compliance with applicable laws (as explained below). OHVs and street-legal ATVs are prohibited on all other unpaved GMP roads in the Orange Cliffs Special Management Unit. The speed limit on unpaved GMP roads is 25 mph or as posted. The speed limits on paved GMP roads will not change and will remain as currently posted. GMP roads will be designated and posted with road numbers. Signs will indicate the status of a road segment as open or closed to OHV and street-legal ATV use and will delineate the designated travel routes. Signs indicating that a GMP road is closed to OHVs or street-legal ATVs will remain in place or will be posted as needed.

Superintendent's Discretionary Authority

Independent from the authority in 36 CFR 1.5, the rule allows the superintendent to close or reopen designated areas or routes to motor vehicle use, or impose conditions or restrictions on the use of off-road motor vehicles after taking into consideration public health and safety, natural and cultural resource protection, lake levels, and other management activities and objectives. The superintendent must provide public notice of all such actions through one or more of the methods listed in 36 CFR 1.7.

Summary of Public Comments

The NPS published a proposed rule in the **Federal Register** on February 28, 2018 (83 FR 8640). The NPS accepted comments on the rule through the mail, by hand delivery, and through the Federal eRulemaking Portal at *www.regulations.gov.* The comment period closed on April 30, 2018. A summary of the pertinent issues raised in the comments and NPS responses are provided below. Many comments on the proposed rule addressed the NPS's evaluation of the environmental impacts of the preferred and other alternatives in the FEIS. Other comments addressed the range of alternatives considered in the FEIS. These comments are not addressed in this final rule because they raise environmental issues that were already considered by the NPS in the NEPA process. The NPS evaluated the environmental impacts of each alternative in the FEIS and explained the reasons for selecting Alternative E: Mixed Use in the ROD. The NPS did not identify any new significant environmental issues in the public comments on the proposed rule.

After considering public comments and after additional review, the NPS made the following changes in the final rule. No other substantive changes were made in the final rule.

1. The NPS clarified the definitions of ''GMP road'' (by stating that there are no park roads in the recreation area other than GMP roads), ''off-highway vehicle'' (by stating that OHVs are by definition not licensed and registered for interstate travel), and ''Street-legal all-terrain vehicle (ATV)'' (by stating that these vehicles by definition must qualify under Arizona or Utah motor vehicle traffic code to operate on state roads and highways).

2. The NPS clarified the requirement that vehicles be equipped at all times with noise suppression devices, including a working exhaust muffler in constant operation.

3. The NPS changed certain management prescriptions in Table 1 to § 7.70(f)(3)(ii) to reflect that street-legal ATVs are allowed in eight shoreline areas (Blue Notch, Bullfrog North and South Crosby Canyon Dirty Devil, Farley Canyon, Red Canyon, Stanton Creek, and White Canyon) from March 2–October 31. These are the dates identified in the FEIS and ROD.

4. The NPS changed the column headings in Table 2 to § 7.70(f)(4)(i) for ease of reading and to reflect that there are no paved roads within the Orange Cliffs Special Management Unit.

5. The NPS clarified that the 8-mile portion of the Poison Spring Loop where street-legal ATVs and OHVs are allowed is located on Route 633 proceeding north to Route 730.

6. The NPS removed references to ''posted'' quiet hours in paragraphs (f)(5)(vi) and (v) to avoid an interpretation that quiet hours must be posted in order for them to be enforceable.

7. The NPS added references to ''dirt bikes'' to clarify that the requirement to display a safety flag on the headgear of a motorcycle operator also applies to the operator of a dirt bike.

8. The NPS added a 25 mph speed limit (unless otherwise posted) for the use of unpaved GMP roads. The NPS referred to this speed limit in the **SUPPLEMENTARY INFORMATION** section of the proposed rule and in the FEIS.

9. The NPS added a requirement that OHV operators under the age of 18 wear a helmet. This requirement was stated in the FEIS.

10. In addition to annual permits, the proposed rule stated that the NPS would issue two-week permits valid from the date of issuance. Instead of specifying two weeks, the final rule says the NPS will make shorter term permits available. This will give the NPS flexibility to determine the duration of shorter-term permits based upon the conditions at the recreation area and experience from implementation of the ORV permit program.

11. The NPS clarified that motor vehicles may be used in designated ORV areas during quiet areas for purposes of entering or exiting a campsite.

12. The NPS added a statement in the final rule that the Superintendent may determine whether to allow street-legal ATVs or OHVs on the upper portion of the Flint Trail within the Orange Cliffs Special Management Unit. The NPS explains this change below in the response to Comment 2.

13. The NPS inserted language delaying implementation of the permit requirement until 90 days after the effective date of the rule. This will allow the NPS to work with the public to develop the permit program (including a fee structure to offset administrative costs) so that visitors to the recreation area are prepared for its implementation.

Travel on GMP Roads

1. Comment: Several commenters disagreed with the proposal to allow conventional motor vehicles on unpaved GMP roads in the Orange Cliffs Special Management Unit. These commenters stated that conventional motor vehicles are not designed to travel on roads in this area and that modifications needed to make the roads passable for them would degrade the GMP requirement to maintain a primitive and undeveloped atmosphere in the Unit. These commenters stated that allowing conventional motor vehicles on these unpaved roads would substantially increase the burden of maintaining the roads so that they can be used safely. If the roads are not upgraded and maintained, these commenters stated that conventional motor vehicles would not be able to travel these roads safely and access popular locations within the Unit, such as Panorama Point. These commenters stated that this outcome would increase the cost of search and rescue activities

and place visitors and first responders at risk.

NPS Response: Conventional motor vehicle use in the Orange Cliffs area predates the establishment of the recreation area in 1972 and is an existing use today. Allowing visitors to use conventional motor vehicles on these roads helps the NPS achieve a primary objective in the GMP to allow year-round access to Panorama Point and other backcountry areas with spectacular views into Canyonlands National Park. The use of conventional motor vehicles in the Orange Cliffs Special Management Unit was reaffirmed in the 1995 Backcountry Management Plan for this area. The NPS and local counties perform maintenance on unpaved GMP roads in the Unit approximately 1–2 times per year in a manner that protects the relatively primitive, undeveloped atmosphere of the Unit. This regular maintenance allows conventional motor vehicles to use the roads, provided the vehicles have a high clearance and are 4-wheel drive capable. The NPS does not expect an increase in the use of these roads by conventional vehicles because this use is already allowed. The NPS also does not expect the continued use of conventional motor vehicles on these roads to increase the burden of maintaining the roads or to increase the cost of search and rescue (SAR) activities, which are jointly managed by the NPS and local counties, associated with such use. The NPS recommends that visitors use 4-wheel drive high clearance vehicles, although they are not required. Since 2012, the Glen Canyon Interagency Dispatch Center dispatch records show only one motor vehicle incident within the Unit and it did not involve a search and rescue.

2. Comment: Several commenters requested that the NPS allow OHVs and street-legal ATVs on all unpaved GMP roads in the Orange Cliffs Special Management Unit. These commenters stated that OHVs and street-legal ATVs are better suited for travel on these roads that require high clearance vehicles. These commenters stated that OHVs and street-legal ATVs would allow visitors to safely recreate and access popular locations within the Unit, such as Panorama Point, without needing to upgrade and further develop the existing roads. These commenters stated that this outcome would better maintain a relatively primitive and undeveloped atmosphere as required by the GMP.

NPS Response: This rule allows OHVs and street-legal ATVs to travel on an 8-mile section of the Poison Spring Loop within the Orange Cliffs Special Management Unit. Expanding this use to allow OHVs and street-legal ATVs on all GMP roads in the Unit would increase day-use traffic and noise disturbances in a manner that would make it more difficult to maintain a relatively primitive and undeveloped atmosphere. The FEIS contains a more detailed analysis of the potential impacts from OHVs and street-legal ATVs within the Unit. The 1995 Backcountry Management Plan does not explicitly prohibit the use of OHVs and street-legal ATVs within the Unit, but directs the NPS to manage the Unit in the same manner as the Maze District of Canyonlands National Park, which prohibits the use of OHVs and street-legal ATVs, to increase consistency in visitor use and resource protection in the area. The prohibition of OHVs and street-legal ATVs in most of the Orange Cliffs Special Management Unit helps the NPS achieve this goal.

In response to comments raised on this issue, the NPS intends to evaluate whether OHVs or street-legal ATVs would be appropriate on a 15–20 mile upper portion of the Flint Trail, which—along with the Poison Spring Loop—is one of many unpaved GPM roads within the Orange Cliffs Special Management Unit. As part of this evaluation, the NPS will consider potential impacts to resources, visitor experience, and the specific management prescriptions for this area. The selected alternative in the ROD closes the Flint Trail to OHVs and street-legal ATVs, which is how this trail is currently managed and will continue to be managed by the Superintendent until and unless a different management decision is made. As part of this evaluation, the NPS will consider the potential impacts to the environment from opening a portion of this trail to OHVs and street-legal ATVs under NEPA and other applicable laws. In a change from the proposed rule in order to reflect the NPS's intent to evaluate more access on this trail, the final rule states that the Superintendent may determine whether to allow street-legal ATVs or OHVs on the upper portion of the Flint Trail within the Orange Cliffs Special Management Unit. If the Superintendent determines that, based on further analysis, OHVs or street-legal ATVs are appropriate on this portion of the Flint Trail, he or she will provide notice to the public prior to allowing such use. No additional changes to the regulations governing motor vehicle use at the recreation area will be required for the Superintendent to take this action. Consistent with the proposed rule, OHVs and street-legal ATVs are prohibited on all other unpaved GMP roads in the Orange Cliffs Special Management Unit.

3. Comment: Several commenters objected to allowing OHVs and street legal ATVs on the Poison Spring Loop because it would compromise the resources, significance, and purpose of the Orange Cliffs Special Management Unit, which the GMP states should be managed to maintain a relatively primitive and undeveloped atmosphere.

NPS Response: This rule allows OHVs and street legal ATVs to travel on 8-miles of the Poison Spring Loop (Route 633 proceeding north to Route 730) in order to complete a 100-mile loop used by recreational OHV users, most of which is located within BLM-administered areas. BLM was a cooperating agency in the preparation of the FEIS and the NPS consulted with BLM specifically about allowing OHVs and ATVs on the 8-mile section of the Poison Springs Loop. Allowing OHVs and street-legal ATVs on this portion of the Poison Spring Loop would not interfere with the management objective to maintain a primitive and undeveloped atmosphere because this area is surrounded by cattle grazing and does not contain the outstanding scenic values found elsewhere in the Orange Cliffs Special Management Unit.

4. Comment: Several commenters objected to the proposal to allow non-street legal OHVs on unpaved GMP roads. These commenters stated that OHVs are not required to have the same safety equipment as street-legal vehicles and may be operated by uninsured and unlicensed drivers. These commenters stated that the NPS is proposing to manage unpaved GMP roads as de facto ORV routes by allowing non-street legal OHVs to use them even though they are not designated under 36 CFR 4.10. These commenters stated that in order to be consistent with Utah law, the NPS should require operators of motor vehicles on all GMP roads to have a valid driver's license.

NPS Response: State laws in Arizona and Utah allow OHVs to be operated on public roads that are open to their use by the controlling federal agency. ARS 28–1174.B; Utah Code Ann. 41–22.10.1. This rule allows OHVs on some unpaved GMP roads within the recreation area, which means the use of OHVs on these roads is allowed under state law. The NPS adopts non-conflicting state laws and regulations governing traffic and the operation of motor vehicles with NPS units. 36 CFR 4.2. As stated above, because OHVs are not licensed or registered for operation on roads in Utah and Arizona in the same manner as street-legal ATVs or

conventional motor vehicles, they are not subject to state licensing, registration, insurance, and equipment requirements that apply to street-legal vehicles when operated on GMP roads. Operators of OHVs on GMP roads must comply, however, with all applicable state and federal traffic requirements (*e.g.,* speed limits, rules of the road) that apply to street-legal ATVs and conventional motor vehicles. 36 CFR 4.2; ARS 28–621; Utah Code 41–22.10.6. Operators of OHVs must also comply with state laws that govern the use of OHVs that are not considered street-legal. In Utah, OHV operators over the age of 16 must possess a valid state driver's license or education certificate and operators ages 8–15 must possess an education certificate. Utah Code Ann. 41–22–30. Arizona requires operators of any vehicle on any road open to 2-wheel drive conventional motor vehicles to have a driver's license. ARS 28–3151. This requirement applies within the recreation area because GMP roads are open to 2-wheel drive conventional motor vehicles. Unpaved GMP roads where 4-wheel drive is recommended, but not required, are located in Utah. The FEIS analyzed the safety of OHV use on unpaved GMP roads and determined that there could be an increased risk of accidents. Adverse impacts to safety are not expected to be significant, however, because of several actions the NPS is taking to mitigate safety risks. The NPS is reducing the speed limit on unpaved GMP roads to 25 mph (unless otherwise posted) for all vehicle types and is requiring all OHV operators under the age of 18 to wear a helmet. The NPS will also require OHV users to complete an educational component about operational safety prior to obtaining an ORV permit from the NPS.

5. Comment: Several commenters rejected the NPS's authority to restrict travel on roads to which the State of Utah has a claim under Revised Statute 2477 (RS 2477), including the Burr Trail Road and Flint Trail/Roost Road.

NPS Response: Claims by the State of Utah under RS 2477 within the recreation area, including the Burr Trail Road and Flint Trail/Roost Road, have not been adjudicated. The NPS will evaluate the legal effects of any future court decisions regarding RS 2477 claims at the appropriate time.

6. Comment: One commenter objected to the proposal to allow street-legal ATVs on paved GMP roads, stating that mixing street-legal ATVs with conventional motor vehicles will increase traffic injuries and fatalities.

NPS Response: Street-legal ATV use on GMP roads is subject to nonconflicting state traffic laws under 36 CFR 4.2. The NPS defers to the expertise of state authorities regarding traffic laws, licensing, and equipment requirements that the state authorities consider necessary to ensure the safe operation of street-legal ATVs alongside conventional motor vehicles on paved GMP roads.

Designated ORV Routes and Areas

7. Comment: One commenter requested that OHVs be allowed in Farley Canyon and Blue Notch because they are low-use areas and would provide an opportunity for OHV users to access the water as a side trip when using nearby trail systems in San Juan County.

NPS Response: Farley Canyon and Blue Notch are geographically removed from developed areas within the recreation area and provide visitors with an opportunity for a more quiet and secluded experience. The FEIS identifies 20 dBA as the level of ambient sound at the recreation area. Noise from OHVs and street-legal ATVs increases ambient sound to 23 dBA at 8,020 feet from the noise source. Conventional motor vehicle noise levels drop to ambient sound levels (20 dBA) only 2,900 feet from the noise source. This rule allows street-legal ATVs at Farley Canyon and Blue Notch from March 2—October 31. OHVs are not allowed in these locations at any time during the year. These restrictions will reduce noise impacts by lowering the number of non-conventional motor vehicles in the area during certain times of the year and by eliminating noise from non-conventional motor vehicles at other times. This will help maintain a more quiet and secluded experience for visitors.

8. Comment: Several commenters requested that the NPS designate a historic route in the Rincon Area leading to Lake Powell as open to motor vehicles. These commenters stated that this route has a precedent of motor vehicle use and is identified on several area maps as the only method of accessing the lake from the Hole in the Rock trail.

NPS Response: The Rincon Road is located within a proposed wilderness area. The Wilderness Act prohibits the use of motor vehicles in wilderness areas. 16 U.S.C. 1133(c). The NPS manages proposed wilderness areas in a manner that preserves the wilderness character and will not diminish the eligibility of such areas for designation.

9. Comment: One commenter suggested that all motor vehicles should be allowed on Warm Creek Road between Big Water and the Cowboy Corral on the way to Kelly Grade and Smoky Mountain. This commenter stated that staging at Big Water is more convenient than trailering ATVs 11 miles down the road to Cowboy Corral. This commenter also suggested opening Crosby Canyon to OHVs because it is often washed out and impassible for conventional motor vehicles.

NPS Response: Conventional motor vehicles, street-legal ATVs, and OHVs are allowed on Warm Creek Road. As a result, OHV and street-legal ATVs users may stage at Big Water and are not required to trailer to Cowboy Corral.

OHVs and street-legal ATVs are allowed on Crosby Canyon Road to the end of the GMP road. Street-legal ATVs may access the shoreline at Crosby Canyon from March 2–October 31. The purpose of the accessible shoreline areas is to provide point-to-point travel from the end of the GMP road to the shoreline of Lake Powell when lake levels are below the end of the GMP roads. These areas are not intended to be ORV play areas. During the open season, street-legal ATVs may choose a point-to-point route in the accessible shoreline areas to avoid locations that may be impassible by conventional motor vehicles.

10. Comment: One commenter identified several trails in the Bullfrog shoreline area (three Ticaboo Mesa Overlook routes, and two routes leading out from the Bullfrog South Campground) and encouraged NPS to designate them as ORV routes, open to OHVs year-round.

This commenter stated that the overlook routes would allow land-based visitors to better appreciate the stunning scenery of the recreation area, while also granting simpler access to visitors who desire to canyoneer and hike along the rim of the canyons. This commenter stated that the routes from the campground are important because they create a non-paved connection to the routes north of Bullfrog, allowing visitors to experience hundreds of miles of routes which lay just outside of the recreation area.

NPS Response: This rule does not designate additional ORV routes near the Bullfrog North and South accessible shoreline area because conventional motor vehicles, OHVs, and street-legal ATVs may access the shoreline area on the unpaved GMP road which leads from adjacent BLM lands and connects to BLM roads and routes. This GMP road also connects to the Bullfrog North and South Campgrounds. Designating GMP roads as the primary means of accessing shoreline destinations, points of interest, and ORV routes and roads on adjacent lands allows the NPS to restore duplicative and social routes that are

neither GMP roads nor designated ORV routes. ORV routes and areas outside the recreation area may be accessed from other non-NPS lands which are not affected by this rule.

Accessibility for Certain Groups of People

11. Comment: One commenter stated that seniors, individuals with disabilities, and veterans should be exempt from the rule. Another commenter suggested that if the purpose of allowing OHVs and street-legal ATVs on unpaved GMP roads is to allow ''traditionally associated people'' to conduct cultural activities, then the NPS should allow these activities to continue under a special use permit or memorandum of understanding, rather than opening unpaved GMP roads to OHV and street-legal ATV use by the general public.

NPS Response: The NPS welcomes visitors of all ages to the recreation area, including seniors, individuals with disabilities, and military veterans. This rule allows these groups to use motor vehicles within the recreation area in the same manner as other visitors. The NPS does not believe any groups should be exempt from rules that are designed to provide a variety of recreational opportunities while at the same time helping to maintain visitor safety and protect resources.

A primary purpose of this rule is to provide a variety of recreational opportunities to all types of visitors to the recreation area. Allowing OHVs and street-legal ATVs on unpaved GMP roads allows access to different locations within the recreation area for activities such as sightseeing, fishing, canyoneering, and hiking. A special use permit or memorandum of understanding that addresses particular groups and specific activities would not be appropriate for a management action that is intended to provide opportunities for access and recreation to all members of the visiting public.

Coordination With State and Local Governments

12. Comment: Several commenters stated that the NPS created an adversarial relationship and failed in its duty to coordinate with state and local governments in the development of the proposed rule. Specifically, these commenters suggested that the NPS disregarded their viewpoint that favored motorized recreation within the recreation area.

NPS Response: The NPS valued the cooperating agency relationship it shared with Kane, Garfield, San Juan, and Wayne Counties during the development of the FEIS. The NPS sent letters to the counties with information about the plan and held public open houses and cooperating agency meetings throughout the process. At the request of the counties, the NPS extended the deadline to review and comment on the DEIS twice. The NPS considered the recommendations of the state and local governments when drafting this rule and incorporated some of those recommendations. The NPS removed permit requirements on two small ORV route segments in San Juan County. The NPS conducted site visits with the counties to the Orange Cliffs Special Management Unit that resulted in the decision to allow OHVs on 8 miles of the Poison Spring Loop where OHVs had been prohibited. These are only two examples of changes made to the FEIS and the rule as a result of input received from the counties. In addition, based upon public comments on the proposed rule, the NPS intends to further evaluate the use of street-legal ATVs and OHVs on the upper portion of the Flint Trail. Collectively, these actions demonstrate that the NPS considered input from state and local governments and did not disregard any particular viewpoint on the FEIS or the proposed rule.

Permit Program

13. Comment: One commenter supported the NPS recovering all of the costs of administering the ORV permit program, including costs for start-up, monitoring, education, partnerships, and permit administration. This commenter requested that the NPS disclose the expected permit fee and demonstrate how fee revenues will offset the costs of administering the program. Another commenter objected to the permit fee requirement.

NPS Response: The NPS will use a permit fee to recover costs associated with administering the ORV program. The fee will be used to offset the costs of permit processing, education, resource protection, and law enforcement activities related to the ORV program. Appendix B of the FEIS identifies expected business and administrative costs that the NPS would incur by implementing the selected action in the ROD. These include the costs of administering the ORV permit program. The NPS is allowed by law to recover all costs of providing necessary services associated with permits. 54 U.S.C. 103104. The NPS may also offset some of the costs of administering the permit program with revenues from fees collected under the Federal Lands Recreation Enhancement Act (16 U.S.C. 6801–6814). The NPS will announce the amount of the fees prior to the start of the permit requirement that will begin 90 days after the effective date of the rule. Fee amounts will be based on the costs that are incurred by the NPS for the administration of the program. The NPS does not expect the permitting system to recover the full costs associated with managing an ORV program.

14. Comment: Several commenters supported the establishment of a permit program conditioned upon how revenues are utilized. One commenter advocated funds be invested in enhanced OHV opportunities and road improvements, another commenter recommended hiring rangers to repair areas damaged from increased use, and more than one commenter requested the NPS hire additional law enforcement officers.

NPS Response: The NPS will use fees to recover costs from administering the ORV program. Fee revenue could be used to maintain facilities at ORV areas, recover personnel costs associated with enforcing ORV rules, or to monitor and restore resources in ORV areas. The NPS will spend fee revenues on a case-by-case basis given the particular management priorities at that time. The NPS will share more information about the fee structure during the 90-day delayed implementation period prior to the start of the permit requirement.

Motor Vehicle Requirements

15. Comment: One commenter asked the NPS to prohibit the use of vehicles with electric motors due to the risk of fire.

NPS Response: The NPS has not identified a risk of fire from electric engines that is greater than the risk of fire from traditional combustion engines.

16. Comment: Several commenters questioned the basis for implementing a 96 dBA noise limit (using the SAE J1287 test standard) instead of using the standard that applies to motor vehicles in other NPS units. This other standard is set forth in 36 CFR 2.12, which prohibits operating a motor vehicle in a manner that exceeds 60 decibels measured on the A-weighted scale at 50 feet. One commenter stated that the 96 dBA standard would diminish the experience of non-motorized visitors and potentially cause hearing damage.

NPS Response: Special regulations may relax a System-wide standard where appropriate for the uses and resources in a specific System unit. 36 CFR 1.2(c). The 96 dBA noise limit is an established industry standard with a well-defined measuring protocol (SAE J1287) and is a practicable limit that has been used by other NPS units with

similar resource concerns, including Lake Meredith National Recreation Area. This limit is used by the State of California for their ORV programs and is consistent with OHV noise limits in Arizona. ARS 28–1179(A)(3). The 96-dBA limit is consistent with requirements set by federal and state agencies that manage lands adjacent to the recreation area, including the United States Forest Service. Adopting this standard for the recreation area will avoid regulations that are inconsistent or incompatible across jurisdictional boundaries. As identified in the FEIS, only 36.5% of the recreation area will be impacted by noise related to ORV activity. This leaves ample opportunities for visitors to have an experience free from noise from OHVs and street-legal ATVs and to avoid areas where they may have concerns about hearing damage. In addition, several of the accessible shoreline areas will be closed seasonally to OHVs and street-legal ATVs.

17. Comment: One commenter objected to using the SAE J1287 test standard, which measures vehicle exhaust noise at 20 inches from the exhaust of a stationary vehicle operating at half throttle. This commenter stated that this test will not capture the actual noise of motor vehicles in use at the recreation area, the majority of which will be operated above half-throttle, generating more than 96 dBA of noise. One commenter stated that the SAE J1287 test will be difficult to implement in the field due to variable conditions, making the 96 dBA noise requirement difficult to enforce, even if law enforcement officers are properly trained and equipped with noise monitoring equipment.

NPS Response: SAE J1287 should be adequate to assess the volume of the primary noise source. SAE J1287 is a well-defined measurement protocol and is widely used to enforce noise regulations in many jurisdictions. Close (short distance) measurement of stationary vehicle noise is recommended for the safety of law enforcement officers, which allows them to give instructions to the vehicle operator and measure noise output while maintaining detainment or arrest of a suspect. Close measurements also allow law enforcement officers to measure noise without needing to move into undisturbed areas to collect noise from a distance.

18. Comment: One commenter suggested that the NPS prohibit the modification of a vehicle in any manner that will amplify and otherwise increase total noise emissions to a level greater than that emitted by the motor vehicle as originally constructed.

NPS Response: The practical application of the decibel restriction will result in the inability to modify most street-legal ATVs, OHVs, and conventional motor vehicles and still meet that restriction. The NPS is not concerned with the modification of vehicles that increase total noise emissions as long as they remain below the 96 dBA limit.

Compliance With Other Laws, Executive Orders, and Department Policy

Use of Off-Road Vehicles on the Public Lands (Executive Orders 11644 and 11989)

Executive Order 11644, as amended by Executive Order 11989, was adopted to address impacts on public lands from ORV use. The Executive Order applies to ORV use on federal public lands that is not authorized under a valid lease, permit, contract, or license. Section 3(a)(4) of Executive Order 11644 provides that ORV ''[a]reas and trails shall be located in areas of the National Park System, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.'' Since the Executive Order clearly was not intended to prohibit all ORV use everywhere in these units, the term ''adversely affect'' does not have the same meaning as the somewhat similar terms ''adverse impact'' and ''adverse effect'' used in the National Environmental Policy Act of 1969 (NEPA). In analyses under NEPA, a procedural statute that provides for the study of environmental impacts, the term ''adverse effect'' includes minor or negligible effects.

Section 3(a)(4) of the Executive Order, by contrast, concerns substantive management decisions and must be read in the context of the authorities applicable to such decisions. Glen Canyon National Recreation Area is an area of the National Park System. Therefore, NPS interprets the Executive Order term ''adversely affect'' consistent with its NPS Management Policies 2006. Those policies require that the NPS only allow ''appropriate use'' of parks and avoid ''unacceptable impacts.''

This rule is consistent with those requirements. It will not impede attainment of the recreation area's desired future conditions for natural and cultural resources as identified in the FEIS. NPS has determined that this rule will not unreasonably interfere with the atmosphere of peace and tranquility or the natural soundscape maintained in natural locations within the recreation area. Therefore, within the context of the resources and values of the recreation area, motor vehicle use on the routes and areas designated by this rule will not cause an unacceptable impact to the natural, aesthetic, or scenic values of the recreation area. The Executive Order does not prohibit the NPS from managing categories of ''off-road vehicles'' differently in order to best protect park resources and values. The selected alternative in the ROD, as implemented by this rule, does this by distinguishing between conventional motor vehicles, OHVs, and street-legal ATVs, all of which fall under the definition of ''off-road vehicle'' in the Executive Order.

Section 8(a) of the Executive Order requires agency heads to monitor the effects of ORV use on lands under their jurisdictions. On the basis of information gathered, agency heads may from time to time amend or rescind designations of areas or other actions as necessary to further the policy of the Executive Order. The preferred alternative in the FEIS includes monitoring and resource protection procedures and periodic review to provide for the ongoing evaluation of impacts of motor vehicle use on protected resources. The superintendent has authority to take appropriate action as needed to protect the resources of the recreation area.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have

developed this rule in a manner consistent with these requirements.

Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771)

Enabling regulations are considered deregulatory under guidance implementing Executive Order 13771 (M–17–21). This rule authorizes the Superintendent to allow a recreational activity for the public to enjoy and experience certain areas within the National Park System that would otherwise be prohibited.

Regulatory Flexibility Act (RFA)

The agency certifies that this rule will not have a significant economic impact on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This certification is based on the cost-benefit and regulatory flexibility analyses found in the report entitled ''Cost-Benefit and Regulatory Flexibility Analyses: Special Regulations of Off-Road Motor Vehicles at Glen Canyon National Recreation Area'' that can be viewed online at on *www.regulations.gov* in Docket ID: NPS–2018–0001. As stated in the Regulatory Flexibility Analysis section of the report, the FEIS and rule were developed to maintain a diversity of recreational opportunities throughout the recreation area. Several small businesses catering to non-motorized recreational opportunities currently operate in the Orange Cliffs Unit. Because the majority of the Orange Cliffs Unit will remain closed to ORVs, impacts to these businesses are not anticipated. Similarly, the NPS does not anticipate impacts to small businesses in other areas of the recreation area due to the incremental nature of the changes to baseline conditions in those locations. Given these findings, the NPS certifies that there will not be a significant economic impact on a substantial number of small entities. The certification made by the NPS under the RFA also relies on the associated cost-benefit analysis, which concludes that the rule will likely generate positive net benefits.

Congressional Review Act (CRA)

This rule is not a major rule under 5 U.S.C. 804(2), the CRA. This rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on state, local or tribal governments or the private sector. The designated ORV routes and areas are located entirely within the recreation area, and will not result in direct expenditure by state, local, or tribal governments. This rule addresses public use of NPS lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

This rule does not effect a taking of private property or otherwise have taking implications under Executive Order 12630. Access to private property adjacent to the recreation area will not be affected by this rule. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. The rule is limited in effect to federal lands managed by the NPS and will not have a substantial direct effect on state and local government. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175 and Department Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's consultation policy and have determined that tribal consultation on the rule is not required because the rule will have no substantial direct effect on federally recognized Indian tribes. In support of the Department of Interior and NPS commitment for government-to-government consultation with the 19 Native American tribes and bands associated with the recreation area, however, and as a reflection of the shared boundary of the recreation area and the Navajo Nation, the NPS has engaged in a continuing process of consultation with these tribes and bands. This consultation has taken the form of correspondence, phone conversations, and meetings during the preparation of the FEIS.

Paperwork Reduction Act (PRA)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the PRA. OMB has approved the information collection requirements associated with NPS Form 10–933, ''Application for Special Park Use Permit–Vehicle/Watercraft Use'' and has assigned OMB Control Number 1024–0026 (expires 11/30/20 and in accordance with 5 CFR 1320.10, the agency may continue to conduct or sponsor this collection of information while the submission is pending at OMB). We estimate the annual burden associated with Forms 10–933 under this information collection to be 12,998 hours per year. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act of 1969 (NEPA)

This rule constitutes a major Federal action significantly affecting the quality of the human environment. We have prepared the FEIS and ROD under the NEPA. The FEIS and ROD are available online at *http://parkplanning.nps.gov/glca-orvplan,* and then clicking on the link entitled ''Document List''.

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211; the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the rule has not otherwise been designated by the Administrator of

OIRA as a significant energy action. A Statement of Energy Effects is not required.

List of Subjects in 36 CFR Part 7

National Parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the NPS amends 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 54 U.S.C. 100101, 100751, 320102; Sec. 7.96 also issued under D.C. Code 10–137 and DC Code 50–2201.07.

■ 2. In § 7.70, add paragraph (f) to read as follows:

§ 7.70 Glen Canyon National Recreation Area.

* * * * *

(f) *Motor vehicle use.* Operating a motor vehicle is allowed within the boundaries of Glen Canyon National Recreation Area under the conditions in this paragraph (f).

(1) *What terms do I need to know?* In addition to the definitions found in § 1.4 of this chapter, the following definitions apply to this paragraph (f) only:

Conventional motor vehicle means any motor vehicle that is designed primarily for operation on streets and highways, and that is licensed and registered for interstate travel. Automobiles, vans, highway motorcycles (including dual-sports motorcycles licensed for use on a highway), sport utility vehicles (SUVs), recreational vehicles (RVs), pickup trucks, and buses are examples of conventional motor vehicles.

GMP road means a paved or unpaved park road that is identified in the Glen Canyon 1979 General Management Plan as open to motor vehicle travel. There are no park roads within the recreation area other than GMP roads.

Off-highway vehicle (OHV) means any motor vehicle designed primarily for off-road travel that is not licensed and registered for interstate travel. ATVs (excluding street legal ATVs, as defined below), dirt bikes, sand rails, side-by-sides, and dune buggies are examples of OHVs.

Orange Cliffs Special Management Unit means the area identified as the Orange Cliffs Special Management Unit in the Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area Backcountry Management Plan (NPS 1995).

Street-legal all-terrain vehicle (ATV) means an ATV that qualifies under Arizona or Utah motor vehicle and traffic code to be operated on state roads and highways.

(2) *Off-road motor vehicle permit requirement.* (i) The provisions in this paragraph (f)(2) are effective beginning on April 15, 2021.

(ii) A special use permit issued and administered by the superintendent is required to operate a motor vehicle off GMP roads at designated locations in the recreation area. Operating a motor vehicle off GMP roads in the recreation area without a permit is prohibited except for designated ORV routes that do not require a permit as indicated in Table 1 to paragraph (f)(3)(ii).

(iii) Annual permits are valid for one calendar year from the day they are issued. Shorter-term permits are valid from the day issued for the stated duration of the permit.

(iv) A permit applicant must acknowledge that he or she understands and agrees to abide by the rules governing off-road vehicle use in the recreation area.

(v) Each motor vehicle permitted to operate off GMP roads must display an NPS decal issued by the superintendent and affixed to the vehicle in a manner and location specified by the superintendent.

(vi) Permits may be requested at recreation area headquarters, recreation area visitor centers, on the recreation area's website, or at other locations designated by the superintendent.

(vii) Violating any term, condition, or requirement of an off-road vehicle permit is prohibited and may result in the suspension or revocation of the permit and the denial of future permits, in addition to the penalties provided by § 1.3 of this chapter.

(3) *Designated off-road motor vehicle locations.* (i) The operation of a motor vehicle off GMP roads within the recreation area is prohibited except at the locations designated by this paragraph (f). Designated locations and vehicle-free zones are identified on maps available at the recreation area headquarters, visitor contact stations, and on the recreation area's website.

(ii) Motor vehicles may be used off GMP roads at the locations and subject to the management prescriptions in Table 1 to paragraph (f)(3)(ii), except for vehicle-free zones where off-road vehicle use is prohibited. Permit requirements in Table 1 to paragraph (f)(3)(ii) are effective beginning on April 15, 2021.

TABLE 1 TO PARAGRAPH (f)(3)(ii)

Designated area or route for off-road motor vehicle use	Approximate size	Management prescriptions
Lone Rock Beach	250 acres	• 15 mph speed limit (unless otherwise posted). • Vehicle-free zone as posted. • Conventional motor vehicles, street-legal ATVs, and OHVs allowed with ORV permit. • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Lone Rock Beach Play Area	180 acres	• Conventional motor vehicles, street-legal ATVs, and OHVs allowed with ORV permit. • OHVs required to display a red or orange safety flag at least six by 12 inches in size that is located at least eight feet off the ground, or at least 18 inches above the top of the protective headgear of a motorcycle or dirt bike operator. • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Blue Notch	325 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Bullfrog North and South	2,250 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent. • Vehicle-free zone as posted.
Copper Canyon	30 acres	• Conventional motor vehicles and street-legal ATVs allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.

TABLE 1 TO PARAGRAPH (f)(3)(ii)—Continued

Designated area or route for off-road motor vehicle use	Approximate size	Management prescriptions
Crosby Canyon	450 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Dirty Devil	75 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Farley Canyon	275 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Hite Boat Ramp	50 acres	• Conventional motor vehicles and street-legal ATVs allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Neskahi	15 acres	• Conventional motor vehicles and street-legal ATVs allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Nokai Canyon	275 acres	• Conventional motor vehicles and street-legal ATVs allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Paiute Canyon	100 acres	• Conventional motor vehicles and street-legal ATVs allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Paiute Farms	1,000 acres	• Conventional motor vehicles and street-legal ATVs allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Red Canyon	50 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Stanton Creek	675 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year-round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent. • Vehicle-free zone as posted.
White Canyon	325 acres	• Street-legal ATVs allowed with ORV permit from March 2–October 31. • Conventional motor vehicles allowed with ORV permit year round. • 15 mph speed limit (unless otherwise posted). • Quiet hours between 10 pm and 6 am or as designated by superintendent.
Ferry Swale	16 miles	• Conventional motor vehicles, street-legal ATVs and OHVs allowed with ORV permit year-round. • 25 mph speed limit (unless otherwise posted).
Middle Moody Canyon Trailhead.	2 miles	• Conventional motor vehicles, street-legal ATVs and OHVs allowed year-round. • ORV permit not required. • 25 mph speed limit (unless otherwise posted).
East Gypsum Canyon Overlook	1.2 miles	• Conventional motor vehicles, street-legal ATVs and OHVs allowed year-round. • ORV permit not required. • 25 mph speed limit (unless otherwise posted).
Imperial Valley	0.75 miles	• Conventional motor vehicles, street-legal ATVs and OHVs allowed year-round. • ORV permit not required. • 25 mph speed limit (unless otherwise posted).
Gunsight Springs Trailhead	1 mile	• Conventional motor vehicles, street-legal ATVs and OHVs allowed year-round. • ORV permit not required. • 25 mph speed limit (unless otherwise posted).

(4) *On-road motor vehicle use.* (i) The operation of a motor vehicle on GMP roads is prohibited except as set forth in Table 2 to paragraph (f)(4)(i):

TABLE 2 TO PARAGRAPH (f)(4)(i)

Type of motor vehicle	Allowed on paved GMP roads	Allowed on unpaved GMP roads outside the Orange Cliffs Special Management Unit	Allowed on unpaved GMP roads within the Orange Cliffs Special Management Unit
Conventional motor vehicle	Yes	Yes	Yes.

TABLE 2 TO PARAGRAPH (f)(4)(i)—Continued

Type of motor vehicle	Allowed on paved GMP roads	Allowed on unpaved GMP roads outside the Orange Cliffs Special Management Unit	Allowed on unpaved GMP roads within the Orange Cliffs Special Management Unit
Street-legal ATV	Yes (except for the Lees Ferry Developed Area).	Yes	Yes, on Route 633 proceeding north to Route 730, an 8-mile portion of the Poison Spring Loop and on the upper portion of the Flint Trail if designated by the Superintendent under paragraph (4)(ii) below.
OHV	No	Yes	Yes, on Route 633 proceeding north to Route 730, an 8-mile portion of the Poison Spring Loop and on the upper portion of the Flint Trail if designated by the Superintendent under paragraph (4)(ii) below.

(ii) The Superintendent may determine whether street-legal ATVs or OHVs are allowed on a 15–20 mile section of an unpaved GMP road known as the upper portion of the Flint Trail within the Orange Cliffs Special Management Unit pursuant to paragraph (f)(6) of this section. Except on the portion of the Poison Spring Loop identified in Table 2 to paragraph (f)(4)(i) and as may be allowed by the Superintendent on the upper portion of the Flint Trail, street-legal ATVs and OHVs are prohibited on unpaved GMP roads in the Orange Cliffs Special Management Unit.

(5) *Motor vehicle and operator requirements.* (i) Motor vehicles must be equipped at all times with noise-suppression devices, including an exhaust muffler in good working order and in constant operation. Operating a motor vehicle that emits more than 96 decibels of sound (using the SAE J1287 test standard) is prohibited. Creating or sustaining unreasonable noise considering the nature and purpose of the actor's conduct, impact on park users, location, and other factors that would govern the conduct of a reasonably prudent person is prohibited.

(ii) All motor vehicles operating in Lone Rock Beach Play Area must be equipped with a solid red or orange safety flag that is a minimum of six by 12 inches in size and that is attached to the vehicle so that the safety flag is at least eight feet above the surface of the level ground, or attached to the protective headgear of a person operating a motorcycle or dirt bike so that the safety flag is at least 18 inches above the top of the person's headgear. Operating a motor vehicle without a safety flag at Lone Rock Beach Play Area is prohibited.

(iii) Operating a motor vehicle in excess of 15 mph (unless otherwise posted) at the following off-road motor vehicle locations—Lone Rock Beach, Blue Notch, Bullfrog North and South, Copper Canyon, Crosby Canyon, Dirty Devil, Farley Canyon, Hite Boat Ramp, Neskahi, Nokai Canyon, Paiute Canyon, Paiute Farms, Red Canyon, Stanton Creek, and White Canyon—is prohibited.

(iv) Operating a motor vehicle in excess of 25 mph (unless otherwise posted) on unpaved GMP roads and on off-road motor vehicle routes in Ferry Swale, Middle Moody Canyon Trailhead, East Gypsum Canyon Overlook, Imperial Valley, and Gunsight Springs Trailhead is prohibited.

(v) Operating a motor vehicle within a designated off-road motor vehicle area during quiet hours with the exception of entering and exiting a campsite is prohibited.

(vi) Operating a generator or audio device, such as a radio, deck or compact disc player, within a designated off-road motor vehicle area during quiet hours is prohibited. During the hours of permitted operation, generators must be adequately muffled and not create excessive noise as defined in 36 CFR 2.12(a)(1).

(vii) Operating a motor vehicle within a posted ''vehicle-free'' zone is prohibited.

(viii) Operating an OHV under the age of 18 without a helmet is prohibited.

(6) *Superintendent's authority.* (i) The superintendent may close or reopen designated areas or routes to motor vehicle use, or impose conditions or restrictions on the use of off-road motor vehicles after taking into consideration public health and safety, natural and cultural resource protection, lake levels, and other management activities and objectives.

(ii) The superintendent will provide public notice of all such actions through one or more of the methods listed in § 1.7 of this chapter.

(iii) Violating any such closure, condition, or restriction is prohibited.

(iv) The superintendent may suspend or revoke an existing permit, and may deny future applications for an off-road motor vehicle permit, based upon violations of any such closure, condition, or restriction.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2020–28464 Filed 1–14–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2019–0009]

RIN 0651–AD33

Small Entity Government Use License Exception

Correction

In rule document C1–2020–27049 appearing on page 2542 in the issue of Wednesday, January 13, 2021, the correction is withdrawn.

[FR Doc. C2–2020–27049 Filed 1–14–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 42

[Docket No. PTO–P–2019–0011]

RIN 0651–AD34

Rules of Practice To Allocate the Burden of Persuasion on Motions To Amend in Trial Proceedings Before the Patent Trial and Appeal Board

Correction

In rule document C1–2020–28159 appearing on page 2542 in the issue of Wednesday, January 13, 2021, the correction is withdrawn.

[FR Doc. C2–2020–28159 Filed 1–14–21; 8:45 am]

BILLING CODE 1301–00–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0435; FRL–10017–70–Region 9]

Air Plan Approval; California; Placer County Air Pollution Control District, Antelope Valley Air Quality Management District, Mariposa County Air Pollution Control District, and Eastern Kern Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Placer County Air Pollution Control District (PCAPCD), Antelope Valley Air Quality Management District (AVAQMD), Mariposa County Air Pollution Control District (MCAPCD), and Eastern Kern Air Pollution Control District (EKAPCD) portions of the California State Implementation Plan (SIP). These revisions concern negative declarations for the Control Techniques Guidelines (CTG) for the Oil and Natural Gas Industry (Oil and Natural Gas CTG). We are approving the negative declarations into the California SIP.

DATES: This rule will be effective on February 16, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2020–0435. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Sina Schwenk-Mueller, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105, by phone: (415) 947–4100 or by email at *SchwenkMueller.Sina@epa.gov;* or Rebecca Newhouse, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105, by phone: (415) 972–3004 or by email at *newhouse.rebecca@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

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I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Statutory and Executive Order Reviews

I. Proposed Action

On October 6, 2020 (85 FR 63064), the EPA proposed to approve the following negative declarations into the CA SIP.

Local agency	Document title	Adopted	Submitted
PCAPCD	Negative Declaration for the Control Techniques Guidelines for the Oil and Natural Gas Industry Source Category.	12/12/19	[1] 01/23/20
AVAQMD	Federal Negative Declaration for Control Techniques Guidelines (CTG) for the Oil and Natural Gas Industry Source Category.	01/21/20	[2] 05/01/20
MCAPCD	Negative Declaration for the Control Techniques Guidelines for the Oil and Natural Gas Industry Source Category.	03/10/20	[3] 05/01/20
EKAPCD	Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) for the 2008 Ozone National Ambient Air Quality Standards—Negative Declaration for Oil and Natural Gas CTG.[4]	05/11/17	08/09/17

[1] This submittal was transmitted to the EPA by a letter from CARB dated January 21, 2020.
[2] This submittal was transmitted to the EPA by a letter from CARB dated April 30, 2020.
[3] This submittal was transmitted to the EPA by a letter from CARB dated April 30, 2020.
[4] The EPA is only acting on the negative declaration for the Oil and Natural Gas CTG in Table 6—CTG Categories with No Applicable Source (Negative Declarations) of the EKAPCD RACT SIP Submittal. At this time, the EPA is not proposing any action on the remainder of the EKAPCD RACT SIP that was submitted on August 9, 2017. The EPA will propose a separate action on the remainder of the EKAPCD RACT SIP at a future date.

We proposed to approve these negative declarations because we determined that they comply with the relevant CAA requirements. Our proposed action contains more information on the negative declarations and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving these revisions into the California SIP.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described

in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 16, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Volatile organic compounds.

Dated: December 11, 2020.

John Busterud,

Regional Administrator, Region IX.

For the reasons stated in the preamble, the Environmental Protection Agency amends Part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—CALIFORNIA

■ 2. Section 52.220 is amended by adding paragraphs (c)(503)(ii), (c)(548), and (c)(549) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(503) * * *

(ii) *Additional materials.* (A) Eastern Kern Air Pollution Control District.

(*1*) Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) for the 2008 Ozone National Ambient Air Quality Standards—Negative Declaration for Oil and Natural Gas CTG only, as adopted on May 11, 2017.

(*2*) [Reserved]

(B) [Reserved]

* * * * *

(548) Additional materials were submitted on January 23, 2020 by the Governor's designee as an attachment to a letter dated January 21, 2020.

(i) [Reserved]

(ii) *Additional materials.* (A) Placer County Air Pollution Control District.

(*1*) Negative Declaration for the Control Techniques Guidelines for the Oil and Natural Gas Industry Source Category as adopted on December 12, 2019.

(*2*) [Reserved]

(B) [Reserved]

(549) Additional materials were submitted on May 1, 2020 by the Governor's designee as an attachment to a letter dated April 30, 2020.

(i) [Reserved]

(ii) *Additional materials.* (A) Antelope Valley Air Quality Management District.

(*1*) Federal Negative Declaration for Control Techniques Guidelines (CTG) for the Oil and Natural Gas Industry Source Category as adopted on January 21, 2020

(*2*) [Reserved]

(B) Mariposa County Air Pollution Control District.

(*1*) Negative Declaration for the Control Techniques Guidelines for the Oil and Natural Gas Industry Source Category as adopted on March 10, 2020.

(*2*) [Reserved]

■ 3. Section 52.222 is amended by adding paragraphs (a)(4)(v), (a)(6)(xii), and (a)(15) and (16) to read as follows:

§ 52.222 Negative declarations.

(a) * * *

(4) * * *

(v) The following negative declaration for the 2008 ozone standard was adopted by the District on December 12, 2019, and submitted to the EPA on January 23, 2020, as an attachment to a letter dated January 21, 2020: The Control Techniques Guidelines for the Oil and Natural Gas Industry (EPA 453/B–16–001).

* * * * *

(6) * * *

(xii) The following negative declaration for the 2008 ozone standard was adopted by the District on January 21, 2020 and submitted to the EPA on May 1, 2020, as an attachment to a letter dated April 30, 2020: The Control Techniques Guidelines for the Oil and Natural Gas Industry (EPA 453/B–16–001).

* * * * *

(15) Mariposa County Air Pollution Control District.

(i) The following negative declaration for the 2008 ozone standard was adopted by the District on March 10, 2020, and submitted to the EPA on May 1, 2020, as an attachment to a letter dated April 30, 2020: The Control Techniques Guidelines for the Oil and Natural Gas Industry (EPA 453/B–16–001).

(ii) [Reserved]

(16) Eastern Kern Air Pollution Control District

(i) The following negative declaration for the 2008 ozone standard was adopted by the District on May 11,2017 and submitted to the EPA on August 9, 2017: The Control Techniques Guidelines for the Oil and Natural Gas Industry (EPA 453/B–16–001).

(ii) [Reserved]

[FR Doc. 2020–28018 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2020–0422; FRL–10018–59-Region 7]

Air Plan Approval; Kansas; Infrastructure State Implementation Plan Requirements for the 2015 Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve certain elements of a State Implementation Plan (SIP) submission from the State of Kansas addressing the applicable requirements of section 110 of the Clean Air Act (CAA) for the 2015 Ozone (O_3) National Ambient Air Quality Standard (NAAQS). Section 110 requires that each state adopt and submit a SIP revision to support the implementation, maintenance, and enforcement of each new or revised NAAQS promulgated by the EPA. These SIPs are commonly referred to as ''infrastructure'' SIPs. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA.

DATES: This final rule is effective on February 16, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2020–0422. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: William Stone, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7714; email address: *stone.william@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to the EPA. A technical support document (TSD) is included in the rulemaking docket.

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I. Background
II. What is being addressed in this document?
III. Have the requirements for approval of a SIP revision been met?
IV. What is the EPA's response to comments?
V. What action is the EPA taking?
VI. Statutory and Executive Order Reviews

I. Background

On September 11, 2020, the EPA proposed to approve Kansas' infrastructure SIP submission for the 2015 O_3 NAAQS in the **Federal Register** (85 FR 56198; September 11, 2020). The EPA solicited comments on the proposed approval of the infrastructure SIP submission and received three separate comments that are addressed in this document.

II. What is being addressed in this document?

The EPA is approving the infrastructure SIP submission, submitted by the state by letter dated September 27, 2018,[1] and supplemented by letter dated February 6, 2020, in accordance with section 110(a)(1) of the CAA. Specifically, the EPA is approving the following infrastructure elements of section 110(a)(2) of the CAA: (A) through (C), (D)(i)(II)- prevent significant deterioration of air quality (prong 3) and protection of visibility (prong 4), (D)(ii), (E) through (H), and (J) through (M). Elements of section 110(a)(2)(D)(i)(I)—significant contribution to nonattainment (prong 1), and interfering with maintenance of the NAAQS (prong 2), will be addressed in a separate action.

Although section 110(a)(2)(I) was addressed in the submission,[2] the EPA is not taking action on section 110(a)(2)(I)—Nonattainment Area Plan or Plan Revisions under Part D, as it is the EPA's interpretation of the CAA that these elements do not need to be addressed in the context of an infrastructure SIP submission.

A Technical Support Document (TSD) in the docket provides additional details of this action, including an analysis of how the SIP meets the applicable 110 requirements for infrastructure SIPs. Included in the TSD is the EPA's analysis concerning Kansas' authority to conduct modeling in accordance with the EPA's ''*Revisions to the Guideline on Air Quality Models: Enhancements to the AERMOD Dispersion Modeling System and Incorporation of Approaches To Address Ozone and Fine Particulate Matter*'' (also referred to as the 2017 *Guideline*).[3] 82 FR 5182. While Kansas has not yet formally adopted the 2017 *Guideline* into its regulations, Kansas states that it has the authority to integrate the requirements and recommendations of the 2017 *Guideline* in its regulatory processes. As detailed in the TSD, the EPA finds that Kansas' September 27, 2018 submission, supplemented by letter dated February 6, 2020, satisfies the PSD-related requirements of CAA sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3), and 110(a)(2)(J), and modeling requirements related to CAA section 110(a)(2)(K).

III. Have the requirements for approval of a SIP revision been met?

The State met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The EPA determined that the submission satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided a public comment period for this SIP revision from August 23, 2018 to September 24, 2018 and received no comments. In addition, as explained in more detail in the TSD which is part of this docket, the infrastructure SIP submission meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

IV. What is the EPA's response to comments?

The public comment period on the EPA's proposed rule opened September 11, 2020, the date of its publication in the **Federal Register** and closed on October 13, 2020. During this period, the EPA received three comments. One comment was not germane to the action and does not require a response from the EPA. Another comment was supportive of the EPA's proposed approval of Kansas' 2015 O_3 Infrastructure SIP. The third comment, which was supportive of the EPA's proposed approval of Kansas' 2015 O_3 Infrastructure SIP but also identified misstatements in the EPA's proposed rule, was submitted by the Kansas Department of Health and the Environment and is summarized below.

Comment 1: The EPA incorrectly listed April 11, 2019 as the date of

[1] The proposed rule mistakenly stated that Kansas' infrastructure SIP submission was received by the EPA on April 11, 2019.

[2] The proposed rule mistakenly stated that Kansas' infrastructure SIP submission did not address section 110(a)(2)(I).

[3] EPA's *Guideline on Air Quality Models* is codified at 40 CFR part 51, appendix W and is generically referred to as *Guideline* herein.

receipt of Kansas' 2015 O_3 Infrastructure SIP submission in the proposed rule.

Response 1: The EPA agrees that it made an error in the proposed rule, and notes that Kansas submitted the 2015 O_3 Infrastructure SIP to the EPA by letter dated September 27, 2018. In addition, the TSD and the 40 CFR part 52 table in the proposed rule correctly identified the September 27, 2018 submittal date. As such, this final rule accurately identifies that the EPA is taking final action on the 2015 O_3 Infrastructure SIP submitted to the EPA by Kansas on September 27, 2018.

Comment 2: The EPA mistakenly identified that particular elements related to interstate pollution transport, specifically prongs 1 and 2 of section 110(a)(2)(D)(i)(I), were not addressed in the submission; however, Kansas did include section 110(a)(2)(D)(i)(I) requirements in the September 27, 2018 submission.

Response 2: The EPA notes that it made an error in the proposed rule by stating that Kansas did not include prongs 1 and 2 of section 110(a)(2)(D)(i)(I) requirements in the September 27, 2018 submission. As noted in the TSD, the EPA plans to address prongs 1 and 2 in a separate rulemaking. The EPA has revised the 40 CFR part 52 table accompanying this action in order to address Kansas' comment.

Comment 3: The EPA states that Kansas did not address section 110(a)(2)(I) requirements in the 2015 O_3 Infrastructure SIP submission; however, Kansas did include section 110(a)(2)(I) requirements in the September 27, 2018 submission.

Response 3: The EPA notes that it made an error in the proposed rule by stating that Kansas did not address section 110(a)(2)(I) requirements in Kansas' 2015 O_3 Infrastructure SIP submission. However, as discussed in the proposed rule and the TSD, it is the EPA's interpretation of the CAA that section 110(a)(2)(I) does not need to be addressed in the context of an infrastructure SIP submission. Section 110(a)(2)(I) requires states to meet the applicable SIP requirements of part D of the CAA relating to designated nonattainment areas. The specific part D submissions for designated nonattainment areas are subject to different submission schedules than those for section 110 infrastructure elements. The EPA acts on part D attainment plan SIP submissions through a separate rulemaking governed by the requirements for nonattainment areas, as described in part D. As such, this final rule does not address the section 110(a)(2)(I) requirements that were included in Kansas' 2015 O_3 Infrastructure SIP submission.

V. What action is EPA taking?

The EPA is approving elements of the September 27, 2018, infrastructure SIP submission from the State of Kansas, which addresses the requirements of CAA sections 110(a)(1) and (2) as applicable to the 2015 O_3 NAAQS. Specifically, the EPA is approving the following infrastructure elements of section 110(a)(2): (A) through(C), (D)(i)(II) prong 3 and prong 4, (D)(ii), (E) through (H), (J) through (M). The EPA intends to act on the elements of section 110(a)(2)(D)(i)(I)- prong 1 and prong 2, in a subsequent rulemaking. The EPA is not addressing section 110(a)(2)(I)-Nonattainment Area Plan or Plan Revisions under part D, as it is the EPA's interpretation of the CAA that these elements do not need to be addressed in the context of an infrastructure SIP submission.

Based upon review of the State's infrastructure SIP submissions and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, the EPA finds that Kansas' SIP meets all applicable required elements of sections 110(a) (1) and (2) (except as otherwise noted) with respect to the 2015 O_3 NAAQS.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 16, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the

purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Infrastructure, Intergovernmental relations, Ozone.

Dated: December 14, 2020.

James Gulliford,

Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA amends the 40 CFR part 52 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart R—KANSAS

■ 2. In § 52.870, the table in paragraph (e) is amended by adding the entry ''(45)'' in numerical order to read as follows:

§ 52.870 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED KANSAS NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
*	*	*	*	*
(45) Section 110(a)(2) Infrastructure Requirements for the 2015 O_3 NAAQS.	Statewide	9/27/18	1/15/21, [insert **Federal Register** citation].	[EPA–R07–OAR–2020–0422; FRL–10013–71-Region 7]. This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II)—prongs 3 and 4, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). EPA intends to act on 110(a)(2)(D)(i)(I)—prongs 1 and 2, in a separate action. 110(a)(2)(I) is not applicable.

[FR Doc. 2020–28120 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0176; FRL–10017–96–Region 9]

Air Plan Approval; California; South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of oxides of nitrogen (NO_X) from on-road heavy-duty vehicles. We are approving a local measure to reduce emissions from these sources under the Clean Air Act (CAA or the Act).

DATES: This rule will be effective on February 16, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2019–0176. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Rebecca Newhouse, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3004 or by email at *newhouse.rebecca@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

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I. Proposed Action
II. Public Comments and EPA Responses
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I. Proposed Action

On April 25, 2019 (84 FR 17365), the EPA proposed to approve the following measure, submitted by the California Air Resources Board (CARB), into the California SIP.

Local agency	Resolution #	Measure title	Adopted	Submitted
CARB	18–3	South Coast On-Road Heavy-Duty Vehicle Incentive Measure	03/22/18	05/04/18

We proposed to approve the South Coast On-Road Heavy-Duty Vehicle Incentive Measure based on a determination that it satisfies the applicable CAA requirements for approval of voluntary measures for SIP

emission reduction credit. Our proposal was based on our evaluation of the documents provided in the SIP submission, including the measure itself (*i.e.,* the State commitments set forth on page 5 of CARB Resolution 18–3), CARB's analysis of the measure in a document entitled ''South Coast On-Road Heavy-Duty Vehicle Incentive Measure,'' Release Date: February 16, 2018 (hereafter ''Demonstration''), and a document entitled ''Additional Information for the South Coast On-Road Heavy-Duty Vehicle Incentive Measure.'' Our proposed rule and associated technical support document (TSD) [1] contain more information about the SIP submission and our evaluation thereof.

On November 24, 2020, CARB submitted a technical clarification to the South Coast On-Road Heavy-Duty Vehicle Incentive Measure that clarifies its commitment to make certain documents concerning the incentive projects implemented to achieve emission reductions available to the public upon request. CARB adopted this technical clarification to the measure by Executive Order S–20–030 (November 23, 2020).[2] We refer to CARB's commitments in Resolution 18–3, as clarified by Executive Order S–20–030, as the ''South Coast Incentive Measure.''

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received comments from Earthjustice, on behalf of a coalition of environmental and community organizations, and comments from an anonymous commenter.[3]

We respond below to a selection of the most significant comments on our proposed rule. We respond to all other comments that are germane to the proposed rule in our separate Response to Comments document available at *https://www.regulations.gov,* Docket ID No. EPA- R09–OAR–2019–0176. We do not respond to the comments from the anonymous commenter because they fail to identify any specific issue that is germane to our action on this measure.

Comment 1: Earthjustice states that the South Coast Incentive Measure does not satisfy the enforceability requirements in section 110(a)(2)(A) of the CAA. Citing the EPA's Memo to Docket for a rulemaking entitled ''State Implementation Plans: Response to Petition for Rulemaking; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction,'' Earthjustice states that to be ''enforceable,'' a measure must be enforceable by the state, the EPA, and citizens. Earthjustice also states that the mere approval of a measure into the SIP does not convert an unenforceable provision into an enforceable one, and that the EPA's SIP rulemaking must explain how the proposed measure can be enforced. According to Earthjustice, the EPA's proposed rule to approve the South Coast Incentive Measure has not provided a legally defensible analysis of how this rule is enforceable.

Response 1: We agree with Earthjustice's statement that the mere approval of a measure into the SIP does not convert an unenforceable provision into an enforceable one, but we disagree with Earthjustice's claim that CARB's commitments in the South Coast Incentive Measure are not enforceable. We explain below how the EPA and citizens may enforce the provisions of CARB's SIP commitments in the South Coast Incentive Measure. We respond to Earthjustice's more specific comments concerning enforceability in our responses to comments 2 through 11. We note that our evaluation here is limited to CARB's commitments in the South Coast Incentive Measure and that the EPA will review each incentive-based control measure submitted by a state on a case-by-case basis, following notice-and-comment rulemaking, to determine whether the applicable requirements of the Act are met.

Under CAA section 110(a)(2)(A), SIPs must include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the Act, as well as timetables for compliance. Similarly, section 172(c)(6) provides that nonattainment area SIPs must include enforceable emission limitations and such other control measures, means or techniques as may be necessary or appropriate to provide for attainment of the national ambient air quality standards (NAAQS) by the applicable attainment date.

Control measures, including commitments in SIPs, are enforced through CAA section 304(a), which provides for citizen suits to be brought against any ''person,'' including a state,[4] who is alleged ''to be in violation of . . . an emission standard or limitation. . ..'' ''Emission standard or limitation'' is defined in subsection (f) of section 304.[5] As observed in *Conservation Law Foundation, Inc.* v. *James Busey et al.,* 79 F.3d 1250, 1258 (1st Cir. 1996):

> Courts interpreting citizen suit jurisdiction have largely focused on whether the particular standard or requirement plaintiffs sought to enforce was sufficiently specific. Thus, interpreting citizen suit jurisdiction as limited to claims ''for violations of specific provisions of the act or specific provisions of an applicable implementation plan,'' the Second Circuit held that suits can be brought to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS, but not to enforce the NAAQS directly. See, *e.g., Wilder,* 854 F.2d at 613–14. Courts have repeatedly applied this test as the linchpin of citizen suit jurisdiction. See, *e.g., Coalition Against Columbus Ctr.* v. *City of New York,* 967 F.2d 764, 769–71 (2d Cir. 1992); *Cate* v. *Transcontinental Gas Pipe Line Corp.,* 904 F. Supp. 526, 530–32 (W.D. Va. 1995); *Citizens for a Better Env't* v. *Deukmejian,* 731 F. Supp. 1448, 1454–59 (N.D. Cal.), modified, 746 F. Supp. 976 (1990).

Thus, courts have found that the citizen suit provision cannot be used to enforce the aspirational goal of attaining the NAAQS but can be used to enforce specific strategies to achieve that goal.[6]

SIP control measures and commitments may also be enforced by the EPA under section 113(a)(1) of the Act, which authorizes the EPA to issue notices and compliance orders, assess administrative penalties, and bring civil actions against any ''person,'' including

[1] EPA Region IX, ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan, California Air Resources Board Resolution 18–3, South Coast On-Road Heavy-Duty Vehicle Incentive Measure,'' April 2019.

[2] Letter dated November 23, 2020, from Richard W. Corey, Executive Officer, CARB, to John W. Busterud, Regional Administrator, EPA Region IX (transmitting, inter alia, CARB Executive Order S–20–030, ''Adoption and Submittal of Technical Clarifications to the South Coast On-Road Heavy-Duty Incentive Measure,'' November 23, 2020).

[3] Letter dated May 28, 2019, from Adriano L. Martinez, Earthjustice, to Rynda Kay, EPA, Region IX, Subject: ''Docket ID No. EPA–R09–OAR–2019–0176'' (on behalf of the California Communities Against Toxics, Center for Community Action and Environmental Justice, Coalition for a Safe Environment, and the Natural Resources Defense Council) and letter dated May 28, 2019, from anonymous commenter.

[4] CAA section 302(e) (defining ''person'' to include a State or political subdivision thereof).

[5] Section 304(f) of the CAA defines ''emission standard or limitation,'' in relevant part, to mean ''a schedule or timetable of compliance'' which is in effect under the Act ''or under an applicable implementation plan.'' Section 302(p) of the Act defines ''schedule and timetable of compliance'' to mean ''a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.'' Section 302(q) of the Act defines ''[a]pplicable implementation plan,'' in relevant part, as ''the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 of [title I of the Act] . . . and which implements the relevant requirements of [the Act].''

[6] See also *Committee for a Better Arvin, et al.* v. *EPA,* 786 F.3d 1169, 1181 (9th Cir. 2015) (finding that California's commitments to propose and adopt emission control measures and to achieve aggregate emission reductions are enforceable ''emission standards or limitations'' under the CAA).

a state, who ''has violated or is in violation of any requirement or prohibition of an applicable implementation plan. . . .''[7]

CARB's commitments in the South Coast Incentive Measure are set forth on page 5 of CARB Resolution 18–3 (March 22, 2018), as clarified by Executive Order S–20–030 (November 23, 2020),[8] and include six key components, as summarized below:

(1) A commitment to monitor the District's implementation of 1,300 on-road heavy-duty compression ignition truck repower and replacement projects in accordance with specified portions of the 2017 Carl Moyer Guidelines;

(2) a commitment to achieve 1 ton per day (tpd) of reductions in NO_X emissions from the 2023 baseline inventory in the 2016 South Coast AQMP through implementation of these repower or replacement projects or substitute measures in the South Coast Air Basin (hereafter ''tonnage commitment'');

(3) a commitment to submit reports to the EPA by March 31 of each year from 2020 through 2023, each of which must include, among other things, specific information about the incentive projects funded through the previous year, about changes to the applicable guidelines, and about actions by CARB and the District to monitor projects for compliance with contract requirements (hereafter ''annual demonstration reports'');

(4) a commitment to make each annual demonstration report publicly available or available upon request;

(5) a commitment to provide to the public, upon request, certain project-specific documents relied upon in the preparation of CARB's annual demonstration reports, including project applications, grant contracts, and inspection-related documents, and

(6) a commitment to adopt and submit to the EPA, by September 1, 2022, substitute measures or rules that address any shortfall in emission reductions required to meet the tonnage commitment by no later than January 1, 2023, if the EPA determines by July 1, 2021 that information submitted by CARB is insufficient to demonstrate that it will fulfill the tonnage commitment on schedule.[9]

In the Demonstration, CARB states that ''CARB is the responsible party for enforcement of this measure and is responsible for achieving the emission reductions from this measure,''[10] thus expressing CARB's decision to voluntarily commit itself to fulfilling the tonnage commitment and to being held accountable for failure to fulfill this commitment.

Upon the EPA's approval of these commitments into the SIP under CAA section 110, the commitments will become federally enforceable requirements of an ''applicable implementation plan'' as defined in CAA section 302(q). Therefore, as discussed below, both citizens and the EPA may enforce these commitments under CAA sections 304(a)(1) and 113(a)(1), respectively. We describe each enforceable component of the South Coast Incentive Measure below.

First, the South Coast Incentive Measure obligates CARB to monitor District implementation of 1,300 on-road heavy-duty compression ignition truck repower and replacement projects in accordance with specified portions of the 2017 Carl Moyer Guidelines.[11] The 2017 Carl Moyer Guidelines enable CARB to carry out its oversight responsibilities by requiring, among other things, that air districts (1) maintain, for specified periods of time, all project-related documentation obtained from participating sources and through the air district's on-site project inspections;[12] (2) make such documents available to CARB staff during CARB's periodic ''incentive program reviews'' and upon request;[13] (3) submit a certified ''yearly report'' to CARB containing specific information about funded projects, including information sufficient to calculate emission reductions and cost-effectiveness for source categories where required;[14] and (4) allow CARB and its designees to conduct fiscal audits and to inspect project engines, vehicles, and/or equipment and associated records during the contract term.[15] The 2017 Carl Moyer Guidelines also specifically identify types of actions on the part of the implementing air district that CARB may treat as violations of program requirements—*e.g.,* misuse of Carl Moyer Program funds to fund ineligible projects and insufficient, incomplete, or inaccurate project documentation[16]—and authorize CARB to enforce the terms of a project contract at any time during the contract term to ensure that emission reductions are obtained.[17] If CARB fails to document in each annual demonstration report the steps it has taken to exercise these monitoring responsibilities, that failure would constitute a violation of the SIP commitment.

Second, the South Coast Incentive Measure obligates CARB to achieve, by December 31, 2022, 1 tpd of reductions in NO_X emissions from the 2023 baseline inventory[18] in the 2016 South Coast AQMP through implementation of these projects in the South Coast Air Basin or substitute measures and/or rules consistent with paragraph 5 of the commitment.[19] If CARB fails to achieve 1 tpd of NO_X emission reductions by December 31, 2022 through implementation of the identified incentive projects or substitute measures and/or rules that meet the identified criteria, that failure would constitute a violation of the SIP commitment.

Third, the South Coast Incentive Measure obligates CARB to submit

[7] CAA section 113(a)(1)-(2) (establishing EPA's SIP enforcement authorities), section 302(e) (defining ''person'' to include a state or political subdivision thereof), and section 302(q) (defining ''applicable implementation plan'' to include the portion(s) of the implementation plan approved under CAA section 110 that implement relevant CAA requirements).

[8] CARB Resolution 18–3, ''South Coast On-Road Heavy Duty Vehicle Incentive Measure'' (March 22, 2018), 5 and CARB Executive Order S–20–030, ''Adoption and Submittal of Technical Clarifications to the South Coast On-Road Heavy-Duty Incentive Measure'' (November 23, 2020) (hereafter ''South Coast Incentive Measure'').

[9] Id. We use the shorthand term ''insufficiency finding'' to refer to a determination by the EPA that information submitted by CARB is insufficient to demonstrate that CARB will fulfill the tonnage commitment on schedule. An insufficiency finding by the EPA triggers CARB's obligation, under the terms of paragraph 5 of the South Coast Incentive Measure, to adopt and submit substitute measures and/or rules that address any shortfall in required emission reductions.

[10] Demonstration, 14.

[11] South Coast Incentive Measure, para. 1. CARB is required under California law to monitor air district implementation of Carl Moyer projects to ensure compliance with the applicable guidelines. California Health & Safety Code (Ca. HSC) section 44291(d) (requiring CARB to ''monitor district programs to ensure that participating districts conduct their programs consistent with the criteria and guidelines established by the state board and the commission pursuant to this chapter'').

[12] The 2017 Carl Moyer Guidelines require that each implementing air district maintain a file for each funded project (a ''project file'') that includes, among other things, a copy of the application, a copy of the executed project contract and any related amendments, photographic and other documentation of the baseline (replaced) engine, vehicle, or equipment, and photographic and other documentation of the new engine, vehicle, or equipment. 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section S (''Requirements for Project Applications''), para. 2; Section T (''Application Evaluation and Project Selection''), paras. 1 and 8; Section V (''Minimum Contract Requirements''); Section W (''Project Pre-Inspection''); and Section X (''Project Post-Inspection''). Air districts must generally maintain each project file for three years after the end of the contract term. Id. at Section T (''Application Evaluation and Project Selection''), para. 8.

[13] Id. at Section M (''Yearly Report''), para. 4 and Section R (''Incentive Program Review''), para. 5.

[14] Id. at Section M (''Yearly Report'').

[15] Id. at Section V (''Minimum Contract Requirements''), para. 10.

[16] Id. at Section Q (''Program Nonperformance'').

[17] Id. at Section V (''Minimum Contract Requirements''), para. 11 (''Repercussions for NonPerformance'').

[18] CARB uses the term ''baseline inventory'' to refer to the projected emissions inventories for future years that account for, among other things, the ongoing effects of economic growth and adopted emissions control requirements.

[19] South Coast Incentive Measure, para. 2. We understand that the reference to ''substitute measures'' in paragraph 2 is intended to reference the ''substitute measures and/or rules'' that CARB must adopt and submit under paragraph 5 if the EPA determines that information submitted by CARB fails to demonstrate that CARB will fulfill the tonnage commitment on schedule.

annual demonstration reports to the EPA by March 31 each year from 2020 through 2023, each of which must include, among other things, specific information about the incentive projects funded through the previous year, about changes to the applicable guidelines, and about actions by CARB and the District to monitor projects for compliance with contract requirements.[20] If CARB fails to timely submit an annual demonstration report containing all of the information listed in paragraph 3 of the South Coast Incentive Measure, that failure would constitute a violation of the SIP commitment.

Fourth, the South Coast Incentive Measure obligates CARB to make each annual demonstration report publicly available or available upon request. If CARB fails to make any annual demonstration report publicly available or to provide it within a reasonable period after receiving a request for it, that failure would constitute a violation of the SIP commitment.

Fifth, the South Coast Incentive Measure obligates CARB to provide to any requestor, beginning May 15, 2021 and through 2029, certain project-specific documents relied upon in the preparation of CARB's annual demonstration reports, including project applications, grant contracts, and inspection-related documents. If CARB fails to provide any of these project records within a reasonable period after receiving a request, that failure would constitute a violation of the SIP commitment.

Finally, the South Coast Incentive Measure obligates CARB to adopt and submit to the EPA, by September 1, 2022, substitute measures and/or rules that address any shortfall in emission reductions no later than January 1, 2023, if the EPA determines by July 1, 2021 that information submitted by CARB is insufficient to demonstrate that it will fulfill the tonnage commitment on schedule. If CARB fails to adopt and submit timely substitute measures and/or rules sufficient to address a shortfall in required emission reductions, this failure would constitute a violation of the SIP commitment. We provide a more detailed discussion of CARB's obligation to adopt and submit substitute measures in Response 7 in the Response to Comments document.

This series of actions mandated by the South Coast Incentive Measure constitutes a specific enforceable strategy for achieving a specific amount of NO_X emission reductions by the beginning of 2023. The fact that CARB may meet its SIP commitments by adopting measures that are not specifically identified in the SIP, or through one of several available techniques, does not render the requirement to achieve the emissions reductions unenforceable.[21]

For all of these reasons, we conclude that CARB's commitments in the South Coast Incentive Measure to monitor and report annually on the implementation of specific types of incentive projects, to achieve a specified tonnage of NO_X emission reductions from these projects or substitute measures, to make the annual demonstration reports and related documentation available to the public, and to adopt and submit substitute control measures where necessary to address an emission reduction shortfall identified by the EPA, constitute appropriate means, techniques, or schedules for compliance under sections 110(a)(2)(A) and 172(c)(6) of the Act.

Comment 2: Earthjustice states that citizens and the EPA can only enforce ''violations,'' and that the EPA must describe what would constitute a violation of the SIP provisions being approved here. Citing section 304(a)(1) of the CAA, Earthjustice states that citizens can commence civil actions for violations of emission standards or limitations or orders issued by the EPA or a state with respect to such standards or limitations. Additionally, citing section 113(a)(1) of the Act, Earthjustice states that the EPA can enforce a violation of any requirement or prohibition of an applicable implementation plan. According to Earthjustice, the EPA ''suggests that EPA and citizens can enforce the commitments to achieve and report on emission reductions'' but that the EPA and the South Coast Incentive Measure ''muddy what exactly would constitute a violation.''

Earthjustice notes the EPA's statement in the TSD that to be enforceable, program violations must be defined, and asserts that the EPA must explain where in the South Coast Incentive Measure such definitions are provided.

Response 2: We disagree with Earthjustice's claim that the commitments at issue in this action do not create obligations that EPA or citizens can enforce, were CARB or the District to violate them. We identify in Response 1 the types of violations of the commitments that could provide the basis for an enforcement action by the EPA or by citizens under section 113(a)(1) or 304(a)(1) of the CAA, respectively. As explained in Response 1, CARB's commitments, as set forth in the South Coast Incentive Measure, constitute a specific enforceable strategy for achieving 1 tpd of NO_X emission reductions on a fixed schedule and, upon approval into the SIP, become requirements of an ''applicable implementation plan'' as defined in CAA section 302(q). Although the South Coast Incentive Measure does not specifically define potential violations of the commitments, we find that it describes each of the actions that CARB has committed to undertake in sufficient detail to enable the EPA and the public to determine whether and when a violation has occurred. Accordingly, these commitments are enforceable by citizens under CAA section 304(a)(1) and by the EPA under CAA section 113(a)(1).

Comment 3: Earthjustice states that CARB's commitment to ''monitor'' District implementation of projects in accordance with the Carl Moyer Guidelines is a ''vague and unenforceable commitment.'' Earthjustice asks what would constitute a violation, and how one could prove that CARB is not monitoring implementation in accordance with the guidelines. Earthjustice asserts that there is no means of measuring or independently verifying compliance because there is no reporting requirement and no deadline. Additionally, Earthjustice claims that the reference to ''1300 repower and replacement projects'' in CARB's commitment ''is a deliberate attempt to mislead the reader on what is actually required.'' For example, Earthjustice states, nothing in this monitoring ''requirement'' specifies that these projects actually need to occur.

Response 3: We disagree with these comments. CARB's commitment to monitor District implementation of projects in accordance with the 2017 Carl Moyer Guidelines is enforceable through specific provisions in the South Coast Incentive Measure that require CARB to, among other things, report annually on the incentive projects it is relying on to achieve emission reductions and the actions that CARB has taken to ensure that these projects comply with the contracts issued by the District in accordance with the 2017 Carl Moyer Guidelines. See Response 1.

Specifically, the South Coast Incentive Measure obligates CARB to

[20] Id. at para. 3.

[21] *Citizens for a Better Environment* v. *Deukmejian,* 731 F. Supp. 1448, 1454–59 (N.D. Cal. 1990) (''the basic commitment to adopt and implement additional measures, should the identified conditions occur, constitutes a specific strategy, fully enforceable in a citizens action, although the exact contours of those measures are not spelled out''), modified, 746 F. Supp. 976 (1990) (holding state and district liable for failing to satisfy SIP commitment).

identify, in each annual demonstration report submitted to the EPA by March 31 of each year from 2020 through 2023, those specific projects funded through the previous year that CARB is relying on to achieve the tonnage commitment. CARB must identify each of these projects ''by project identification number, project life and implementation date, description of both baseline and new equipment, applicable incentive program guidelines, and quantified emission reductions.'' [22] Additionally, each annual demonstration report must describe any changes to the 2017 Carl Moyer Guidelines and related impacts on program integrity, describe CARB's and the District's actions to monitor selected projects for compliance with contract requirements, and contain CARB's determination of whether the identified projects are projected to achieve the full 1 tpd of NO_X emission reductions in the South Coast Air Basin by 2023.[23]

These provisions ensure that CARB's annual demonstration reports will contain both the project-specific information needed to independently calculate the emission reductions that CARB attributes to each project and the programmatic information needed to determine whether CARB and the District are taking appropriate steps to ensure that the identified projects comply with contract terms, which in turn assure compliance with the 2017 Carl Moyer Guidelines.[24] The 2017 Carl Moyer Guidelines specifically require that air districts audit at least five percent of active Carl Moyer projects or 20 active projects (whichever is less), including any audits conducted following unsatisfactory annual reporting.[25] If CARB's annual demonstration report for a given year fails to identify the project-specific information described in paragraph 3.a of the South Coast Incentive Measure or to document the steps that CARB and the District have taken to monitor selected projects for compliance with contract terms, consistent with paragraph 3.c of the South Coast Incentive Measure, the EPA or citizens may bring an enforcement action against CARB for violating its monitoring and reporting obligations.

We also disagree with Earthjustice's claim that the reference to ''1300 repower and replacement projects'' in CARB's commitment is misleading as to what is actually required. As explained in Response 1, CARB is specifically obligated to monitor the District's implementation of at least 1,300 on-road heavy-duty compression ignition truck repower and replacement projects in accordance with specified portions of the 2017 Carl Moyer Guidelines.[26] The 2017 Carl Moyer Guidelines enable CARB to monitor the District's compliance with these guidelines by requiring, among other things, that air districts maintain compliance-related documentation, make such documents available to CARB staff upon request, submit certified ''yearly reports'' to CARB containing specific information about funded projects, and allow CARB and its designees to inspect project engines, vehicles, and/or equipment and associated records during the contract term.[27] The 2017 Carl Moyer Guidelines also specifically identify types of actions on the part of the implementing air district that CARB may treat as program violations and authorize CARB to enforce the terms of a project contract.[28] If CARB fails to document in each annual demonstration report the steps it has taken to exercise these monitoring responsibilities, that failure would constitute a violation of the SIP commitment.

Additionally, as explained in Response 1, CARB is obligated to achieve 1 tpd of NO_X emission reductions in the South Coast Air Basin, either through implementation of the identified truck repower and replacement projects or through substitute measures adopted and submitted in accordance with the deadlines specified in paragraph 5 of the South Coast Incentive Measure.[29] Thus, although CARB is not necessarily obligated to ensure that 1,300 incentive projects are implemented or to achieve 1 tpd of NO_X emission reductions through these incentive projects, CARB is obligated to monitor at least 1,300 such projects for purposes of determining whether those projects will achieve 1 tpd of NO_X emission reductions by December 31, 2022. If those projects do not fulfill the tonnage commitment, CARB is obligated to adopt and submit substitute measures sufficient to address the shortfall.[30]

Comment 4: Earthjustice states that nothing in CARB's commitment to ''achieve 1 ton per day of [NO_X] emission reductions . . . by December 31, 2022'' specifies where these emission reductions must come from or where they must occur. Earthjustice claims that nothing specifies whether these reductions must be the result of some action by the agencies or merely the result of favorable economic conditions, and that CARB has relied on the latter in the past to claim compliance with similar ''commitments.'' Earthjustice further claims that there is no way for the EPA or citizens to look at the entire emissions inventory for the South Coast on December 31, 2022 and determine whether CARB has achieved this emission reduction, and that even if overall emissions increase between 2019 and 2022, CARB could still claim that but for some unspecified reason, the total NO_X emissions would have been 1 tpd higher. Earthjustice argues that because there is no way to prove that CARB has not achieved the 1 tpd of NO_X reductions, the commitment fails to define any possible violation and is not practicably enforceable.

Response 4: We identify in Response 1 the types of violations of the commitments that could provide the basis for an enforcement action by the EPA or by citizens under section 113(a)(1) or 304(a)(1) of the CAA, respectively. As explained in Response 1, CARB's commitments constitute a specific enforceable strategy for achieving 1 tpd of NO_X emission reductions on a fixed schedule and, upon approval into the SIP, become requirements of an ''applicable implementation plan'' as defined in CAA section 302(q). Accordingly, these commitments are enforceable by citizens under CAA section 304(a)(1) and by the EPA under CAA section 113(a)(1).

Earthjustice's characterization of CARB's commitments is incorrect in several respects. First, with respect to

[22] South Coast Incentive Measure, para. 3.a. The ''project life'' begins on the purchase date of the new equipment and is the period during which the project is under contract. Email dated February 13, 2020, from Austin Hicks (CARB) to Rynda Kay (EPA Region IX), Subject: ''RE: Follow-up questions on the Valley Incentive Measure.'' We understand the ''implementation date'' to mean the post-inspection date, which is the date on which the District verifies that the old equipment has been destroyed and that the new equipment has been purchased, is operational, and is the same equipment that was used in the emission reduction calculations. 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section V (''Minimum Contract Requirements'') and Section X (''Project Post-Inspection'').

[23] Id. at paras. 3.b–3.d.

[24] The 2017 Carl Moyer Guidelines require that each contract issued to a grantee contain provisions to ensure compliance with Carl Moyer program requirements. See, *e.g.,* 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section V, para. 6(C) (requiring that each contract state that the project complies with Moyer Program requirements) and para. 11(C) (requiring that each contract inform grantee that CARB and the District may seek any remedies available under the law for noncompliance with Moyer Program requirements).

[25] 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section AA (''Air District Audit of Projects''), para. 1.

[26] South Coast Incentive Measure, para. 1.

[27] See footnotes 12–15, supra.

[28] See footnotes 16 and 17, supra.

[29] South Coast Incentive Measure, para. 2.

[30] Id.

CARB's commitment to achieve 1 tpd of NO_X emission reductions by December 31, 2022, Earthjustice claims incorrectly that the commitments do not specify where these emission reductions must come from or where they must occur. The South Coast Incentive Measure specifies that CARB must achieve 1 tpd of NO_X emission reductions through implementation of one or both of the following types of measures: (1) Heavy-duty compression-ignition truck repower and replacement projects implemented in accordance with specified portions of the 2017 Carl Moyer Guidelines, and/or (2) substitute measures and/or rules adopted and submitted to the EPA by specified deadlines.[31] It also makes clear that these emission reductions must occur in the South Coast Air Basin.[32]

Second, Earthjustice claims incorrectly that nothing in the commitment ''specifies whether [the emission reductions] must be the result of some action by the agencies or merely the result of favorable economic conditions,'' and that CARB has relied on the latter in the past to claim compliance with similar ''commitments.'' As explained in Response 1, the South Coast Incentive Measure explicitly states that CARB will do the following:

> By December 31, 2022, achieve one ton per day of reductions in NO_X emissions from the 2023 baseline inventory, as detailed in the 2016 South Coast Air Quality Management Plan and discussed in the State SIP Strategy, through implementation of these projects or substitute measures for the [South Coast Air] Basin; [and]
>
> If U.S. EPA determines by July 1, 2021, that information submitted by CARB is insufficient to demonstrate that emission reductions required under Paragraph 2 will occur on schedule, adopt and submit to U.S. EPA, no later than September 1, 2022, substitute measures and/or rules that will achieve emission reductions addressing the shortfall as expeditiously as practicable and no later than January 1, 2023.[33]

Thus, by its terms, the South Coast Incentive Measure obligates CARB to ''achieve'' 1 tpd of NO_X emission reductions no later than January 1, 2023, either by confirming implementation of identified incentive projects in accordance with the specified portions of the 2017 Carl Moyer Guidelines or by adopting and submitting to the EPA substitute measures and/or rules that achieve equivalent emission reductions. In the interpretative statements preceding these commitments and in the Demonstration, CARB states that it is creating a ''publicly-enforceable commitment to achieve emission reductions'' [34] and confirms that ''CARB is the responsible party for enforcement of this measure and is responsible for achieving the emission reductions from this measure.'' [35] Nowhere in the South Coast Incentive Measure or in CARB's interpretative statements does CARB indicate that favorable economic conditions may suffice to achieve the aggregate tonnage commitments.

We note that in prior EPA actions approving aggregate tonnage commitments from CARB, the EPA has rejected claims that ''actual emission decreases'' resulting from an economic recession or other circumstances may count towards meeting the commitments and made clear that the only permissible means for achieving the required emission reductions is through notice-and-comment rulemaking procedures leading to the adoption and implementation of enforceable control measures.[36]

Third, Earthjustice suggests, incorrectly, that the EPA and citizens would have to look at the entire emissions inventory for the South Coast on December 31, 2022, to determine whether CARB has achieved 1 tpd of NO_X emission reductions. For the reasons stated in this response and earlier in Response 1, it is not necessary to review an emissions inventory to determine whether CARB has achieved the required reductions. The South Coast Incentive Measure obligates CARB to provide, in each annual demonstration report submitted to the EPA from March 2020 through March 2023, detailed information about each incentive project that CARB is relying on to achieve the required 1 tpd of NO_X emission reductions.[37] Each of these annual demonstration reports must be readily available to the public on CARB's website or available upon request.[38] If CARB's 2023 annual demonstration report (which is due March 31, 2023) fails to demonstrate that the identified projects have achieved 1 tpd of NO_X emission reductions from the 2023 baseline inventory in the 2016 South Coast AQMP, citizens may sue CARB for violating its SIP commitment. The tonnage commitment remains enforceable even if the EPA has not made an insufficiency determination in accordance with paragraph 5 of the South Coast Incentive Measure. See Response 6 and Response 8 in the Response to Comments document.

Additionally, if the EPA determines by July 1, 2021, that information submitted by CARB is insufficient to demonstrate that the emission reductions necessary to fulfill the 2023 tonnage commitment will occur on schedule, CARB must adopt and submit to the EPA, no later than September 1, 2022, substitute measures and/or rules that will achieve emission reductions addressing the shortfall as expeditiously as practicable and no later than January 1, 2023.[39] Any such substitute control measure must be adopted following state rulemaking procedures through which the EPA and the public may track the State's progress in achieving the requisite emissions reductions. We expect CARB to make clear during any such rulemaking that it is proposing the identified measure or rule for purposes of submission to the EPA consistent with its commitment in the South Coast Incentive Measure.[40] If, following an insufficiency finding by the EPA, CARB fails to adopt and submit substitute control measures that fully address the identified shortfall in required emission reductions by the relevant deadline, citizens may sue CARB for violating its SIP commitment.

For all of these reasons, we disagree with Earthjustice's claim that the South Coast Incentive Measure fails to define any possible violation and is not practicably enforceable.

[31] South Coast Incentive Measure, paras. 1, 2, and 5.

[32] Id. at para. 2 (requiring CARB to achieve NO_X emission reductions ''from the 2023 baseline inventory, as detailed in the 2016 South Coast Air Quality Management Plan and discussed in the State SIP Strategy, through implementation of these projects or substitute measures for the [South Coast Air] Basin.''). The 2016 South Coast Air Quality Management Plan (AQMP), relevant portions of the 2016 State Strategy and other related documents (hereafter ''2016 South Coast Ozone SIP'') contain California's attainment demonstrations for the 1979 1-hour ozone NAAQS, the 1997 ozone NAAQS and the 2008 ozone NAAQS in the South Coast Air Basin. 84 FR 52005, 52012–52013 (October 1, 2019).

[33] South Coast Incentive Measure, paras. 2, 5.

[34] CARB Resolution 18–3, 4 (''Whereas, the South Coast Incentive Measure provides a publicly-enforceable commitment to achieve emission reductions'').

[35] Demonstration, 14.

[36] See, *e.g.,* 76 FR 69896, 69914–16 (November 9, 2011) (approving $PM_{2.5}$ attainment demonstration for San Joaquin Valley).

[37] South Coast Incentive Measure, para. 3.

[38] Id. at para. 4.

[39] By its terms, the commitment is to ''adopt and submit to U.S. EPA. . . substitute measures and/or rules''—*i.e.,* new or revised control measures subject to notice-and-comment rulemaking—that achieve the necessary emission reductions, if the EPA makes an insufficiency finding. Id. at para. 5.

[40] See EPA, Memorandum dated November 22, 2011, from Janet McCabe, Deputy Assistant Administrator, EPA Office of Air and Radiation, to Air Division Directors, EPA Regions 1–10, Attachment B (''Guidelines to States Agencies for Preparing the Public Notices for State Implementation Plan (SIP) Revisions'') (noting that state public notices must state that the regulation or document at issue will be submitted to the EPA for approval into the SIP).

III. Final Action

No comments were submitted that change our assessment of the rule as described in our proposed action. Therefore, the EPA is fully approving this measure into the California SIP in accordance with section 110(k)(3) of the Act.

In addition, the EPA is determining that CARB's adoption, implementation, and submission of the South Coast Incentive Measure satisfy the State's commitment in the 2016 South Coast Ozone SIP to bring to the Board for consideration an incentive-based measure for on-road heavy-duty vehicles and achieves 1 tpd of CARB's aggregate NO_X emission reduction commitment for 2023, as codified in 40 CFR 52.220(c)(517)(ii)(A)(*3*).[41]

We are codifying this measure as additional material in the code of federal regulations (CFR), rather than through incorporation by reference, because, under its terms, the measure contains commitments enforceable only against CARB and because the measure is not a substantive rule of general applicability.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 16, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 11, 2020.

John Busterud,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—CALIFORNIA

■ 2. Section 52.220 is amended by adding paragraph (c)(550) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(550) The following plan was submitted on May 4, 2018 by the Governor's designee.

(i) [Reserved]

(ii) *Additional materials.* (A) California Air Resources Board.

(*1*) CARB Resolution 18–3, adopted March 22, 2018, as revised by Executive Order S–20–030, adopted November 23, 2020.

(*2*) [Reserved]

(B) [Reserved]

[FR Doc. 2020–28020 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

[41] 84 FR 52005, 52013–52014 (October 1, 2019) (referencing CARB Resolution 17–7 (March 23, 2017), Attachment A (''Proposed New SIP Measures and Schedule'')) and 84 FR 28132, 28149 (June 17, 2019) (Table 6, ''Defined Measures in the 2016 State Strategy—Continued'').

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2020–0240; FRL–10017–21–OAR]

Final Anti-Backsliding Determination for Renewable Fuels and Air Quality

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has determined that no additional measures are necessary pursuant to Clean Air Act (CAA) section 211(v) to mitigate the adverse air quality impacts of the renewable fuel volumes required under CAA section 211(o).

DATES: January 15, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2020–0240. All documents in the docket are listed at the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rich Cook, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734–214–4827; email address: *cook.rich@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

CAA section 211(v) requires EPA to take two actions. First, EPA must complete ''a study to determine whether the renewable fuel volumes required under [CAA section 211(o)] will adversely impact air quality as a result in changes of vehicle and engine emissions of air pollutants.'' The study, commonly known as the ''anti-backsliding study,'' must include consideration of different blend levels, types of renewable fuels, and available vehicle technologies, as well as appropriate national, regional, and local air quality control measures. EPA has completed the required study, which is available in the docket for this action and at *https://www.epa.gov/renewable-fuel-standard-program/anti-backsliding-determination-and-study.*

Second, considering the results of the study, EPA must proceed down one of two paths: Either ''promulgate fuel regulations to implement appropriate measures to mitigate, to the greatest extent achievable. . .any adverse impacts on air quality, as a result of the renewable volumes required by [Section 211]'' or ''make a determination that no such measures are necessary.''

EPA announced its proposed determination on June 8, 2020 (85 FR 35048) and invited public comment. The proposed determination is available in the docket for this action and at *https://www.epa.gov/renewable-fuel-standard-program/anti-backsliding-determination-and-study.*

II. Final Determination

After considering public comment, we determine, as proposed, that no additional appropriate fuel control measures are necessary to mitigate adverse air quality impacts of required renewable fuel volumes. More information on this determination can be found in the supporting document, which is available in the docket for this action and at *https://www.epa.gov/renewable-fuel-standard-program/anti-backsliding-determination-and-study.*

Dated: January 5, 2021.

Andrew Wheeler,

Administrator.

[FR Doc. 2021–00271 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 174

[EPA–HQ–OPP–2018–0403; FRL–10015–98]

Bacillus Thuringiensis Cry1Ab/Cry2Aj Protein and G10-evo Enolpyruvylshikimate-3-Phosphate Synthase (G10evo-EPSPS) Protein; Exemptions From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes exemptions from the requirement of a tolerance for residues of the insecticide *Bacillus thuringiensis* Cry1Ab/Cry2Aj protein in or on the food and feed commodities of corn; corn, field; corn, sweet; and corn, pop, and for residues of the inert ingredient G10-evo Enolpyruvylshikimate-3-phosphate synthase (G10evo-EPSPS) protein in or on the food and feed commodities of all crops when used in a plant-incorporated protectant. Hangzhou Ruifeng Biosciences Co., Ltd. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting exemptions from the requirement of a tolerance for these pesticide chemical residues. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus thuringiensis* Cry1Ab/Cry2Aj and G10evo-EPSPS proteins.

DATES: This regulation is effective January 15, 2021. Objections and requests for hearings must be received on or before March 16, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2018–0403, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave, NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave, NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Publishing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2018–0403 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before March 16, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2018–0403, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of December 21, 2018 (83 FR 65660) (FRL–9985–67) and March 18, 2019 (84 FR 9735) (FRL–9989–90), EPA issued documents pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of pesticide tolerance petitions (PP 8E8669 and IN–11257) by Hangzhou Ruifeng Biosciences Co., Ltd., 1500 Wenyi Rd., Building 1, Room 103, Hangzhou, China (c/o GA Bannon Consulting LLC, 13 Blue Flag Court, Dardenne Prairie, MO 63368). Petition 8E8669 requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Bacillus thuringiensis* fusion protein Cry1Ab/Cry2Aj in or on the food and feed commodities of corn, field; corn, sweet; and corn, pop when used as a plant-incorporated protectant in corn; Petition IN–11257 requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Deinococcus radiodurans* 5-enolpyruvylshikimate-3-phosphate synthase (EPSPS) protein in or on all food commodities when used as an inert ingredient in a plant-incorporated protectant. The documents referenced a summary of each petition prepared by the petitioner Hangzhou Ruifeng Biosciences Co., Ltd., which are available in the docket, *http://www.regulations.gov.* One comment was received on the notice of filing that published on December 21, 2018. EPA's response to this comment is discussed in Unit VII.B of the document titled ''Federal Food, Drug, and Cosmetic Act (FFDCA) Safety Determination for Cry1Ab/Cry2Aj and G10evo-EPSPS Proteins'' available in the docket.

III. Final Rule

A. EPA's Safety Determination

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues'' and ''other substances that have a common mechanism of toxicity.''

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of these actions and considered their validity, completeness and reliability, and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. A summary of the data upon which EPA relied and its risk assessment based on those data can be found within the document entitled ''Final Human Health Risk Assessment and Review of Product Characterization of the Insecticidal Plant-Incorporated Protectant *Bacillus thuringiensis* Cry1Ab/Cry2Aj, a G10evo-EPSPS Herbicide Tolerance Protein, and the Genetic Material Necessary for their Production in ShuangKang 12–5 Maize and Establishment of a Permanent Tolerance Exemption.'' This document, as well as other relevant information, is available in the docket for this action EPA–HQ–OPP–2018–0403.

The *Bacillus thuringiensis* Cry1Ab/Cry2Aj fusion protein is an active ingredient produced within the plant to confer protection against lepidopteran pests. The *Deinococcus radiodurans* 5-enolpyruvylshikimate-3-phosphate synthase (EPSPS) protein (hereafter referred to by its common name ''G10evo-EPSPS'') protein is an inert ingredient used as a selectable marker that is produced in the plant and confers tolerance to the herbicide glyphosate. The available data demonstrated that, with regard to humans, the Cry1Ab/Cry2Aj fusion protein and G10evo-EPSPS are not toxic or allergenic via any anticipated route of

exposure. Dietary exposure is the most relevant route of exposure, and the Agency concludes that dietary exposure would present no harm because of the lack of toxicity or allergenicity of either protein. In addition, both proteins are contained within plant cells, which essentially eliminates the dermal and inhalation exposure routes or reduces them to negligible levels. EPA also determined that a Food Quality Protection Act (FQPA) safety factor was not necessary as part of the qualitative assessment conducted for Cry1Ab/Cry2Aj and G10evo-EPSPS, due to the low risk of these ingredients. These findings are discussed in more detail in the document titled ''Federal Food, Drug, and Cosmetic Act (FFDCA) Safety Determination for Cry1Ab/Cry2Aj and G10evo-EPSPS Proteins.'' Based upon its evaluation in the Federal Food, Drug, and Cosmetic Act (FFDCA) Safety Determination for Cry1Ab/Cry2Aj and G10evo-EPSPS Proteins, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of Cry1Ab/Cry2Aj and G10evo-EPSPS. Therefore, exemptions from the requirement of a tolerance are established for residues of the *Bacillus thuringiensis* Cry1Ab/Cry2Aj fusion protein in or on the food and feed commodities of corn, field; corn, sweet; and corn, pop when used as a plant-incorporated protectant in corn, and for residues of G10-evo EPSPS protein in or on the food and feed commodities of all crops when used as an inert ingredient in a plant-incorporated protectant.

B. Analytical Enforcement Methodology

The petitioner submitted Enzyme-Linked Immunosorbent Assays (ELISAs) that detect the G10evo-EPSPS protein and the Cry1Ab/Cry2Aj protein in corn seed, along with a PCR method for use as a Cry1Ab/Cry2Aj screening and confirmation tool. G10evo-EPSPS protein is detectable via a quantitative, ''sandwich'' ELISA assay using a commercially available kit (YouLong, Catalog # AA1141). Cry1Ab/Cry2Aj protein is detectable by combining a PCR screening method targeting the junction sequence of the cry1Ab/cry2Aj fusion gene followed by an ELISA assay to detect the Cry1Ab protein. The ELISA assay provided is the commercially available QualiPlate Kit for Cry1Ab/Cry1Ac (Envirologix, Catalog # AP–003–CRBS), which is designed to detect the Cry1Ab protein in corn leaf and seed samples.

C. Revisions to the Requested Tolerance Exemption

The following modifications were made to the original requests for an exemption from a tolerance:

1. EPA replaced ''40 CFR part 180'' with ''40 CFR part 174'' because PIP tolerance exemptions are published in part 174.

2. Changed the name from ''*Bacillus thuringiensis* fusion protein Cry1Ab/Cry2Aj'' to ''*Bacillus thuringiensis* Cry1Ab/Cry2Aj protein,'' to align with nomenclature for other exemptions published in 40 CFR part 174.

3. Changed the name from ''*Deinococcus radiodurans* 5-enolpyruvylshikimate-3-phosphate synthase (EPSPS) protein'' to ''G10evo Enolpyruvylshikimate-3-phosphate synthase (G10evo-EPSPS) protein,'' to align with nomenclature for other exemptions published in 40 CFR part 174.

IV. Statutory and Executive Order Reviews

This action establishes exemptions from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 174

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 5, 2020.

Edward Messina,

Acting Director, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 174—PROCEDURES AND REQUIREMENTS FOR PLANT-INCORPORATED PROTECTANTS

■ 1. The authority citation for part 174 continues to read as follows:

Authority: 7 U.S.C. 136–136y; 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 174.542 to read as follows:

§ 174.542 Bacillus thuringiensis Cry1Ab/Cry2Aj protein in corn; exemption from the requirement of a tolerance.

Residues of *Bacillus thuringiensis* Cry1Ab/Cry2Aj protein in or on the food or feed commodities of corn, field; corn, sweet; and corn, pop, are exempt from the requirement of a tolerance when used as a plant-incorporated protectant in corn.

■ 3. Add § 174.543 to read as follows:

§ 174.543 G10evo-EPSPS protein in all plants; exemption from the requirement of a tolerance.

Residues of G10evo-Enolpyruvylshikimate-3-phosphate synthase (G10evo-EPSPS) protein in or on all food or feed commodities, are exempt from the requirement of a tolerance when used as an inert ingredient in a plant-incorporated protectant.

[FR Doc. 2020–28122 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[DA 20–1540; FRS 17365]

Annual Adjustment of Civil Monetary Penalties To Reflect Inflation

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act) requires the Federal Communications Commission to amend its forfeiture penalty rules to reflect annual adjustments for inflation in order to improve their effectiveness and maintain their deterrent effect. The Inflation Adjustment Act provides that the new penalty levels shall apply to penalties assessed after the effective date of the increase, including when the penalties whose associated violation predate the increase.

DATES: The rule is effective January 15, 2021. The civil monetary penalties are applicable beginning January 15, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Lisa Gelb, Deputy Chief, Enforcement Bureau, at *Lisa.Gelb@fcc.gov* or 202–418–2019.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, DA 20–1540, adopted and released on December 29, 2020. The document is available for download at *https://www.fcc.gov/document/2021-annual-adjustment-civil-monetary-penalties-reflect-inflation.* The complete text of this document is also available for inspection and copying during normal business hours in the FCC Reference Information Center, 45 L Street NE, Washington, DC 20554. To request this document in accessible formats for people with disabilities (*e.g.,* Braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (*e.g.,* accessible format documents, sign language interpreters, CART, etc.), send an email to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

The Bipartisan Budget Act of 2015 included, as section 701 thereto, the Inflation Adjustment Act, which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), to improve the effectiveness of civil monetary penalties and maintain their deterrent effect. Under the Inflation Adjustment Act, agencies are required to make annual inflationary adjustments by January 15 each year, beginning in 2017. The adjustments are calculated pursuant to Office of Management and Budget (OMB) guidance. OMB issued guidance on December 23, 2020, and this Order follows that guidance. The Commission therefore updates the civil monetary penalties for 2021, to reflect an annual inflation adjustment based on the percent change between each published October's CPI–U; in this case, October 2020 CPI–U (260.388)/October 2019 CPI–U (257.346) = 1.01182. The Commission multiplies 1.01182 by the most recent penalty amount and then rounds the result to the nearest dollar.

The Bureau notes that, although our annual inflation adjustment orders have specifically amended ''[§] 1.80(b) of the Commission's rules . . . to adjust the forfeiture penalties for inflation, in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Inflation Adjustment Act),'' we did not list all of the relevant rules in the Appendix to those orders. In addition, § 1.80(b) was recently amended to include new civil monetary penalties adopted since the prior inflation adjustment order. Therefore, we now include amendments to § 1.80(b)(1) through (8) of the Commission's rules, and the penalties in paragraph (b)(6) associated with the Preventing Illegal Radio Abuse Through Enforcement Act (PIRATE Act). The penalties stated in these provisions reflect all appropriate inflation adjustments under the 2015 Inflation Adjustment Act, including the initial ''catch up'' adjustment where appropriate.

Paperwork Reduction Act

This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Congressional Review Act

The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Penalties.

Federal Communications Commission.

Lisa Gelb,

Deputy Chief, Enforcement Bureau.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461, unless otherwise noted.

■ 2. Amend § 1.80 by revising paragraphs (b)(1) through (8), the table in section III of the note to paragraph (b)(8), and paragraph (b)(10)(ii) to read as follows:

§ 1.80 Forfeiture proceedings.

* * * * *

(b) * * *

(1) *Forfeiture penalty for a broadcast station licensee, permittee, cable television operator, or applicant.* If the violator is a broadcast station licensee or permittee, a cable television operator, or an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument of authorization issued by the Commission, except as otherwise noted in this paragraph (b)(1), the forfeiture penalty under this section shall not exceed $51,827 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $518,283 for any single act or failure to act described in paragraph (a) of this section. There is no limit on forfeiture assessments for EEO violations by cable operators that occur after notification by the Commission of a potential violation. See section 634(f)(2) of the Communications Act. Notwithstanding the foregoing in this section, if the violator is a broadcast station licensee or permittee or an applicant for any broadcast license, permit, certificate, or other instrument of authorization issued by the Commission, and if the violator is determined by the Commission to have broadcast obscene, indecent, or profane material, the forfeiture penalty under this section shall not exceed $419,353 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,870,946 for any single act or failure to act described in paragraph (a) of this section.

(2) *Forfeiture penalty for a common carrier or applicant.* If the violator is a common carrier subject to the provisions of the Communications Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed $207,314 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $2,073,133 for any single act or failure to act described in paragraph (a) of this section.

(3) *Forfeiture penalty for a manufacturer or service provider.* If the violator is a manufacturer or service provider subject to the requirements of section 255, 716, or 718 of the Communications Act, and is determined by the Commission to have violated any such requirement, the manufacturer or service provider shall be liable to the United States for a forfeiture penalty of not more than $119,055 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,190,546 for any single act or failure to act.

(4) *Forfeiture penalty for a 227(e) violation.* Any person determined to have violated section 227(e) of the Communications Act or the rules issued by the Commission under section 227(e) of the Communications Act shall be liable to the United States for a forfeiture penalty of not more than $11,905 for each violation or three times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,190,546 for any single act or failure to act. Such penalty shall be in addition to any other forfeiture penalty provided for by the Communications Act.

(5) *Forfeiture penalty for a 227(b)(4)(B) violation.* Any person determined to have violated section 227(b)(4)(B) of the Communications Act or the rules in 47 CFR part 64 issued by the Commission under section 227(b)(4)(B) of the Communications Act shall be liable to the United States for a forfeiture penalty determined in accordance with paragraphs (A)-(F) of section 503(b)(2) plus an additional penalty not to exceed $10,118.

(6) *Forfeiture penalty for a section 6507(b)(4) Tax Relief Act violation.* If a violator who is granted access to the Do-Not-Call registry of public safety answering points discloses or disseminates any registered telephone number without authorization, in violation of section 6507(b)(4) of the Middle Class Tax Relief and Job Creation Act of 2012 or the Commission's implementing rules in 47 CFR part 64, the monetary penalty for such unauthorized disclosure or dissemination of a telephone number from the registry shall be not less than $111,493 per incident nor more than $1,114,929 per incident depending upon whether the conduct leading to the violation was negligent, grossly negligent, reckless, or willful, and depending on whether the violation was a first or subsequent offense.

(7) *Forfeiture penalty for a section 6507(b)(5) Tax Relief Act violation.* If a violator uses automatic dialing equipment to contact a telephone number on the Do-Not-Call registry of public safety answering points, in violation of section 6507(b)(5) of the Middle Class Tax Relief and Job Creation Act of 2012 or the Commission's implementing rules in 47 CFR part 64, the monetary penalty for contacting such a telephone number shall be not less than $11,149 per call nor more than $111,493 per call depending on whether the violation was negligent, grossly negligent, reckless, or willful, and depending on whether the violation was a first or subsequent offense.

(8) *Maximum forfeiture penalty for any case not previously covered.* In any case not covered in paragraphs (b)(1) through (7) of this section, the amount of any forfeiture penalty determined under this section shall not exceed $20,731 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $155,485 for any single act or failure to act described in paragraph (a) of this section.

* * * * *

Note to paragraph (b)(8): * * *

Section III. Non-Section 503 Forfeitures That Are Affected by the Downward Adjustment Factors

* * * * *

Violation	Statutory amount after 2021 annual inflation adjustment
Sec. 202(c) Common Carrier Discrimination	$12,439, $622/day.
Sec. 203(e) Common Carrier Tariffs	$12,439, $622/day.
Sec. 205(b) Common Carrier Prescriptions	$24,877.
Sec. 214(d) Common Carrier Line Extensions	$2,487/day.
Sec. 219(b) Common Carrier Reports	$2,487/day.
Sec. 220(d) Common Carrier Records & Accounts	$12,439/day.
Sec. 223(b) Dial-a-Porn	$128,904/day.

Violation	Statutory amount after 2021 annual inflation adjustment
Sec. 227(e) Caller Identification	$11,905/violation. *$35,715/day for each day of continuing violation, up to $1,190,546 for any single act or failure to act
Sec. 364(a) Forfeitures (Ships)	$10,366/day (owner).
Sec. 364(b) Forfeitures (Ships)	$2,074 (vessel master).
Sec. 386(a) Forfeitures (Ships)	$10,366/day (owner).
Sec. 386(b) Forfeitures (Ships)	$2,074 (vessel master).
Sec. 511 Pirate Radio Broadcasting	$2,023,640, $101,182/day.
Sec. 634 Cable EEO	$919/day.

(10) * * *

(ii) The application of the annual inflation adjustment required by the foregoing Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 results in the following adjusted statutory maximum forfeitures authorized by the Communications Act:

TABLE 4 TO PARAGRAPH (B)(10)(II)

U.S. Code citation	Maximum penalty after 2021 annual inflation adjustment
47 U.S.C. 202(c)	$12,439 622
47 U.S.C. 203(e)	12,439 622
47 U.S.C. 205(b)	24,877
47 U.S.C. 214(d)	2,487
47 U.S.C. 219(b)	2,487
47 U.S.C. 220(d)	12,439
47 U.S.C. 223(b)	128,904
47 U.S.C. 227(e)	11,905 35,715 1,190,546
47 U.S.C. 362(a)	10,366
47 U.S.C. 362(b)	2,074
47 U.S.C. 386(a)	10,366
47 U.S.C. 386(b)	2,074
47 U.S.C. 503(b)(2)(A)	51,827 518,283
47 U.S.C. 503(b)(2)(B)	207,314 2,073,133
47 U.S.C. 503(b)(2)(C)	419,353 3,870,946
47 U.S.C. 503(b)(2)(D)	20,731 155,485
47 U.S.C. 503(b)(2)(F)	119,055 1,190,546
47 U.S.C. 507(a)	2,053
47 U.S.C. 507(b)	301
47 U.S.C. 511	2,023,640 101,182
47 U.S.C. 554	919

* * * * *

[FR Doc. 2021–00432 Filed 1–14–21; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 213, and 252

[Docket DARS–2019–0063]

RIN 0750–AJ84

Defense Federal Acquisition Regulation Supplement: Covered Defense Telecommunications Equipment or Services (DFARS Case 2018–D022)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2018 and 2019 related to the procurement of covered telecommunications equipment or services. Specifically, the rule prohibits the use of telecommunications equipment or services from certain Chinese entities and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by, or otherwise connected to, the government of the People's Republic of China or the Russian Federation, as a substantial or essential component of any system, or as a critical technology as a part of any system.

DATES: Effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, telephone 571–372–6104.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 84 FR 72231 on December 31, 2019, to implement section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). This final DFARS rule implements the section 1656 prohibition, partially implements section 889(a)(1)(A) of the NDAA for FY 2019 prohibitions for DoD, and is structured to align with the Federal Acquisition Regulation implementation of the section 889(a)(1)(A) Governmentwide prohibition. The final rule should increase security of systems and critical technology that is part of any system used to carry out the nuclear deterrence and homeland defense missions of DoD by prohibiting the use of telecommunications equipment or services from certain Chinese entities, and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by, or otherwise connected to, the government of the People's Republic of China or the Russian Federation. Three respondents submitted comments on the interim rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. Two changes were made to the rule as a result of those comments. A respondent expressed support for the rule. Some respondents expressed concern over the underlying intent of the statute and recommended changes to the rule text to provide specific examples related to definitions. While DoD recognizes the concerns identified by the respondents, most of the recommendations are not within the scope of the statute. The ability to provide examples within the rule text is limited by the statute, which does not provide examples. A discussion of the public comments is provided as follows:

A. Summary of Significant Changes From Interim Rule

There are two changes from the interim rule. The changes amend DFARS clause 252.204–7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, by extending: (1) The reporting timeframe for the discovery of covered defense

telecommunications equipment or services from one day to three days, and (2) the reporting timeframe to submit information about mitigation actions undertaken from ten days to thirty days.

B. Analysis of Public Comments

1. Cost to the Public and Government

Comment: A respondent stated that the representation adds administration costs to the public and Government and will make it difficult for small businesses to work with the Government.

Response: The interim rule imposed the least amount of burden necessary to implement the statutory requirements by including an annual representation that may be relied upon if a negative representation (*i.e.,* ''does not'') is provided in lieu of an offer-by-offer representation.

2. Reporting Timelines

Comment: Respondents recommended that the reporting timeline for the discovery of covered defense telecommunications equipment or services be extended beyond one business day and that the reporting timeline for the mitigation actions undertaken by the contractor be extended beyond ten days.

Response: Concur. The one-day and ten-day requirements for reporting to DIBNet are extended in the final rule to three days and thirty days, respectively.

3. Subcontract Reporting

Comment: Respondents recommended that contractors only report subcontractor's discovery of covered defense telecommunications equipment or services that have ''credible information''.

Response: The clause flow down requires that entities at all tiers report the discovery of covered defense telecommunications equipment or services to the higher tier subcontractor or prime contractor. If the higher tier subcontractor or prime contractor does not report lower tier notifications of the discovery of covered defense telecommunications equipment or services, the higher tier subcontractor and prime contractor are at risk of being in violation of the prohibition.

4. Flowdown Requirements

Comment: Respondents recommended that the subcontract flow down to ''all subcontracts'' instead of ''all subcontracts and other contractual instruments''.

Response: The statutory authority does not provide an exception for vendor agreements or suppliers that are not considered subcontractors; therefore, the flow down to ''other contractual instruments'' is required by the statute.

5. List of Subsidiaries and Affiliates

Comment: Respondents recommended that DoD provide a publicly available list of the subsidiaries and affiliates against which to evaluate compliance. A respondent recommended that the list of subsidiaries and affiliates be included in DIBNet in coordination with the Office of Federal Contract Compliance Programs and recommended this list use the Department of Commerce list of affiliates and subsidiaries for Huawei. Another respondent recommended DoD provide and update, as necessary, a comprehensive list of all of the subsidiaries and affiliates on *SAM.gov*.

Response: The statute does not give the Secretary of Defense the mission to maintain such a list.

6. Definitions

a. ''Covered defense telecommunications equipment or services''

Comment: Respondents stated that the definition of ''covered defense telecommunications equipment or services'' should provide examples of what is ''covered defense telecommunications equipment or services''.

Response: The text of the rule aligns with the statutory language. These terms are not defined in the statute.

b. ''Defense''

Comment: A respondent recommended defining the term ''defense''.

Response: The term ''defense'' is used in the term ''covered defense telecommunications equipment or services'' to clarify that the covered telecommunications equipment or services prohibited by section 1656 are only prohibited for DoD, therefore, a definition is not necessary.

c. ''Substantial or essential component''

Comment: A respondent stated that there should be a new definition of ''substantial or essential component'' or that examples of what is and is not a ''substantial or essential component'' should be provided.

Response: The text of the rule aligns with the statutory language. These terms are not defined in the statute.

d. ''Critical technologies''

Comment: A respondent stated that the definition of ''critical technology'' should include the list of 27 emerging and foundational technologies developed pursuant to section 1758 of the Export Control Reform Act of 2018.

Response: To ensure consistency in the event of future changes to the list, the technologies are referenced by a citation, within the definition, to section 1758 of the Export Control Reform Act of 2018.

e. ''Owned or controlled by''

Comment: A respondent stated that there should be clarifications or definitions provided for ''an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country''.

Response: The text of the rule aligns with the statutory language, which does not clarify these terms.

f. ''Covered missions''

Comment: A respondent stated that the prescription is not limited to covered missions and that examples of covered missions should be provided.

Response: The prescription is not limited to covered missions as a matter of national security. Covered missions include the examples provided in the statutory definition. The statute does not provide additional examples of covered missions.

g. ''Equipment'', ''produce'', and ''component''

Comment: A respondent stated that the terms ''equipment,'' ''produce,'' and ''component'' should be more clearly defined, consistent with definitions existing in current regulations (such as export control regulations in ITAR, etc.).

Response: The text of the rule aligns with the statutory language. These terms are not defined in the statute.

7. Waiver Process

Comment: A respondent stated that there should be clarification for the public on the waiver process.

Response: The waiver process is an internal Government operating procedure. By submission of an offer containing the prohibited equipment or services, an entity is by default requesting a waiver. Waivers are a limited exception to the prohibition, and questions regarding the waiver process may be directed to the contracting officer. The contracting officer, working with the requiring activity, will review the representations and disclosures and make a determination to process the formal waiver. At that time, a contracting officer will request the additional information required by the statute for processing a waiver; this does not preclude an offeror from providing this information with its offer. The time to

process the information for a waiver is prior to award because the award is prohibited unless and until a waiver is granted.

8. DIBNet Process

Comment: A respondent recommended that the DIBNet homepage clarify how DIBNet would work and who has access to the reported data such as contractors or agencies.

Response: DIBNet provides information on its website to clarify who has access to the data. The data is shared with the contracting officer so the contracting officer may work with legal counsel to enforce contractual remedies for violating the terms of the contract.

9. Risk Mitigation Process

Comment: A respondent recommended that DoD provide the steps to mitigate supply chain risk related to the requirement for the contractor to provide additional information about mitigation actions undertaken or recommended after the presence of covered defense telecommunications equipment or services is identified.

Response: The steps to mitigate supply chain risk are unique to the contractor, and the contractor is required to provide the mitigation actions undertaken.

10. Consistent Application

Comment: A respondent stated that there should be consistent inter-department interpretations and that the term ''use'' should be clarified and used in the same way in all rules.

Response: The text of the rule aligns with the statutory language. This term is not defined in the statute. The FAR and DFARS rules on the section 889 prohibition are intended to be complementary.

III. Applicability to Contracts At or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

A. New Solicitation Provisions and Contract Clause

The interim rule added two new solicitation provisions and a new contract clause as follows:

- The provision at DFARS 252.204–7016, Covered Defense Telecommunications Equipment or Services—Representation.
- The provision at DFARS 252.204–7017, Prohibition on Acquisition of Covered Defense Telecommunications Equipment or Services—Representation.
- The clause at DFARS 252.204–7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

B. Determinations

Consistent with the determinations that DoD made on December 19, 2019, with regard to the application of the requirements of section 1656 of the NDAA for FY 2018, the two provisions and the clause listed above apply to all solicitations and contracts, including solicitations and contracts below the simplified acquisition threshold and for the acquisition of commercial items (including commercially available off-the-shelf items). It is important to apply the statutory prohibitions to all acquisitions in order to protect the security of nuclear command, control, and communications systems and ballistic missile defense from commercial dependencies on equipment and services from certain companies or certain foreign countries that are considered to create a risk to our national security.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to the requirements of E.O. 13771, because the rule is issued with respect to a national security function of the United States.

VI. Regulatory Flexibility Act

This final rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* A final regulatory flexibility analysis has been performed and is summarized as follows:

DoD is converting to a final rule, with two minor changes, an interim rule that amended the DFARS to implement section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. This rule also partially implements section 889(a)(1)(A) of the NDAA for FY 2019 prohibitions for DoD, and is structured to align with the Federal Acquisition Regulation implementation of the section 889(a)(1)(A) Governmentwide prohibition. The changes to the interim rule do not change the economic impact on the public. The changes provide additional time to complete the reporting requirements required by the clause at DFARS 252.204–7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

The objective of this rule is to increase security of systems and critical technology which is part of any system used to carry out the nuclear deterrence and homeland defense missions of DoD by prohibiting the use of telecommunications equipment or services from certain Chinese entities, and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by or otherwise connected to, the government of the People's Republic of China or the Russian Federation. Section 1656 of the NDAA for FY 2018 and section 889(a)(1)(A) of the NDAA for FY 2019 are the legal basis for the rule.

There were no public comments in response to the initial regulatory flexibility analysis.

This rule includes a burden for two representations and a reporting requirement. Data from the Federal Procurement Data System (FPDS) for Fiscal Year (FY) 2016 through FY 2018 and data from the System for Award Management (SAM) was used to estimate the number of small businesses affected by this rule.

The provision at DFARS 252.204–7016, Covered Defense Telecommunications Equipment or Services—Representation, requires the offeror to represent whether it does or does not provide covered defense telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument. This provision is estimated to affect 145,955 unique small businesses, which is the estimated number of unique small businesses required to complete DoD representations in SAM.

As of July 15, 2019, there were 424,927 active registrants in SAM for contracts. DoD extrapolated the estimated number of SAM registrants that are required to fill out DoD

representations to be 211,529 unique entities by dividing the average number of DoD unique awardees in the Federal Procurement Data System (FPDS) by the average number of Federal unique awardees in FPDS for FY 2016 through FY 2018 to obtain a percentage of 49.78 percent of all Federal unique awardees that receive DoD awards. Applying 49.78 percent to the total number of active SAM registrants results in 211,529 estimated respondents. To further calculate the number of estimated respondents that are small businesses, this analysis multiplies the 211,529 estimated respondents for DoD by 69 percent, which is the percentage of unique DoD awardees on average for FY 2016 through FY 2018 in FPDS that are small businesses, to estimate 145,955 unique small entities impacted by DFARS 252.204–7016.

The provision at DFARS 252.204–7017, Prohibition on Acquisition of Covered Defense Telecommunications Equipment or Services—Representation, requires that if an offeror provides an affirmative representation under the provision at 252.204–7016, Covered Defense Telecommunications Equipment or Services—Representation, that offeror is required to represent whether it will or will not provide under the contract, covered defense telecommunications equipment or services. If the offeror responds affirmatively, the offeror is required to further disclose information about the covered defense telecommunications equipment or services.

DFARS provision 252.204–7017 is estimated to affect a total of only 3,054 unique small business entities. Although DoD has no factual basis on which to estimate at this time what percentage of offerors will respond affirmatively to this representation, to be conservative DoD estimates 10 percent of the 44,277 DoD unique awardees on average in FPDS for FY 2016 through FY 2018 (4,428) will respond affirmatively, which triggers the disclosure requirement of the representation. Applying the estimated 69 percent factor for small businesses to the estimate of 4,428 results in 3,054. To calculate the additional disclosure impact within 252.204–7017, DoD estimates 10 percent of the offerors filling out this representation will have to complete the additional disclosure (443 total, of which 306 are small entities).

The clause at DFARS 252.204–7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, requires contractors and subcontractors to report through *https://dibnet.dod.mil,* any discovery of covered telecommunications equipment or services during the course of contract performance. Although DoD has no factual basis on which to estimate at this time what percentage of awardees will be required to submit a report, the clause is estimated to affect 443 unique entities, which is 1 percent of the number of unique entities that received DoD awards on average for FY 2016 through FY 2018 in FPDS (44,277). Of the 443 impacted entities 306 entities (69 percent) are estimated to be DoD unique small entities.

Because of the nature of the prohibition enacted by section 1656, it is not possible to establish different compliance or reporting requirements or timetables that take into account the resources available to small entities or to exempt small entities from coverage of the rule, or any part thereof. DoD was unable to identify any alternatives that would reduce the burden on small entities and still meet the objectives of section 1656.

VII. Paperwork Reduction Act

The rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0750–0002, titled: Covered Defense Telecommunications Equipment or Services.

List of Subjects in 48 CFR Parts 204, 212, 213, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 204, 212, 213, and 252 published at 84 FR 72231 on December 31, 2019, is adopted as a final rule with the following changes.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

252.204–7018 [Amended]

■ 2. Amend section 252.204–7018 by—

■ a. Removing the clause date of ''(DEC 2019)'' and adding ''(JAN 2021)'' in its place;

■ b. In paragraph (d)(2)(i), removing ''one business day'' and adding ''3 business days'' in its place; and

■ c. In paragraph (d)(2)(ii), removing ''10 business days'' and adding ''30 business days'' in its place.

[FR Doc. 2021–00612 Filed 1–14–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212 and 252

[Docket DARS–2021–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to provide needed editorial changes.

DATES: Effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6100.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS as follows:

1. Corrects the numbering of paragraphs at section 212.301(f)(ii). On December 31, 2019, DoD published in the **Federal Register** at 84 FR 72231 an interim rule titled ''Covered Defense Telecommunications Equipment or Services (DFARS Case 2018–D022)''. The rule added paragraphs (f)(ii)(H), (I), and (J); however the correct paragraph numbers should have reflected (f)(ii)(G), (H), and (I). A prior change to this section on October 31, 2019, published at 84 FR 58332, had redesignated paragraphs (f)(ii)(F) and (G) as paragraphs (f)(ii)(E) and (F); however, this redesignation was not reflected in the paragraph numbering in the December 19, 2019, publication. This sequence of events resulted in the current electronic Code of Federal Regulations (eCFR) not reflecting a paragraph (f)(ii)(G) in the numbering sequence, which this amendment corrects.

2. Corrects DFARS clause 252.244–7000 in paragraph (d) by removing ''(c)'' and adding ''(d)'' in its place. On

September 29, 2020, DoD published in the **Federal Register** at 85 FR 60918 a final rule titled ''Treatment of Certain Items as Commercial Items (DFARS Case 2019–D029)'' that included this change; however, the revision is not reflected in the eCFR. This amendment corrects the eCFR.

List of Subjects in 48 CFR Parts 212 and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.301 [Amended]

■ 2. Amend section 212.301 by redesignating paragraphs (f)(ii)(H) through (M) as paragraphs (f)(ii)(G) through (L).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.244–7000 by—

■ a. Removing the clause date of ''(OCT 2020)'' and adding ''(JAN 2021)'' in its place; and

■ b. Revising paragraph (d).

The revision reads as follows:

252.244–7000 Subcontracts for Commercial Items.

* * * * *

(d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial items.

* * * * *

[FR Doc. 2021–00616 Filed 1–14–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 225

[Docket DARS–2021–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendment

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making a technical amendment to the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a needed editorial change.

DATES: Effective February 24, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6100.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS to update a reference at DFARS 225.872–7 to remove a reference to DoD Industrial Security Regulation DoD 5220.22–R and replace it with the National Industrial Security Program Operating Manual (NISPOM), 32 CFR part 117. On December 21, 2020, DoD issued a final rule in the **Federal Register** at 85 FR 83300 to codify the NISPOM in the regulations. This change becomes effective February 24, 2021. Accordingly, this DFARS reference is being updated to incorporate this change.

List of Subjects in 48 CFR Part 225

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 225 is amended as follows:

PART 225—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

225.872–7 [Amended]

■ 2. Amend section 225.872–7 by removing ''DoD Industrial Security Regulation DoD 5220.22–R'' and adding ''National Industrial Security Program Operating Manual, 32 CFR part 117'' in its place.

[FR Doc. 2021–00617 Filed 1–14–21; 8:45 am]

BILLING CODE 6820–ep–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 239 and 252

[Docket DARS–2019–0031]

RIN 0750–AK07

Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Clause ''Tariff Information'' (DFARS Case 2018–D044)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a clause that is no longer necessary.

DATES: Effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 85 FR 34576 on June 5, 2020, to remove the DFARS clause 252.239–7006, Tariff Information, from the DFARS as the clause is no longer necessary. No public comments were received in response to the proposed rule. No changes were made to the rule, as proposed.

II. Applicability To Contracts At or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-The-Shelf Items

This rule only removes the obsolete contract clause at DFARS 252.239–7006, Tariff Information. This rule does not impose any new requirements on contracts at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

III. Expected Cost Savings

This rule impacts only telecommunication service providers who do business, or want to do business, with DoD. DFARS clause 252.239–7006, Tariff Information, requires telecommunications service contractors to submit certain tariff and

non-tariff information to DoD when requested by the contracting officer or as specified in the clause. Removal of this DFARS clause is expected to result in savings for both DoD and DoD contractors that provide telecommunications services.

The following is a summary of the estimated public and Government cost savings calculated in perpetuity in 2016 dollars at a 7-percent discount rate:

Summary	Public	Government	Total
Present Value	−$1,624,014	−$406,000	−$2,030,014
Annualized Costs	−113,681	−28,420	−142,101

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''DFARS Case 2018–D044,'' click ''Open Docket,'' and view ''Supporting Documents.''

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is an E.O. 13771 deregulatory action. DoD estimates that this rule generates $2.03 million in annualized cost savings, discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated cost savings can be found in section III of this preamble.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a recommendation from the DoD Regulatory Reform Task Force established pursuant to Executive Order 13777, Enforcing the Regulatory Agenda, to repeal DFARS clause 252.239–7006, Tariff Information, and the associated clause prescription at DFARS 239.7411(a). The objective of this rule is to remove the requirement for contractors to report tariff information under the DFARS clause. The legal basis for this change is 41 U.S.C. 1303.

No public comments were received in response to the initial regulatory flexibility analysis.

According to the Electronic Document Access system, DoD awards approximately 855 contracts to 83 unique contractors each year that include DFARS clause 252.239–7006. It is estimated that 171 of those contracts are awarded to small entities. Based on the information available, DoD does not anticipate that this rule will significantly impact small business entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities. Rather, this rule reduces the information collection requirements approved under OMB Control Number 0704–0341. Small entities will no longer be required to provide the tariff information to the contracting officer in accordance with 252.239–7006. Removal of this clause and its reporting requirement serves to reduce the burden on small entities.

VII. Paperwork Reduction Act

This rule removes the burden associated with DFARS clause 252.239–7006, Tariff Information, from the information collection requirement currently approved under OMB Control Number 0704–0341, entitled ''Defense Federal Acquisition Regulation Supplement (DFARS) Part 239, Acquisition of Information Technology, and associated clause at 252.239–7000.'' Accordingly, DoD submitted, and OMB approved, the following reduction of the annual reporting burden and OMB inventory of hours under OMB Control Number 0704–0341 as follows:

Respondents: 83.

Responses per respondent: Approximately 10.3.

Total annual responses: 855.

Hours per response: 2 hours.

Total response Burden Hours: 1,710.

List of Subjects in 48 CFR Parts 239 and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 239 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 239 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

239.7411 [Amended]

■ 2. Amend section 239.7411 by removing paragraph (a)(3) and redesignating paragraph (a)(4) as paragraph (a)(3).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.239–7006 [Removed and Reserved]

■ 3. Remove and reserve section 252.239–7006.

[FR Doc. 2021–00613 Filed 1–14–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 245 and 252

[Docket DARS–2020–0026]

RIN 0750–AK92

Defense Federal Acquisition Regulation Supplement: Property Loss Reporting in the Procurement Integrated Enterprise Environment (DFARS Case 2020–D005)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal

Acquisition Regulation Supplement (DFARS) to replace a legacy software application used for reporting loss of Government property with new capabilities developed within the DoD enterprise-wide, eBusiness platform, Procurement Integrated Enterprise Environment.

DATES: Effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to replace the Defense Contract Management Agency (DCMA) eTool application used to report the loss of Government property with the new Government-Furnished Property (GFP) module in the Procurement Integrated Enterprise Environment (PIEE). The DCMA eTool application is a self-contained, legacy application that has numerous limitations, to include its inability to share data with other internal or external DoD business systems or to respond to changes in regulation, policies, and procedures. DoD developed the GFP module within the PIEE to house the GFP lifecycle to address these limitations and to provide the Department with the end-to-end accountability for all GFP transactions within a secure, single, integrated system.

DoD published a proposed rule in the **Federal Register** at 85 FR 53761 on August 31, 2020.

No respondents submitted public comments in response to the proposed rule, and no changes were made in the final rule.

II. Applicability to Contracts At or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This final rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the simplified acquisition threshold, or for commercial items, including commercially available off-the shelf items.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

DoD has prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement to replace a legacy software application used for reporting loss of Government property with new capabilities developed within the fully integrated, DoD enterprise-wide, eBusiness platform, Procurement Integrated Enterprise Environment (PIEE). The objective of the case is to transition property loss reporting from a stand-alone, legacy software application to the PIEE. Use of the new system functionality will enable DoD to address numerous audit findings and security concerns.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will likely affect some small business concerns that are provided Government-furnished property in the performance of their contracts and those who experience a loss which must be reported in the PIEE. Data generated from the Defense Contract Management Agency eTool for fiscal years (FY) 2017 through 2019 indicates that an average of 3,765 loss cases are submitted each year. Of those 3,765 loss cases, 52 percent or 1,958 cases are filed by the top 7 large entities, while 48 percent or 1,807 make up all others, which may include unique small entities.

Data generated from the Federal Procurement Data System (FPDS) for FY 2017 through 2019 indicates that DoD has awarded an average of 34,463 contracts that contain the two applicable Government property clauses, FAR 52.245–1, Government Property, and DFARS 252.245–7002, Reporting Loss of Government Property. Of those applicable contracts, DoD has awarded approximately 16,966 contracts to an average of 4,009 unique small entities during the three-year period. This would equate to 4 applicable contracts awarded to each unique small entity.

While there is no way to identify how many property loss cases are attributable specifically to unique small business concerns, it can be assumed that 11 percent of applicable contracts have had a property loss case reported (3,765/34,463). If the top 7 large entities are removed from the equation, the number is reduced to 5 percent (1,807/34,463). We can therefore assume that of the 16,966 contracts awarded to small entities, approximately 5 percent, or 848 contracts awarded to 212 small entities, may require a property loss case.

The rule does not impose any new reporting, recordkeeping, or compliance requirements. The replacement of the application used for the approved information collection requirements is intended to maintain the status quo and potentially reduce compliance requirements over time due to the technological advances in the PIEE.

There are no practical alternatives that will accomplish the objectives of the rule.

VII. Paperwork Reduction Act

The Paperwork Reduction Act does apply to this rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0075, Government Property. By replacing the software application used for reporting property loss, the status quo is maintained for the current information collection requirements. OMB Control Number 9000–0075 provides approval for collections of information under FAR clause 52.245–1, Government Property, which requires reporting of Government-property losses. DFARS clause 252.245–7002, Reporting Loss of Government Property, is used in conjunction with FAR 52.245–1, and merely stipulates that DoD contractors will electronically report any property losses as required by FAR 52.245–1 using the PIEE portal.

List of Subjects in 48 CFR Parts 245 and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 245 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 245 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 245—GOVERNMENT PROPERTY

■ 2. Amend section 245.102 by—

■ a. In paragraph (4)(i) removing ''GFP'' and adding ''Government-furnished property'' in its place; and

■ b. Revising paragraph (5).

The revision reads as follows:

245.102 Policy.

* * * * *

(5) *Reporting loss of Government property.* The Government-Furnished Property module of the Procurement Integrated Enterprise Environment is the DoD data repository for reporting loss of Government property in the possession of contractors. The requirements and procedures for reporting loss of Government property to the Government-Furnished Property module are set forth in the clause at 252.245–7002, Reporting Loss of Government Property, prescribed at 245.107.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.245–7002 by—

■ a. Removing the clause date of ''(DEC 2017)'' and adding ''(JAN 2021)'' in its place; and

■ b. Revising paragraph (b)(1).

The revision reads as follows:

252.245–7002 Reporting Loss of Government Property.

* * * * *

(b) * * *

(1) The Contractor shall use the property loss function in the Government-Furnished Property (GFP) module of the Procurement Integrated Enterprise Environment (PIEE) for reporting loss of Government property. Reporting value shall be at unit acquisition cost. Current PIEE users can access the GFP module by logging into their account. New users may register for access and obtain training on the PIEE home page at *https://piee.eb.mil/piee-landing.*

* * * * *

[FR Doc. 2021–00614 Filed 1–14–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191 and 192

[Docket No. PHMSA–2019–0225]

Pipeline Safety: Frequently Asked Questions on the Gas Transmission Rule

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notification and request for comments.

SUMMARY: PHMSA is seeking public comment on a second set of draft frequently asked questions (Batch-2 FAQs) to facilitate implementation of its final rule titled ''Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and other Related Amendments'' (Gas Transmission Rule).

DATES: Comments on the draft Batch-2 FAQs should be submitted to Docket No. PHMSA–2019–0225 no later than March 16, 2021.

ADDRESSES:

• *E-Gov Web: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the online instructions for submitting comments.

• *Mail:* Docket Management System: U.S. Department of Transportation (DOT), West Building, Ground Floor, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* DOT Docket Management System: West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9:00 a.m. and 5:00 p.m. EST, Monday through Friday, except federal holidays.

• *Fax:* 202–493–2251.

• *Instructions:* Identify the Docket Number PHMSA–2019–0225 at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.*

• *Privacy Act:* DOT may solicit comments from the public regarding certain general notices. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

• *Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this document contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this document, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 CFR 190.343, you may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential,'' (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted, and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under FOIA, and the submissions will not be placed in the public docket of this notification. Submissions containing CBI should be sent to Chris Hoidal at Pipeline and Hazardous Materials Safety Administration, Western Region, PHP–500, 12300 W. Dakota Avenue, Suite 110, Lakewood, CO 80228. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.

• *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. Alternatively, you may review the documents in person at DOT in the West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT:

General: Chris Hoidal, Senior Technical Advisor, Office of Pipeline Safety, by telephone at 303–807–8833, or email at *chris.hoidal@dot.gov.*

Technical: Steve Nanney, Project Manager, Office of Pipeline Safety, by telephone at 713–272–2855, or email at *steve.nanney@dot.gov.*

SUPPLEMENTARY INFORMATION: PHMSA provides written clarification of the pipeline safety regulations (49 CFR parts

190–199) in the form of periodically updated FAQs and other guidance materials. On October 1, 2019, PHMSA published amendments to 49 CFR parts 191 and 192 in the Gas Transmission final rule (84 FR 52180), which addressed several statutory mandates from the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90). PHMSA finalized the first set of FAQs (Batch-1 FAQs) to help clarify, explain, and promote better understanding of the Gas Transmission final rule. The Batch-1 FAQs were posted to the docket on September 16, 2020.

PHMSA is requesting public comment on a second set of draft FAQs (Batch-2 FAQs) pertaining to the Gas Transmission final rule. The Batch-2–FAQs are intended to help the public understand and implement necessary changes in response to PHMSA's new regulations. They are in response to specific questions received from the regulated community, pipeline safety regulators, and the public. Operators and state regulators may also request written regulatory interpretations from PHMSA regarding specific situations in accordance with 49 CFR 190.11.

While FAQs are provided to help the public understand how to comply with the regulations, they are not substantive rules themselves and do not create legally enforceable rights, assign duties, or impose new obligations not otherwise contained in the existing regulations and standards. However, an operator who is able to demonstrate compliance with the FAQs is likely to be able to demonstrate compliance with the relevant regulations.

The draft FAQs and other supporting documents are available online on the Federal eRulemaking Portal, *https://www.regulations.gov;* search for Docket No. PHMSA–2019–0225. Before finalizing the draft FAQs, PHMSA will evaluate all comments received on or before the comment closing date. Comments received after the closing date will be evaluated to the extent

practicable. Once finalized, the FAQs will be posted in the docket and on PHMSA's public website at *https://www.phmsa.dot.gov.*

Issued in Washington, DC on December 22, 2020, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2020–28777 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 219

[Docket No. 201020–0275]

RIN 0648–BJ71

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Southwest Fisheries Science Center Fisheries Research

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; notification of issuance of Letters of Authorization.

SUMMARY: NMFS' Office of Protected Resources (OPR), upon request from NMFS' Southwest Fisheries Science Center (SWFSC), hereby issues regulations to govern the unintentional taking of marine mammals incidental to fisheries research conducted in multiple specified geographical regions over the course of five years. These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from January 15, 2021 through January 15, 2026.

ADDRESSES: A copy of SWFSC's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-southwest-fisheries-science-center-fisheries-and.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

These regulations establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to the SWFSC's fisheries research activities in the California Current Ecosystem and the Antarctic Marine Living Resources Ecosystem research areas.

We received an application from the SWFSC requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment incidental to the use of active acoustic devices, as well as by visual disturbance of pinnipeds in the Antarctic, and by Level A harassment, serious injury, or mortality incidental to the use of fisheries research gear. Please see ''Background'' below for definitions of harassment.

Legal Authority for the Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, this rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Regulations

Following is a summary of the major provisions of these regulations regarding SWFSC fisheries research activities. These measures include:

- Required monitoring of the sampling areas to detect the presence of marine mammals before deployment of certain research gear; and
- Required implementation of the mitigation strategy known as the ''move-on rule mitigation protocol'' which incorporates best professional judgment, when necessary during certain research fishing operations.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce

(as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On April 30, 2020, we received an adequate and complete request from SWFSC for authorization to take marine mammals incidental to fisheries research activities. On May 8, 2020 (85 FR 27388), we published a notice of receipt of SWFSC's application in the **Federal Register**, requesting comments and information related to the SWFSC request for thirty days. We did not receive any comments in response. We published a notice of proposed rulemaking in the **Federal Register** on August 28, 2020 (85 FR 53606) and requested comments and information from the public. Please see Comments and Responses, below.

These regulations are the second consecutive five-year incidental take regulations issued in response to a petition from SWFSC. The initial regulations were finalized in 2015 and are effective through October 30, 2020 (80 FR 58982; September 30, 2015). Three Letters of Authorization (LOA) were issued to SWFSC pursuant to the regulations, related to SWFSC research survey activities in the California Current Ecosystem (CCE), the Eastern Tropical Pacific (ETP), and the Antarctic Marine Living Resources Ecosystem (AMLR). Information related to this previous rulemaking and required reporting submitted by SWFSC according to the terms of the LOAs may be found online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-fisheries-swfsc-fisheries-and-ecosystem-research.* SWFSC adhered to all mitigation, monitoring, and reporting requirements and did not exceed authorized numbers of take.

SWFSC conducts fisheries research using pelagic trawl gear used at various levels in the water column, pelagic longlines with multiple hooks, purse seine gear, and other gear. If a marine mammal interacts with gear deployed by SWFSC, the outcome could potentially be Level A harassment, serious injury (*i.e.,* any injury that will likely result in mortality), or mortality. However, there is not sufficient information upon which to base a prediction of what the outcome may be for any particular interaction. Therefore, SWFSC has pooled the estimated number of incidents of take resulting from gear interactions, and we have assessed the potential impacts accordingly. SWFSC also uses various active acoustic devices in the conduct of fisheries research, and use of these devices has the potential to result in Level B harassment of marine mammals. Level B harassment of pinnipeds hauled out on ice may also occur, in the Antarctic only, as a result of visual disturbance from vessels conducting SWFSC research.

The SWFSC conducts fisheries research surveys in the CCE, ETP, and the AMLR. However, SWFSC does not plan to conduct research over the five-year period in the ETP. Therefore, these regulations address only the CCE and AMLR. In the CCE, SWFSC requested authorization to take individuals of 24 stocks by Level A harassment, serious injury, or mortality (hereafter referred to as M/SI) and of 38 stocks by Level B harassment. In the AMLR, SWFSC requested authorization to take individuals of fifteen species by Level B harassment. No takes by M/SI are anticipated in the AMLR. These regulations are effective for five years.

Description of the Specified Activity

Overview

The SWFSC collects a wide array of information necessary to evaluate the status of exploited fishery resources and the marine environment. SWFSC scientists conduct fishery-independent research onboard NOAA-owned and operated vessels or on chartered vessels. Some surveys may be conducted onboard commercial fishing vessels or by cooperating scientists on non-NOAA vessels, but the SWFSC designs and executes the studies and funds vessel time. The SWFSC plans to administer and conduct approximately 18 survey programs over the five-year period, within two separate research areas. Please see Table 1–2 in SWFSC's application for details relating to the planned survey programs. The gear types used fall into several categories: Towed nets fished at various levels in the water column, longline and other hook and line gear, purse seine nets, and other gear. Only use of trawl nets, hook and line gear, and purse seine nets are likely to result in interaction with marine mammals. Many of these surveys also use active acoustic devices.

The Federal government has a responsibility to conserve and protect living marine resources in U.S. waters and has also entered into a number of international agreements and treaties related to the management of living marine resources in international waters outside the United States. NOAA has the primary responsibility for managing marine finfish and shellfish species and their habitats, with that responsibility delegated within NOAA to NMFS.

In order to direct and coordinate the collection of scientific information needed to make informed fishery management decisions, Congress created six regional fisheries science centers, each a distinct organizational entity and the scientific focal point within NMFS for region-based Federal fisheries-related research. This research is aimed at monitoring fish stock recruitment, abundance, survival and biological rates, geographic distribution of species and stocks, ecosystem process changes, and marine ecological research. The SWFSC is the research arm of NMFS in the southwest region of the United States. The SWFSC conducts research and provides scientific advice to manage fisheries and conserve protected species in the geographic research areas listed above and provides scientific information to support the Pacific Fishery Management Council and numerous other domestic and international fisheries management organizations.

Dates and Duration

The specified activity may occur at any time during the five-year period of validity of the regulations. Dates and duration of individual surveys are inherently uncertain, based on congressional funding levels for the SWFSC, weather conditions, or ship contingencies. In addition, cooperative research is designed to provide

flexibility on a yearly basis in order to address issues as they arise. Some cooperative research projects last multiple years or may continue with modifications. Other projects only last one year and are not continued. Most cooperative research projects go through an annual competitive selection process to determine which projects should be funded based on proposals developed by many independent researchers and fishing industry participants. SWFSC survey activity does occur during most months of the year; however, trawl surveys typically occur during May through June and September and longline surveys are typically completed during June–July and September.

Specified Geographical Region

The SWFSC conducts research within two research areas considered to be distinct specified geographical regions: The CCE and AMLR. No research activity is planned within the ETP over the next five years. Please see Figures 1–1, 2–1, and 2–2 in the SWFSC application for maps of the research areas. We note here that, while the specified geographical regions within which the SWFSC operates may extend outside of the U.S. Exclusive Economic Zone (EEZ), the MMPA's authority does not extend into foreign territorial waters. Detailed descriptions of the SWFSC's research areas were provided in the notice of proposed rulemaking for SWFSC's previous incidental take regulations (80 FR 8166; February 13, 2015). Those descriptions remain accurate and sufficient, and we refer the reader to that notice rather than reprinting the information here.

Detailed Description of Activities

A detailed description of SWFSC's planned activities was provided in the notice of proposed rulemaking (85 FR 53606; August 28, 2020) and is not repeated here. No changes have been made to the specified activities described therein.

Comments and Responses

We published a notice of proposed rulemaking in the **Federal Register** on August 28, 2020 (85 FR 53606) and requested comments and information from the public. During the 30-day comment period, we received comments from the Marine Mammal Commission (Commission) and from 6 private citizens. Of the latter, two comments expressed general opposition, two expressed general support, and two were not relevant to the proposed rulemaking. The remaining comments and our responses are provided here, and the comments have been posted online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-southwest-fisheries-science-center-fisheries-and.* Please see the Commission's comment letter for full rationale behind the Commission's recommendations, to which we respond below. In response to the comments, minor changes were made to the take number for southern elephant seals and to certain reporting requirements, as detailed below.

The Commission noted that a 2015 requirement for SWFSC to report whether the move-on rule was waived for California sea lions was not included in the proposed rule. The Commission asserted that this information remains relevant (and would apply to purse seines in addition to longlines), and that it should be included as a requirement in the final rule. (See footnote 2 of the Commission's public comment letter.) NMFS concurs with this suggestion and has included these reporting requirements in the final rule.

Comment—The Commission recommends that NMFS ensure that any criteria and guidance developed regarding de minimis acoustic sources consider the overall level of impacts and are used consistently across all action proponents and applications.

Response—NMFS concurs with the Commission's recommendation and intends to use any such criteria and/or guidance consistently.

Comment—The Commission recommends that NMFS require SWFSC to estimate the numbers of marine mammals that may be taken by Level B harassment due to sound exposure resulting from use of active acoustic sources based on the 120- rather than the 160-dB re 1 μPa threshold for non-impulsive, intermittent sources, including those sources whose primary operating frequency is above 180 kHz that have been shown to elicit behavioral responses above the 120-dB re 1 μPa threshold.

Response—NMFS does not concur with the Commission's recommendation and does not adopt it. NMFS has addressed the Commission's recommendation on numerous occasions, and the Commission does not offer any substantive new points in support of its position. NMFS provided a detailed explanation of the reasons why the recommendation was not followed in response to the Commission's letter pertaining to proposed incidental take regulations for NMFS' Alaska Fisheries Science Center (84 FR 46788; September 5, 2019). We refer the Commission and the public to that explanation.

Comment—The Commission recommends that NMFS prioritize updating its generic Level B harassment thresholds and formulate a strategy for developing thresholds for all types of sound sources and for incorporating new data regarding these thresholds as soon as possible.

Response—NMFS concurs with the Commission's recommendation and agrees that this issue is a priority.

Comment—The Commission recommends that NMFS increase the annual take by Level B harassment of southern elephant seals due to on-ice disturbance from one per year to five per year in the final rule, in order to account for the potential that smaller groups could be present.

Response—NMFS concurs with the recommendation and has increased the annual take number as suggested. See Table 9.

Comment—The Commission recommends that NMFS include in all proposed and final incidental harassment authorizations and rules, including the SWFSC's final rule, the explicit requirement to cease activities if a marine mammal is injured or killed by vessel strike, until NMFS reviews the circumstances involving any injury or death that is likely attributable to the activities and determines what additional measures are necessary to minimize additional injuries or deaths.

Response—NMFS does not anticipate, and has not authorized, any takes associated with vessel strikes. Further, in the event of a vessel strike, SWFSC is required both to collect and report an extensive suite of information that NMFS has identified in order to evaluate the event, and to notify OPR and the West Coast Regional Stranding Coordinator as soon as feasible. At that point, as the Commission suggests, NMFS would work with SWFSC to determine whether there are additional mitigation measures or modifications that could further reduce the likelihood of vessel strike for the activities. However, given the very low likelihood of a vessel strike occurring, the protective value of ceasing operations while NMFS and SWFSC discuss potential additional mitigations in order to avoid a second highly unlikely event is unclear, while a requirement for project activities to cease would not be practicable for a vessel that is operating on the open water. Therefore, NMFS does not concur that the measure is warranted, and we have not included this requirement in the authorization. NMFS retains authority to modify the LOA and cease all activities immediately based on a vessel strike

and will exercise that authority if warranted.

With respect to the Commission's recommendation that NMFS include these requirements in all proposed and final incidental take authorizations, NMFS determines the requirements for mitigation measures in each authorization based on numerous case-specific factors, including the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. As NMFS must make these determinations on a case-by-case basis, we therefore do not agree with this recommendation.

Comment—The Commission recommends that NMFS (1) include a specific condition either in section 219.5 of the final rule or in any LOA issued under the final rule requiring SWFSC to cease its activities and consult with NMFS if the number of authorized takes has been met for any species and (2) reinforce that SWFSC should keep a running tally of the numbers of species-specific M/SI and on-ice Level B harassment takes and the line-kilometers surveyed to ensure that the authorized taking limits are not exceeded.

Response—NMFS does not concur with the recommendation and does not adopt it. The LOA stipulates that the allowable taking is limited to the authorized numbers specified in the LOA, and states that any taking exceeding the authorized numbers (or any taking of a species for which take is not authorized) is prohibited and may result in the modification, suspension, or revocation of the LOA. Additional, redundant language is not necessary. Therefore, while we agree that SWFSC must ensure they do not exceed authorized takes, we do not agree that the recommended requirements are helpful. SWFSC is responsible for ensuring that it does not operate in violation of an issued LOA.

Comment—The Commission recommends that NMFS require SWFSC to include in each annual monitoring report (1) the distance at which a pinniped is disturbed and the closest point of approach for each disturbance event; (2) the numbers of takes differentiated by species and age class for each disturbance event; and (3) the raw sightings data in each annual monitoring report.

Response—NMFS concurs with the recommendation and has included the suggested reporting requirements in the final rule. See § 219.6(e)(2)(ii)(D) of the final regulations.

Comment—Regarding the negligible impact analysis provided for the California coastal stock of bottlenose dolphin, the Commission states that NMFS should apply the information contained in the current stock assessment reports when making negligible impact determinations unless reliable, relevant new information that has yet to be fully assessed and incorporated into the reports warrants some other treatment, and additionally recommends that NMFS authorize a smaller number of takes by M/SI than proposed, such that total estimated M/SI does not exceed the potential biological removal (PBR) value.

Response—NMFS does not concur with the Commission's recommendation to reduce the authorized take number for the California coastal stock of bottlenose dolphin, or the underlying rationale, and does not adopt it. We also clarify that the proposed annual take number for the stock (0.8) does not exceed the PBR value of 2.7. The annual take number does exceed the residual PBR value of 0.7. (See Table 1, Table 9, and Negligible Impact Analysis and Determinations for details of the analysis.) The Commission suggests first that application of NMFS' new criteria for negligible impact determinations (NID) under section 101(a)(5)(E) of the MMPA (NMFS, 2020) would show the proposed authorized take number to not be negligible, and that NMFS should explain its rationale if it believes that the criteria are not relevant when assessing M/SI that occurs in contexts other than commercial fishing. Indeed, application of those criteria to NIDs made under section 101(a)(5)(A) of the MMPA may not be appropriate. Section 101(a)(5)(E) only pertains to marine mammal stocks designated as depleted because of their listing under the ESA, and the corresponding criteria were developed in that context. The California coastal stock of bottlenose dolphin is not designated as a depleted stock. NMFS has made no decisions on whether and how to apply the 101(a)(5)(E) criteria to other negligible impact determinations under section 101(a)(5)(A). Therefore, the appropriate negligible impact factor may be different than those specified in the 101(a)(5)(E) criteria. Applicability of those criteria to stocks not designated as depleted was not considered in development of the criteria and is not addressed by the Commission. Therefore, we reject the suggestion that the criteria may be used to show deficiency in NMFS' NID for the California coastal stock of bottlenose dolphin. Please see the discussion of use of PBR generally for section 101(a)(5)(A) authorizations below in the Negligible Impact Analysis and Determinations section.

With regard to the Commission's recommendation to apply the information contained in the current stock assessment reports, NMFS agrees and has done so, as shown in the Negligible Impact Analysis and Determinations section of this preamble. In addition to considering quantitative information, *i.e.,* the estimate of annual M/SI and the stock's PBR value, we also consider other relevant factors discussed in the stock assessment report (SAR), such as the nature of the recorded M/SI events that contribute to the estimate and the information that is available regarding stock abundance. NMFS disagrees with the Commission's characterization of the discussion of these factors as ''downplaying'' the information in the SAR and notes the Commission's apparent agreement with the validity of these points, *i.e.,* that the stock abundance is likely negatively biased and that some of the specific incidents contributing to the SAR estimate of annual M/SI are unlikely to recur. It is appropriate to perform a negligible impact analysis by considering the quantitative information available in the SAR in context with other, qualitative information. Although not currently applicable to 101(a)(5)(A) NID evaluations, the 101(a)(5)(E) criteria explicitly address this, stating ''There may be circumstances, such as when the M/SI estimate is slightly below or slightly above the negligible impact threshold(s), where the analyst may deviate from the determination that would be dictated by strictly adhering to the [negligible impact] thresholds. Such deviations may be due to the consideration of additional factors affecting the likelihood or impact of the incidental M/SI [. . . .] In such circumstances, NMFS should provide the rationale in the document supporting the NID.'' In this case, NMFS has described the available quantitative information, evaluated additional relevant information, and provided its rationale in making a finding of negligible impact.

Finally, the Commission does not suggest that the level of taking proposed for authorization is unrealistically high but, nevertheless, recommends that it be reduced in order to, in the Commission's estimation, make a finding of negligible impact. It would be improper to lower arbitrarily NMFS' best estimate of anticipated taking in order to make the necessary finding. Rather, that best estimate must be evaluated in context of all relevant

available information and, if the estimated taking is found to be likely to cause greater than a negligible impact on the affected species or stock, additional mitigation that may reduce the amount of anticipated taking may be considered. In this case, NMFS has considered the amount of anticipated taking in context of all relevant available information and has made the necessary finding of negligible impact.

Description of Marine Mammals in the Area of the Specified Activity

We have reviewed SWFSC's species descriptions—which summarize available information regarding status and trends, distribution and habitat preferences, behavior and life history, and auditory capabilities of the potentially affected species—for accuracy and completeness and refer the reader to Sections 3 and 4 of SWFSC's application, instead of reprinting the information here. Additional information regarding population trends and threats may be found in NMFS' SARs (*www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*), and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.fisheries.noaa.gov/find-species*).

Table 1 lists all species with expected potential for occurrence in the specified geographical regions where SWFSC plans to continue the specified activities and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and PBR, where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population, is discussed in greater detail later in this document (see Negligible Impact Analysis and Determinations).

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that the stock comprises. For some species, this geographic area may extend beyond U.S. waters. Survey abundance (as compared to stock or species abundance) is the total number of individuals estimated within the survey area, which may or may not align completely with a stock's geographic range as defined in the SARs. These surveys may also extend beyond U.S. waters.

All stocks occurring in the CCE are assessed in either NMFS' U.S. Alaska SARs or U.S. Pacific SARs. All values presented in Table 1 are the most recent available at the time of writing and are available in the 2019 SARs (Carretta *et al.,* 2020; Muto *et al.,* 2020). Antarctic stocks are not generally defined by NMFS, and information relating to species occurring in the AMLR is lacking relative to those occurring in the CCE. For species occurring in AMLR, we provide International Union for the Conservation of Nature (IUCN) status. The IUCN systematically assesses the relative risk of extinction for terrestrial and aquatic plant and animal species via a classification scheme using five designations, including three threatened categories (Critically Endangered, Endangered, and Vulnerable) and two non-threatened categories (Near Threatened and Least Concern) (*www.iucnredlist.org/;* accessed June 22, 2020). These assessments are generally made relative to the species' global status, and therefore may have limited applicability when marine mammal stocks are defined because we analyze the potential population-level effects of the specified activity to the relevant stock. However, where stocks are not defined, IUCN status can provide a useful reference.

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In the CCE, 33 species (with 40 managed stocks) are considered to have the potential to co-occur with SWFSC activities. Species that could potentially occur in the research area but are not expected to have the potential for interaction with SWFSC research gear or that are not likely to be harassed by SWFSC's use of active acoustic devices are described briefly but omitted from further analysis. These include extralimital species, which are species that do not normally occur in a given area but for which there are one or more occurrence records that are considered beyond the normal range of the species. Species considered to be extralimital here include the North Pacific right whale (*Eubalaena japonica*) and the Bryde's whale (*Balaenoptera edeni brydei*). In addition, the sea otter is found in coastal waters, with the southern sea otter (*Enhydra lutris nereis*) found in California and the northern (or eastern) sea otter (*E. l. kenyoni;* Washington stock only) found in Washington. However, sea otters are managed by the U.S. Fish and Wildlife Service and are not considered further in this document. Most survey activity occurs offshore and is therefore less likely to interact with coastal species such as harbor porpoise, the coastal stock of bottlenose dolphin, or gray whales (during the northbound migration), although these species are considered further in this document. SWFSC does not conduct research activities in the inland waters of Washington. Therefore, stocks occurring solely in those waters (*i.e.,* harbor porpoise and harbor seal) are not addressed herein.

TABLE 1—MARINE MAMMALS POTENTIALLY PRESENT IN THE VICINITY OF SWFSC RESEARCH ACTIVITIES IN THE CCE

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific (ENP)	-; N	26,960 (0.05; 25,849; 2016).	801	139
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae kuzira*	California/Oregon/Washington (CA/OR/WA).	E/D; Y	2,900 (0.05; 2,784; 2014)	[9] 16.7	≥42.1
Minke whale	*Balaenoptera acutorostrata scammoni.*	CA/OR/WA	-; N	636 (0.72; 369; 2014)	3.5	≥1.3
Sei whale	*B. borealis borealis*	ENP	E/D; Y	519 (0.4; 374; 2014)	0.75	≥0.2
Fin whale	*B. physalus physalus*	CA/OR/WA	E/D; Y	9,029 (0.12; 8,127; 2014)	81	≥43.5

TABLE 1—MARINE MAMMALS POTENTIALLY PRESENT IN THE VICINITY OF SWFSC RESEARCH ACTIVITIES IN THE CCE—Continued

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Blue whale	*B. musculus musculus*	ENP	E/D; Y	1,496 (0.44; 1,050; 2014)	[9] 1.2	≥19.4
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	CA/OR/WA	E/D; Y	1,997 (0.57; 1,270; 2014)	2.5	0.6
Family Kogiidae:						
Pygmy sperm whale	*Kogia breviceps*	CA/OR/WA	-; N	4,111 (1.12; 1,924; 2014)	19.2	0
Dwarf sperm whale	*K. sima*	CA/OR/WA [5]	-; N	Unknown	n/a	0
Family Ziphiidae (beaked whales):						
Cuvier's beaked whale	*Ziphius cavirostris*	CA/OR/WA	-; N	3,274 (0.67; 2,059; 2014)	21	<0.1
Baird's beaked whale	*Berardius bairdii*	CA/OR/WA	-; N	2,697 (0.6; 1,633; 2014)	16	0
Hubbs' beaked whale	*Mesoplodon carlhubbsi*	CA/OR/WA [6]	-; N	3,044 (0.54; 1,967; 2014)	20	0.1
Blainville's beaked whale	*M. densirostris*					
Ginkgo-toothed beaked whale.	*M. ginkgodens*					
Perrin's beaked whale	*M. perrini*					
Lesser (pygmy) beaked whale.	*M. peruvianus*					
Stejneger's beaked whale	*M. stejnegeri*					
Family Delphinidae:						
Common bottlenose dolphin	*Tursiops truncatus truncatus*	CA/OR/WA Offshore	-; N	1,924 (0.54; 1,255; 2014)	11	≥1.6
		California Coastal	-; N	453 (0.06; 346; 2011)	2.7	≥2.0
Striped dolphin	*Stenella coeruleoalba*	CA/OR/WA	-; N	29,211 (0.2; 24,782; 2014).	238	≥0.8
ENP long-beaked common dolphin.	*Delphinus delphis bairdii*	California	-; N	101,305 (0.49; 68,432; 2014).	657	≥35.4
Common dolphin	*D. d. delphis*	CA/OR/WA	-; N	969,861 (0.17; 839,325; 2014).	8,393	≥40
Pacific white-sided dolphin	*Lagenorhynchus obliquidens*	CA/OR/WA	-; N	26,814 (0.28; 21,195; 2014).	191	7.5
Northern right whale dolphin	*Lissodelphis borealis*	CA/OR/WA	-; N	26,556 (0.44; 18,608; 2014).	179	3.8
Risso's dolphin	*Grampus griseus*	CA/OR/WA	-; N	6,336 (0.32; 4,817; 2014)	46	≥3.7
Killer whale	*Orcinus orca* [4]	West Coast Transient [7]	-; N	243 (n/a; 2009)	2.4	0
		ENP Offshore	-;N	300 (0.1; 276; 2012)	2.8	0
		ENP Southern Resident	E/D; Y	75 (n/a; 2018)	0.13	0
Short-finned pilot whale	*Globicephala macrorhynchus*	CA/OR/WA	-; N	836 (0.79; 466; 2014)	4.5	1.2
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena vomerina*	Morro Bay	-; N	4,255 (0.56; 2,737; 2012)	66	≥0.4
		Monterey Bay	-; N	3,455 (0.58; 2,197; 2013)	23	≥0.2
		San Francisco-Russian River	-; N	7,524 (0.57; 4,801; 2017)	48	≥0.6
		Northern CA/Southern OR	-; N	24,195 (0.4; 17,447; 2016).	349	≥0.2
		Northern OR/WA Coast	-; N	21,487 (0.44; 15,123; 2011).	151	≥3
Dall's porpoise	*Phocoenoides dalli dalli*	CA/OR/WA	-; N	25,750 (0.45; 17,954; 2014).	172	0.3
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Guadalupe fur seal	*Arctocephalus philippii townsendi.*	Mexico to California	T/D; Y	34,187 (n/a; 31,019; 2013).	1,062	[10] ≥3.8
Northern fur seal	*Callorhinus ursinus*	Pribilof Islands/Eastern Pacific	D; Y	620,660 (0.2; 525,333; 2016).	11,295	399
California			-; N	14,050 (n/a; 7,524; 2013)	451	1.8
California sea lion	*Zalophus californianus*	United States	-; N	257,606 (n/a; 233,515; 2014).	14,011	≥321
Steller sea lion	*Eumetopias jubatus monteriensis.*	Eastern U.S.	-; N	43,201 (n/a; 2017)	2,592	112
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina richardii*	California	-; N	30,968 (n/a; 27,348; 2012).	1,641	43
		OR/WA Coast [8]	-; N	24,732 (0.12; 22,380; 1999).	n/a	10.6
Northern elephant seal	*Mirounga angustirostris*	California Breeding	-; N	179,000 (n/a; 81,368; 2010).	4,882	8.8

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable. For most stocks of killer whales, the abundance values represent direct counts of individually identifiable animals; therefore there is only a single abundance estimate with no associated CV. For certain stocks of pinnipeds, abundance estimates are based upon observations of animals (often pups) ashore multiplied by some correction factor derived from knowledge of the species' (or similar species') life history to arrive at a best abundance estimate; therefore, there is no associated CV. In these cases, the minimum abundance may represent actual counts of all animals ashore.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, subsistence hunting, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value. All M/SI values are as presented in the 2019 SARs.

[4] Transient and resident killer whales are considered unnamed subspecies (Committee on Taxonomy, 2020).

[5] No information is available to estimate the population size of dwarf sperm whales off the U.S. West Coast, as no sightings of this species have been documented despite numerous vessel surveys of this region (Carretta *et al.,* 2017). Dwarf and pygmy sperm whales are difficult to differentiate at sea but, based on previous sighting surveys and historical stranding data, it is thought that recent ship survey sightings were of pygmy sperm whales.

[6] The six species of Mesoplodont beaked whales occurring in the CA/OR/WA region are managed as a single stock due to the rarity of records and the difficulty in distinguishing these animals to species in the field. Based on bycatch and stranding records, it appears that *M. carlhubbsi* is the most commonly encountered of these species (Carretta *et al.,* 2008; Moore and Barlow, 2013).

[7] The abundance estimate for this stock includes only animals from the ''inner coast'' population occurring in inside waters of southeastern Alaska, British Columbia, and Washington—excluding animals from the ''outer coast'' subpopulation, including animals from California—and therefore should be considered a minimum count. For comparison, the previous abundance estimate for this stock, including counts of animals from California that are now considered outdated, was 354.

[8] Abundance estimate for this stock is not considered current. PBR is therefore considered undetermined, as there is no current minimum abundance estimate for use in calculation. We nevertheless present the most recent abundance estimates, as it represents the best available information for use in this document.

[9] These stocks are known to spend a portion of their time outside the U.S. EEZ. Therefore, the PBR presented here is the allocation for U.S. waters only and is a portion of the total. The total PBR for blue whales is 2.1 (7/12 allocation for U.S. waters), and the total for CA/OR/WA humpback whales is 33.4 (one half allocation for U.S. waters). Annual M/SI presented for these species is for U.S. waters only.

[10] This represents annual M/SI in U.S. waters. However, the vast majority of M/SI for this stock—the level of which is unknown—would likely occur in Mexican waters. There is insufficient information to determine whether mortality in Mexico exceeds the PBR for this stock, but given the observed growth of the population over time, this is unlikely (Carretta *et al.,* 2020).

Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.,* 2015), NMFS established 14 distinct population segments (DPS) with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. The DPSs that occur in U.S. waters do not necessarily equate to the existing stocks designated under the MMPA and shown in Table 1. Because MMPA stocks cannot be portioned, *i.e.,* parts managed as ESA-listed while other parts managed as not ESA-listed, until such time as the MMPA stock delineations are reviewed in light of the DPS designations, NMFS considers the existing humpback whale stocks under the MMPA to be endangered and depleted for MMPA management purposes (*e.g.,* selection of a recovery factor, stock status).

Within U.S. West Coast waters, three current DPSs may occur: The Hawaii DPS (not listed), Mexico DPS (threatened), and Central America DPS (endangered). According to Wade *et al.* (2016), whales off of Washington are most likely to be from the Hawaii DPS (52.9 percent), but are almost equally likely to be from the Mexico DPS (41.9 percent), and could also be from the Central America DPS (14.7 percent). Off of Oregon and California, whales are most likely to be from the Mexico DPS (89.6 percent), with a 19.7 percent probability of an encountered whale being from the Central America DPS. Note that these probabilities reflect the upper limit of the 95 percent confidence interval of the probability of occurrence; therefore, numbers may not sum to 100 percent for a given area.

Take Reduction Planning—Take reduction plans are designed to help recover and prevent the depletion of strategic marine mammal stocks that interact with certain U.S. commercial fisheries, as required by Section 118 of the MMPA. The immediate goal of a take reduction plan is to reduce, within six months of its implementation, the M/SI of marine mammals incidental to commercial fishing to less than the PBR level. The long-term goal is to reduce, within five years of its implementation, the M/SI of marine mammals incidental to commercial fishing to insignificant levels, approaching a zero serious injury and mortality rate, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans. Take reduction teams are convened to develop these plans.

For marine mammals in the CCE, there is currently one take reduction plan in effect (Pacific Offshore Cetacean Take Reduction Plan). The goal of this plan is to reduce M/SI of several marine mammal stocks incidental to the California thresher shark/swordfish drift gillnet fishery (CA DGN). A team was convened in 1996 and a final plan produced in 1997 (62 FR 51805; October 3, 1997). Marine mammal stocks of concern initially included the California, Oregon, and Washington stocks for all CCE beaked whales, short-finned pilot whales, pygmy sperm whales, sperm whales, and humpback whales. The most recent five-year averages of M/SI for all stocks except the humpback whale are below PBR. For humpback whales, the majority of total annual M/SI is attributed to other fisheries—notably pot/trap fisheries—and ship strikes, with no observed M/SI in the DGN fishery from 2013–2017, and estimated mean annual M/SI in the fishery at <0.1 (CV = 1.9) over the same period. The most recent observed take of a sperm whale in the DGN fishery was in 2010, though the mean annual estimated M/SI attributed to the fishery over the period from 2008–2017 is 0.56 (CV = 0.78). Two short-finned pilot whales were observed taken in the DGN fishery in 2014, leading to a mean annual M/SI estimate of 1.2 (CV = 0.39) for the fishery. None of the other species were observed taken in the fishery in the most recent five-year period for which data are available, though some have estimated mean annual M/SI values for the fishery that are >0. More information is available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/pacific-offshore-cetacean-take-reduction-plan.* Of the stocks of concern, the SWFSC has requested the authorization of incidental M/SI for the short-finned pilot whale only (see ''Estimated Take by Incidental Harassment'' later in this document). The SWFSC does not use drift gillnets in its fisheries research program; therefore, take reduction measures applicable to the CA DGN fisheries are not relevant to the SWFSC.

Unusual Mortality Events (UME)—A UME is defined under the MMPA as a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response. From 1991 to the present, there have been 16 formally recognized UMEs on the U.S. West Coast involving species under NMFS' jurisdiction. The only currently ongoing investigations involve Guadalupe fur seals and gray whales along the west coast.

Increased strandings of Guadalupe fur seals (up to eight times the historical average) have occurred along the entire coast of California and extending into Oregon and Washington. Increased strandings in California were reported beginning in January 2015 and peaked from April through June 2015, but have remained well above average.

Strandings in Oregon and Washington became elevated starting in 2019 and are five times higher than the historical average. Findings from the majority of stranded animals include malnutrition with secondary bacterial and parasitic infections, and the UME has been attributed to ecological factors. For more information, please visit: *www.fisheries.noaa.gov/national/marine-life-distress/2015-2020-guadalupe-fur-seal-unusual-mortality-event-california.*

Since January 1, 2019, elevated gray whale strandings have occurred along the west coast of North America from Mexico through Alaska. As of September 2, 2020, there have been a total of 378 whales reported in the event, with approximately 168 dead whales in Mexico, 194 whales in the United States (53 in California; 9 in Oregon; 46 in Washington, 86 in Alaska), and 16 whales in British Columbia, Canada. For the United States, the historical 18-year 5-month average (Jan–May) is 14.8 whales for the four states for this same time-period. Several dead whales have been emaciated with moderate to heavy whale lice (cyamid) loads. Necropsies have been conducted on a subset of whales with additional findings of vessel strike in three whales and entanglement in one whale. In Mexico, 50–55 percent of the free-ranging whales observed in the lagoons in winter have been reported as ''skinny'' compared to the annual average of 10–12 percent ''skinny'' whales normally seen. The cause of the UME is as yet undetermined. For more information, please visit: *www.fisheries.noaa.gov/national/marine-life-distress/2019-2020-gray-whale-unusual-mortality-event-along-west-coast-and.*

Additional UMEs in the past ten years include those involving California sea lions (2013–2016; ecological factors) and large whales in Alaska and British Columbia (2015–2016; undetermined cause with secondary ecological factors). For more information on UMEs, please visit: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events.*

Antarctic

The SWFSC's Antarctic Research Area (ARA) comprises a portion of the AMLR ecosystem. In the ARA, seventeen species are considered to have the potential to co-occur with SWFSC activities. Marine mammals in the AMLR do not constitute stocks under U.S. jurisdiction; therefore, the stocks are not managed by NMFS, there are no SARs, and substantially less information is available for these species in relation to the stocks or populations and their occurrence in the ARA than is available for CCE stocks (*e.g.,* PBR is not calculated for AMLR stocks, and strategic designations are not made). Extralimital species in the ARA include the pygmy right whale (*Caperea marginata*), sei whale, Cuvier's beaked whale, Shepherd's beaked whale (*Tasmacetus shepherdi*), Gray's beaked whale (*Mesoplodon grayi*), and strap-toothed beaked whale (*M. layardii*), which have distributions that only border the northernmost edge of the ARA. The Ross seal (*Ommatophoca rossii*) is also considered extralimital to the ARA due to its preference for dense pack ice, which is not typically present in the ARA.

TABLE 2—MARINE MAMMALS POTENTIALLY PRESENT IN THE VICINITY OF SWFSC RESEARCH ACTIVITIES IN THE AMLR

Common name	Scientific name	Stock [2]	ESA/MMPA/IUCN status [3]	Abundance (CV) [4]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)				
Family Balaenidae (right whales):				
Southern right whale	*Eubalaena australis*		E/D/LC	1,755 (0.62).[5]
Family Balaenopteridae (rorquals):				
Humpback whale	*Megaptera novaeangliae australis*		E/D/LC	9,484 (0.28).[5]
Antarctic minke whale	*Balaenoptera bonaerensis*		-/NT	18,125 (0.28).[5]
Fin whale	*B. physalus quoyi*		E/D/VU	4,672 (0.42).[5]
Blue whale	*B. musculus intermedia*		E/D/EN	1,700 (95% CI 860–2,900).[6]
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)				
Family Physeteridae:				
Sperm whale	*Physeter macrocephalus*		E/D/VU	12,069 (0.17).[7]
Family Ziphiidae (beaked whales):				
Arnoux' beaked whale	*Berardius arnuxii*		-/DD	Unknown.
Southern bottlenose whale	*Hyperoodon planifrons*		-/LC	53,743 (0.12).[8]
Family Delphinidae:				
Hourglass dolphin	*Lagenorhynchus cruciger*		-/LC	144,300 (0.17).[9]
Killer whale	*Orcinus orca* [1]		-/DD	24,790 (0.23).[8]
Long-finned pilot whale	*Globicephala melas edwardii*		-/LC	200,000 (0.35).[9]
Family Phocoenidae (porpoises):				
Spectacled porpoise	*Phocoena dioptrica*		-/LC	Unknown.
Order Carnivora—Superfamily Pinnipedia				
Family Otariidae (eared seals and sea lions):				
Antarctic fur seal	*Arctocephalus gazella*	South Georgia	-/LC	2,700,000.[10]
Family Phocidae (earless seals):				
Southern elephant seal	*Mirounga leonina*	South Georgia	-/LC	401,572.[11]
Weddell seal	*Leptonychotes weddellii*		-/LC	500,000–1,000,000.[12]
Crabeater seal	*Lobodon carcinophaga*		-/LC	5,000,000–10,000,000.[12]
Leopard seal	*Hydrurga leptonyx*		-/LC	222,000–440,000.[12]

[1] Three distinct forms of killer whale have been described from Antarctic waters; referred to as types A, B, and C, they are purported prey specialists on Antarctic minke whales, seals, and fish, respectively (Pitman and Ensor, 2003; Pitman *et al.,* 2010).

[2] For most species in the AMLR, stocks are not delineated and entries refer generally to individuals of the species occurring in the research area.

[3] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Any species listed under the ESA is automatically designated under the MMPA as depleted. IUCN status: Endangered (EN), Vulnerable (VU), Near Threatened (NT), Least Concern (LC), Data Deficient (DD).

[4] CV is coefficient of variation. All abundance estimates, except for those from Reilly *et al.* (2004) (right, humpback, minke, and fin whales), are for entire Southern Ocean (*i.e.,* waters south of 60°S) and not the smaller area comprising the SWFSC research area.

[5] Abundance estimates reported in Reilly *et al.* (2004) for the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) survey area from 2000. Surveys include Antarctic Peninsula (473,300 km^2) and Scotia Sea (1,109,800 km^2) strata, which correspond roughly to ARA, as reported by Hewitt *et al.* (2004).

[6] Southern Ocean abundance estimate (Branch *et al.,* 2007). CI is confidence interval.

[7] Southern Ocean abundance estimate (IWC, 2001 in Whitehead, 2002).

[8] Southern Ocean abundance estimate from circumpolar surveys covering 68 percent of waters south of 60°S from 1991–98 (Branch and Butterworth, 2001).

[9] Southern Ocean abundance estimate derived from surveys conducted from 1976–88 (Kasamatsu and Joyce, 1995).

[10] South Georgia abundance estimate; likely >95 percent of range-wide abundance (Forcada and Staniland, 2009). Genetic evidence shows two distinct population regions, likely descended from surviving post-sealing populations at South Georgia, Bouvetøya, and Kerguelen Islands (Wynen *et al.,* 2000; Forcada and Staniland, 2009). Individuals from the South Georgia population (including breeding populations at the South Orkney and South Shetland Islands, which are within the ARA) are likely to occur in the ARA.

[11] Four genetically distinct populations are recognized: The Peninsula Valdés population in Argentina, the South Georgia population in the South Atlantic Ocean, the Kerguelen population in the South Indian Ocean and the Macquarie population in the South Pacific Ocean (Slade *et al.,* 1998; Hoelzel *et al.,* 2001). Animals occurring in ARA are likely to belong to South Georgia population, which includes subpopulations at South Georgia Island (>99% of population) and at the South Orkney and South Shetland Islands; South Georgia population abundance estimate from 2001 (McMahon *et al.,* 2005).

[12] Range-wide abundance estimates (Thomas and Terhune, 2009; Bengtson, 2009; Rogers, 2009).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans).

Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with an exception for lower limits for low-frequency cetaceans where the result was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Within the CCE, 33 marine mammal species (27 cetacean and six pinniped [four otariid and two phocid] species) have the potential to co-occur with SWFSC research activities. Please refer to Table 1. Of the 27 cetacean species that may be present, six are classified as low-frequency cetaceans (*i.e.,* all mysticete species), seventeen are classified as mid-frequency cetaceans (*i.e.,* all delphinid and ziphiid species and the sperm whale), and four are classified as high-frequency cetaceans (*i.e.,* porpoises and *Kogia* spp.). Within the AMLR, seventeen marine mammal species (twelve cetacean and five pinniped [one otariid and four phocid] species) have the potential to co-occur with SWFSC research activities. Please refer to Table 2. Of the twelve cetacean species that may be present, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), five are classified as mid-frequency cetaceans (*i.e.,* all delphinid and ziphiid species [excluding the hourglass dolphin] and the sperm whale), and two are classified as high-frequency cetaceans (*i.e.,* the hourglass dolphin and spectacled porpoise).

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

Detailed descriptions of the potential effects of the various elements of the SWFSC's specified activity on marine mammals and their habitat were provided in association with the 2015 SWFSC rulemaking (80 FR 8166; February 15, 2015). Additionally, detailed descriptions of the potential effects of similar specified activities have also been provided in other **Federal Register** notices (*e.g.,* 81 FR 38516; 83 FR 37638; 84 FR 6576), and section 7 of SWFSC's application provides a discussion of the potential effects of their specified activity, which we have reviewed for accuracy and completeness. No significant new information is available, and these discussions provide the necessary adequate and relevant information regarding the potential effects of SWFSC's specified activity on marine mammals and their habitat. Therefore, we refer the reader to these documents rather than repeating the information here. The referenced information includes a summary and discussion of the ways that components of the specified activity (*e.g.,* gear deployment, use of active acoustic sources, visual disturbance) may impact marine mammals and their habitat.

As stated previously, the use of certain research gears, including trawl nets, hook and line gear, and purse seine nets, has the potential to result in interaction with marine mammals. In the event of a marine mammal interaction with research gear, injury, serious injury, or mortality may result from entanglement or hooking. Exposure to sound through the use of active acoustic systems for research purposes may result in Level B harassment. However, as detailed in the previously referenced discussions, Level A harassment in the form of permanent threshold shift (PTS) is extremely unlikely to occur, and we consider such effects discountable. Finally, in the Antarctic only, it is expected that hauled pinnipeds may be disturbed by approaching researchers such that Level B harassment could occur. Ship strike is not a reasonably anticipated outcome of SWFSC research activities, given the small amount of distance covered by research vessels and their relatively slow speed in comparison to commercial shipping traffic (*i.e.,* the primary cause of marine mammal vessel strikes).

With specific reference to Level B harassment that may occur as a result of acoustic exposure, we note that the analytical methods from the original 2015 analysis are retained here. However, the state of science with regard to our understanding of the likely potential effects of the use of systems like those used by SWFSC has advanced in the preceding five years, as have readily available approaches to estimating the acoustic footprints of such sources, with the result that we view this analysis as highly conservative. Although more recent literature provides documentation of marine mammal responses to the use of these and similar acoustic systems (*e.g.,* Cholewiak *et al.,* 2017; Quick *et al.,* 2017; Varghese *et al.,* 2020), the described responses do not generally comport with the degree of severity that should be associated with Level B harassment, as defined by the MMPA. We retain the 2015 analytical approach for consistency with existing analyses and for purposes of efficiency here, and consider this acceptable because the approach provides a conservative estimate of potential incidents of Level B harassment. In summary, while we authorize the amount of take by Level B harassment indicated in the Estimated Take section, and consider these potential takings at face value in our negligible impact analysis, it is uncertain whether use of these acoustic systems are likely to cause take at all, much less at the estimated levels.

The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determinations section considers the potential effects of the specified activity, the Estimated Take section, and the Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Estimated Take

This section provides an estimate of the number of incidental takes that may be authorized under the rule, which will inform both NMFS's consideration of whether the number of takes is ''small'' and the negligible impact determination.

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Take of marine mammals incidental to SWFSC research activities could occur as a result of (1) injury or mortality due to gear interaction in the CCE (Level A harassment, serious injury, or mortality); (2) behavioral disturbance resulting from the use of active acoustic sources (Level B harassment only); or (3) behavioral disturbance of pinnipeds resulting from incidental approach of researchers in the Antarctic (Level B harassment only). Below we describe how the potential take is estimated.

Estimated Take Due to Gear Interaction

In order to determine the number of incidental takes requested for authorization, SWFSC retained the approach to estimating their requested take numbers that was developed in support of the 2015 rule. That approach was based on historical incidents of gear interaction and on an assessment of which species of marine mammal that have not historically been taken might have similar risk of interaction to those species that have been taken. In particular, records from the year 2008—which remains the year with the highest number of gear interaction incidents—were used as the basis for generating a precautionary, worst-case assessment of potential takes. Reporting from 2015–19 under the current regulations demonstrates that this approach was indeed a precautionary one, as annual numbers of takes have remained well below those recorded in 2008, and only one additional species that had not historically been taken in SWFSC research gear in 2015 has subsequently been taken (common dolphin; see Table 4). SWFSC has elected to carry forward this precautionary approach to their take authorization request in support of this rulemaking, and we incorporate it into our rulemaking, as described in further detail below.

The approach to estimating the number of potential incidents of take that could occur through gear interaction first requires consideration of SWFSC's record of past such incidents. We then consider in addition other species that may have similar vulnerabilities to SWFSC trawl and longline gear as those species for which we have historical interaction records. Historical interactions with research gear are described in Tables 4 and 5, and we anticipate that all species that interacted with SWFSC fisheries research gear historically could potentially be taken in the future. Available records are for the years 2006 through present. All historical SWFSC interactions have taken place in the CCE. The locations of incidental take events from 2015–2019 are shown in Figure 6–1 of SWFSC's application.

TABLE 4—HISTORICAL INTERACTIONS WITH TRAWL GEAR

Gear [1]	Survey	Date	Species	Number killed	Number released alive	Total
Midwater trawl	Coastal Pelagic Species (CPS).	4/24/2006	Northern fur seal (CA stock)	1		1
Midwater trawl	CPS	4/29/2007	Northern fur seal (CA stock)	1		1

TABLE 4—HISTORICAL INTERACTIONS WITH TRAWL GEAR—Continued

Gear [1]	Survey	Date	Species	Number killed	Number released alive	Total
Midwater trawl [2]	Juvenile Rockfish	5/30/2007	Northern fur seal (eastern Pacific stock).	1		1
Midwater trawl	CPS	4/18/2008	California sea lion	1		1
Midwater trawl	CPS	4/21/2008	Pacific white-sided dolphin	1		1
Midwater trawl	CPS	4/26/2008	Pacific white-sided dolphin	2		2
Midwater trawl	CPS	4/27/2008	California sea lion	1		1
Midwater trawl	CPS	4/27/2008	Northern fur seal (eastern Pacific stock).	1		1
Midwater trawl [2]	Juvenile Rockfish	6/15/2008	California sea lion	1	2	3
Midwater trawl	CPS	7/19/2008	Pacific white-sided dolphin	1		1
Midwater trawl	CPS	7/28/2008	California sea lion	1		1
Midwater trawl	CPS	7/31/2008	Northern fur seal (CA stock)	1		1
Midwater trawl	CPS	8/3/2008	Northern fur seal (CA stock)	1		1
Midwater trawl	CPS	8/9/2008	Pacific white-sided dolphin	11		11
Midwater trawl	CPS	8/9/2008	Northern right whale dolphin	6		6
Midwater trawl	CPS	8/14/2008	California sea lion	9		9
Midwater trawl	CPS	5/1/2009	Pacific white-sided dolphin		3	3
Midwater trawl [2]	Juvenile Rockfish	5/25/2009	California sea lion		1	1
Midwater trawl	CPS	4/18/2010	Pacific white-sided dolphin		1	1
Midwater trawl	CPS	4/25/2010	Pacific white-sided dolphin	1		1
Midwater trawl [2]	Juvenile Rockfish	9/10/2010	Pacific white-sided dolphin	1		1
Midwater trawl	CPS	4/3/2011	Pacific white-sided dolphin	1		1
Midwater trawl	Juvenile Salmon	9/9/2011	California sea lion	1		1
Midwater trawl	Juvenile Salmon	9/10/2011	Pacific white-sided dolphin	6		6
Midwater trawl	CPS	6/29/2012	Pacific white-sided dolphin		1	1
Midwater trawl	CPS	8/18/2012	Pacific white-sided dolphin	1		1
Midwater trawl	CPS	8/24/2012	Pacific white-sided dolphin	2		2
Midwater trawl	CPS	8/1/2013	Pacific white-sided dolphin	1	2	3
Midwater trawl	Juvenile Salmon	9/14/2013	Pacific white-sided dolphin	3		3
Midwater trawl [2]	Juvenile Rockfish	6/1/2014	Pacific white-sided dolphin	1		1
Surface trawl	Sardine-Hake Acoustic Trawl	8/26/2015	Pacific white-sided dolphin	1		1
Surface trawl	Juvenile Salmon	9/14/2015	California sea lion		1	1
Midwater trawl [2]	Juvenile Rockfish	5/15/2016	Pacific white-sided dolphin	1		1
Surface trawl	CPS	7/17/2016	Pacific white-sided dolphin	7	1	8
Midwater trawl [2]	Juvenile Rockfish	6/14/2018	Pacific white-sided dolphin	1		1
Midwater trawl [2]	Juvenile Rockfish	6/21/2018	California sea lion	1		1
Midwater trawl	CPS	7/24/2018	Pacific white-sided dolphin	1		1
Midwater trawl	CPS	8/27/2018	Pacific white-sided dolphin	1		1
Surface trawl	CCE Survey (CCES)	6/22/2019	Pacific white-sided dolphin	2		2
Midwater trawl	CCES	8/8/2019	Pacific white-sided dolphin	2		2
Midwater trawl	CCES	8/8/2019	Pacific white-sided dolphin	1		1
Midwater trawl	CCES	8/26/2019	Common dolphin (long-beaked).	1		1
Total individuals captured (total number of interactions given in parentheses)			Northern fur seal (6)	6		6
			California sea lion (9)	15	4	19
			Pacific white-sided dolphin (25).	49	8	57
			Northern right whale dolphin (1).	6		6
			Common dolphin (1)	1		1

[1] All incidents involved use of the NETS Nordic 264 midwater trawl, except as noted below.
[2] These incidents involved use of the modified-Cobb midwater trawl.

TABLE 5—HISTORICAL INTERACTIONS WITH LONGLINE GEAR

Gear	Survey	Date	Species	Number killed	Number released alive	Total
Pelagic longline	Highly Migratory Species (HMS).	9/6/2008	California sea lion		1	1
Pelagic longline	HMS	9/15/2008	California sea lion		1	1
Pelagic longline	Thresher Shark	9/18/2009	California sea lion		1	1
Pelagic longline	HMS	7/27/2010	California sea lion		1	1
Pelagic longline	HMS	6/23/2012	California sea lion		1	1
Pelagic longline	HMS	7/10/2013	California sea lion		1	1
Pelagic longline	HMS	7/2/2014	California sea lion		1	1
Pelagic longline	HMS	7/8/2015	California sea lion	1		1
Pelagic longline	Thresher Shark	9/20/2015	California sea lion		1	1
Total				1	8	9

In order to use these historical interaction records as the basis for the take estimation process, and because we have no specific information to indicate whether any given future interaction might result in M/SI versus Level A harassment, we conservatively assume that all interactions equate to mortality for these fishing gear interactions. The

SWFSC has no recorded interactions with any gear other than midwater trawl and pelagic longline gear, and we do not anticipate any future interactions in any other gears historically used by SWFSC, including the bottom trawl gear periodically employed by the SWFSC in the AMLR. However, SWFSC has not historically used purse seine gear, and we do anticipate that the planned future use of purse seine gear in the CCE could present some risk of marine mammal interaction.

During trawl surveys, SWFSC has recorded interactions with northern fur seals (California and eastern Pacific stocks); California sea lions; Pacific white-sided dolphins; northern right whale dolphins; and common dolphins (long-beaked stock). No northern fur seal has been captured since 2008, and northern right whale dolphins have been involved in only one incident, also in 2008. Common dolphins have been involved in only one incident. Therefore, California sea lions and Pacific white-sided dolphins are the species most likely to interact with SWFSC trawl gear. For longline gear, only California sea lions have been captured.

Take records from 2008 were used as the basis for estimation of potential incidental take in support of the 2015 rule, as this year was the worst on record and therefore was assumed to provide a worst-case basis for predicting potential future take. Take interactions from 2008 remain the historical maximum. Therefore, as noted above, the 2015 analysis is retained here as a potential worst-case scenario for marine mammal take in SWFSC gear over the 5 years considered in this rulemaking. In the 2015 analysis, the annual average over the most recent 5-year period that included 2008 (rounded up to the next whole number) was used to estimate the potential annual take level over the next five years. A five-year time frame provides enough data to adequately capture year-to-year variation in take levels, reflecting environmental conditions that may change over time. In order to incorporate records from the year 2008, we retain 2008–12 as the 5-year period over which we consider interaction records. Those annual averages are 7 Pacific white-sided dolphins, 4 California sea lions, 2 northern right whale dolphins, and 1 northern fur seal, and the prior assumption was that this number could be taken in each of the 5 years (*i.e.,* 35 Pacific white-sided dolphins, 20 California sea lions, 10 northern right whale dolphins, 5 northern fur seals). These take numbers are retained, with the exception of the Pacific white-sided dolphin. Historically, the CPS survey has only surveyed in water depths >50 m and consequently does not sample the nearshore area, potentially under-sampling any nearshore CPS aggregations. The aim of planned collaborative research over the next five years is to quantify this potential sampling bias by using an industry fishing vessel to extend the sampling closer to shore. In order to account for the potential for increased interactions with Pacific white-sided dolphins in nearshore waters, SWFSC added one additional take per year. For the species most commonly taken, the maximum number of individuals taken through any one interaction was 11 Pacific white-sided dolphins and 9 California sea lions. Similarly, the annual average of California sea lions taken in longline gear from 2008–12 was 1. Therefore, the assumption is that five California sea lions may be taken in hook and line gear over the next five-year period.

In order to evaluate the potential vulnerability of additional species to midwater trawl and pelagic longline gear as part of the take estimation process for the 2015 rule, we consulted NMFS' List of Fisheries (LOF), which classifies U.S. commercial fisheries into one of three categories according to the level of incidental marine mammal M/SI that is known to occur on an annual basis over the most recent five-year period (generally) for which data has been analyzed: Category I, frequent incidental M/SI; Category II, occasional incidental M/SI; and Category III, remote likelihood of or no known incidental M/SI.

Information related to incidental M/SI in relevant commercial fisheries is not, however, the sole determinant of whether it may be appropriate to authorize take incidental to SWFSC survey operations. A number of factors (*e.g.,* species-specific knowledge regarding animal behavior, overall abundance in the geographic region, density relative to SWFSC survey effort, feeding ecology, propensity to travel in groups commonly associated with other species historically taken) were taken into account by the SWFSC to determine whether a species may have a similar vulnerability to certain types of gear as historically taken species. In some cases, we have determined that species without documented M/SI may nevertheless be vulnerable to capture in SWFSC research gear. Similarly, we have determined that some species groups with documented M/SI are not likely to be vulnerable to capture in SWFSC gear.

This review led to our inference that common dolphin, Risso's dolphin, Dall's porpoise, Steller sea lion, harbor seal, and northern elephant seal could have risk of capture in midwater trawl gear given the demonstrated risk of capture in commercial fishing gear that is similar to the gear used by SWFSC. In addition, as a result of presumed similarities to Pacific white-sided dolphin or California sea lion or to other species for which there are recorded interactions in similar commercial fishing gear, SWFSC determined that there was risk of capture for striped dolphin, bottlenose dolphin, and harbor porpoise despite a lack of relevant LOF records.

The LOF review similarly led to our inference that *Kogia* spp., bottlenose dolphin, common dolphin, striped dolphin, Risso's dolphin, and short-finned pilot whale could have risk of capture in pelagic longline gear given the demonstrated risk of capture in commercial fishing gear that is similar to the gear used by SWFSC. We note that, due to the expected distribution of longline sampling effort in offshore waters, no take of coastal bottlenose dolphins in longline gear is expected. In addition, as a result of presumed similarities to California sea lion or to other species for which there are recorded interactions in similar commercial fishing gear, SWFSC determined that there was risk of capture for Steller sea lion despite a lack of relevant LOF records.

As noted above, the worst-case single interactions with trawl gear for the two most commonly taken species (Pacific white-sided dolphin and California sea lion) involved 11 and 9 individuals, respectively. For species deemed by SWFSC to have a similar risk profile as these two species, these numbers were taken to represent the potential total take over the five-year period. Use of these numbers is sufficient to appropriately analyze either of two scenarios: (1) More frequent interactions with a lesser number of individuals; or (2) a single, worst-case interaction. For trawl gear, species deemed to have a similar risk profile as the Pacific white-sided dolphin include the Risso's dolphin, bottlenose dolphin, striped dolphin, and common dolphins. (Note that the 11 takes for bottlenose dolphin in trawl gear are split across stocks based on the spatial distribution of SWFSC trawl survey effort; 8 takes are assumed for the offshore stock and 3 takes for the coastal stock.) Species deemed to have a similar risk profile as the California sea lion include the Steller sea lion and harbor seal. The remainder of species determined to be at risk of potential interaction with trawl gear are expected to have a relatively

lower risk profile and, therefore, the expected potential take is one per year, or five over the five-year period. Note that a common dolphin has subsequently been captured in SWFSC trawl gear. However, we retain the original approach, which yields a five-year take estimate of 11 animals, versus the approach for historically captured species, which would produce a rounded annual average of 1 and, therefore, a 5-year estimate of 5.

For hook and line gear, no species is expected to have a similar risk profile as the California sea lion and, therefore, the expected potential take for all other cetacean species is two over the five-year period, with the exception of bottlenose dolphin, for which only one take over five years was requested. Although take due to use of deep-set buoy gear is generally considered unlikely, SWFSC increased their take request for most cetacean species over the 2015 request (from 1 to 2 over five years) due to the potential that their use of this gear in cetacean habitat could lead to an increased risk of interaction compared with only their use of typical pelagic longline gear.

Regarding potential interactions with purse seine gear, we adopt the analysis that was developed in support of a similar incidental take rulemaking requested by NMFS' Northwest Fisheries Science Center (NWFSC) (83 FR 36370; July 27, 2018). Unlike SWFSC, NWFSC has historically used purse seine gear and similarly operates in the CCE. NWFSC has not had any historical interactions with purse seine gear. Therefore, we followed a similar approach as described above, in which the LOF was consulted and assumptions regarding species that may be vulnerable to interactions with the gear developed. Species with presumed risk of interaction with purse seine gear, based on LOF records, include common dolphins, harbor seal, and California sea lion. In addition, despite a lack of relevant LOF records, NWFSC deemed the following species as having risk of potential interaction with purse seine gear: Dall's porpoise, Pacific white-sided dolphin, Risso's dolphin, northern right whale dolphin, Steller sea lion, and harbor porpoise. SWFSC reviewed the assumptions made by NWFSC and has concurred and adopted the same assumptions in support of their requested take authorization. SWFSC additionally reviews records of marine mammal interactions with commercial purse seines in section 6.2.2 of their application. For most species, the risk of interaction is expected to be relatively low and, therefore, SWFSC requested authorization of one take per potentially affected stock over the five-year period. However, based on the greater number of recorded interactions with purse seine gear for California sea lions and harbor seals, SWFSC requested 5 takes for each species over the five-year period.

We have reviewed subsequent LOFs and determined that there are no new records that would change the assumptions regarding potential vulnerability to gear interaction described above. For a summation of the LOF records discussed above for trawl and longline gear, please see Table 13 (80 FR 8166) and Table 6 (81 FR 38516). The final 2020 LOF was published on April 16, 2020 (85 FR 21079), and more information about the LOF is available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries.*

It is also possible that a captured animal may not be able to be identified to species with certainty. Certain pinnipeds and small cetaceans are difficult to differentiate at sea, especially in low-light situations or when a quick release is necessary. For example, a captured delphinid that is struggling in the net may escape or be freed before positive identification is made. Therefore, the SWFSC requested the authorization of incidental take in trawl gear for one unidentified pinniped and one unidentified small cetacean, and additionally one take of unidentified pinnipeds in both purse seine and longline gear, over the course of the five-year period of the regulations. Table 6 summarizes the total M/SI take authorization due to gear interaction in the CCE.

TABLE 6—TOTAL ESTIMATED TAKE DUE TO GEAR INTERACTION IN THE CCE, 2020–25 [1]

Species	Estimated 5-year total, trawl	Estimated 5-year total, hook and line	Estimated 5-year total, purse seine	Total
Kogia spp. [2]		2		2
Bottlenose dolphin (CA/OR/WA offshore) [3]	8	1		9
Bottlenose dolphin (CA coastal) [3]	3			3
Striped dolphin	11	2	1	14
Common dolphin (short-beaked)	11	2	1	14
Common dolphin (long-beaked)	11	2	1	14
Pacific white-sided dolphin	40		1	41
Northern right whale dolphin	10		1	11
Risso's dolphin	11	2	1	14
Short-finned pilot whale		2		2
Harbor porpoise [4]	5		1	6
Dall's porpoise	5		1	6
Northern fur seal [5]	5			5
California sea lion	20	5	5	30
Steller sea lion	9	1		10
Harbor seal [4]	9		5	14
Northern elephant seal	5			5
Unidentified pinniped	1	1	1	3
Unidentified cetacean	1			1

[1] Please see preceding text for derivation of take estimates.

[2] We expect that *Kogia* spp. taken over the five-year timespan could be either a pygmy or dwarf sperm whale.

[3] As a species believed to have similar propensity for capture in trawl gear as that demonstrated by the Pacific white-sided dolphin, we assume that eleven bottlenose dolphins could be captured over the five-year timespan. Total potential take of bottlenose dolphins in trawl gear has been apportioned by stock according to typical occurrence of that stock relative to SWFSC survey locations. We assume that the requested take of a bottlenose dolphin in longline gear would be from the offshore stock due to the typical location of SWFSC longline sampling.

[4] Incidental take may be of animals from any stock, excluding Washington inland waters stocks.

[5] Incidental take may be of animals from either the eastern Pacific or California stocks.

Whales—For large whales (baleen whales and sperm whales), beaked whales, and killer whales, observed M/SI is extremely rare for trawl gear and, for most of these species, only slightly more common in longline gear. Although whale species could become captured or entangled in SWFSC gear, the probability of interaction is extremely low considering the lower level of effort relative to that of commercial fisheries. We believe it extremely unlikely that any large whale, beaked whale, or killer whale would be captured or entangled in SWFSC research gear.

Estimated Take Due to Acoustic Harassment

As described previously, we believe it unlikely that SWFSC use of active acoustic sources is realistically likely to cause Level B harassment of marine mammals. However, per SWFSC request, we conservatively assume that, at worst, Level B harassment may result from exposure to noise from these sources, and we carry forward the analytical approach developed in support of the 2015 rule. At that time, in order to quantify the potential for Level B harassment to occur, NMFS developed an analytical framework considering characteristics of the active acoustic systems, their expected patterns of use, and characteristics of the marine mammal species that may interact with them. The framework incorporated a number of deliberately precautionary, simplifying assumptions, and the resulting exposure estimates, which are presumed here to equate to take by Level B harassment (as defined by the MMPA), may be seen as an overestimate of the potential for such effects to occur as a result of the operation of these systems.

Regarding the potential for Level A harassment in the form of permanent threshold shift to occur, the very short duration sounds emitted by these sources reduces the likely level of accumulated energy an animal is exposed to. An individual would have to remain exceptionally close to a sound source for unrealistic lengths of time, suggesting the likelihood of injury occurring is exceedingly small. Potential Level A harassment is therefore not considered further in this analysis.

The assessment paradigm for active acoustic sources used in SWFSC fisheries research is relatively straightforward and has a number of key simplifying assumptions. Sound produced by these sources is intermittent and, therefore, evaluated against the 160 dB rms criterion for Level B harassment by behavioral disturbance. Estimating the number of exposures at the specified received level requires several determinations:

(1) A detailed characterization of the acoustic characteristics of the effective sound source or sources in operation;

(2) The operational areas exposed to levels at or above those associated with Level B harassment when these sources are in operation;

(3) A method for quantifying the resulting sound fields around these sources; and

(4) An estimate of the average density for marine mammal species in each area of operation.

We provide a summary of the analytical approach here, but invite the reader interested in additional detail to review the detailed description provided in support of the 2015 rule (80 FR 8166) as well as the detailed description provided in section 6.4.2 of SWFSC's application.

Quantifying the spatial and temporal dimension of the sound exposure footprint (or ''swath width'') of the active acoustic devices in operation on moving vessels and their relationship to the average density of marine mammals enables a quantitative estimate of the number of events in which sound levels exceed the relevant threshold. The number of potentially harassing exposures is ultimately estimated as the product of the volume of water ensonified at 160 dB rms or higher (to a maximum depth of 500 m) and the volumetric density of animals determined from simple assumptions about their vertical stratification in the water column. Specifically, reasonable assumptions based on what is known about diving behavior across different marine mammal species were made to segregate those that predominately remain in the upper 200 m of the water column versus those that regularly dive deeper during foraging and transit. Because depths range dramatically along the margin of the continental slope that define the outer edge of the survey areas, but deeper surveyed depths rarely range over 500 m in practice, the depth range for determining volumes was set at 500 m for deep diving species.

An initial characterization of the general source parameters for the primary active acoustic sources operated by the SWFSC was conducted, enabling a full assessment of all sound sources used by the SWFSC (see Table 2 of the notice of proposed rulemaking). This auditing of the active acoustic sources also enabled a determination of the predominant sources that, when operated, would have sound footprints exceeding those from any other simultaneously used sources. These sources were effectively those used directly in acoustic propagation modeling to estimate the zones within which the 160 dB rms received level would occur.

Many of these sources can be operated in different modes and with different output parameters. In modeling their potential impact areas, those features among those given in Table 2 of the notice of proposed rulemaking (*e.g.,* lowest operating frequency) that would lead to the most precautionary estimate of maximum received level ranges (*i.e.,* largest ensonified area) were used. The effective beam patterns took into account the normal modes in which these sources are typically operated. While these signals are brief and intermittent, a conservative assumption was taken in ignoring the temporal pattern of transmitted pulses in calculating potential Level B harassment events. Operating characteristics of each of the predominant sound sources were used in the calculation of effective line-kilometers and area of exposure for each source in each survey.

Three predominant sources were identified as having the largest potential impact zones during operations, based on their relatively lower output frequency, higher output power, and their operational pattern of use. These sources are the SX90, EK60/EK80, and ME70. Estimated effective cross-sectional areas of exposure were estimated for each of these sources. In determining the effective line-kilometers for each of these predominant sources, the operational patterns of use relative to one another were further applied to determine which source was the predominant one operating at any point in time for each survey. When multiple sound sources are used simultaneously, the one with the largest potential impact zone in each relevant depth strata is considered for use in estimating exposures.

The cross-sectional area of water ensonified at or above the 160 dB rms threshold was calculated using a simple model of sound propagation loss, which accounts for the loss of sound energy over increasing range. We used a spherical spreading model (where propagation loss = 20 * log [range]; such that there would be a 6-dB reduction in sound level for each doubling of distance from the source), a reasonable approximation over the relatively short ranges involved. Spherical spreading is a reasonable assumption even in relatively shallow waters since, taking into account the beam angle, the reflected energy from the seafloor will be much weaker than the direct source

and the volume influenced by the reflected acoustic energy would be much smaller over the relatively short ranges involved. We also accounted for the frequency-dependent absorption coefficient and beam pattern of these sound sources, which is generally highly directional. The lowest frequency was used for systems that are operated over a range of frequencies. The vertical extent of this area is calculated for two depth strata. These results were applied differentially based on the typical vertical stratification of marine mammals.

Following the determination of effective sound exposure area for transmissions considered in two dimensions, the next step was to determine the effective volume of water ensonified at or above 160 dB rms for the entirety of each survey. For each of the three predominant sound sources, the volume of water ensonified is estimated as the athwartship cross-sectional area (in square kilometers) of sound at or above 160 dB rms multiplied by the total distance traveled by the ship. Where different sources operating simultaneously would be predominant in each different depth strata, the resulting cross-sectional area calculated took this into account. Specifically, for shallow-diving species this cross-sectional area was determined for whichever was predominant in the shallow stratum, whereas for deeper-diving species this area was calculated from the combined effects of the predominant source in the shallow stratum and the (sometimes different) source predominating in the deep stratum. This creates an effective total volume characterizing the area ensonified when each predominant source is operated and accounts for the fact that deeper-diving species may encounter a complex sound field in different portions of the water column.

The best available information regarding marine mammal occurrence in the CCE was used to develop volumetric density values for use in calculating estimated exposures. This information was determined through review of available information, as indicated through NOAA's CetMap catalogue, available online at: *cetsound.noaa.gov/cda-index.* More detail, and the density values used, are provided in section 3 and Appendix A of the SWFSC application. For marine mammals occurring in the AMLR, no new information is available, and the density values used in the 2015 rule are carried forward.

Estimates of potential incidents of Level B harassment (*i.e.,* potential exposure to levels of sound at or exceeding the 160 dB rms threshold) are then calculated by using (1) the combined results from output characteristics of each source and identification of the predominant sources in terms of acoustic output; (2) their relative annual usage patterns for each operational area; (3) a source-specific determination made of the area of water associated with received sounds at the extent of a depth boundary; and (4) determination of a biologically-relevant volumetric density of marine mammal species in each area. Estimates of Level B harassment by acoustic sources are the product of the volume of water ensonified at 160 dB rms or higher for the predominant sound source for each relevant survey and the volumetric density of animals for each species. Please see Tables 6–12 and 6–13 in SWFSC's application for relevant information. Take estimates are summarized in Table 9 below.

Estimated Take Due to Physical Disturbance

Estimated take due to physical disturbance could potentially happen in the AMLR only as a result of the unintentional approach of SWFSC vessels to pinnipeds hauled out on ice, and would result in no greater than Level B harassment. During Antarctic ecosystem surveys conducted in the austral winter (*i.e.,* June 1 through August 31), it is expected that shipboard activities may result in behavioral disturbance of some pinnipeds. It is likely that some pinnipeds on ice will move or flush from the haul-out into the water in response to the presence or sound of SWFSC survey vessels. Behavioral responses may be considered according to the scale shown in Table 7 and based on the method developed by Mortenson (1996). We consider responses corresponding to Levels 2–3 to constitute Level B harassment.

TABLE 7—PINNIPED RESPONSE TO DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flush	All retreats (flushes) to the water.

The SWFSC has estimated potential incidents of Level B harassment due to physical disturbance (Table 8) using the vessel distance traveled (20,846 km) during a typical AMLR survey, an effective strip width of 200 m (animals are assumed to react if they are less than 100 m from the vessel; see below), and the estimated population density for each species (see Table 6–2 of SWFSC's application). Although there is likely to be variation between individuals and species in reactions to a passing research vessel—that is, some animals assumed to react in this calculation will not react, and others assumed not to react because they are outside the effective strip width may in fact react—we believe that this approach is a reasonable effort towards accounting for this potential source of disturbance and have no information to indicate that the approach is biased either negatively or positively. SWFSC used an effective strip width of 200 m (*i.e.,* 100 m on either side of a passing vessel) to be consistent with the regional marine mammal viewing guidelines that NMFS has established for Alaska, which restrict approaches to marine mammals to a distance of 100 m or greater in order to reduce the potential to cause inadvertent harm. Alaska is believed to have the most similar environment to the Antarctic of all regions for which NMFS has established viewing guidelines. Each estimate is the product of the species-specific density, annual

line-kilometers, and the effective strip-width.

TABLE 8—ESTIMATED LEVEL B HARASSMENT OF PINNIPEDS ASSOCIATED WITH AMLR VESSEL TRANSECTS

Species	Estimated annual Level B harassment	5-Year total
Antarctic fur seal	417	2,085
Southern elephant seal	[1] 1	5
Weddell seal	225	1,125
Crabeater seal	2,704	13,520
Leopard seal	68	340

[1] Based on the recommendation of the Marine Mammal Commission (see Comments and Responses), this has been increased to 5.

Mitigation

Under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (''least practicable adverse impact''). NMFS does not have a regulatory definition for ''least practicable adverse impact.'' However, NMFS' implementing regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, implementation of the measure(s) is expected to reduce impacts to marine mammal species or stocks, their habitat, and their availability for subsistence uses. This analysis will consider such things as the nature of the potential adverse impact (such as likelihood, scope, and range), the likelihood that the measure will be effective if implemented, and the likelihood of successful implementation.

(2) The practicability of the measure for applicant implementation. Practicability of implementation may consider such things as cost, impact on operations, personnel safety, and practicality of implementation.

The following suite of mitigation measures and procedures, *i.e.,* measures taken to monitor, avoid, or minimize the encounter and potential take of marine mammals, will be employed by the SWFSC during research cruises and activities. For a summary of measures proposed by SWFSC, please see Table 11–1 of the application. These procedures are the same whether the survey is conducted by SWFSC or is a SWFSC-supported survey, which may be conducted onboard a variety of vessels, *e.g.,* on board a NOAA vessel or charter vessel. The procedures described are based on protocols used during previous research surveys and/or best practices developed for commercial fisheries using similar gear. The SWFSC conducts a large variety of research operations, but only activities using trawl, hook and line, and purse seine gears are expected to present a reasonable likelihood of resulting in incidental take of marine mammals. SWFSC's past survey operations have resulted in marine mammal interactions. These protocols are designed to minimize to the extent practicable the interactions that do happen while providing credible, documented, and safe encounters with observed or captured animals. Mitigation procedures will be focused on those situations where mammals, in the best professional judgement of the vessel operator and Chief Scientist (CS), pose a risk of incidental take. In many instances, the SWFSC will use streamlined protocols and training for protected species developed in support of the 2015 rule and refined during implementation of the rule.

The SWFSC has invested significant time and effort in identifying technologies, practices, and equipment to minimize the impact of the proposed activities on marine mammal species and stocks and their habitat. These efforts have resulted in the consideration of many potential mitigation measures, including those the SWFSC has determined to be feasible and has implemented for years as a standard part of sampling protocols. These measures include the move-on rule mitigation protocol (also referred to in the preamble as the move-on rule), protected species visual watches, and use of acoustic pingers and a marine mammal exclusion device (MMED) on surface trawls using the Nordic 264 trawl net.

Effective monitoring is a key step in implementing mitigation measures and is achieved through regular marine mammal watches. Marine mammal watches are a standard part of conducting SWFSC fisheries research activities, particularly those activities that use gears that are known to or potentially interact with marine mammals. Marine mammal watches and monitoring occur during daylight hours prior to deployment of gear (*e.g.,* trawls, purse seine, and longline gear), and they continue through active fishing and during retrieval of gear. If marine mammals are sighted in the area and are considered to be at risk of interaction with the research gear, then the sampling station is either moved or canceled or the activity is suspended until the marine mammals are no longer in the area. On smaller vessels, the CS and the vessel operator are typically those looking for marine mammals and other protected species. When marine mammal researchers are on board (distinct from marine mammal observers dedicated to monitoring for potential gear interactions), they will record the estimated species and numbers of animals present and their behavior. If marine mammal researchers are not on board or available, then the CS in cooperation with the vessel operator will monitor for marine mammals and provide training as practical to bridge crew and other crew to observe and record such information. Because marine mammals are frequently observed in CCE waters, marine mammal observations may be limited to

those animals that directly interact with or are near to the vessel or gear. NOAA vessels, chartered vessels, and affiliated vessels or studies are required to monitor interactions with marine mammals but are limited to reporting direct interactions, dead animals, or entangled whales.

General Measures

Coordination and Communication—When SWFSC survey effort is conducted aboard NOAA-owned vessels, there are both vessel officers and crew and a scientific party. Vessel officers and crew are not composed of SWFSC staff but are employees of NOAA's Office of Marine and Aviation Operations (OMAO), which is responsible for the management and operation of NOAA fleet ships and aircraft and is composed of uniformed officers of the NOAA Commissioned Corps as well as civilians. The ship's officers and crew provide mission support and assistance to embarked scientists, and the vessel's Commanding Officer (CO) has ultimate responsibility for vessel and passenger safety and, therefore, decision authority. When SWFSC survey effort is conducted aboard cooperative platforms (*i.e.,* non-NOAA vessels), ultimate responsibility and decision authority again rests with non-SWFSC personnel (*i.e.,* vessel's master or captain). Decision authority includes the implementation of mitigation measures (*e.g.,* whether to stop deployment of trawl gear upon observation of marine mammals). The scientific party involved in any SWFSC survey effort is composed, in part or whole, of SWFSC staff and is led by a CS. Therefore, because the SWFSC—not OMAO or any other entity that may have authority over survey platforms used by SWFSC—is the applicant to whom any incidental take authorization issued under the authority of these regulations will be issued, we require that the SWFSC take all necessary measures to coordinate and communicate in advance of each specific survey with OMAO, or other relevant parties, to ensure that all mitigation measures and monitoring requirements described herein, as well as the specific manner of implementation and relevant event-contingent decision-making processes, are clearly understood and agreed-upon. This may involve description of all required measures when submitting cruise instructions to OMAO or when completing contracts with external entities. SWFSC will coordinate and conduct briefings at the outset of each survey and as necessary between ship's crew (CO/master or designee(s), as appropriate) and scientific party in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures. The CS will be responsible for coordination with the Officer on Deck (OOD; or equivalent on non-NOAA platforms) to ensure that requirements, procedures, and decision-making processes are understood and properly implemented.

Vessel Speed—Vessel speed during active sampling rarely exceeds 5 kn, with typical speeds being 2–4 kn. Transit speeds vary from 6–14 kn but average 10 kn. These low vessel speeds minimize the potential for ship strike. At any time during a survey or in transit, if a crew member or designated marine mammal observer standing watch sights marine mammals that may intersect with the vessel course that individual will immediately communicate the presence of marine mammals to the bridge for appropriate course alteration or speed reduction, as possible, to avoid incidental collisions.

Other Gears—The SWFSC deploys a wide variety of gear to sample the marine environment during all of their research cruises. Many of these types of gear (*e.g.,* plankton nets, video camera and ROV deployments) are not considered to pose any risk to marine mammals and are therefore not subject to specific mitigation measures. However, at all times when the SWFSC is conducting survey operations at sea, the OOD and/or CS and crew will monitor for any unusual circumstances that may arise at a sampling site and use best professional judgment to avoid any potential risks to marine mammals during use of all research equipment.

Handling Procedures—Handling procedures are those taken to return a live animal to the sea or process a dead animal. The SWFSC will continue to implement handling protocols developed in support of the 2015 rule and refined during implementation of the rule, to minimize potential harm to marine mammals that are incidentally taken during the course of fisheries research activities. These procedures are expected to increase post-release survival and, in general, following a ''common sense'' approach to handling captured or entangled marine mammals will present the best chance of minimizing injury to the animal and of decreasing risks to scientists and vessel crew. Handling or disentangling marine mammals carries inherent safety risks, and using best professional judgment and ensuring human safety is paramount.

Captured live or injured marine mammals are released from research gear and returned to the water as soon as possible with no gear or as little gear remaining on the animal as possible. Animals are released without removing them from the water if possible and data collection is conducted in such a manner as not to delay release of the animal(s) or endanger the crew. SWFSC staff are instructed on how to identify different species; handle and bring marine mammals aboard a vessel; assess the level of consciousness; remove fishing gear; and return marine mammals to water. For further information regarding proposed handling procedures, please see section 11.5 of SWFSC's application.

Trawl Survey Visual Monitoring and Operational Protocols

Visual monitoring protocols, described above, are an integral component of trawl mitigation protocols. Observation of marine mammal presence and behaviors in the vicinity of SWFSC trawl survey operations allows for the application of professional judgment in determining the appropriate course of action to minimize the incidence of marine mammal gear interactions.

The OOD, CS or other designated member of the scientific party, and crew standing watch on the bridge visually scan surrounding waters with the naked eye and rangefinding binoculars (or monocular) for marine mammals prior to, during, and until all trawl operations are completed. Some sets may be made at night or other limited visibility conditions, when visual observation may be conducted using the naked eye and available vessel lighting with limited effectiveness.

Marine mammal watches will be initiated 15 minutes prior to arrival on station (or for the amount of time to travel between stations if less than 15 minutes) to determine if marine mammals are near the planned trawl set location. Either dedicated observers, the OOD, CS, and/or crew standing watch will visually scan for marine mammals during all daytime operations. Marine mammal watches will be conducted using any binocular or monocular sighting instrument, with a means to estimate distance to infringing protected species during daytime, and the best available means of observation during nighttime observations. This typically occurs during transit leading up to arrival at the sampling station because of standard protocol of immediate deployment of trawl gear upon arriving at station (intended to reduce the risk of attracting curious marine mammals). However, in some cases it may be necessary to conduct a plankton tow

prior to deploying trawl gear. In these cases, the visual watch will continue until trawl gear is ready to be deployed.

Lookouts immediately alert the OOD and CS as to their best estimate of the species and number of animals observed and any observed animal's distance, bearing, and direction of travel relative to the ship's position. If any marine mammals are sighted around the vessel before setting gear, the vessel may be moved away from the animals to a different section of the sampling area if the animals appear to be at risk of interaction with the gear. This is what is referred to as the ''move-on'' rule.

If marine mammals are sighted within 1 nmi of the planned set location in the 15 minutes before setting the gear, the vessel will transit to a different section of the sampling area to maintain a minimum set distance of 1 nmi. An exception to this protocol is for baleen whales; baleen whales are commonly observed within the 1 nmi distance from SWFSC trawl sampling locations but have never been observed to be attracted to SWFSC research activity and have never interacted with SWFSC research gear. Decision regarding the potential need to move-on in response to baleen whale presence will be made on the basis of professional judgment based on the specific circumstances. If after moving on, protected species remain within the 1 nmi exclusion zone, the CS or watch leader may decide to move again or to skip the station. However, SWFSC acknowledges that the effectiveness of visual monitoring may be limited depending on weather and lighting conditions, and it may not always be possible to conduct visual observations out to 1 nmi. The CS or watch leader will determine the best strategy to avoid potential takes of marine mammals based on the species encountered, their numbers and behavior, position and vector relative to the vessel, and other factors. For instance, a marine mammal transiting through the area off in the distance might only require a short move from the designated station while a pod of dolphins gathered around the vessel may require a longer move from the station or possibly cancellation if they follow the vessel. In any case, no gear will be deployed if marine mammals other than baleen whales have been sighted within 1 nmi of the planned set location during the 15-minute watch period.

In many cases, trawl operations will be the first activity undertaken upon arrival at a new station, in order to reduce the opportunity to attract marine mammals to the vessel. However, in some cases it will be necessary to conduct plankton tows prior to deploying trawl gear in order to avoid trawling through extremely high densities of jellies and similar taxa that are numerous enough to severely damage trawl gear.

Once the trawl net is in the water, the OOD, CS, and/or crew standing watch will continue to monitor the waters around the vessel and maintain a lookout for marine mammal presence as far away as environmental conditions allow. If marine mammals are sighted before the gear is fully retrieved, the most appropriate response to avoid incidental take will be determined by the professional judgment of the CS, watch leader, OOD and other experienced crew as necessary. This judgment will be based on their past experience operating gears around marine mammals and SWFSC training sessions that facilitate dissemination of expertise operating in these situations (*e.g.,* factors that contribute to marine mammal gear interactions and those that aid in successfully avoiding these events). These judgments take into consideration the species, numbers, and behavior of the animals, the status of the trawl net operation (net opening, depth, and distance from the stern), the time it would take to retrieve the net, and safety considerations for changing speed or course.

The appropriate course of action to minimize the risk of incidental take is determined by the professional judgment of the OOD, vessel operator, and the CS based on all situation variables, even if the choices compromise the value of the data collected at the station. We recognize that it is not possible to dictate in advance the exact course of action that the OOD or CS should take in any given event involving the presence of marine mammals in proximity to an ongoing trawl tow, given the sheer number of potential variables, combinations of variables that may determine the appropriate course of action, and the need to prioritize human safety in the operation of fishing gear at sea. Nevertheless, we require a full accounting of factors that shape both successful and unsuccessful decisions, and these details will be fed back into SWFSC training efforts and ultimately help to refine the best professional judgment that determines the course of action taken in any given scenario (see further discussion in Monitoring and Reporting).

If trawling operations have been suspended because of the presence of marine mammals, the vessel will resume trawl operations (when practicable) only when the mammals have not been sighted within 1 nmi of the planned set location. This decision is at the discretion of the officer on watch and is dependent on the situation.

Care will be taken when emptying the trawl to avoid damage to any marine mammals that may be caught in the gear but are not visible upon retrieval. The gear will be emptied as quickly as possible after retrieval in order to determine whether or not marine mammals, or any other protected species, are present.

Standard survey protocols that are expected to lessen the likelihood of marine mammal interactions include standardized tow durations and distances. Standard tow durations of not more than 45 minutes at the target depth have been implemented, excluding deployment and retrieval time (which may require an additional 30 minutes depending on depth), to reduce the likelihood of attracting and incidentally taking marine mammals and other protected species. These short tow durations decrease the opportunity for curious marine mammals to find the vessel and investigate. Trawl tow distances are less than 3 nmi, which should reduce the likelihood of attracting and incidentally taking marine mammals. Typical tow distances are 1–2 nmi, depending on the survey and trawl speed. In addition, the vessel's crew will clean trawl nets prior to deployment to remove prey items that might attract marine mammals. Catch volumes are typically small, with every attempt made to collect all organisms caught in the trawl.

Marine Mammal Excluder Devices—The NETS Nordic 264 trawl gear will be fitted with MMEDs to allow marine mammals caught during trawling operations an opportunity to escape. These devices enable target species to pass through a grid or mesh barrier and into the codend while preventing the passage of marine mammals, which are ejected out through an escape opening or swim back out of the mouth of the net. Potential for interactions with protected species, such as marine mammals, is often greatest during the deployment and retrieval of the trawl, when the net is at or near the surface of the water. During retrieval of the net, protected species may become entangled in the net while attempting to feed from the codend as it floats near the surface of the water. Considerable effort has been given to developing MMEDs that allow marine mammals to escape from the net while allowing retention of the target species (*e.g.,* Dotson *et al.,* 2010). MMEDs generally consist of a large aluminum grate

positioned in the intermediate portion of the net forward of the codend and below an ''escape panel'' constructed into the upper net panel above the grate (Figure A–1 of SWFSC's application). The angled aluminum grate is intended to guide marine mammals through the escape panel and prevent them from being caught in the codend (Dotson *et al.,* 2010). MMEDs are currently deployed on all surveys using Nordic 264 nets.

Acoustic Deterrent Devices—Pingers will be deployed during all trawl operations and on all types of trawl nets. Two to four pingers will be placed along the footrope and/or headrope to discourage marine mammal interactions.

Acoustic pingers are underwater sound emitting devices that are designed to decrease the probability of entanglement or unintended capture of marine mammals (see Appendix B of the SWFSC application). Acoustic pingers have been shown to effectively deter several species of small cetaceans from becoming entangled in gillnets and driftnets (for detailed discussion, please see 80 FR 8166).

The CPS Survey uses the Netguard 70 kHz dolphin pinger manufactured by Future Oceans and the Rockfish Recruitment and Ecosystem Assessment Surveys use the DDD–03H pinger manufactured by STM Products. Pingers remain operational at depths between 10 m and 200 m. Tones range from 100 microseconds to seconds in duration, with variable frequency of 5–500 kHz and maximum sound pressure level of 176 dB rms re 1 μPa at 1 m at 30–80 kHz.

If one assumes that use of a pinger is effective in deterring marine mammals from interacting with fishing gear, one must therefore assume that receipt of the acoustic signal has a disturbance effect on those marine mammals (*i.e.,* potential Level B harassment). However, Level B harassment that may be incurred as a result of SWFSC use of pingers does not constitute take that must be authorized under the MMPA. The MMPA prohibits the taking of marine mammals by U.S. citizens or within the U.S. EEZ unless such taking is appropriately permitted or authorized. However, the MMPA provides several narrowly defined exemptions from this requirement (*e.g.,* for Alaskan natives; for defense of self or others; for Good Samaritans (16 U.S.C. 1371(b)–(d))). Section 109(h) of the MMPA (16 U.S.C. 1379(h)) allows for the taking of marine mammals in a humane manner by Federal, state, or local government officials or employees in the course of their official duties if the taking is necessary for the protection or welfare of the mammal, the protection of the public health and welfare, or the non-lethal removal of nuisance animals. SWFSC use of pingers as a deterrent device, which may cause Level B harassment of marine mammals, is intended solely for the avoidance of potential marine mammal interactions with SWFSC research gear (*i.e.,* avoidance of Level A harassment, serious injury, or mortality). Therefore, use of such deterrent devices, and the taking that may result, is for the protection and welfare of the mammal and is covered explicitly under MMPA section 109(h)(1)(A). Potential taking of marine mammals resulting from SWFSC use of pingers is not discussed further in this document.

Longline Survey Visual Monitoring and Operational Protocols

Visual monitoring requirements for all longline surveys are similar to the general protocols described above for trawl surveys. Please see that section for full details of the visual monitoring protocol and the move-on rule mitigation protocol. In summary, requirements for longline surveys are to: (1) Conduct visual monitoring prior to arrival on station; (2) implement the move-on rule if marine mammals are observed within the area around the vessel and may be at risk of interacting with the vessel or gear; (3) deploy gear as soon as possible upon arrival on station (depending on presence of marine mammals); and (4) maintain visual monitoring effort throughout deployment and retrieval of the longline gear. As was described for trawl gear, the OOD, CS, or watch leader will use best professional judgment to minimize the risk to marine mammals from potential gear interactions during deployment and retrieval of gear. If marine mammals are detected during setting operations and are considered to be at risk, immediate retrieval or suspension of operations may be warranted. If operations have been suspended because of the presence of marine mammals, the vessel will resume setting (when practicable) only when the animals are believed to have departed the area. If marine mammals are detected during retrieval operations and are considered to be at risk, haul-back may be postponed. These decisions are at the discretion of the OOD/CS and are dependent on the situation.

An exception is when California sea lions are sighted during the watch period prior to setting longline gear. For this species only, longline gear may be set if a group of 5 or fewer animals is sighted within 1 nmi of the planned set location; when groups of more than 5 sea lions are sighted within 1 nmi of the sampling station, deployment of gear would be suspended. This exception has been defined considering the rarity of past interactions between this gear and California sea lions and in order to make this mitigation measure practicable to implement. Without it, given the density of California sea lions in the areas where longline surveys are conducted, the SWFSC believes implementing the move-on rule for a single animal would preclude sampling in some areas and introduce significant bias into survey results. Groups of five California sea lions or greater is believed to represent a trigger for the move-on rule that would allow sampling in areas where target species can be caught without increasing the number of interactions between marine mammals and research longline gear. This measure was implemented under the 2015 rule, and no increase in sea lion take was observed, nor were multiple sea lions captured during any set. SWFSC is required to report occasions when the move-on rule is waived based on this exception.

As for trawl surveys, some standard survey protocols are expected to minimize the potential for marine mammal interactions. SWFSC longline sets are conducted with drifting pelagic or anchored gear marked at both ends with buoys. Typical soak times are 2–4 hours, but may be as long as 8 hours when targeting swordfish (measured from the time the last hook is in the water to when the first hook is brought out of the water).

SWFSC longline protocols specifically prohibit chumming (releasing additional bait to attract target species to the gear). However, spent bait may be discarded during gear retrieval while gear is still in the water. In the experience of SWFSC, this practice increases survey efficiency and has not resulted in interactions with marine mammals. Scientist observations indicate pinnipeds do not gather immediately aft of the survey vessel as a result of discarding spent bait. However, if protected species interactions with longline gear increase, or if SWFSC staff observe that this practice is contributing to protected species interactions, the SWFSC will revisit this practice and consider the need to retain spent bait until no gear remains in the water.

Purse Seine Survey Visual Monitoring and Operational Protocols

Visual monitoring and operational protocols for purse seine surveys are similar to those described previously for trawl surveys, with a focus on visual

observation in the survey area and avoidance of marine mammals that may be at risk of interaction with survey vessels or gear. The crew will keep watch for marine mammals before and during a set. If a bird or marine mammal observer is on board, the observer(s) inform the CS and captain of any marine mammals detected at or near a sampling station. Observations focus on avoidance of cetaceans (*e.g.,* dolphins, and porpoises) and aggregations of pinnipeds.

If any killer whales, dolphins, or porpoises are observed within approximately 500 m of the purse seine survey location, the set will be delayed. If any dolphins or porpoises are observed in the net, the net will be immediately opened to let the animals go. Pinnipeds may be attracted to fish caught in purse seine gear but are known to jump in and out of the net without entanglement. If pinnipeds are in the immediate area where the net is to be set, the set is delayed until the animals move out of the area or the station is abandoned. However, if fewer than five pinnipeds are seen in the vicinity but do not appear to be in the direct way of the setting operation, the net may be set. SWFSC is required to report occasions when the move-on rule is waived based on this exception.

SWFSC also uses unmanned aerial systems (UAS) to conduct research. For pinnipeds, UAS flights will be at 100–200 ft depending on species (*i.e.,* 100 ft for elephant seals and 200 ft for other species); in mixed aggregations, the most conservative altitude is used. UASs will not be flown directly over pinniped haulouts.

We have carefully evaluated the SWFSC's planned mitigation measures and considered a range of other measures in the context of ensuring that we prescribed the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Based on our evaluation of these measures, we have determined that these mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Monitoring and Reporting

In order to issue an LOA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of the authorized taking. NMFS's MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104(a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of significant interactions with marine mammal species in action area (*e.g.,* animals that came close to the vessel, contacted the gear, or are otherwise rare or displaying unusual behavior);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

SWFSC plans to continue its systematic training, operations, data collection, animal handling and sampling protocols, etc., as refined through implementation of the 2015 rule, in order to improve its ability to understand how mitigation measures influence interaction rates and ensure its research operations are conducted in an informed manner and consistent with lessons learned from those with experience operating these gears in close proximity to marine mammals. It is in this spirit that we plan to continue the monitoring requirements described below.

Visual Monitoring

Marine mammal watches are a standard part of conducting fisheries research activities, and are implemented as described previously in Mitigation. Dedicated marine mammal visual monitoring occurs as described (1) for some period prior to deployment of most research gear; (2) throughout deployment and active fishing of all research gears; (3) for some period prior to retrieval of longline gear; and (4) throughout retrieval of all research gear. This visual monitoring is performed by trained SWFSC personnel or other trained crew during the monitoring period. Observers record the species and estimated number of animals present and their behaviors, which may be valuable information towards an understanding of whether certain species may be attracted to vessels or certain survey gears. Separately, marine mammal watches are conducted by watch-standers (those navigating the vessel and other crew; these will typically not be SWFSC personnel) at all times when the vessel is being operated. The primary focus for this type of watch is to avoid striking marine mammals and to generally avoid navigational hazards. These watch-standers typically have other duties associated with navigation and other vessel operations and are not required to record or report to the scientific party data on marine mammal sightings, except when gear is being deployed or retrieved.

SWFSC will also monitor disturbance of hauled-out pinnipeds resulting from the presence of researchers in the Antarctic, paying particular attention to the distance at which different species of pinniped are disturbed. Disturbance will be recorded according to the three-point scale, representing increasing seal response to disturbance, shown in Table 7.

Training

SWFSC anticipates that additional information on practices to avoid marine mammal interactions can be gleaned from training sessions and the continuation of systematic data collection standards. The SWFSC will conduct annual trainings for all chief scientists and other personnel who may be responsible for conducting marine mammal visual observations or handling incidentally captured marine mammals to explain mitigation measures and monitoring and reporting requirements, mitigation and monitoring protocols, marine mammal identification, recording of count and disturbance observations, completion of datasheets, and use of equipment. Some

of these topics may be familiar to SWFSC staff, who may be professional biologists; the SWFSC shall determine the agenda for these trainings and ensure that all relevant staff have necessary familiarity with these topics. Training typically includes three primary elements: (1) An overview of the purpose and need for the authorization, including mandatory mitigation measures by gear and the purpose for each, and species that SWFSC is authorized to incidentally take; (2) detailed descriptions of reporting, data collection, and sampling protocols; and (3) discussion of best professional judgment (which is recognized as an integral component of mitigation implementation; see Mitigation).

The second topic includes instruction on how to complete data collection forms such as the marine mammal watch log, the incidental take form (*e.g.,* specific gear configuration and details relevant to an interaction with protected species), and forms used for species identification and biological sampling.

The third topic includes use of professional judgment in any incidents of marine mammal interaction and instructive examples where use of best professional judgment was determined to be successful or unsuccessful. We recognize that many factors come into play regarding decision-making at sea and that it is not practicable to simplify what are inherently variable and complex situational decisions into rules that may be defined on paper. However, it is our intent that use of best professional judgment be an iterative process from year to year, in which any at-sea decision-maker (*i.e.,* responsible for decisions regarding the avoidance of marine mammal interactions with survey gear through the application of best professional judgment) learns from the prior experience of all relevant SWFSC personnel (rather than from solely their own experience). The outcome should be increased transparency in decision-making processes where best professional judgment is appropriate and, to the extent possible, some degree of standardization across common situations, with an ultimate goal of reducing marine mammal interactions. It is the responsibility of the SWFSC to facilitate such exchange.

To reduce marine mammal takes over time, the SWFSC maximizes efficient use of charter and NOAA ship time, and engages in operational planning with the NMFS Northwest and Pacific Islands Fisheries Science Centers to delineate respective research responsibilities and to reduce duplication of effort among the Centers.

Handling Procedures and Data Collection

Improved standardization of handling procedures were discussed previously in Mitigation. In addition to the benefits implementing these protocols are believed to have on the animals through increased post-release survival, SWFSC believes adopting these protocols for data collection will also increase the information on which ''serious injury'' determinations are based and improve scientific knowledge about marine mammals that interact with fisheries research gears and the factors that contribute to these interactions. SWFSC personnel are provided standard guidance and training regarding handling of marine mammals, including how to identify different species, bring an individual aboard a vessel, assess the level of consciousness, remove fishing gear, return an individual to water and log activities pertaining to the interaction.

SWFSC will record interaction information on their own standardized forms. To aid in serious injury determinations and comply with the current NMFS Serious Injury Guidelines (NMFS, 2012a, 2012b), researchers will also answer a series of supplemental questions on the details of marine mammal interactions. Finally, for any marine mammals that are killed during fisheries research activities, scientists will collect data and samples as appropriate.

Reporting

As is normally the case, SWFSC will coordinate with the relevant stranding coordinators for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that are encountered during field research activities. In addition, Chief Scientists (or cruise leader, CS) will provide reports to SWFSC leadership and to the Office of Protected Resources (OPR). As a result, when marine mammals interact with survey gear, whether killed or released alive, a report provided by the CS will fully describe any observations of the animals, the context (vessel and conditions), decisions made and rationale for decisions made in vessel and gear handling. The circumstances of these events are critical in enabling SWFSC and OPR to better evaluate the conditions under which takes are most likely occur. We believe in the long term this will allow the avoidance of these types of events in the future.

The SWFSC will submit annual summary reports to OPR including: (1) Annual line-kilometers surveyed during which the predominant acoustic systems were used (see ''Estimated Take by Acoustic Harassment'' for further discussion), specific to each region; (2) summary information regarding use of all hook and line, purse seine, and trawl gear, including number of sets, tows, etc., specific to each research area and gear; (3) accounts of all incidents of marine mammal interactions, including circumstances of the event and descriptions of any mitigation procedures implemented or not implemented and why; (4) information related to occasions when the move-on rule was waived based on occurrence of groups of California sea lions; (5) summary information related to any on-ice disturbance of pinnipeds, including raw sightings data and the event-specific total counts of animals present, counts of reactions according to a three-point scale of response severity and numbers of takes (differentiated by species and age class), the distance at which a pinniped is disturbed and the closest point of approach for each disturbance event; and (6) a written evaluation of the effectiveness of SWFSC mitigation strategies in reducing the number of marine mammal interactions with survey gear, including best professional judgment and suggestions for changes to the mitigation strategies, if any. The period of reporting will be annually, and the report must be submitted not less than ninety days following the end of a given year. Submission of this information is in service of an adaptive management framework allowing NMFS to make appropriate modifications to mitigation and/or monitoring strategies, as necessary, during the five-year period of validity for these regulations.

NMFS has established a formal incidental take reporting system, the Protected Species Incidental Take (PSIT) database, requiring that incidental takes of protected species be reported within 48 hours of the occurrence. The PSIT generates automated messages to NMFS leadership and other relevant staff, alerting them to the event and to the fact that updated information describing the circumstances of the event has been inputted to the database. The PSIT and CS reports not only provide valuable real-time reporting and information dissemination tools but also serve as an archive of information that may be mined in the future to study why takes occur by species, gear, region, etc.

SWFSC will also collect and report all necessary data, to the extent practicable

given the primacy of human safety and the well-being of captured or entangled marine mammals, to facilitate serious injury (SI) determinations for marine mammals that are released alive. SWFSC will require that the CS complete data forms and address supplemental questions, both of which have been developed to aid in SI determinations. SWFSC understands the critical need to provide as much relevant information as possible about marine mammal interactions to inform decisions regarding SI determinations. In addition, the SWFSC will perform all necessary reporting to ensure that any incidental M/SI is incorporated as appropriate into relevant SARs.

Negligible Impact Analysis and Determinations

Introduction—NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, and Level A or Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, and specific consideration of take by M/SI previously authorized for other NMFS research activities).

We note here that the takes from potential gear interactions enumerated below could result in non-serious injury, but their worst potential outcome (mortality) is analyzed for the purposes of the negligible impact determination. We discuss here the connection, and differences, between the legal mechanisms for authorizing incidental take under section 101(a)(5) for activities such as SWFSC's research activities, and for authorizing incidental take from commercial fisheries. In 1988, Congress amended the MMPA's provisions for addressing incidental take of marine mammals in commercial fishing operations. Congress directed NMFS to develop and recommend a new long-term regime to govern such incidental taking (see MMC, 1994). The need to develop a system suited to the unique circumstances of commercial fishing operations led NMFS to suggest a new conceptual means and associated regulatory framework. That concept, PBR, and a system for developing plans containing regulatory and voluntary measures to reduce incidental take for fisheries that exceed PBR were incorporated as sections 117 and 118 in the 1994 amendments to the MMPA.

PBR is defined in section 3 of the MMPA (16 U.S.C. 1362(20)) as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (OSP) and, although not controlling, can be one measure considered among other factors when evaluating the effects of M/SI on a marine mammal species or stock during the section 101(a)(5)(A) process. OSP is defined in section 3 of the MMPA (16 U.S.C. 1362(9)) as the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. Through section 2, an overarching goal of the statute is to ensure that each species or stock of marine mammal is maintained at or returned to its OSP.

PBR values are calculated by NMFS as the level of annual removal from a stock that will allow that stock to equilibrate within OSP at least 95 percent of the time, and is the product of factors relating to the minimum population estimate of the stock (N_{min}), the productivity rate of the stock at a small population size, and a recovery factor. Determination of appropriate values for these three elements incorporates significant precaution, such that application of the parameter to the management of marine mammal stocks may be reasonably certain to achieve the goals of the MMPA. For example, calculation of N_{min} incorporates the precision and variability associated with abundance information, while also providing reasonable assurance that the stock size is equal to or greater than the estimate (Barlow *et al.,* 1995). In general, the three factors are developed on a stock-specific basis in consideration of one another in order to produce conservative PBR values that appropriately account for both imprecision that may be estimated, as well as potential bias stemming from lack of knowledge (Wade, 1998).

Congress called for PBR to be applied within the management framework for commercial fishing incidental take under section 118 of the MMPA. As a result, PBR cannot be applied appropriately outside of the section 118 regulatory framework without consideration of how it applies within the section 118 framework, as well as how the other statutory management frameworks in the MMPA differ from the framework in section 118. PBR was not designed and is not used as an absolute threshold limiting commercial fisheries. Rather, it serves as a means to evaluate the relative impacts of those activities on marine mammal stocks. Even where commercial fishing is causing M/SI at levels that exceed PBR, the fishery is not suspended. When M/SI exceeds PBR in the commercial fishing context under section 118, NMFS may develop a take reduction plan, usually with the assistance of a take reduction team. The take reduction plan will include measures to reduce and/or minimize the taking of marine mammals by commercial fisheries to a level below the stock's PBR. That is, where the total annual human-caused M/SI exceeds PBR, NMFS is not required to halt fishing activities contributing to total M/SI but rather utilizes the take reduction process to further mitigate the effects of fishery activities via additional bycatch reduction measures. In other words, under section 118 of the MMPA, PBR does not serve as a strict cap on the operation of commercial fisheries that may incidentally take marine mammals.

Similarly, to the extent PBR may be relevant when considering the impacts of incidental take from activities other than commercial fisheries, using it as the sole reason to deny (or issue) incidental take authorization for those activities would be inconsistent with Congress's intent under section 101(a)(5), NMFS' long-standing regulatory definition of ''negligible impact,'' and the use of PBR under section 118. The standard for authorizing incidental take for activities other than commercial fisheries under section 101(a)(5) continues to be, among

other things that are not related to PBR, whether the total taking will have a negligible impact on the species or stock. Nowhere does section 101(a)(5)(A) reference use of PBR to make the negligible impact finding or authorize incidental take through multi-year regulations, nor does its companion provision at 101(a)(5)(D) for authorizing non-lethal incidental take under the same negligible-impact standard. NMFS' MMPA implementing regulations state that take has a negligible impact when it does not adversely affect the species or stock through effects on annual rates of recruitment or survival—likewise without reference to PBR. When Congress amended the MMPA in 1994 to add section 118 for commercial fishing, it did not alter the standards for authorizing non-commercial fishing incidental take under section 101(a)(5), implicitly acknowledging that the negligible impact standard under section 101(a)(5) is separate from the PBR metric under section 118. In fact, in 1994 Congress also amended section 101(a)(5)(E) (a separate provision governing commercial fishing incidental take for species listed under the Endangered Species Act) to add compliance with the new section 118 but retained the standard of the negligible impact finding under section 101(a)(5)(A) (and section 101(a)(5)(D)), showing that Congress understood that the determination of negligible impact and application of PBR may share certain features but are, in fact, different.

Since the introduction of PBR in 1994, NMFS had used the concept almost entirely within the context of implementing sections 117 and 118 and other commercial fisheries management-related provisions of the MMPA. Prior to the Court's ruling in *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* 97 F. Supp. 3d 1210 (D. Haw. 2015) and consideration of PBR in a series of section 101(a)(5) rulemakings, there were a few examples where PBR had informed agency deliberations under other MMPA sections and programs, such as playing a role in the issuance of a few scientific research permits and subsistence takings. But as the Court found when reviewing examples of past PBR consideration in *Georgia Aquarium* v. *Pritzker,* 135 F. Supp. 3d 1280 (N.D. Ga. 2015), where NMFS had considered PBR outside the commercial fisheries context, ''it has treated PBR as only one 'quantitative tool' and [has not used it] as the sole basis for its impact analyses.'' Further, the agency's thoughts regarding the appropriate role of PBR in relation to MMPA programs outside the commercial fishing context have evolved since the agency's early application of PBR to section 101(a)(5) decisions. Specifically, NMFS' denial of a request for incidental take authorization for the U.S. Coast Guard in 1996 seemingly was based on the potential for lethal take in relation to PBR and did not appear to consider other factors that might also have informed the potential for ship strike in relation to negligible impact (61 FR 54157; October 17, 1996).

The MMPA requires that PBR be estimated in SARs and that it be used in applications related to the management of take incidental to commercial fisheries (*i.e.,* the take reduction planning process described in section 118 of the MMPA and the determination of whether a stock is ''strategic'' as defined in section 3), but nothing in the statute requires the application of PBR outside the management of commercial fisheries interactions with marine mammals. Nonetheless, NMFS recognizes that as a quantitative metric, PBR may be useful as a consideration when evaluating the impacts of other human-caused activities on marine mammal stocks. Outside the commercial fishing context, and in consideration of all known human-caused mortality, PBR can help inform the potential effects of M/SI requested to be authorized under 101(a)(5)(A). As noted by NMFS and the U.S. Fish and Wildlife Service in our implementation regulations for the 1986 amendments to the MMPA (54 FR 40341, September 29, 1989), the Services consider many factors, when available, in making a negligible impact determination, including, but not limited to, the status of the species or stock relative to OSP (if known); whether the recruitment rate for the species or stock is increasing, decreasing, stable, or unknown; the size and distribution of the population; and existing impacts and environmental conditions. In this multi-factor analysis, PBR can be a useful indicator for when, and to what extent, the agency should take an especially close look at the circumstances associated with the potential mortality, along with any other factors that could influence annual rates of recruitment or survival.

When considering PBR during evaluation of effects of M/SI under section 101(a)(5)(A), we first calculate a metric for each species or stock that incorporates information regarding ongoing anthropogenic M/SI into the PBR value (*i.e.,* PBR minus the total annual anthropogenic mortality/serious injury estimate in the SAR), which is called ''residual PBR'' (Wood *et al.,* 2012). We first focus our analysis on residual PBR because it incorporates anthropogenic mortality occurring from other sources. If the ongoing human-caused mortality from other sources does not exceed PBR, then residual PBR is a positive number, and we consider how the anticipated or potential incidental M/SI from the activities being evaluated compares to residual PBR using the framework in the following paragraph. If the ongoing anthropogenic mortality from other sources already exceeds PBR, then residual PBR is a negative number and we consider the M/SI from the activities being evaluated as described further below.

When ongoing total anthropogenic mortality from the applicant's specified activities does not exceed PBR and residual PBR is a positive number, as a simplifying analytical tool we first consider whether the specified activities could cause incidental M/SI that is less than 10 percent of residual PBR (the ''insignificance threshold,'' see below). If so, we consider M/SI from the specified activities to represent an insignificant incremental increase in ongoing anthropogenic M/SI for the marine mammal stock in question that alone (*i.e.,* in the absence of any other take) will not adversely affect annual rates of recruitment and survival. As such, this amount of M/SI would not be expected to affect rates of recruitment or survival in a manner resulting in more than a negligible impact on the affected stock unless there are other factors that could affect reproduction or survival, such as Level A and/or Level B harassment, or other considerations such as information that illustrates uncertainty involved in the calculation of PBR for some stocks. In a few prior incidental take rulemakings, this threshold was identified as the ''significance threshold,'' but it is more accurately labeled an insignificance threshold, and so we use that terminology here. Assuming that any additional incidental take by Level A or Level B harassment from the activities in question would not combine with the effects of the authorized M/SI to exceed the negligible impact level, the anticipated M/SI caused by the activities being evaluated would have a negligible impact on the species or stock. However, M/SI above the 10 percent insignificance threshold does not indicate that the M/SI associated with the specified activities is approaching a level that would necessarily exceed negligible impact. Rather, the 10 percent insignificance threshold is meant only to identify

instances where additional analysis of the anticipated M/SI is not required because the negligible impact standard clearly will not be exceeded on that basis alone.

Where the anticipated M/SI is near, at, or above residual PBR, consideration of other factors (positive or negative), including those outlined above, as well as mitigation is especially important to assessing whether the M/SI will have a negligible impact on the species or stock. PBR is a conservative metric and not sufficiently precise to serve as an absolute predictor of population effects upon which mortality caps would appropriately be based. For example, in some cases stock abundance (which is one of three key inputs into the PBR calculation) is underestimated because marine mammal survey data within the U.S. EEZ are used to calculate the abundance even when the stock range extends well beyond the U.S. EEZ. An underestimate of abundance could result in an underestimate of PBR. Alternatively, we sometimes may not have complete M/SI data beyond the U.S. EEZ to compare to PBR, which could result in an overestimate of residual PBR. The accuracy and certainty around the data that feed any PBR calculation, such as the abundance estimates, must be carefully considered to evaluate whether the calculated PBR accurately reflects the circumstances of the particular stock. M/SI that exceeds PBR may still potentially be found to be negligible in light of other factors that offset concern, especially when robust mitigation and adaptive management provisions are included.

PBR was designed as a tool for evaluating mortality and is defined as the number of animals that can be removed while allowing that stock to reach or maintain its OSP. OSP is defined as a population that falls within a range from the population level that is the largest supportable within the ecosystem to the population level that results in maximum net productivity, and thus is an aspirational management goal of the overall statute with no specific timeframe by which it should be met. PBR is designed to ensure minimal deviation from this overarching goal, with the formula for PBR typically ensuring that growth towards OSP is not reduced by more than 10 percent (or equilibrates to OSP 95 percent of the time). As PBR is applied by NMFS, it provides that growth toward OSP is not reduced by more than 10 percent, which certainly allows a stock to reach or maintain its OSP in a conservative and precautionary manner—and we can therefore clearly conclude that if PBR were not exceeded, there would not be adverse effects on the affected species or stocks. Nonetheless, it is equally clear that in some cases the time to reach this aspirational OSP level could be slowed by more than 10 percent (*i.e.,* total human-caused mortality in excess of PBR could be allowed) without adversely affecting a species or stock through effects on its rates of recruitment or survival. Thus even in situations where the inputs to calculate PBR are thought to accurately represent factors such as the species' or stock's abundance or productivity rate, it is still possible for incidental take to have a negligible impact on the species or stock even where M/SI exceeds residual PBR or PBR.

PBR is helpful in informing the analysis of the effects of mortality on a species or stock because it is important from a biological perspective to be able to consider how the total mortality in a given year may affect the population. However, section 101(a)(5)(A) of the MMPA indicates that NMFS shall authorize the requested incidental take from a specified activity if we find that the total of such taking [*i.e.,* from the specified activity] will have a negligible impact on such species or stock. In other words, the task under the statute is to evaluate the applicant's anticipated take in relation to their take's impact on the species or stock, not other entities' impacts on the species or stock. Neither the MMPA nor NMFS' implementing regulations call for consideration of other unrelated activities and their impacts on the species or stock. In fact, in response to public comments on the implementing regulations NMFS explained that such effects are not considered in making negligible impact findings under section 101(a)(5), although the extent to which a species or stock is being impacted by other anthropogenic activities is not ignored. Such effects are reflected in the baseline of existing impacts as reflected in the species' or stock's abundance, distribution, reproductive rate, and other biological indicators.

Our evaluation of the M/SI for each of the species and stocks for which M/SI could occur follows. In addition, all mortality authorized for some of the same species or stocks over the next several years pursuant to our final rulemakings for the NMFS Alaska Fisheries Science Center (AFSC) and the NMFS Northwest Fisheries Science Center (NWFSC) has been incorporated into the residual PBR. By considering the maximum potential incidental M/SI in relation to PBR and ongoing sources of anthropogenic mortality, we begin our evaluation of whether the potential incremental addition of M/SI through SWFSC research activities may affect the species' or stocks' annual rates of recruitment or survival. We also consider the interaction of those mortalities with incidental taking of that species or stock by harassment pursuant to the specified activity.

We first consider maximum potential incidental M/SI for each stock (Table 6) in consideration of NMFS's threshold for identifying insignificant M/SI take (10 percent of residual PBR (69 FR 43338; July 20, 2004)). By considering the maximum potential incidental M/SI in relation to PBR and ongoing sources of anthropogenic mortality, we begin our evaluation of whether the potential incremental addition of M/SI through SWFSC research activities may affect the species' or stock's annual rates of recruitment or survival. We also consider the interaction of those mortalities with incidental taking of that species or stock by harassment pursuant to the specified activity.

Summary of Estimated Incidental Take

Here we provide a summary of the total incidental take authorization on an annual basis, as well as other information relevant to the negligible impact analysis. Table 9 shows information relevant to our negligible impact analysis concerning the total annual taking that could occur for each stock from NMFS' scientific research activities when considering incidental take that may be authorized for SWFSC, as well as take previously authorized for AFSC (84 FR 46788; September 5, 2019) and NWFSC (83 FR 36370; July 27, 2018). We authorize take by M/SI over the five-year period of validity for these regulations as indicated in Table 9 below. As noted previously, although some gear interactions may result in Level A harassment or the release of an uninjured animal, for the purposes of the negligible impact analysis, we assume that all of these takes could potentially be in the form of M/SI. Table 9 also summarizes annual amounts of take by Level B harassment that may be authorized.

We previously authorized take of marine mammals incidental to fisheries research operations conducted by the AFSC (see 83 FR 37638 and 84 FR 46788), and NWFSC (see 81 FR 38516 and 83 FR 36370). This take would occur to some of the same stocks for which we may authorize take incidental to SWFSC fisheries research operations. Therefore, in order to evaluate the likely impact of the take by M/SI in this rule, we consider not only other ongoing sources of human-caused mortality but the potential mortality authorized for AFSC/NWFSC. As used in this

document, other ongoing sources of human-caused (anthropogenic) mortality refers to estimates of realized or actual annual mortality reported in the SARs and does not include authorized or unknown mortality. Below, we consider the total taking by M/SI for SWFSC and previously authorized for AFSC/NWFSC together to produce a maximum annual M/SI take level (including take of unidentified marine mammals that could accrue to any relevant stock) and compare that value to the stock's PBR value, considering ongoing sources of anthropogenic mortality. PBR and annual M/SI values considered in Table 9 reflect the most recent information available (*i.e.,* 2019 SARs).

TABLE 9—SUMMARY INFORMATION RELATED TO SWFSC ANNUAL TAKE AUTHORIZATION, 2020–25 (CCE)

Species [1]	Stock	Annual Level B harassment authorization	Percent of estimated population abundance [2]	SWFSC total M/SI authorization, 2020–25 [3]	AFSC/NWFSC total M/SI authorization	Estimated maximum annual M/SI [4]	PBR minus annual M/SI (%) [5]
Gray whale	ENP	533	2.0	0	0	0	n/a
Humpback whale	CA/OR/WA	23	0.8	0	0	0	n/a
Minke whale	Alaska	19	3.0	0	0	0	n/a
Sei whale	CA/OR/WA	10	1.9	0	0	0	n/a
Fin whale	CA/OR/WA	124	1.4	0	0	0	n/a
Blue whale	ENP	18	1.2	0	0	0	n/a
Sperm whale	CA/OR/WA	96	4.8	0	0	0	n/a
Kogia spp	CA/OR/WA	213	5.2	2	1	0.6	19.2 (3.1)
Cuvier's beaked whale	CA/OR/WA	160	4.9	0	0	0	n/a
Baird's beaked whale	CA/OR/WA	72	2.7	0	0	0	n/a
Mesoplodont beaked whales.	CA/OR/WA	84	2.8	0	0	0	n/a
Bottlenose dolphin	CA/OR/WA Offshore	62	3.2	9	3	2.8	9.4 (29.8)
	CA Coastal		13.7	3	0	0.8	0.7 (114.3)
Striped dolphin	CA/OR/WA	883	3.0	14	7	4.6	237.2 (1.9)
Common dolphin (short-beaked).	CA/OR/WA	14,430	1.4	14	4	4	621.6 (0.6)
Common dolphin (long-beaked).	California	1,425	1.5	14	2	3.6	8,353 (0.0)
Pacific white-sided dolphin	CA/OR/WA	412	1.5	41	31	14.8	[9] 183.5 (8.1)
Northern right whale dolphin.	CA/OR/WA	614	2.3	11	7	4	175.2 (2.3)
Risso's dolphin	CA/OR/WA	209	3.3	14	9	5	42.3 (11.8)
Killer whale	ENP Offshore	13	4.3	0	0	n/a	n/a
	West Coast Transient		5.3	0	0	n/a	n/a
	ENP Southern Resident		17.3	0	0	n/a	n/a
Short-finned pilot whale	CA/OR/WA	30	3.6	2	2	0.8	3.3 (24.2)
Harbor porpoise	Morro Bay	675	15.9	6	[6] 2	2	65.6 (3.0)
	Monterey Bay		19.5			2	22.8 (8.8)
	San Francisco-Russian River.		9.0			2	47.4 (4.2)
	Northern CA/Southern OR		2.8			2	348.8 (0.6)
	Northern OR/WA Coast		3.1		[6] 4	2.4	148 (1.6)
Dall's porpoise	CA/OR/WA	916	3.6	6	4	2.4	171.7 (1.4)
Guadalupe fur seal	Mexico-CA	313	0.9	0	0	0	n/a
Northern fur seal	Pribilof Islands/Eastern Pacific.	12,595	[8] 2.0	5	[7] 18–23	6.2	10,896 (0.1)
	California		[8] 2.0		[7] 5–13	4.2	449.2 (0.9)
California sea lion	United States	5,095	2.0	30	11	9.2	[9] 13,690 (0.1)
Steller sea lion	Eastern U.S	914	2.1	10	[7] 16–21	7	2,480 (0.3)
Harbor seal	California	1,114	3.6	14	[6] 6	4.8	1,598 (0.3)
	OR/WA Coast		4.5		[6] 8	5.2	?
Northern elephant seal	California Breeding	4,916	2.7	5	1	1.6	4,873.2 (0.0)

[1] For some species with multiple stocks, indicated level of take could occur to individuals from any stock (as indicated in table). For some stocks, a range is presented.

[2] For species with multiple potentially affected stocks, value is conservatively calculated as though all estimated annual takes accrue to each potentially affected stock.

[3] As explained earlier in this document, gear interaction could result in mortality, serious injury, or Level A harassment. Because we do not have sufficient information to enable us to parse out these outcomes, we present such take as a pool. For purposes of this negligible impact analysis we assume the worst case scenario (that all such takes incidental to research activities result in mortality).

[4] This column represents the total number of incidents of M/SI that could potentially accrue to the specified species or stock as a result of NMFS' fisheries research activities and is the number carried forward for evaluation in the negligible impact analysis (later in this document). To reach this total, we add one to the total for each pinniped and cetacean that may be captured in trawl gear and one to the total for each pinniped that may be captured in hook and line gear. This represents the potential that the take of an unidentified pinniped or cetacean could accrue to any given stock captured in that gear in that area. The take authorization number is formulated as a five-year total; the annual average is used only for purposes of negligible impact analysis. We recognize that portions of an animal may not be taken in a given year.

[5] This value represents the calculated PBR less the average annual estimate of ongoing anthropogenic mortalities (*i.e.,* total annual human-caused M/SI, which is presented in the SARs) (see Table 1). In parentheses, we provide the estimated maximum annual M/SI expressed as a percentage of this value.

[6] A total of 4 takes of harbor porpoise by M/SI were authorized incidental to NWFSC research occurring offshore CA/OR/WA. However, two of these were expected to occur in the lower Columbia River. Therefore, a maximum of 4 takes could accrue to the Northern OR/WA Coast stock, while a maximum of only 2 of those takes could potentially accrue to the remaining stocks of harbor porpoise. A total of 7 takes of harbor seal by M/SI were authorized incidental to NWFSC research occurring offshore CA/OR/WA. However, two of these were expected to occur in the lower Columbia River. Therefore, a maximum of 7 takes could accrue to the OR/WA Coast stock, while a maximum of only 5 of those takes could potentially accrue to the California stock of harbor seal. One take of each stock by M/SI was authorized incidental to AFSC research.

[7] These ranges reflect that, as part of the overall take authorization for AFSC, a total of five takes of northern fur seals and Steller sea lions are expected to occur as a result specifically of International Pacific Halibut Commission longline operations. These five takes are considered as potentially accruing to either stock of northern fur seal or to either the eastern or western stocks of Steller sea lion; therefore, we assess the consequences of the take authorization for these stocks as though the maximum could occur for that stock.

[8] Calculated on the basis of assumed relative abundance; *i.e.,* we would expect on the basis of relative abundance in the study area that approximately 98 percent of Level B harassment would accrue to the Pribilof Islands/Eastern Pacific stock and approximately two percent would accrue to the California stock.

[9] Calculation of residual PBR for these stocks includes M/SI that occurred incidental to SWFSC research activities. Assumed annual M/SI due to SWFSC is accounted for in this calculation through the take authorization number. Therefore, the assumed effects of SWFSC research on these stocks is overestimated as the take numbers are incorporated to the calculation through both the reduction of ''available'' PBR due to past interactions as well as through the take number that is then evaluated against the residual PBR.

TABLE 10—ANNUAL TAKE AUTHORIZATION IN THE AMLR, 2020–25

Species	Estimated annual Level B harassment (acoustic exposure)	Estimated annual Level B harassment (on-ice disturbance)	Total annual Level B harassment authorization	Percent of estimated population
Southern right whale	0	0	0	n/a
Humpback whale	25	0	25	0.3
Antarctic minke whale	5	0	5	0.0
Fin whale	57	0	57	1.2
Blue whale	0	0	0	n/a
Sperm whale	5	0	5	0.0
Arnoux' beaked whale [1]	2	0	2	?
Southern bottlenose whale	10	0	10	0.0
Hourglass dolphin	10	0	10	0.0
Killer whale	10	0	10	0.0
Long-finned pilot whale	21	0	21	0.0
Spectacled porpoise [1]	10	0	10	?
Antarctic fur seal	136	417	553	0.0
Southern elephant seal	2	5	7	0.0
Weddell seal	74	225	224	[2] 0.1
Crabeater seal	884	2,704	3,588	[2] 0.1
Leopard seal	22	68	90	[2] 0.0

[1] There is no available abundance information for these species. See Small Numbers below for further discussion.
[2] A range is provided for these species' abundance. We have used the lower bound of the given range for calculation of these values.

Analysis—To avoid repetition, the majority of our analysis applies to all the species listed in Tables 9–10, given that the anticipated effects of SWFSC's research activities on marine mammals are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

The majority of stocks that may potentially be taken by M/SI (18 of 22) fall below the insignificance threshold (*i.e.,* 10 percent of residual PBR), while an additional two stocks do not have current PBR values and therefore are evaluated using other factors. We first consider stocks expected to be affected only by Level B harassment and those stocks that fall below the insignificance threshold. Next, we consider those stocks above the insignificance threshold (*i.e.,* two stocks of bottlenose dolphin, Risso's dolphin, and short-finned pilot whale) and those without PBR values (the dwarf sperm whale, for which no information is available, and the Oregon and Washington coastal stock of harbor seal).

As stated previously and described in detail in support of the 2015 rule (80 FR 8166), we do not believe that SWFSC use of active acoustic sources has the likely potential to cause any effect exceeding Level B harassment of marine mammals. We have produced what we believe to be precautionary estimates of potential incidents of Level B harassment. There is a general lack of information related to the specific way that these acoustic signals, which are generally highly directional and transient, interact with the physical environment. Additionally, there is a lack of meaningful understanding of marine mammal perception of these signals. The procedure for producing these estimates, described in detail in ''Estimated Take Due to Acoustic Harassment,'' represents a reasonable and precautionary effort towards quantifying the potential for exposure to noise from these sources, which we equate herein with Level B harassment. The sources considered here have moderate to high output frequencies, generally short ping durations, and are typically focused (highly directional) to serve their intended purpose of mapping specific objects, depths, or environmental features. In addition, some of these sources can be operated in different output modes (*e.g.,* energy can be distributed among multiple output beams) that may lessen the likelihood of perception by and potential impacts on marine mammals in comparison with the quantitative estimates that guide our take authorization. We also produced estimates of incidents of potential Level B harassment due to disturbance of hauled-out pinnipeds that may result from the physical presence of researchers in the Antarctic; these estimates are combined with the estimates of Level B harassment that may result from use of active acoustic devices.

Here, we consider authorized Level B harassment take less than five percent of population abundance to be ''de minimis,'' and authorized Level B harassment taking between 5–15 percent as ''low.'' A ''moderate'' amount of authorized taking by Level B harassment would be from 15–25 percent, and ''high'' above 25 percent. Of the 53 stocks that may be subject to Level B harassment, the level of taking that may be authorized would represent a de minimis impact for 43 stocks and a low impact for an additional four stocks. We do not consider these impacts further for these 47 stocks.

The level of taking by Level B harassment would represent a moderate impact on three additional stocks: The southern resident stock of killer whales and Morro Bay and Monterey Bay stocks of harbor porpoise. However, the values calculated for proportion of population potentially affected assume that all estimated takes species-wide would accrue to each of the potentially affected stocks. In the absence of information to

better refine stock-specific values, this worst-case proportion is an appropriate way to evaluate whether an amount of taking is greater than small numbers. For purposes of determining whether the total impacts to a stock represent no greater than a negligible impact, however, these values are overly conservative. We know that a majority of SWFSC use of active acoustic systems will not be concentrated in either of Morro Bay or Monterey Bay and, therefore, we conclude that the actual significance of taking by Level B harassment for these stocks of harbor porpoise will likely be significantly less than ''moderate.'' Similarly, the only potential avenue for effects to southern resident killer whales would be during the time when whales are foraging in coastal waters. Considering that whales are present in coastal waters for relatively brief portions of the year and that SWFSC research has limited overlap with the whales' relatively shallow foraging grounds in coastal waters, we again conclude that actual significance of any potential acoustic exposure for the stock would be less than moderate. Therefore, we do not consider these stocks further. For an additional three stocks (Arnoux' beaked whale and spectacled porpoise in Antarctica and dwarf sperm whales in the CCE whale), there is no abundance estimate upon which to base a comparison. However, we note that the anticipated number of incidents of take by Level B harassment are very low (2 and 10 for the Antarctic species, respectively, and 213 combined for both stocks of *Kogia* spp.) and likely represent a de minimis impact on these stocks.

As described previously, there is some minimal potential for temporary effects to hearing for certain marine mammals, but most effects would likely be limited to temporary behavioral disturbance. Effects on individuals that are taken by Level B harassment will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring), which are all reactions that are considered to be of low severity (*e.g.,* Ellison *et al.,* 2012). Individuals may move away from the source if disturbed; but, because the source is itself moving and because of the directional nature of the sources considered here, there is unlikely to be even temporary displacement from areas of significance and any disturbance would be of short duration. Although there is no information on which to base any distinction between incidents of harassment and individuals harassed, the same factors, in conjunction with the fact that SWFSC survey effort is widely dispersed in space and time, indicate that repeated exposures of the same individuals would be very unlikely. For these reasons, we do not consider the level of take by acoustic disturbance to represent a significant additional population stressor when considered in context with the level of take by M/SI for any species, including those for which no abundance estimate is available.

Similarly, disturbance of pinnipeds on haul-outs by researchers (expected for Antarctic pinnipeds) is expected to be infrequent and cause only a temporary disturbance on the order of minutes. Monitoring results from other activities involving the disturbance of pinnipeds and relevant studies of pinniped populations that experience more regular vessel disturbance indicate that individually significant or population level impacts are unlikely to occur. When considering the individual animals likely affected by this disturbance, only a small fraction of the estimated population abundance of the affected stocks would be expected to experience the disturbance.

For Risso's dolphin, short-finned pilot whale, and the offshore stock of bottlenose dolphin, maximum total potential M/SI due to NMFS' fisheries research activity (SWFSC, NWFSC, and AFSC combined) is approximately 12, 24, and 30 percent of residual PBR, respectively. For example, PBR for Risso's dolphin is currently set at 46 and the annual average of known ongoing anthropogenic M/SI is 3.7, yielding a residual PBR value of 42.3. The maximum combined annual average M/SI incidental to NMFS fisheries research activity is 5, or 11.8 percent of residual PBR. The only known source of other anthropogenic mortality for these species is in commercial fisheries. For the Risso's dolphin and offshore stock of bottlenose dolphin, such take is considered to be insignificant and approaching zero mortality and serious injury. This is not the case for the short-finned pilot whale; however, the annual take from fisheries (1.2) and from NMFS's fisheries research (0.8) are both very low. There are no other factors that would lead us to believe that take by M/SI of 24 percent of residual PBR would be problematic for this species.

For the California coastal stock of bottlenose dolphin, maximum total potential M/SI due to NMFS' fisheries research activity (SWFSC, NWFSC, and AFSC combined) is approximately 114 percent of residual PBR. Although the maximum annual take by M/SI is low (0.8), the residual PBR is also low (0.7). (Note that there is no take by M/SI authorized for this stock other than for SWFSC activities.) Here we provide additional detail regarding the available information for the coastal stock of bottlenose dolphin and explain our conclusion that the calculated proportion of residual PBR presents an unrealistically conservative assessment of the potential impacts to the stock due to SWFSC fisheries research activity. First, the available information indicates that the PBR value is biased low. PBR is calculated in consideration of the minimum population size which, for coastal bottlenose dolphins, represents the minimum number of individually identifiable animals documented during mark-recapture surveys in 2009–11 (Carretta *et al.,* 2017). This number (346 animals) represents the minimum abundance, but estimates of population abundance resulting from the 2009–11 study range from 411–564 animals (Carretta *et al.,* 2017). Even these higher abundance estimates represent marked animals only, and exclude the approximately 40 percent of animals that are not individually recognizable (Weller *et al.,* 2016). In addition, the estimates based on the 2009–11 study were the highest ever for the population and included a high proportion (~75 percent) of previously uncatalogued dolphins (Weller *et al.,* 2016). The number of individually identifiable animals from 2009–11 exceeded previous estimates for the abundance of the entire marked population. These facts suggest that the stock may have grown in the ten years since conclusion of the last abundance study. Finally, although the stock is confined to U.S. waters for management purposes, the biological stock is transboundary and an unknown additional number of dolphins are likely found in Mexico. Regarding anthropogenic M/SI that is assumed to be ongoing, current estimates are based on scant data. With 9 percent observer coverage in the coastal halibut/yellowtail gillnet fishery during 2010–14, no entanglements were observed, and none have been observed since 2003 (Carretta *et al.,* 2017). The basis for the assumption that a minimum of 1.6 dolphins are killed annually in fisheries was the discovery of two carcasses with evidence of entanglement from 2010–14. In addition, during this same period, one dolphin was found floating under a U.S. Navy marine mammal program dolphin pen enclosure dock and was assumed to have become entangled in the net curtain, and another dolphin became entrapped and drowned in a sea otter

research net. Both of these incidents could rightly be considered as unpredictable occurrences with little likelihood of recurring. However, they add 0.4 animals to the assumed amount of ongoing annual anthropogenic M/SI. None of NMFS' fisheries research activities on the west coast have ever resulted in an interaction with bottlenose dolphins. In summary, the available information leads us to conclude that the PBR value for the stock is likely unrealistically low and that the assumed annual anthropogenic M/SI value may be higher than is actually occurring. Therefore, we find that the potential total take of coastal bottlenose dolphin considered here represents a negligible impact on the stock.

PBR is unknown for harbor seals on the Oregon and Washington coasts. The Oregon/Washington coast stock of harbor seal was considered to be stable following the most recent abundance estimates (in 1999, stock abundance estimated at 24,732). However, a Washington Department of Fish and Wildlife expert (S. Jeffries) stated an unofficial abundance of 32,000 harbor seals in Washington (Mapes, 2013). Therefore, it is reasonable to assume that at worst, the stocks have not declined since the last abundance estimates. Ongoing anthropogenic mortality is estimated at 10.6 harbor seals per year. Therefore, we reasonably assume that the maximum potential annual M/SI incidental to NMFS' fisheries research activities (5.2) is a small fraction of any sustainable take level that might be calculated for the stock.

PBR is also undetermined for the dwarf sperm whale. However, a PBR of 19.2 is calculated for the pygmy sperm whale, and there are no additional known sources of anthropogenic M/SI for *Kogia* spp. Although it is possible that there are fewer dwarf sperm whales than pygmy sperm whales in the CCE, we reasonably assume that the maximum potential annual M/SI incidental to NMFS' fisheries research activities (0.6) is a small fraction of any sustainable take level that might be calculated for the stock.

In summary, our negligible impact analysis is founded on the following factors: (1) The possibility of injury, serious injury, or mortality from the use of active acoustic devices may reasonably be considered discountable; (2) the anticipated incidents of Level B harassment from the use of active acoustic devices and physical disturbance of pinnipeds consist of, at worst, temporary and relatively minor modifications in behavior; (3) the predicted number of incidents of potential mortality are at insignificant levels for a majority of affected stocks; (4) consideration of additional factors for Risso's dolphin, short-finned pilot whale, and the offshore stock of bottlenose dolphin do not reveal cause for concern; (5) total maximum potential M/SI incidental to NMFS fisheries research activity for coastal bottlenose dolphin, considered in conjunction with other sources of ongoing mortality and in context of the available information regarding stock abundance, presents only a minimal incremental addition to total M/SI; (6) available information regarding stocks for which no current PBR estimate is available indicates that total maximum potential M/SI is sustainable; and (7) the presumed efficacy of the planned mitigation measures in reducing the effects of the specified activity to the level of least practicable adverse impact. In combination, we believe that these factors demonstrate that the specified activity will have only short-term effects on individuals (resulting from Level B harassment) and that the total level of taking will not impact rates of recruitment or survival sufficiently to result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, we find that the total marine mammal take from the proposed activities will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(A) of the MMPA for specified activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Please see Tables 9 and 10 for information relating to this small numbers analysis. The total amount of taking is less than five percent for a majority of stocks, and the total amount of taking is less than one-third of the stock abundance for all stocks.

Based on the analysis contained herein of the activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by these actions. Therefore, we have determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to SWFSC fisheries research survey operations contain an adaptive management component. The inclusion of an adaptive management component will be both valuable and necessary within the context of five-year regulations for activities that have been associated with marine mammal mortality.

The reporting requirements associated with this rule are designed to provide OPR with monitoring data from the previous year to allow consideration of whether any changes are appropriate. OPR and the SWFSC will meet annually to discuss the monitoring reports and current science and whether mitigation or monitoring modifications are appropriate. The use of adaptive management allows OPR to consider new information from different sources to determine (with input from the SWFSC regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

In 2015, NMFS prepared a Programmatic Environmental Assessment (PEA; *Programmatic Environmental Assessment for Fisheries Research Conducted and Funded by the Southwest Fisheries Science Center*) to consider the direct, indirect and cumulative effects to the human environment resulting from SWFSC's activities as well as the NMFS Office of Protected Resources (OPR) issuance of the regulations and subsequent incidental take authorization. NMFS made the PEA available to the public for review and comment, in relation specifically to its suitability for assessment of the impacts of our action under the MMPA. OPR signed a Finding of No Significant Impact (FONSI) related to our action under the MMPA on August 31, 2015. The PEA and the 2015 FONSI are available online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-noaa-fisheries-swfsc-fisheries-and-ecosystem-research.*

On May 11, 2020, NMFS announced the availability of a ''*Draft Supplemental Programmatic Environmental Assessment (SPEA) for Fisheries Research Conducted and Funded by the Southwest Fisheries Science Center*'' for review and comment (85 FR 27719). The purpose of the Draft SPEA is to evaluate potential direct, indirect, and cumulative effects of unforeseen changes in research that were not analyzed in the 2015 PEA, or new research activities along the U.S. West Coast, throughout the Eastern Tropical Pacific Ocean, and in the Scotia Sea area off Antarctica. Where necessary, updates to certain information on species, stock status or other components of the affected environment that may result in different conclusions from the 2015 PEA are presented in this analysis.

NMFS evaluated information in the PEA, SPEA, and SWFSC's application, as well as the 2015 FONSI, and determined that the initial FONSI is sufficient to support issuance of these regulations and subsequent Letters of Authorization. NMFS has documented this determination in a memorandum for the record.

Endangered Species Act (ESA)

There are multiple marine mammal species listed under the ESA with confirmed or possible occurrence in the proposed specified geographical regions (see Tables 1 and 2). The authorization of incidental take pursuant to the SWFSC's specified activity would not affect any designated critical habitat. OPR requested initiation of consultation with NMFS' West Coast Regional Office (WCRO) under section 7 of the ESA on the promulgation of five-year regulations and the subsequent issuance of LOAs to SWFSC under section 101(a)(5)(A) of the MMPA.

WCRO issued a biological opinion to OPR and to the SWFSC (concerning the conduct of the specified activities) which concluded that the issuance of the authorizations is not likely to adversely affect any listed marine mammal species.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. SWFSC is the sole entity that would be subject to the requirements of these regulations, and the SWFSC is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. No comments were received regarding this certification or on the economic impacts of the rule more generally. As a result, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. However, this rule does not contain a collection-of-information requirement subject to the provisions of the PRA because the applicant is a Federal agency.

Waiver of Delay in Effective Date

NMFS has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in the effective date of this final rule. No individual or entity other than the SWFSC is affected by the provisions of these regulations. The SWFSC has requested that this final rule take effect on October 30, 2020, to accommodate the SWFSC's LOA expiring on October 29, 2020, so as to not cause a disruption in research activities. The waiver of the 30-day delay of the effective date of the final rule will ensure that the MMPA final rule and LOA are in place by the time the previous authorizations expire. Any delay in finalizing the rule would result in either: (1) A suspension of planned research, which would disrupt the provision of vital data necessary for effective management of fisheries; or (2) the SWFSC's procedural non-compliance with the MMPA (should the SWFSC conduct research without an LOA), thereby resulting in the potential for unauthorized takes of marine mammals. Moreover, the SWFSC is ready to implement the regulations immediately and requested the waiver. For these reasons, NMFS finds good cause to waive the 30-day delay in the effective date. In addition, the rule authorizes incidental take of marine mammals that would otherwise be prohibited under the statute. Therefore, by granting an exception to the SWFSC, the rule will relieve restrictions under the MMPA, which provides a separate basis for waiving the 30-day effective date for the rule.

List of Subjects in 50 CFR Part 219

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 14, 2020.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For reasons set forth in the preamble NOAA adds part 219 to read as follows:

PART 219—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Subpart A—Taking Marine Mammals Incidental to Southwest Fisheries Science Center Fisheries Research

Sec.

219.1 Specified activity and specified geographical region.
219.2 Effective dates.
219.3 Permissible methods of taking.
219.4 Prohibitions.
219.5 Mitigation requirements.

219.6 Requirements for monitoring and reporting.
219.7 Letters of Authorization.
219.8 Renewals and modifications of Letters of Authorization.
219.9–219.10 [Reserved]

Subpart B [Reserved]

Authority: 16 U.S.C. 1361 *et seq.*

Subpart A—Taking Marine Mammals Incidental to Southwest Fisheries Science Center Fisheries Research

§ 219.1 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the National Marine Fisheries Service's (NMFS) Southwest Fisheries Science Center (SWFSC) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to research survey program operations.

(b) The taking of marine mammals by SWFSC may be authorized in a Letter of Authorization (LOA) only if it occurs within the California Current Ecosystem (CCE) or Antarctic Marine Living Resources Ecosystem (AMLR).

§ 219.2 Effective dates.

Regulations in this subpart are effective from January 15, 2021 through January 15, 2026.

§ 219.3 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 219.7, the Holder of the LOA (hereinafter ''SWFSC'') may incidentally, but not intentionally, take marine mammals within the area described in § 219.1(b) by Level B harassment associated with use of active acoustic systems and physical or visual disturbance of hauled-out pinnipeds and by Level A harassment, serious injury, or mortality associated with use of fisheries research gear, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 219.4 Prohibitions.

(a) Notwithstanding takings contemplated in § 219.1 and authorized by a LOA issued under §§ 216.106 of this chapter and 219.7, no person in connection with the activities described in § 219.1 may:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 219.7;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

§ 219.5 Mitigation requirements.

When conducting the activities identified in § 219.1(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 219.7 must be implemented.

(a) *General conditions.* (1) SWFSC must take all necessary measures to coordinate and communicate in advance of each specific survey with the National Oceanic and Atmospheric Administration's (NOAA) Office of Marine and Aviation Operations (OMAO) or other relevant parties on non-NOAA platforms to ensure that all mitigation measures and monitoring requirements described herein, as well as the specific manner of implementation and relevant event-contingent decision-making processes, are clearly understood and agreed upon.

(2) SWFSC must coordinate and conduct briefings at the outset of each survey and as necessary between ship's crew (Commanding Officer/master or designee(s), as appropriate) and scientific party in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(3) SWFSC must coordinate as necessary on a daily basis during survey cruises with OMAO personnel or other relevant personnel on non-NOAA platforms to ensure that requirements, procedures, and decision-making processes are understood and properly implemented.

(4) When deploying any type of sampling gear at sea, SWFSC must at all times monitor for any unusual circumstances that may arise at a sampling site and use best professional judgment to avoid any potential risks to marine mammals during use of all research equipment.

(5) SWFSC must implement handling and/or disentanglement protocols as specified in guidance provided to SWFSC survey personnel.

(b) *Trawl survey protocols.* (1) SWFSC must conduct trawl operations as soon as is practicable upon arrival at the sampling station.

(2) SWFSC must initiate marine mammal watches (visual observation) at least 15 minutes prior to beginning of net deployment (or for the amount of time to travel between stations if less than 15 minutes) but must also conduct monitoring during any pre-set activities including CTD casts and plankton or bongo net hauls.

(3) In the CCE, SWFSC must implement the move-on rule mitigation protocol, as described in this paragraph. If one or more marine mammals, with the exception of baleen whales, are observed within 1 nautical mile (nmi) of the planned sampling location during the visual observation period, SWFSC must move on to another sampling location. If, after moving on, marine mammals remain within 1 nmi, the SWFSC must move again or skip the station. SWFSC may use best professional judgment in making these decisions but may not elect to conduct trawl survey activity when marine mammals other than baleen whales remain within the 1-nmi zone.

(4) SWFSC must maintain visual monitoring effort during the entire period of time that trawl gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, SWFSC must take the most appropriate action to avoid marine mammal interaction. SWFSC may use best professional judgment in making this decision.

(5) If trawling operations have been suspended because of the presence of marine mammals, SWFSC may resume trawl operations when practicable only when the animals are believed to have departed the 1 nmi area. SWFSC may use best professional judgment in making this determination.

(6) SWFSC must implement standard survey protocols to minimize potential for marine mammal interactions, including maximum tow durations at target depth and maximum tow distance, and shall carefully empty the trawl as quickly as possible upon retrieval. Trawl nets must be cleaned prior to deployment.

(7) SWFSC must install and use a marine mammal excluder device at all times when the Nordic 264 trawl net or any other net is used for which the device is appropriate.

(8) SWFSC must install and use acoustic deterrent devices whenever any midwater trawl net is used, with two to four devices placed along the footrope and/or headrope of the net. SWFSC must ensure that the devices are

operating properly before deploying the net.

(c) *Pelagic longline survey protocols.* (1) SWFSC must deploy longline gear as soon as is practicable upon arrival at the sampling station.

(2) SWFSC must initiate marine mammal watches (visual observation) no less than 15 minutes (or for the duration of transit between locations, if shorter than 15 minutes) prior to both deployment and retrieval of longline gear.

(3) SWFSC must implement the move-on rule mitigation protocol, as described in this paragraph. If one or more marine mammals, with the exception of groups of five or fewer California sea lions, are observed within 1 nmi of the planned sampling location during the visual observation period, SWFSC must move on to another sampling location. If, after moving on, marine mammals remain within 1 nmi, the SWFSC must move again or skip the station. SWFSC may use best professional judgment in making these decisions but may not elect to conduct pelagic longline survey activity when animals remain within the 1-nmi zone.

(4) SWFSC must maintain visual monitoring effort during the entire period of gear deployment and retrieval. If marine mammals are sighted before the gear is fully deployed or retrieved, SWFSC must take the most appropriate action to avoid marine mammal interaction. SWFSC may use best professional judgment in making this decision.

(5) If deployment or retrieval operations have been suspended because of the presence of marine mammals, SWFSC may resume such operations when practicable only when the animals are believed to have departed the 1 nmi area. SWFSC may use best professional judgment in making this decision.

(6) SWFSC must implement standard survey protocols, including maximum soak durations and a prohibition on chumming.

(d) *Purse seine survey protocols.* (1) SWFSC must conduct purse seine operations as soon as is practicable upon arrival at the sampling station.

(2) SWFSC must conduct marine mammal watches (visual observation) prior to beginning of net deployment.

(3) SWFSC must implement the move-on rule mitigation protocol, as described in this paragraph for use of purse seine gear. If one or more killer whales or small cetaceans (*i.e.,* dolphin or porpoise) or five or more pinnipeds are observed within 500 m of the planned sampling location before setting the purse seine gear, SWFSC must either remain onsite or move on to another sampling location. If remaining onsite, the set must be delayed. If the animals depart or appear to no longer be at risk of interacting with the vessel or gear, a further observation period must be conducted. If no further observations are made or the animals still do not appear to be at risk of interaction, then the set may be made. If the vessel is moved to a different area, the move-on rule mitigation protocol would begin anew. If, after moving on, marine mammals remain at risk of interaction, the SWFSC must move again or skip the station. Marine mammals that are sighted further than 500 m from the vessel must be monitored to determine their position and movement in relation to the vessel to determine whether the move-on rule mitigation protocol should be implemented. SWFSC may use best professional judgment in making these decisions.

(4) SWFSC must maintain visual monitoring effort during the entire period of time that purse seine gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, SWFSC must take the most appropriate action to avoid marine mammal interaction. SWFSC may use best professional judgment in making this decision.

(5) If purse seine operations have been suspended because of the presence of marine mammals, SWFSC may resume seine operations when practicable only when the animals are believed to have departed the area. SWFSC may use best professional judgment in making this determination.

(6) If any cetaceans are observed in a purse seine net, SWFSC must immediately open the net and free the animals.

§ 219.6 Requirements for monitoring and reporting.

(a) *Compliance coordinator.* SWFSC must designate a compliance coordinator who shall be responsible for ensuring compliance with all requirements of any LOA issued pursuant to § 216.106 of this chapter and § 219.7 and for preparing for any subsequent request(s) for incidental take authorization.

(b) *Visual monitoring program.* (1) Marine mammal visual monitoring must occur prior to deployment of trawl, hook and line, and purse seine gear, respectively; throughout deployment of gear and active fishing of research gears (not including longline soak time); prior to retrieval of longline gear; and throughout retrieval of all research gear.

(2) Marine mammal watches must be conducted by watch-standers (those navigating the vessel and/or other crew) at all times when the vessel is being operated.

(3) SWFSC must monitor any potential disturbance of pinnipeds on ice, paying particular attention to the distance at which different species of pinniped are disturbed. Disturbance must be recorded according to a three-point scale representing increasing seal response to disturbance.

(c) *Training.* (1) SWFSC must conduct annual training for all chief scientists and other personnel who may be responsible for conducting dedicated marine mammal visual observations to explain mitigation measures and monitoring and reporting requirements, mitigation and monitoring protocols, marine mammal identification, completion of datasheets, and use of equipment. SWFSC may determine the agenda for these trainings.

(2) SWFSC must also dedicate a portion of training to discussion of best professional judgment, including use in any incidents of marine mammal interaction and instructive examples where use of best professional judgment was determined to be successful or unsuccessful.

(3) SWFSC must coordinate with NMFS' Northwest Fisheries Science Center (NWFSC) regarding surveys conducted in the CCE, such that training and guidance related to handling procedures and data collection is consistent.

(d) *Handling procedures and data collection.* (1) SWFSC must implement standardized marine mammal handling, disentanglement, and data collection procedures. These standard procedures will be subject to approval by NMFS's Office of Protected Resources (OPR).

(2) When practicable, for any marine mammal interaction involving the release of a live animal, SWFSC must collect necessary data to facilitate a serious injury determination.

(3) SWFSC must provide its relevant personnel with standard guidance and training regarding handling of marine mammals, including how to identify different species, bring an individual aboard a vessel, assess the level of consciousness, remove fishing gear, return an individual to water, and log activities pertaining to the interaction.

(4) SWFSC must record such data on standardized forms, which will be subject to approval by OPR. SWFSC must also answer a standard series of supplemental questions regarding the details of any marine mammal interaction.

(e) *Reporting.* (1) SWFSC must report all incidents of marine mammal interaction to NMFS's Protected Species Incidental Take database within 48 hours of occurrence and must provide supplemental information to OPR upon request. Information related to marine mammal interaction (animal captured or entangled in research gear) must include details of survey effort, full descriptions of any observations of the animals, the context (vessel and conditions), decisions made, and rationale for decisions made in vessel and gear handling.

(2) SWFSC must submit annual reports including:

(i) An annual summary report to OPR not later than 90 days following the end of a given year. SWFSC must provide a final report within 30 days following resolution of comments on the draft report.

(ii) These reports must contain, at minimum, the following:

(A) Annual line-kilometers surveyed during which predominant active acoustic sources were used;

(B) Summary information regarding use of all hook and line, purse seine, and trawl gear, including number of sets, hook hours, tows, etc., specific to each gear;

(C) Accounts of all incidents of significant marine mammal interactions, including circumstances of the event and descriptions of any mitigation procedures implemented or not implemented and why, and, for interactions due to use of pelagic longline or purse seine, whether the move-on rule was waived due to the presence of five or fewer California sea lions;

(D) Summary information related to any on-ice disturbance of pinnipeds, including raw sightings data and the event-specific total counts of animals present, counts of reactions according to a three-point scale of response severity and numbers of takes (differentiated by species and age class), the distance at which a pinniped is disturbed and the closest point of approach for each disturbance event;

(E) A written evaluation of the effectiveness of SWFSC mitigation strategies in reducing the number of marine mammal interactions with survey gear, including best professional judgment and suggestions for changes to the mitigation strategies, if any;

(F) Final outcome of serious injury determinations for all incidents of marine mammal interactions where the animal(s) were released alive; and

(G) A summary of all relevant training provided by SWFSC and any coordination with NWFSC or NMFS' West Coast Regional Office.

(f) *Reporting of injured or dead marine mammals.* (1) In the event that personnel involved in the survey activities covered by the authorization discover an injured or dead marine mammal, SWFSC must report the incident to OPR and to the appropriate West Coast Regional Stranding Coordinator as soon as feasible. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, SWFSC must report the incident to OPR and to the appropriate West Coast Regional Stranding Coordinator as soon as feasible. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Vessel's speed during and leading up to the incident;

(iv) Vessel's course/heading and what operations were being conducted (if applicable);

(v) Status of all sound sources in use;

(vi) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(vii) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(viii) Estimated size and length of animal that was struck;

(ix) Description of the behavior of the marine mammal immediately preceding and following the strike;

(x) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(xi) Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(xii) To the extent practicable, photographs or video footage of the animal(s).

§ 219.7 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, SWFSC must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, SWFSC may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, SWFSC must apply for and obtain a modification of the LOA as described in § 219.8.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within thirty days of a determination.

§ 219.8 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 219.7 for the activity identified in § 219.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) OPR determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to

the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), OPR may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 219.7 for the activity identified in § 219.1(a) may be modified by OPR under the following circumstances:

(1) OPR may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with SWFSC regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from SWFSC's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies;

(C) Any information that reveals marine mammals may have been taken in a manner; and extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, OPR will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If OPR determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 219.7, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

§ § 219.9–219.10 [Reserved]

[FR Doc. 2020–27817 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 86, No. 10

Friday, January 15, 2021

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

RIN 1904–AE39

Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters; Withdrawal

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Proposed rulemakings; withdrawal.

SUMMARY: In response to a petition for rulemaking submitted on October 18, 2018 (Gas Industry Petition), the Department of Energy (DOE or the Department) has published elsewhere in this issue of the **Federal Register** a final interpretive rule determining that, in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) constitute a performance-related ''feature'' under the Energy Policy and Conservation Act (EPCA) that cannot be eliminated through adoption of an energy conservation standard. Relatedly, DOE published in the **Federal Register** a notice of proposed rulemaking for residential furnaces on March 12, 2015, a notice of proposed rulemaking for commercial water heaters on May 31, 2016, and a supplemental notice of proposed rulemaking for residential furnaces on September 23, 2016. In light of the final interpretive rule, DOE hereby withdraws these proposed rules.

DATES: The proposed rule for residential furnaces that appeared in the **Federal Register** on March 12, 2015 at 80 FR 13120, the proposed rule for commercial water heaters that appeared in the **Federal Register** on May 31, 2016 at 81 FR 34440, and the supplemental proposed rule for residential furnaces that appeared in the **Federal Register** on September 23, 2016 at 81 FR 65720 are withdrawn as of January 15, 2021.

FOR FURTHER INFORMATION CONTACT:

Ms. Lysia Bowling, Senior Advisor, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 430–1257. Email: *Lysia.Bowling@ee.doe.gov.*

Mr. Eris Stas, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–5827. Email: *Eric.Stas@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On March 12, 2015, DOE published in the **Federal Register** a rule proposing amended energy conservation standards for residential non-weatherized gas furnaces and mobile home furnaces, in furtherance of its statutory obligation to determine whether more-stringent, amended standards would be technologically feasible and economically justified, and would save a significant amount of energy (80 FR 13120), and the Department subsequently published in the **Federal Register** a supplemental proposed rule for this rulemaking on September 23, 2016 (81 FR 65720). Similarly, on May 31, 2016, DOE published in the **Federal Register** a rule proposing amended energy conservation standards for commercial water heaters (81 FR 34440).

However, in response to a petition for rulemaking submitted on October 18, 2018 (Gas Industry Petition), DOE published that petition in the **Federal Register** on November 1, 2018, for public review and input (83 FR 54883). The Gas Industry Petition was submitted by the American Public Gas Association (APGA), Spire, Inc., the Natural Gas Supply Association (NGSA), the American Gas Association (AGA), and the National Propane Gas Association (NPGA), asking DOE to: (1) Issue an interpretive rule stating that DOE's proposed energy conservation standards for residential furnaces and commercial water heaters would result in the unavailability of ''performance characteristics'' within the meaning of EPCA, as amended (*i.e.,* by setting standards which can only be met by condensing combustion technology products/equipment and thereby precluding the distribution in commerce of non-condensing combustion technology products/equipment) and (2) withdraw the proposed energy conservation standards for residential furnaces and commercial water heaters based upon such findings. To address the Gas Industry Petition, DOE subsequently published in the **Federal Register** a proposed interpretive rule on July 11, 2019 (84 FR 33011), and a supplemental notice of proposed interpretive rule on September 24, 2020 (85 FR 60090), both of which offered opportunity for public comment.

After careful review, DOE ultimately decided to adopt a final interpretive rule determining that, in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) constitute a performance-related ''feature'' under EPCA that cannot be eliminated through adoption of an energy conservation standard. That final interpretive rule is published elsewhere in this issue of the **Federal Register**. In light of its changed interpretation, DOE withdraws the aforementioned proposed rules for further rulemaking consistent with its revised interpretation.

Signing Authority

This document of the Department of Energy was signed on January 12, 2021, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 12, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–00898 Filed 1–14–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 600

Development of Nuclear Energy Technologies and Collaboration With States on Nuclear Development, Notice of Petition for Rulemaking

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Notification of petition for rulemaking; request for comment.

SUMMARY: On October 23, 2019, the Department of Energy (DOE) received a petition from Mr. Ken Kay asking DOE to promulgate rules and establish programs that will allow States and their agents to collaboratively develop new nuclear technologies with DOE, and under the authority of DOE, including but not limited to the development of small nuclear reactors. The petition further requests that DOE promulgate rules and establish programs that would allow States to develop collaborative nuclear and non-nuclear laboratories with DOE on currently licensed or formerly licensed nuclear facility grounds, within their respective States, and allow for the construction of collaborative nuclear experimentation containment facility testing platforms. Through this document, DOE seeks comment on the petition, as well as any data or information that could be used in DOE's determination on whether to proceed with the petitions.

DATES: Written comments and information are requested on or before April 15, 2021.

ADDRESSES: Interested persons are encouraged to submit comments, identified by ''Nuclear Petition,'' by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: NuclearPetitions@hq.doe.gov Include ''Nuclear Petition'' in the subject line of the message.

Postal Mail: Mark Yale, Office of Nuclear Energy, U.S. Department of Energy, Mailstop 5A–148, 1000 Independence Avenue SW, Washington, DC 20585. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Mark Yale, Office of Nuclear Energy, U.S. Department of Energy, Mailstop 5A–148, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–7856. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Mark Yale, Office of Nuclear Energy, U.S. Department of Energy, Mailstop 5A–148, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–7856. Email: *Mark.Yale@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* provides among other things, that ''[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.'' (5 U.S.C. 553(e)) DOE received a petition from Mr. Ken Kay, as described in this document and set forth verbatim below, requesting that DOE promulgate rules and establish programs to (1) allow States and their agents to collaboratively develop new nuclear technologies with DOE, and under the authority of DOE, to include, but not be limited to, the development of small nuclear reactors designed to produce ten megawatts or less of thermal energy, and (2) establish programs that would allow States to develop collaborative nuclear and non-nuclear laboratories with DOE on currently licensed or formerly licensed nuclear facility grounds, and allow for the construction of collaborative nuclear experimentation containment facility testing platforms. Among the cited grounds for petitioner's petition are: the Atomic Energy Act of 1954, Public Law 83–703, as amended; 42 U.S.C. 2013; and 42 U.S.C. 2021. In publishing this petition for public comment, DOE is seeking views on whether it should grant the petition and undertake a proposed rulemaking or other appropriate action. By seeking comment on whether to grant this petition, DOE takes no position at this time regarding the merits of the suggested rulemaking or the assertions made by the Petitioner.

DOE welcomes comments and views of interested parties on any aspect of the petition.

Submission of Comments. DOE invites all interested parties to submit in writing by April 15, 2021 comments and information regarding these petitions.

Submitting comments via http://www.regulations.gov. The *http://www.regulations.gov* web page will require you to provide your name and contact information prior to submitting comments. Your contact information will be viewable to DOE Office of Nuclear Energy staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or postal mail. Comments and documents via email, hand delivery, or postal mail will also be posted to *http://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information in your cover letter each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not include any special characters or any form of encryption, and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked ''Confidential'' including all the information believed to be confidential, and one copy of the document marked ''Non-confidential'' with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of its process for considering rulemaking petitions. DOE actively encourages the participation and interaction of the public during the comment period. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in determining how to proceed with a petition. Anyone who wishes to be added to DOE's mailing list to receive future notices and information about this petition should contact Office of Nuclear Energy program staff at (202) 586–2240 or via email at *Mark.Yale@hq.doe.gov.*

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this petition for rulemaking.

Signing Authority

This document of the Department of Energy was signed on December 17, 2020, by Dr. Rita Baranwal, Assistant Secretary for Nuclear Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 17, 2020.

Treena V. Garrett,

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

Attn: John T. Lucas General Counsel, GC–1
U.S. Department of Energy
1000 Independence Avenue, SW.
Washington, DC 20585.

Cc:

Eric J. Fygi, Deputy General Counsel, at *eric.fygi@hq.doe.gov*

Mary Therese Keokuk, Executive Assistant to the Deputy General Counsel, at *therese.keokuk@hq.doe.gov*

Daniel Cohen, Assistant General Counsel for Legislation, Regulation, and Energy Efficiency, at *daniel.cohen@hq.doe.gov*

Elizabeth Kohl, Deputy Assistant General Counsel for Legislation and Regulation, at *elizabeth.kohl@hq.doe.gov.*

United States Department of Energy

In the Matter of Proposed Rulemaking Regarding the Creation of New Rules

Petition for Rulemaking

This Petition for Rulemaking is submitted pursuant to The Administrative Procedure Act, 5 U.S.C. 551, and 553, requires each federal agency to ''give an interested person the right to petition for the issuance, amendment, or repeal of a rule'' and defines a ''person'' to include an individual, partnership, corporation, association, or public or private organization other than an agency.

Statement of Petitioner's Interest

I, Ken Kay am From the State of Ohio, have a sincere interest and support the Creation of new rules, to enable further research and development into safe modular nuclear reactors as a true means of sustainable low-cost abundant ultra-clean energy, remove unused nuclear fuel known as waste and many of beneficial factors that will come with unleashing safe nuclear technology.

Background

Federal agencies have failed to provide a domestic program of research and development for nuclear technologies to encourage maximum scientific and industrial progress allowing other nations to become the world leaders in nuclear and energy diplomacy. This failure has compromised America's safety and security and put states at a competitive disadvantage to foreign countries in producing new nuclear technologies. Federal policies with states are not consistent with international arrangements and agreements of cooperation.

Providing a regulatory pathway that removes much of the potential for litigation during the research and development phase of a technology allows private industry to better prove technologies and reduce investor risks. Such a pathway would allow America to bring many more nuclear technologies at an accelerated pace.

Countries around the world — particularly China, Russia, India, and developing nations — see the benefits of developing new nuclear technology and are poised to increase their nuclear production.

Unfortunately, projections by the Energy Information Agency show a diminishing U.S. nuclear presence as closures of reactors mount. To improve

the human condition — ensuring clean air, clean water, and a robust economy — nuclear energy should be a part of America's diverse energy mix. The failure to innovate within the nuclear industry and produce newer more cost effective technologies and allow current nuclear power plants to produce income streams other than those from electricity generation; have prevented the nuclear industry from competing against other technologies such as natural gas.

Nuclear energy is simply more reliable than all other sources of energy except geothermal. It has the ability to operate at full capacity 90 percent of the time. By contrast, solar energy can only sustain maximum output less than one-third of the time and wind generation just about half of the time because the sun isn't always shining and the wind isn't always blowing. Another source of energy must always be ready to back up unreliable renewables, which is often coal and natural gas.

Nuclear power has even proved its reliability in the face of devastating conditions. A two-reactor nuclear power plant located near Houston, known as the South Texas Project, took a direct hit from the Category 4 Hurricane Harvey. While Texas' wind farms quickly cut off generation due to high winds, the nuclear power plant continued providing power at capacity for struggling communities during the disaster.

In other words, nuclear provided electricity when Texans needed it most.

While states have their own development programs for other energy technologies (coal, oil, gas, wind, and solar); the federal government has a near monopoly in the development of new nuclear technologies. The federal government has failed to recognize substantively the interest of the states to develop new nuclear technologies for peaceful uses.

The federal government should remove barriers to the research and development of nuclear technologies so that states can provide scientific diversity and aid in accelerating the development of new nuclear technologies. This will help provide Americans with a program of maximum development and an energy future that is not only clean, affordable, and reliable, but also powers their lives and their potential for flourishing.

Grounds for Proposed Action

The United States has fallen behind or is falling behind the rest of the world in building nuclear reactors and developing new nuclear technologies. The United States has not come close to the rate of building and planning of nuclear power plants under the Atomic Energy Commission (AEC) which was formed in 1946 and dissolved in 1974. In 1974 the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission (NRC) legally split the duties of the AEC. The ERDA was to take on the research and development activities of the AEC and the NRC was to take on the safety and regulatory aspects of the defunct AEC. In 1977, Congress saw fit to dissolve the ERDA and consolidate the Federal Energy Administration, the ERDA, the Federal Power Commission, and programs of various other agencies into the Department of Energy (DOE).

What was lost in the dissolution of the AEC were a number of key issues that remain unresolved to this day. The 1954 Atomic Energy Act (AEA) amended the 1946 Atomic Energy Act and is still the core piece of legislation that drives the regulation of the nuclear industry. Included within the language of the 1954 Atomic Energy Act:

- Required the AEC to ''*recognize the interests of the States in the peaceful uses of atomic energy*'' U.S. Code 42 Section 2021.
- Required the AEC to ''*promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development*'' U.S. Code 42 Section 2021.
- Required the AEC to create ''*a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress*'' U.S. Code 42 Section 2013.
- Required the AEC to ''*create a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation*'' U.S. Code 42 Section 2013.

Many of these legal requirements, as laid out by Congress in 1954 are not being met since the AEC was dissolved.

Statement in Support of Proposed Action

While the NRC has developed rules that allow states to regulate source material and byproducts, it has failed to recognize the interests of states to develop new nuclear technologies and to encourage maximum scientific and industrial progress. The NRC however, has correctly identified that its mission is only concerned with safety and regulation; not development. Providing a program that encourages maximum scientific and industrial progress most correctly falls under the umbrella of the DOE. We believe a proper interpretation of the law is that the authority of the DOE can be extended to states in collaborative research and development agreements per the 1954 AEA mandate to recognize the states interest in developing nuclear technologies for peaceful uses and the provision for providing a program of maximum development. We do not believe DOE authority can extend to commercial activity unless the NRC has previously authorized such activity such as in the production of medical isotopes from research reactors -or- the DOE developed reactor is a demonstration reactor that aids in determining real world feasibility.

Proposed Action

I, Ken Kay, hereby petitions the United States Department of Energy, under its authority, to promulgate rules and establish programs that will allow states and their agents to collaboratively develop new nuclear technologies with the United States Department of Energy, and under the authority of the United States Department of Energy, including, but not limited to, the development of small nuclear reactors that are designed to produce ten megawatts or less of thermal energy, thus providing for a program of maximum development that recognizes the interests of states.

I, Ken Kay, hereby petitions the USDOE to promulgate rules and programs that will allow states to develop collaborative nuclear and non-nuclear laboratories with the United States Department of Energy on currently licensed or formerly licensed nuclear facility grounds, within their respective states, and allow for the construction of collaborative nuclear experimentation containment facility testing platforms.

Ken Kay

Ken Kay

October 23rd 2019.

[FR Doc. 2020–28202 Filed 1–14–21; 8:45 am]

BILLING CODE 6450–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AF20

Overdraft Policy

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) is issuing a proposed rule to amend one of the requirements that a federal credit union (FCU) must adopt as a part of their written overdraft policy. Specifically, the proposed rule would modify the requirement that an FCU's written overdraft policy establish a time limit, not to exceed 45 calendar days, for a member to either deposit funds or obtain an approved loan from the FCU to cover each overdraft. The proposed rule would remove the 45-day limit and replace it with a requirement that the written policy must establish a specific time limit that is both reasonable and applicable to all members, for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft. Consistent with U.S. generally accepted accounting principles (GAAP), overdraft balances should generally be charged off when considered uncollectible. The Board believes that this change would improve a requirement that is not only overly prescriptive, but could be especially detrimental as FCUs take steps to provide their members the flexibility needed to cope with the impacts of COVID–19.

DATES: Comments must be received on or before February 16, 2021.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF20, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (703) 518–6319. Include ''[Your Name]—Comments on Overdraft Policy'' in the transmittal.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection:

You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION, CONTACT: *Policy and Analysis:* Alison Clark, Chief Accountant, Office of Examination and Insurance, at (703) 518–6611; *Legal:* Gira Bose and Thomas Zells, Staff Attorneys, Office of General Counsel, at (703) 518–6540; or by mail at: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SUPPLEMENTARY INFORMATION:

I. Background
II. Legal Authority
III. Section-by-Section Analysis
IV. Regulatory Procedures

I. Background

The COVID–19 pandemic has created uncertainty for federally insured credit unions (FICUs) and their members. The Board has been working with federal and state regulatory agencies, in addition to FICUs, to assist FICUs in managing their operations and to facilitate continued assistance to credit union members and communities impacted by the coronavirus. As part of these ongoing efforts, the Board is proposing to modify the maximum time an FCU overdraft policy may allow for a member to cure an overdraft. The Board believes that this change would help ensure that FCUs have the additional flexibility necessary to provide relief to their members in a manner consistent with the NCUA's responsibility to maintain the safety and soundness of the credit union system.[1]

The NCUA first permitted FCUs to advance money to a member to cover his or her account deficit (overdraft) without having a credit application on file in 2000.[2] The Federal Credit Union Act (FCU Act) does not specifically address an FCU's authority to pay or honor a debit from a share account that will result in an overdrawn account. However, the NCUA's longstanding position has been that an overdraft, as a financial accommodation to a member, constitutes a loan or line of credit to a member. The Board also believes that the authority to cover overdrafts is incidental[3] to an FCU's authority to accept payment on shares.[4] In particular, under the incidental powers test established by the courts[5] and in the NCUA's regulations in 12 CFR part 721, covering overdrafts from such accounts: (1) Is useful in carrying out FCU business because it facilitates ongoing maintenance of accounts that are temporarily overdrawn; (2) is the functional equivalent and indeed directly associated with other deposit account activity; and (3) involves risks similar to those FCUs assume in accepting payment on shares generally.[6]

When providing FCUs with this authority in 2000, the NCUA adopted a regulatory requirement that, in order for an FCU to advance money to a member to cover an account deficit without having a credit application from the borrower on file, the FCU must have a written overdraft policy that meets certain requirements. One of these requirements is that the FCU's written policy must establish a time limit not to exceed 45 calendar days for a member either to deposit funds or obtain an approved loan from the FCU to cover each overdraft. As described more fully in section III, the Board believes that this policy is overly prescriptive and potentially harmful to both FCUs and their members. The Board is especially concerned that the requirement has and will continue to prevent FCUs from taking appropriate steps to provide their members the flexibility needed to cope with the impact of COVID–19. As such, the Board proposes removing the prescriptive 45-day limit and instead requiring that an FCU's written policy must establish a specific time limit that is both reasonable and applicable to all members for a member to cure their overdraft by either depositing funds or obtaining an approved loan. Consistent with U.S. GAAP, overdraft balances should generally be charged off when considered uncollectible. The Board is also proposing to add a reference to Regulation E,[7] which implements the Electronic Fund Transfer Act and governs certain overdraft services.

II. Legal Authority

The Board is issuing this proposed rule pursuant to its authority under the FCU Act.[8] The FCU Act grants the Board a broad mandate to issue regulations governing both FCUs and, more generally, all FICUs. For example, section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the Act.[9] Section 209 of the FCU Act is a plenary grant of regulatory authority to issue rules and regulations necessary or appropriate to carry out its role as share

[1] Federally insured, state-chartered credit unions (FISCU) are not subject to the overdraft policy requirements in 12 CFR 701.21(c)(3).

[2] 65 FR 15224 (Mar. 22, 2000).

[3] 12 U.S.C. 1757(17).

[4] 12 U.S.C. 1757(6).

[5] *Nations Bank of N. Carolina* v. *Variable Annuity Life Ins. Co.,* 513 U.S. 251 (1995).

[6] *See* Overdraft Practices, Office of the Comptroller of the Currency, Interpretive Letter #1082 (May 17, 2007), *available at https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2007/int1082.pdf.*

[7] 12 CFR part 1005.

[8] 12 U.S.C. 1751 *et seq.*

[9] 12 U.S.C. 1766(a).

insurer for all FICUs.[10] Other provisions of the Act confer specific rulemaking authority to address prescribed issues or circumstances.[11] Accordingly, the FCU Act grants the Board broad rulemaking authority to ensure that the credit union industry and the National Credit Union Share Insurance Fund (NCUSIF) remain safe and sound.

III. The Proposed Rule

Section 701.21(c)(3) of the NCUA's regulations provides that an FCU can advance money to a member to cover his or her account deficit without having a credit application on file if the credit union had a written overdraft policy. Specifically, § 701.21(c)(3) requires that an FCU's written overdraft policy must: (1) Set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses; (2) establish a time limit not to exceed 45 calendar days for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft; (3) limit the dollar amount of overdrafts the credit union will honor per member; and (4) establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts.

As previously noted, the Board is concerned that the requirement that an FCU's overdraft policy establish a time limit not to exceed 45 calendar days for a member to cure their overdraft is unnecessarily prescriptive during normal times, but has been and will continue to be especially detrimental as FCUs and their members face challenges imposed by COVID–19. The Board believes it is imperative that FCUs have the flexibility to work with their members to take positive and proactive actions that can manage or mitigate adverse impacts on members while maintaining safe-and-sound operations. As such, the Board proposes amending § 701.21(c)(3) to remove the prescriptive 45-day limit for curing an overdraft and replacing it with a requirement that an FCU's written overdraft policy must establish a specific time limit that is both reasonable and applicable to all members for a member to either deposit funds or obtain an approved loan from the FCU to cover each overdraft. Consistent with U. S. GAAP, overdraft balances should generally be charged off when considered uncollectible.

This change would also remedy a discrepancy between the current 45-day limit imposed on FCUs for curing an overdraft and NCUA-adopted interagency guidance on overdraft protection programs that suggests a maximum of 60 days before an overdraft is charged-off.[12] The Board emphasizes that the recommended maximum of 60 days for charging off an overdraft in the interagency guidance is a suggestion derived from general safety and soundness considerations and U.S. GAAP for generally charging off overdraft balances when they are considered uncollectible.[13] The Board expects that FCUs will exercise their good, professional judgment when working with members and determining when overdraft balances are deemed uncollectible. This professional judgment is especially important as FCUs help their members deal with the impacts of COVID–19.

The Board is also proposing to amend § 701.21(c)(3) to add a cross-reference to Regulation E. Regulation E sets forth other requirements applicable to certain overdraft services and was amended in 2009, after the adoption of § 701.21(c)(3).[14] This addition would not impose any new or additional requirements on FCUs, nor would this rule supersede, or relieve FCUs from complying with, any provisions of Regulation E.

The Board requests comment on all aspects of this proposed rule. Because of the targeted nature of the proposed amendments to this existing regulation, the Board believes that a 30-day comment period provides adequate opportunity for public participation.[15]

In addition to offering your comments on any aspect of this proposed rule, please provide your input on the following questions:

- 1. What specific difficulties or adverse outcomes you have encountered as a result of the 45-day time limit in 12 CFR 701.21 during COVID–19?
- 2. Has your credit union made any changes to its overdraft program to mitigate the impact of the pandemic on members, such as reducing or eliminating overdraft or insufficient funds fees? Please share any and all overdraft relief you are currently providing to your members.
- 3. With regard to overdraft programs in general, what additional relief do commenters feel would be appropriate for the NCUA and/or credit unions to extend to members utilizing overdraft products during COVID–19? Are there any other potential changes to the overdraft provisions in 12 CFR 701.21 that could be beneficial for credit union members?

IV. Regulatory Procedures

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden (44 U.S.C. 3507(d)). For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid OMB control number.

The proposed rule would modify the requirements of an FCU's written overdraft policy by removing the 45-day overdraft limit requirement and replacing it with a requirement that the policy establish a specific time limit that is, reasonable, applicable to all members, and consistent with U.S. GAAP. The information collection requirement of this part to retain and maintain a written overdraft policy is currently covered by OMB control number 3133–0092. The rule would not result in a change in burden, and there are no new information collection requirements associated with the rule.

B. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles.

This proposed rule would not have substantial direct effects on the states,

[10] 12 U.S.C. 1789.

[11] An example of a provision of the FCU Act that provides the Board with specific rulemaking authority is section 207 (12 U.S.C. 1787), which is a specific grant of authority over share insurance coverage, conservatorships, and liquidations.

[12] In February 2005, the NCUA, along with the Federal Reserve Board, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, published guidance on overdraft protection programs in response to concerns about aspects of the growing marketing, disclosure, and implementation of overdraft services. 70 FR 9127 (February 24, 2005) (Joint Guidance) (''[O]verdraft balances should generally be charged off when considered uncollectible, but no later than 60 days from the date first overdrawn.''), available at *https://www.ncua.gov/files/letters-credit-unions/LCU2005-03Encl.pdf.*

[13] Overdraft balances should be charged off against the allowance for loan and lease losses or allowance for credit losses, if applicable. Any payments received after the account is charged off, up to the amount charged off against the allowance should be reported as a recovery.

[14] 12 CFR part 1005.

[15] *See* NCUA Interpretive Ruling and Policy Statement (IRPS) 87–2, as amended by IRPS 03–2 and IRPS 15–1. 80 FR 57512 (Sept. 24, 2015), *available at https://www.ncua.gov/files/publications/irps/IRPS1987-2.pdf.*

on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has therefore determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

C. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA [16] or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**.[17] Specifically, the RFA requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than $100 million to be small entities.[18] The proposed rule would relieve some of the restrictiveness of a requirement applicable to all FCUs to maintain requirements in policies relating to member overdrafts. The proposed rule would not require any FCUs to change their current policies or impose new burdens. Therefore, the Board certifies that this proposed rule would not have a significant economic effect on a substantial number of small entities.

List of Subjects in 12 CFR Part 701

Credit, Credit unions, Reporting and recordkeeping requirements.

By the NCUA Board on December 17, 2020.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, the Board proposes to amend part 701 of chapter VII of title 12 of the Code of Federal Regulations to read as follows:

[16] 5 U.S.C. 553(b).

[17] 5 U.S.C. 603, 604.

[18] NCUA IRPS 15–1. 80 FR 57512 (Sept. 24, 2015).

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. Amend § 701.21 by revising paragraph (c)(3) to read as follows:

§ 701.21 Loans to Members and lines of credit to members.

* * * * *

(c) * * *

(3) *Credit applications and overdrafts.* Consistent with policies established by the board of directors, the credit committee or loan officer shall ensure that a credit application is kept on file for each borrower supporting the decision to make a loan or establish a line of credit. A credit union may advance money to a member to cover an account deficit without having a credit application from the borrower on file if the credit union has a written overdraft policy. The policy must: Set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses; establish a specific time limit that is reasonable and universally applicable for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft; limit the dollar amount of overdrafts the credit union will honor per member; and establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts. Consistent with U.S. GAAP, overdraft balances should generally be charged off when considered uncollectible. In addition, overdraft services covered by Regulation E, 12 CFR part 1005, are subject to applicable requirements set forth in that regulation.

* * * * *

[FR Doc. 2020–28280 Filed 1–14–21; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1169; Product Identifier MCAI–2020–01373–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2020–07–16, which applies to certain Dassault Aviation Model FALCON 7X airplanes. AD 2020–07–16 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2020–07–16, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

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

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

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

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

FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1169.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1169; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226; email *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1169; Product Identifier MCAI–2020–01373–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal based on those comments.

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

Confidential Business Information

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

Discussion

The FAA issued AD 2020–07–16, Amendment 39–19895 (85 FR 20405, April 13, 2020) (''AD 2020–07–16''), for certain Dassault Aviation Model FALCON 7X airplanes. AD 2020–07–16 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. AD 2020–07–16 resulted from a determination that new or more restrictive airworthiness limitations are necessary. The FAA issued AD 2020–07–16 to address reduced structural integrity and reduced control of airplanes due to the failure of system components. AD 2020–07–16 specifies that accomplishing the revision required by paragraph (g) or (i) of that AD terminates paragraph (q) of AD 2014–16–23.

Actions Since AD 2020–07–16 Was Issued

Since the FAA issued AD 2020–07–16, the FAA has determined that new or more restrictive airworthiness limitations are necessary.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0214, dated October 6, 2020 (EASA AD 2020–0214) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Dassault Aviation Model FALCON 7X airplanes.

Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after June 1, 2020 must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is proposing this AD to address reduced structural integrity and reduced control of airplanes due to the failure of system components. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0214 describes new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This AD would also require EASA AD 2019–0257, dated October 17, 2019, which the Director of the Federal Register approved for incorporation by reference as of May 18, 2020 (85 FR 20405, April 13, 2020).

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

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

Proposed AD Requirements

This proposed AD would retain the requirements of AD 2020–07–16. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2020–0214 described previously, as incorporated by reference. Any differences with EASA AD 2020–0214 are identified as exceptions in the regulatory text of this AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections) and Critical Design Configuration Control

Limitations (CDCCLs). Compliance with these actions and CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (n)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0214 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0214 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD.

Service information specified in EASA AD 2020–0214 that is required for compliance with EASA AD 2020–0214 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1169 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in the AMOCs paragraph under ''Other FAA Provisions.'' This new format includes a ''New Provisions for Alternative Actions, Intervals, and CDCCLs'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action, interval, or CDCCL.

Costs of Compliance

The FAA estimates that this proposed AD affects 122 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2020–07–16 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. In the past, the agency has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. The FAA estimates the total cost per operator for the new proposed actions to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2020–07–16, Amendment 39–19895 (85 FR 20405, April 13, 2020); and

■ b. Adding the following new airworthiness directive:

Dassault Aviation: Docket No. FAA–2020–1169; Product Identifier MCAI–2020–01373–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) action by March 1, 2021.

(b) Affected ADs

(1) This AD replaces AD 2020–07–16, Amendment 39–19895 (85 FR 20405, April 13, 2020) (AD 2020–07–16).

(2) This AD affects AD 2014–16–23, Amendment 39–17947 (79 FR 52545, September 4, 2014) (AD 2014–16–23).

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 1, 2020.

Note 1 to paragraph (c): Model FALCON 7X airplanes with modification M1000 incorporated are commonly referred to as ''Model FALCON 8X'' airplanes as a marketing designation.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity and reduced control of airplanes due to the failure of system components.

(f) Compliance

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

(g) Retained Maintenance or Inspection Program Revision, With No Changes.

This paragraph restates the requirements of paragraph (i) of AD 2020–07–16, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 1, 2019, except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0257, dated October 17, 2019 (EASA AD 2019–0257).

(h) Retained Exceptions to EASA AD 2019–0257, With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2020–07–16 with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 1, 2019:

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2019–0257 do not apply to this AD.

(2) Where paragraph (3) of EASA AD 2019–0257 specifies a compliance time of ''Within 12 months'' after its effective date to ''revise the approved AMP [Aircraft Maintenance Program],'' this AD requires ''revising the existing maintenance or inspection program, as applicable'' to incorporate the ''limitations, tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA AD 2019–0257 within 90 days after May 18, 2020 (the effective date of AD 2020–07–16).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2019–0257 is at the applicable ''associated thresholds'' specified in paragraph (3) of EASA AD 2019–0257, or within 90 days after May 18, 2020 (the effective date of AD 2020–07–16), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2019–0257 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2019–0257 does not apply to this AD.

(i) Retained Provisions for Alternative Actions, Intervals, and Critical Design Configuration Control Limitations (CDCCLs) With a New Exception

This paragraph restates the requirements of paragraph (k) of AD 2020–07–16, with a new exception. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 1, 2019, except as required by paragraph (j) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2019–0257.

(j) New Maintenance or Inspection Program Revision

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0214. Accomplishing the maintenance or inspection program revision required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2020–0214

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0214 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2020–0214 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the ''limitations, tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA AD 2020–0214 within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0214 is at the applicable ''associated thresholds'' specified in paragraph (3) of EASA AD 2020–0214, or within 90 days after the effective date of this AD, whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2019–0257 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2020–0214 does not apply to this AD.

(l) New Provisions for Alternative Actions, Intervals, and CDCCLs

After the maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs are allowed except as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2020–0214.

(m) Terminating Action for Certain Requirements in AD 2014–16–23

Accomplishing the actions required by paragraphs (g) or (j) of this AD terminates the requirements of paragraph (q) of AD 2014–16–23.

(n) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (o)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(o) Related Information

(1) For EASA AD 2020–0214, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1169.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226; email *tom.rodriguez@faa.gov.*

Issued on January 4, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–00105 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1119; Project Identifier 2019–SW–089–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Helicopters Model EC 155B and EC155B1 helicopters. This proposed AD was prompted by a report of mechanical deformation of the protective cover of the ''SHEAR'' control pushbutton on the copilot collective stick. This proposed AD would require replacement of the protective cover of the ''SHEAR'' control pushbutton on the pilot and copilot collective sticks and re-identification of the pilot and copilot collective sticks, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

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

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

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

For material that will be incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 89990 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1119.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1119; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; phone: 562–627–5353; email: *katherine.venegas@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1119; Project Identifier 2019–SW–089–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; phone: 562–627–5353; email: *katherine.venegas@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0246, dated October 1, 2019 (EASA AD 2019–0246) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus Helicopters Model EC 155B and EC155B1 helicopters.

This proposed AD was prompted by a report of mechanical deformation of the protective cover of the ''SHEAR'' control pushbutton on the copilot collective stick of an EC 225 LP helicopter from incorrect handling. The FAA has determined that Model EC

155B and EC155B1 helicopters are also affected due to an identical switch guard design. The FAA is proposing this AD to address mechanical deformation of the protective cover of the ''SHEAR'' control pushbutton on the copilot collective stick, which could lead to uncommanded shearing of the hoist cable and possible injury to hoisted person(s). See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2019–0246 describes procedures for replacement of the protective cover of the ''SHEAR'' control pushbutton on the pilot and copilot collective sticks and re-identification of the pilot and copilot collective sticks. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0246, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD and except as discussed under ''Differences Between this Proposed AD and the MCAI.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2019–0246 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0246 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2019–0246 that is required for compliance with EASA AD 2019–0246 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1119 after the FAA final rule is published.

Differences Between This Proposed AD and the MCAI

Where paragraph (1) of EASA AD 2019–0246 refers to a table for the compliance time for the modification, for this proposed AD, the compliance time for the modification is before any hoist operations after the effective date of this AD but no later than 3 months after the effective date of this AD.

Costs of Compliance

The FAA estimates that this proposed AD affects 17 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$2,446	$2,616	$44,472

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators. The FAA does not control warranty coverage for affected operators. As a result, the FAA has included all known costs in the cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator,

the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters: Docket No. FAA–2020–1119; Project Identifier 2019–SW–089–AD.

(a) Comments Due Date

The FAA must receive comments by March 1, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to all Airbus Helicopters Model EC 155B and EC155B1 helicopters, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 6700, Rotorcraft flight control.

(e) Reason

This AD was prompted by a report of mechanical deformation of the protective cover of the ''SHEAR'' control pushbutton on the copilot collective stick. The FAA is issuing this AD to address mechanical deformation of the protective cover of the ''SHEAR'' control pushbutton on the copilot collective stick, which could lead to uncommanded shearing of the hoist cable and possible injury to hoisted person(s).

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0246, dated October 1, 2019 (EASA AD 2019–0246).

(h) Exceptions to EASA AD 2019–0246

(1) Where EASA AD 2019–0246 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0246 does not apply to this AD.

(3) Where the service information referenced in EASA AD 2019–0246 specifies to use tooling, equivalent tooling may be used.

(4) Where paragraph (1) of EASA AD 2019–0246 refers to a table for the compliance time for the modification, for this AD, the compliance time for the modification is before the first hoist operation done after the effective date of this AD but no later than 3 months after the effective date of this AD.

(5) Although the service information referenced in EASA 2019–0246 specifies to discard certain parts, this AD does not include that requirement.

(i) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the helicopter can be modified (if the operator elects to do so), provided the helicopter is not used for hoist operations and no passengers are onboard.

(j) Alternative Methods of Compliance (AMOCs):

The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Manager, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: 817–222–5110; email: *9-ASW-FTW-AMOC-Requests@faa.gov.*

(k) Related Information

(1) For EASA AD 2019–0246, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 89990 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu*. You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu*. You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1119.

(2) For more information about this AD, contact Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; phone: 562–627–5353; email: *katherine.venegas@faa.gov.*

Issued on December 4, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–00325 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1167; Project Identifier AD–2020–01007–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all The Boeing Company Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40 and DC–10–40F airplanes; and Model MD–10–10F and MD–10–30F airplanes. This proposed AD was prompted by a report that an operator found a crack in the upper flange of the pylon aft bulkhead bracket. This proposed AD would require a general visual inspection of the left and right wing pylon at the aft bulkhead bracket for any lockbolt and collar; repetitive surface and open hole eddy current high frequency (ETHF) inspections of the left and right wing pylon at the aft bulkhead bracket for any cracking; and applicable on-condition actions. The FAA is proposing this AD to address the unsafe condition on these products.

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

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

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

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1167.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1167; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other

information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Manuel Hernandez, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5256; fax: 562–627–5210; email: *Manuel.F.Hernandez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1167; Project Identifier AD–2020–01007–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Manuel Hernandez, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5256; fax: 562–627–5210; email: *Manuel.F.Hernandez@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA has received a report indicating that an operator found a crack in the upper flange of the pylon aft bulkhead bracket. The crack was discovered during an open hole ETHF inspection and was not detectable with the fastener installed. Further investigation revealed that the crack growth was caused by fatigue loading. This condition, if not addressed, could result in possible cracking of the wing pylon at the aft bulkhead bracket, which could result in the inability of the pylon to sustain limit load and adversely affect the structural integrity of the airplane.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020. The service information describes procedures for a general visual inspection of the left and right wing pylon at the aft bulkhead bracket for any lockbolt and collar; repetitive surface and open hole ETHF inspections of the left and right wing pylon at the aft bulkhead bracket for any cracking; and applicable on-condition actions. On-condition actions include modifying any aft bulkhead bracket that has a lockbolt and collar, and repair or replacement of the aft bulkhead bracket.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

The FAA is proposing this AD because the agency evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishment of the actions identified in Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020, described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1167.

Explanation of Requirements Bulletin

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (AD ARC), to enhance the AD system. One enhancement is a process for annotating which steps in the service information are ''required for compliance'' (RC) with an AD. Boeing has implemented this RC concept into Boeing service bulletins.

In an effort to further improve the quality of ADs and AD-related Boeing service information, a joint process improvement initiative was worked between the FAA and Boeing. The initiative resulted in the development of a new process in which the service information more clearly identifies the actions needed to address the unsafe condition in the ''Accomplishment Instructions.'' The new process results in a Boeing Requirements Bulletin, which contains only the actions needed to address the unsafe condition (*i.e.,* only the RC actions).

Costs of Compliance

The FAA estimates that this proposed AD affects 103 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
General visual inspection	2 work-hours × $85 per hour = $170.	$0	$170	$17,510.
Surface and open hole ETHF inspections.	5 work-hours × $85 per hour = $425 per inspection cycle.	0	425 per inspection cycle	8,755 per inspection cycle.

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
1 work-hour × $85 per hour = $85 per lockbolt/collar (maximum of 8 lockbolt/collars).	$100 per lockbolt/collar	$185 per lockbolt/collar.

The FAA has received no definitive data on which to base the cost estimates for the on-condition repairs and replacements specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2020–1167; Project Identifier AD–2020–01007–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by March 1, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model airplanes specified in paragraphs (c)(1) through (5) of this AD, certificated in any category.

(1) Model DC–10–10 and DC–10–10F airplanes.

(2) Model DC–10–15 airplanes.

(3) Model DC–10–30 and DC–10–30F (KC–10A and KDC–10) airplanes.

(4) Model DC–10–40 and DC–10–40F airplanes.

(5) Model MD–10–10F and MD–10–30F airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 54, Nacelles/pylons.

(e) Unsafe Condition

This AD was prompted by a report that an operator found a crack in the upper flange of the pylon aft bulkhead bracket. The FAA is issuing this AD to address possible cracking of the wing pylon at the aft bulkhead bracket, which could result in the inability of the pylon to sustain limit load and adversely affect the structural integrity of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin DC10–54A111, dated June 26, 2020, which is referred to in Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020, uses the phrase ''the original issue date of Requirements Bulletin DC10–54A111 RB,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin DC10–54A111 RB, dated June 26, 2020, specifies contacting Boeing for repair, modification, or replacement instructions: This AD requires doing the repair, modification, or replacement using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the

certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Manuel Hernandez, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5256; fax: 562–627–5210; email: *Manuel.F.Hernandez@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on December 18, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–29227 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1082; Airspace Docket No. 20–ASW–10]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Wharton, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Wharton Regional Airport, Wharton, TX. The FAA is proposing this action as the result of an airspace review caused by the decommissioning of the Wharton non-directional beacon (NDB). The name and geographical coordinates of the airport would also be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before March 1, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2020–1082/Airspace Docket No. 20–ASW–10, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Wharton Regional Airport, Wharton, TX, to support instrument flight rule operations at this airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–1082/Airspace Docket No. 20–ASW–10.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas,

air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by amending the Class E airspace extending upward from 700 feet above the surface at Wharton Regional Airport, Wharton, TX, by removing the Wharton RBN and associated extensions from the airspace legal description; removing the exclusionary language from the airspace legal description as it is no longer required; and updating the name (previously Wharton Municipal Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is the result of airspace reviews caused by the decommissioning of the Wharton NDB which provided navigation information for the instrument procedures this airport.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Wharton, TX [Amended]

Wharton Regional Airport, TX
(Lat. 29°15′15″ N, long. 96°09′16″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Wharton Regional Airport.

Issued in Fort Worth, Texas, on January 4, 2021.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2021–00021 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1155; Airspace Docket No. 20–ASO–28]

RIN 2120–AA66

Proposed Amendment of Area Navigation (RNAV) Route Q–34; Northeastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Area Navigation (RNAV) route Q–34 in the northeastern United States in support of the Northeast Corridor Atlantic Coast Route Project (NEC ACR) for improve efficiency of the National Airspace System (NAS) while reducing the dependency on ground based navigational systems.

DATES: Comments must be received on or before March 1, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–1155; Airspace Docket No. 20–ASO–28 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC, 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Sean Hook, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would

expand the availability of RNAV routes in the NAS, increase airspace capacity, and reduce complexity in high air traffic volume areas.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2020–1155 and Airspace Docket No. 20–ASO–28) and be submitted in triplicate to the Docket Management Facility (see ''**ADDRESSES**'' section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–1155 and Airspace Docket No. 20–ASO–28.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see ''**ADDRESSES**'' section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA, 30337.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020 and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The Northeast Corridor Atlantic Coast Route (NEC ACR) project developed Performance Based Navigation (PBN) routes involving the Washington, Boston, New York, and Jacksonville Air Route Traffic Control Centers (ARTCC). The proposed route would enable aircraft to travel from most locations along the east coast of the United States mainland between Maine and Charleston, SC. The proposed NEC ACR route would also tie-in to the existing high altitude RNAV route structure enabling more efficient direct routings between the U.S. east coast and Caribbean area locations.

Additionally, the proposed Q-route would support the strategy to transition the NAS from a ground-based navigation aid, and radar-based system, to a satellite-based PBN system.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to amend RNAV route Q–34, in the northeastern United States to support the Northeast Corridor Atlantic Coast Route Project.

Q–34: Q–34 currently extends between the Texarkana, AR (TXK), VORTAC to the SWAPP, TN, Fix. The FAA is proposing to extend Q–34 to the northeast from the SWAPP, TN, Fix to the Robbinsville, NJ (RBV), VORTAC. The portion from the Gordonsville, VA (GVE), VORTAC to the Robbinsville, NJ (RBV), VORTAC would replace the proposed route of Q–115 in Airspace Docket No. 18–AEA–16 (85 FR 16572; March 24, 2020). Note, 18–AEA–16 proposed multiple routes but never published a final rule ultimately implementing them. Since the Q–34 effectively can cover the same geographic area, the decision was made to extend Q–34, saving an additional Q-route identifier for future use since there is limited quantity. Additionally, the LOOSE, AR, WP is added after the Texarkana, AR (TXK), VORTAC and the MEMFS, TN, WP is added in lieu of the Memphis, TN, VORTAC. Finally, the following points are added to the route from the SWAPP, TN, Fix to the Robbinsville, NJ (RBV), VORTAC: GHATS, KY, Fix; FOUNT, KY, Fix; TONIO, KY, Fix; KONGO, KY, Fix; NEALS, WV, Fix; SITTR, WV, WP; ASBUR, WV, Fix; DENNY, VA, Fix; MAULS, VA, WP; Gordonsville, VA (GVE); BOOYA, VA, WP; DUALY, MD, WP; BIGRG, MD, WP; PNGWN, NJ, WP; HULKK, NJ, WP.

United States area navigation routes are published in paragraph 2006 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The area navigation routes listed in this document would be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration

proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020 and effective September 15, 2020, is amended as follows:

Paragraph 2006 United States Area Navigation Routes.

* * * * *

Q–34 Texarkana, AR (TXK) to Robbinsville, NJ (RBV) [Amend]

Texarkana, AR (TXK)	VORTAC	(Lat. 33°30′49.97″ N, long. 094°04′23.67″ W)
LOOSE, AR	WP	(Lat. 33°53′ 46.88″ N, long. 093°05′ 08.38″ W)
MATIE, AR	FIX	(Lat. 34°05′ 41.96″ N, long. 092°33′ 02.35″ W)
MEMFS, TN	WP	(Lat. 35°00′ 54.62″ N, long. 089°58′ 58.87″ W)
SWAPP, TN	FIX	(Lat. 36°36′ 49.78″ N, long. 085°10′ 56.04″ W)
GHATS, KY	FIX	(Lat. 36°48′ 06.75″ N, long. 084°34′ 02.44″ W)
FOUNT, KY	FIX	(Lat. 36°57′ 24.34″ N, long. 084°03′ 01.92″ W)
TONIO, KY	FIX	(Lat. 37°15′ 15.20″ N, long. 083°01′ 47.53″ W)
KONGO, KY	FIX	(Lat. 37°30′ 19.46″ N, long. 082°08′ 12.56″ W)
NEALS, WV	FIX	(Lat. 37°35′ 45.99″ N, long. 081°48′ 24.62″ W)
SITTR, WV	WP	(Lat. 37°46′ 49.13″ N, long. 081°07′ 23.70″ W)
ASBUR, WV	FIX	(Lat. 37°49′ 24.41″ N, long. 080°27′ 51.44″ W)
DENNY, VA	FIX	(Lat. 37°52′ 00.15″ N, long. 079°44′ 13.75″ W)
MAULS, VA	WP	(Lat. 37°52′ 49.36″ N, long. 079°19′ 49.19″ W)
Gordonsville, VA	(GVE) VORTAC	(Lat. 38°00′ 48.96″ N, long. 078°09′ 10.90″ W)
BOOYA, VA	WP	(Lat. 38°24′ 20.50″ N, long. 077°21′ 46.36″ W)
DUALY, MD	WP	(Lat. 38°45′ 53.59″ N, long. 076°50′ 33.76″ W)
BIGRG, MD	WP	(Lat. 39°15′ 13.92″ N, long. 076°07′ 13.77″ W)
PNGWN, NJ	WP	(Lat. 39°39′ 27.07″ N, long. 075°30′ 41.79″ W)
HULKK, NJ	WP	(Lat. 39°59′ 53.04″ N, long. 074°58′ 52.52″ W)
Robbinsville, NJ (RBV)	VORTAC	(Lat. 40°12′ 08.65″ N, long. 074°29′ 42.09″ W)

* * * * *

Issued in Washington, DC, on January 5, 2021.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–00146 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1126; Airspace Docket No. 19–ANM–10]

RIN 2120–AA66

Proposed Amendment of Class E airspace; Great Falls, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace, designated as an extension to a Class D or Class E surface area, at Great Falls International Airport. This action also proposes to modify the Class E airspace extending upward from 700 feet above the surface. Additionally, this action proposes to modify the Class E airspace extending upward from 1,200 feet above the surface. This action also proposes to remove the Great Falls VORTAC from the Class E4 and Class E5 text headers and airspace descriptions. Further, this action proposes to remove Malmstrom AFB from the Class E5 text header and airspace description. Lastly, this action proposes several administrative corrections to the airspaces' legal descriptions. This action would ensure the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before March 1, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–1126; Airspace Docket No. 19–ANM–10, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use

of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend the Class E airspace at Great Falls International Airport, Great Falls, MT, to support IFR operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–1126; Airspace Docket No. 19–ANM–10''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations Part 71 by modifying the Class E airspace, designated as an extension to a Class D or Class E surface area, at Great Falls International Airport. This action proposes to reduce the size of the area to properly contain IFR aircraft descending below 1,000 feet above the surface. This area would be described as follows: That airspace extending upward from the surface within 1 mile each side of the 224° bearing from the airport, extending from the 5.5-mile radius to 9.6 miles southwest of Great Falls International Airport.

This action also proposes to modify the Class E airspace extending upward from 700 feet above the surface. This action proposes to significantly reduce the size of this area to properly contain IFR departures to 1,200 feet above the surface and IFR arrivals descending below 1,500 feet above the surface. This area would be described as follows: That airspace extending upward from 700 feet above the surface within a 7-mile radius of the airport, and within 3.4 miles each side of the 047° bearing from the airport, extending from the 7-mile radius to 12 miles northeast of the airport, and within 8 miles south and 4 miles north of the 222° from the airport, extending from 2.6 miles southwest of the airport to 18.7 miles southwest of Great Falls International Airport.

Additionally, this action proposes to modify the Class E airspace extending upward from 1,200 feet above the surface. This action would also reduce the size of this area to properly contain IFR aircraft transitioning to/from the terminal and en route environments. This area would be described as follows: That airspace extending upward from 1,200 feet above the surface within a 48-mile radius of Great Falls International Airport.

This action also proposes to remove the Great Falls VORTAC from the Class E4 and Class E5 text headers and airspace descriptions. The Navigational Aid (NAVAID) is not needed to describe the airspace areas. Removal of the NAVAID allows the airspace to be described from a single point, which simplifies the airspaces' descriptions.

Further, this action proposes to remove Malmstrom AFB from the Class E5 text header and airspace description. Reference to Malmstrom AFB is not needed to describe the airspace area. Removal of Malmstrom AFB allows the airspace to be described from a single point, which simplifies the airspace's description.

Lastly, this action proposes several administrative amendments to the airspaces' legal descriptions. The first line of the Class D and Class E4 text headers is not correct. The first line of text should not include the airport name, ''International Airport'' should be removed from this line of text. The airport's geographic coordinates in the Class D, Class E4, and Class E5 text header are incorrect. To match the FAA database, the geographic coordinates should be updated to lat. 47°28′56″ N, long. 111°22′13″ W.

Class D, E4, and E5 airspace designations are published in paragraphs 5000, 6004, and 6005, respectively, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations listed in this document will be published subsequently in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial, and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 5000 Class D Airspace

* * * * *

ANM MT D Great Falls, MT [Amended]

Great Falls International Airport, MT
(Lat. 47°28′56″ N, long. 111°22′13″ W)

That airspace extending upward from the surface to and including 6,200 feet MSL within a 5.5-mile radius of Great Falls International Airport.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area

* * * * *

ANM MT E4 Great Falls, MT [Amended]

Great Falls International Airport, MT
(Lat. 47°28′56″ N, long. 111°22′13″ W)

That airspace extending upward from the surface within 1 mile each side of the 224° bearing from the airport, extending from the 5.5-mile radius to 9.6 miles southwest of Great Falls International Airport.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANM MT E5 Great Falls, MT [Amended]

Great Falls International Airport, MT
(Lat. 47°28′56″ N, long. 111°22′13″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of the airport, and within 3.4 miles each side of the 047°bearing from the airport, extending from the 7-mile radius to 12 miles northeast of the airport, and within 8 miles south and 4 miles north of the 222° from the airport, extending from 2.6 miles southwest of the airport to 18.7 miles southwest of the airport; and that airspace extending upward from 1,200 feet above the surface within a 48-mile radius of Great Falls International Airport.

Issued in Seattle, Washington, on December 31, 2020.

B.G. Chew,

Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2020–29319 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1164; Airspace Docket No. 20–ANE–8]

RIN 2120–AA66

Proposed Establishment of Class E Airspace; Newburyport, MA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace extending upward from 700 feet above the surface for Anna Jaques Hospital Heliport, Newburyport, MA, to accommodate new area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures (SIAPs) serving this heliport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Comments must be received on or before March 1, 2021.

ADDRESSES: Send comments on this proposal to: The U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Telephone: (800) 647–5527, or (202) 366–9826. You must identify the Docket No. FAA–2020–1164; Airspace Docket No. 20–ANE–8, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11E Airspace Designations and Reporting Points, and subsequent amendments can be viewed on-line at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; Telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would establish Class E airspace in Newburyport, MA, to support IFR operations in the area.

Comments Invited

Interested persons are invited to comment on this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (Docket No. FAA–2020–1164 and Airspace Docket No. 20–ANE–8) and be submitted in triplicate to DOT Docket Operations (see ''**ADDRESSES**'' section for the address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments

on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–1164; Airspace Docket No. 20–ANE–8.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace extending upward from 700 feet above the surface at Anna Jaques Hospital Heliport, Newburyport, MA, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures for IFR operations at Anna Jaques Hospital Heliport.

Class E airspace designations are published in Paragraph 6005, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANE MA E5 Newburyport, MA [New]

Anna Jaques Hospital Heliport, MA
(Lat. 42°48′49.82″ N, long. 70°53′29.56″ W)

That airspace extending upward from 700 feet above the surface of the earth within a 6-mile radius of Anna Jaques Hospital Heliport.

Issued in College Park, Georgia, on January 4, 2021.

Matthew N. Cathcart,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2021–00106 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1186; Airspace Docket No. 20–AGL–42]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Fosston and Little Falls, Minnesota

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Fosston Municipal Airport-Anderson Field, Fosston, MN, and Little Falls/Morrison County Airport-Lindbergh Field, Little Falls, MN. The FAA is proposing this action as the result of airspace reviews caused by the decommissioning of the Fosston and Little Falls non-federal non-directional beacons (NDBs). The names and geographic coordinates of the airports would also be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before March 1, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2020–1186/Airspace Docket No. 20–AGL–42, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Fosston Municipal Airport-Anderson Field, Fosston, MN, and Little Falls/Morrison County Airport-Lindbergh Field, Little Falls, MN, to support instrument flight rule operations at these airports.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–1186/Airspace Docket No. 20–AGL–42.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the ''**ADDRESSES**'' section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by:

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.3-mile (decreased from a 7-mile) radius of Fosston Municipal Airport-Anderson Field, Fosston, MN; adding an extension 1 mile each side of the 341° bearing from the airport extending from the 6.3-mile radius to 6.5 miles north of the airport; and updating the name (previously Fosston Municipal Airport) of the airport to coincide with the FAA's aeronautical database;

And amending the Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile (decreased from a 7-mile) radius of Little Falls/Morrison County Airport-Lindbergh Field, Little Falls, MN; and updating the name (previously Little Falls-Morrison County Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is the result of airspace reviews caused by the decommissioning of the Fosston and Little Falls non-federal NDBs which provided navigation information for the instrument procedures at these airports.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally

current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AGL MN E5 Fosston, MN [Amended]

Fosston Municipal Airport-Anderson Field, MN
(Lat. 47°35′34″ N, long. 95°46′25″ W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Fosston Municipal Airport-Anderson Field, and within 1 mile each side of the 341° bearing from the airport extending from the 6.3-mile radius to 6.5 miles north of the airport.

* * * * *

AGL MN E5 Little Falls, MN [Amended]

Little Falls/Morrison County Airport-Lindbergh Field, MN
(Lat. 45°56′58″ N, long. 94°20′49″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Little Falls/Morrison County Airport-Lindbergh Field.

Issued in Fort Worth, Texas, on January 4, 2021.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2021–00019 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1187; Airspace Docket No. 20–ANE–9]

RIN 2120–AA66

Proposed Establishment of Class E Airspace; Wareham, MA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace extending upward from 700 feet above the surface for Tobey Hospital Heliport, Wareham, MA, to accommodate new area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures (SIAPs) serving this heliport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Comments must be received on or before March 1, 2021.

ADDRESSES: Send comments on this proposal to: the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Telephone: (800) 647–5527, or (202) 366–9826. You must identify the Docket No. FAA–2020–1187; Airspace Docket No. 20–ANE–9, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11E Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; Telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov,* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would establish Class E airspace at the Tobey Hospital Heliport in Wareham, MA, to support IFR operations in the area.

Comments Invited

Interested persons are invited to comment on this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (Docket No. FAA–2020–1187 and Airspace Docket No. 20–ANE–9) and be submitted in triplicate to DOT Docket Operations (see ''**ADDRESSES**'' section for the address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–1187; Airspace Docket No. 20–ANE–9.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace extending upward from 700 feet above the surface at Tobey Hospital Heliport, Wareham, MA, providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures for IFR operations at Tobey Hospital Heliport.

Class E airspace designations are published in Paragraph 6005, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'', prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANE MA E5 Wareham, MA [New]

Tobey Hospital Heliport, MA
(Lat. 41°58′49.18.14″ N, long. 70°42′52.10″ W)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of Tobey Hospital Heliport.

Issued in College Park, Georgia, on January 7, 2021.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2021–00444 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010, 1020, and 1022

RIN 1506–AB47

Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: On December 23, 2020, FinCEN published a notice of proposed rulemaking proposing requirements for banks and money services businesses (''MSBs'') related to certain transactions involving convertible virtual currency (''CVC'') or digital assets with legal tender status (''legal tender digital assets'' or ''LTDA''). As set forth below, FinCEN is identifying additional statutory authority for the proposed rule under the Anti-Money Laundering Act of 2020, providing additional information regarding the reporting form, and reopening the comment period for the proposal. Specifically, FinCEN is providing an additional 15 days for comments on the proposed reporting requirements regarding

information on CVC or LTDA transactions greater than $10,000, or aggregating to greater than $10,000, that involve unhosted wallets or wallets hosted in a jurisdiction identified by FinCEN. FinCEN is providing an additional 45 days for comments on the proposed requirements that banks and MSBs report certain information regarding counterparties to transactions by their hosted wallet customers, and on the proposed recordkeeping requirements.

DATES: The comment period for the proposed rule published on December 23, 2020 (85 FR 83840) is reopened for 15 days for comments on the proposed reporting requirements and for 45 days for comments on the proposed requirement to report counterparty information and the proposed recordkeeping requirements. Written comments are now therefore due with respect to the proposed reporting requirements (except with respect to reporting of counterparty information) on February 1, 2021, and with respect to all other aspects of the proposed rule on March 1, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2020–0020 and the specific RIN number 1506–AB47 to which the comment applies.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2020–0020 and the specific RIN number.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION: On December 18, 2020, FinCEN filed with the **Federal Register** a notice of proposed rulemaking (the ''December Notice''). The December Notice was published in the **Federal Register** on December 23, 2020.[1] In the December Notice, FinCEN proposed to address the threat of illicit finance with respect to certain transactions involving CVC or LTDA by (i) establishing new reporting requirements for certain CVC or LTDA transactions analogous to existing currency transaction reports, and (ii) establishing new recordkeeping requirements for certain CVC or LTDA transactions that is similar to the recordkeeping and travel rule regulations pertaining to funds transfers and transmittals of funds. The original comment period formally closed on January 7, 2021, although FinCEN took steps to ensure comments could still be received after that date.[2]

On January 1, 2021, the Anti-Money Laundering Act of 2020 (Division F of Pub. L. 116–283) (''AML Act of 2020'') became law. The AML Act of 2020 amended 31 U.S.C. 5312(a)(3), the definition of ''monetary instruments'' in the Bank Secrecy Act (''BSA''), on which Treasury proposed to rely to determine that CVC and LTDA are monetary instruments. As amended by the AML Act of 2020, the BSA now defines the term monetary instruments as United States coins and currency; as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; as the Secretary of the Treasury shall provide by regulation for purposes of sections 5316 and 5331, checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form; and, as the Secretary shall provide by regulation, value that substitutes for any monetary instrument described in the other categories.[3]

In the December Notice, FinCEN proposed prescribing by regulation that CVC and LTDA are monetary instruments because they constitute ''similar material'' to instruments described in 31 U.S.C. 5312(a)(3)(B) (''coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, [and] stock on which title is passed on delivery. . . .''). As the December Notice explained, CVC and LTDA are ''similar material'' to ''coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, [and] stock on which title is passed on delivery. . . .'' FinCEN now intends to prescribe by regulation that CVC and LTDA are ''monetary instruments'' pursuant to paragraph (D) of 31 U.S.C. 5312(a)(3), as amended. Specifically, pursuant to 31 U.S.C. 5312(a)(3)(D), CVC and LTDA are both value that substitute for currency and are therefore ''monetary instruments'' under the BSA.

As FinCEN specified in the December Notice, the determination at 31 CFR 1010.316(a) is *not* intended to affect the regulatory definition of ''monetary instruments'' at 31 CFR 1010.100(dd), or the use of that regulatory definition elsewhere in FinCEN's regulations, including in relation to the currency transaction reporting requirements at 31 CFR 1010.311 and the transportation of currency or monetary instruments reporting requirements at 31 CFR 1010.340.[4]

The AML Act of 2020 also amended 31 U.S.C. 5318(a)(2), granting the Secretary additional authority to implement reporting requirements. Specifically, the Secretary may require a class of domestic financial institutions to ''maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to ensure compliance with [subchapter 53 of title 31 of the U.S. Code] and regulations prescribed under [such] subchapter or to guard against money laundering, the financing of terrorism, or other forms of illicit finance.'' Thus, in addition to the authority cited in the December Notice, the proposed rule relies on authority under 31 U.S.C. 5318(a)(2) to extend transaction reporting requirements to CVC/LTDA transactions.[5]

Reports required by the proposed rule would be submitted on a Value Transaction Report form similar to the existing FinCEN Currency Transaction Report (''CTR'') Form 112. The form would be submitted through the existing BSA E-filing system and would be able to be batch reported.[6] Filers would be able submit information commonly associated with CVC and LTDA transactions, such as:

[1] Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 FR 83840 (Dec. 23, 2020).

[2] Members of the public have continued to be able to, and have in fact continued to, submit comments since January 7, 2021. FinCEN will continue to review comments submitted after the filing of the original notice of proposed rulemaking, including comments received between January 7, 2021 and January 15, 2021.

[3] 31 U.S.C. 5312(a)(3), as amended by section 6102(d) of the AML Act of 2020, which added paragraph (D).

[4] Nor is this regulatory determination intended to have any impact on the definition of ''currency'' in 31 CFR 1010.100(m). Furthermore, nothing in the proposal is intended to constitute a determination that any CVC or LTDA that is within the regulatory definition of ''monetary instruments'' prescribed pursuant to 31 U.S.C. 5312(a)(3) is currency for the purposes of the federal securities laws, 15 U.S.C. 78c(47), or the federal derivatives laws, 7 U.S.C. 1–26, and the regulations promulgated thereunder. Finally, this determination is intended to have no impact on the taxability of CVC or LTDA.

[5] 31 U.S.C. 5318(a)(2), as amended by section 6101(b) of the AML Act of 2020.

[6] The user guide for the existing CTR form is available at: *https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENCTR.pdf.*

(a) The CVC or LTDA type used in the transaction;

(b) The transaction amount;

(c) The assessed transaction value (in U.S. dollars);

(d) The date and time of the transaction;

(e) The transaction hash;

(f) CVC or LTDA addresses involved in the transaction, and if they are hosted or unhosted;

(g) The name and physical address of each counterparty to the transaction of the financial institution's customer; and

(h) Other information readily available to the bank or MSB, which aids in identifying the specific reported transaction(s), the means by which it was conducted, and the parties involved.

A final rule implementing these proposed reporting requirements would be effective 30 days after its publication, except that the requirement to report counterparty information (if adopted) would not take effect for 60 days given the additional complexity it may present.

FinCEN also continues to invite comment on the portion of the December Notice related to proposed independent recordkeeping obligations for transactions greater than $3,000. Any final rule implementing the recordkeeping requirements would be effective 60 days after its publication.

Comments on the December Notice: FinCEN reviewed and considered 7,506 comments submitted in response to the December Notice prior to January 8, 2021. Commenters included financial institutions and companies that provide services related to CVC or LTDA, academics, trade organizations, cryptocurrency development groups, non-profit organizations, customers and employees of companies that provide services related to CVC or LTDA, and cryptocurrency owners and other individuals (both domestic and foreign), as well as anonymous sources. Commenters addressed a range of considerations, including implications for technological development and other forms of innovation, the economics of the digital asset industry, U.S. economic competitiveness, compliance matters, data security and privacy, utility to law enforcement, and procedural aspects of the December Notice (including the length of the comment period).

Determination to Reopen the Public Comment Period: FinCEN appreciates the substantial response from commenters during the original comment period, and FinCEN welcomes further comment in the reopened comment periods. With respect to the additional 15 days for comments on the proposed reporting requirements, FinCEN notes that these proposed requirements are essentially equivalent to the existing CTR reporting requirements that apply to transactions in currency. The proposed rule is a vital loophole-closing measure to prevent illicit transactions using CVC and LTDA, including the financing of terrorism, in light of the fact that such transactions would otherwise be subject to familiar and long-established reporting requirements if they were in cash. The proposal is also consistent with Congress's recent expansion of the definition of ''monetary instrument'' in the BSA, which reflects the expectation that FinCEN would bring CVC and LTDA within monetary instrument reporting requirements. FinCEN notes that a large number of commenters agreed it is fully appropriate for FinCEN to finalize a rule providing similar regulatory treatment to similar activity. FinCEN welcomes comments during this reopened comment period on FinCEN's application of new statutory authority pursuant to the BSA amendments made by the AML Act of 2020. In addition, several commenters noted the need for additional information on the nature of the reports required by the proposal in order to provide an assessment of potential costs and benefits of the proposed rule. As indicated in the supplementary information, FinCEN intends to use a form similar to the existing CTR form and requests further comment in light of this additional information.

With respect to the additional 45 days for comments on the proposed recordkeeping requirements and the proposed requirement to report counterparty information, FinCEN is providing a longer period in light of the somewhat greater complexity of those aspects of the proposed rule and various issues identified in comments received during the original comment period.

Kenneth A. Blanco,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2021–01016 Filed 1–14–21; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 96

46 CFR Parts 71, 115, and 176

[Docket No. USCG–2020–0123]

RIN 1625–AC65

Safety Management Systems for Domestic Passenger Vessels

AGENCY: Coast Guard, DHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Coast Guard is evaluating the potential use of Safety Management Systems (SMSs) to improve safety and reduce marine casualties on board U.S.-flagged passenger vessels. In this document, the Coast Guard is seeking public input and responses to specific questions on the feasibility, applicability, and nature of SMSs for potential use on U.S.-flagged passenger vessels. The Coast Guard may use this information to develop a proposed rule regarding SMSs; if so, notification of that proposed rule would appear in the **Federal Register** under this docket number.

DATES: Comments and related material must be received by the Coast Guard on or before April 15, 2021.

ADDRESSES: You may submit comments identified by docket number USCG–2020–0123 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Lieutenant Kimberly Gates, Vessel and Facility Operating Standards Division (CG–OES–2), U.S. Coast Guard, 2703 Martin Luther King Jr. Avenue SE, Washington, DC 20593; telephone 202–372–1455, email *kimberly.m.gates@uscg.mil.*

SUPPLEMENTARY INFORMATION:

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I. Public Participation and Request for Comments

The Coast Guard views public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this advance notice of proposed rulemaking (ANPRM) for alternate instructions. Public comments are available in our online docket at *https://www.regulations.gov,* and can be viewed by following that website's instructions. Additionally, if you visit the online docket and sign up for email alerts, you will be notified when comments or additional documents are posted. The Coast Guard will not issue a separate response to the comments received, but will carefully consider each comment and will address them in a proposed rule if one is developed.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see the Department of Homeland Security's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

We do not plan to hold a public meeting, but we will consider doing so if we determine that a meeting would be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

II. Abbreviations

ANPRM Advance Notice of Proposed Rulemaking
CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
IMO International Maritime Organization
ISM International Safety Management Code
PVA Passenger Vessel Association
SMS Safety Management System
§ Section
U.S.C. United States Code

III. Background

Overview of Safety Management Systems (SMSs)

An SMS is a structured and documented set of procedures enabling company and vessel personnel to effectively implement safety and environmental protection policies that are specific to that company or vessel. An SMS may include, among other things, procedures and policies for vessel operations, maintenance of equipment, responding to specific types of incidents, for reporting accidents or other non-conformities, and for conducting internal audits and reviews. This tool, if properly used, can reduce human factor error and subsequent harm to people, property, and the environment. Developing an SMS from inception reduces hazards and incidents through the creation of a safety culture which prevents accidents and protects the safety and health of employees. A fully functional SMS is continuously updated and evolving based on observations of current work practices and recognizing the need for changes or additional protections. In this way, an organization can improve its safety culture and performance.[1]

An SMS is designed to provide a strong safety management program and an effective means to manage complex or unique operations, monitor equipment maintenance, and mitigate hazards to prevent costly harm to people, the environment, and property. Furthermore, standardized operational procedures greatly assist vessel crews in performing both routine and non-routine tasks. Lastly, an SMS that is properly implemented promotes a continuously improving safety culture. Using an SMS approach recognizes that operators are in the best position to identify risks associated with company specific operations before casualties happen. Effective use of an SMS can avoid the necessity of additional regulation (or in some cases, may possibly eliminate the need for certain existing regulations) by encouraging operators to identify and mitigate risks specific to their own operations. The Coast Guard invites comment identifying existing regulations that may no longer be needed as a result of adoption of an effective SMS.

For nearly two decades, the National Transportation Safety Board (NTSB) has identified issues associated with failed safety management and oversight as the probable cause or a contributing factor in some of the most serious casualties involving U.S. passenger vessels, such as the deadly allision of passenger ferry with a pier in 2003,[2] and fires on board small passenger vessels in 2000[3] and 2018.[4] This led to their issuing several formal safety recommendations seeking the required use of SMSs on U.S. passenger vessels, and highlighting the continued problems stemming from poor safety management.

There are approximately 6,500 active and inspected passenger vessels in the U.S-flag fleet.[5] Of these, 530 are already required by domestic law to have SMSs, in accordance with International Maritime Organization (IMO) treaty obligations, because they transport more than 12 passengers on foreign voyages (see below). The Coast Guard tracks accidents and incidents through the Marine Information for Safety and Law Enforcement (MISLE) database.[6] From 2017 to 2019, there were a total of 6 vessel-related fatal accidents on passenger vessels, resulting in 55 deaths. Of these, 34 were deaths by asphyxiation associated with a fire aboard the dive boat MV *Conception.* Five of the six fatal incidents, and 54 of the 55 deaths, involved vessels without

[1] For more on safety management systems, see the Proceedings of the Marine Safety & Security Council; Spring 2016 magazine devoted to that topic, available at *https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2016/Vol73_No1_Spring2016.pdf?ver=2017-05-31-120938-307* and in the docket.

[2] On October 15, 2003, the Staten Island Ferry Andrew J. Barberi allided at full speed with a maintenance pier at the St. George's ferry terminal. Eleven passengers died and 70 were injured. Property damage was in excess of $8 million dollars. See NTSB Recommendation M05–06.

[3] On November 17, 2000, the U.S. small passenger vessel Port Imperial Manhattan was in route to Weehawken, New Jersey from the borough of Manhattan when a fire broke out in the engine room. There were no deaths; however, one passenger was treated for smoke inhalation. Property damage was estimated at $1.2 million dollars. See NTSB SMS Recommendation M02–05.

[4] On January 14, 2018, the U.S. small passenger vessel Island Lady was in route from Port Richey, Florida to a casino boat located about 9 miles offshore with 53 people on board when a fire broke out involving its exhaust system. The master intentionally beached the vessel near shore to evacuate the passengers. All persons escaped by entering the water and wading or crawling ashore. Fifteen people were injured and transported to local hospitals. One passenger died in the hospital several hours after the fire. The Island Lady, valued at $450,000, was declared a total constructive loss. See NTSB SMS Recommendations M02–05 and M–12–03.

[5] *See* USCG–PVA Quality Partnership Annual Report 2017–2019, available in the docket and also online at *https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Office-of-Investigations-Casualty-Analysis/Marine-Casualty-Reports/* (last visited Jan. 11, 2021).

[6] Certain vessel information, including limited casualty information, is available at *https://cgmix.uscg.mil/.*

an SMS in place. In three of the six incidents, the NTSB recommendations made in response to the incident called for SMS. The Coast Guard seeks comment on the number and type of accidents and fatalities that might be prevented by requiring SMSs on some subset of passenger vessels.

The Coast Guard believes that SMSs may encourage the spread of relevant safety information, preventing information about vessel safety from being compartmentalized (or ''siloed'') on one vessel or in one operational division of a vessel or company. The Coast Guard seeks comment on the correct approach to prevent information from being siloed within a company. We seek comment on whether it would be more beneficial to develop an SMS that covers an operator's entire fleet of passenger vessels with similar characteristics, as opposed to developing an SMS for each individual vessel.

To fully assess the benefits of an SMS, we seek public feedback on how much siloing or sharing of information occurs on a typical vessel operated by a large business and one operated by a small business. Additionally, we seek comment on whether an SMS typically imposes disproportionate costs on small businesses. We also seek comment on the scope of applicability appropriate for an SMS requirement, including such factors as vessel size and type of operation. And, we are interested in the public's input as to how an operator with a multi-vessel fleet would implement SMS across their organization.

Legal Requirements for SMS

The IMO developed the International Safety Management (ISM) Code and adopted it as part of the International Convention for the Safety of Life at Sea, making compliance with the ISM Code mandatory for certain oceangoing ships. The ISM Code was adopted in 1993 by resolution A.741(18) and entered into force July 1, 1998, and has been amended several times. In 1996, Congress enacted the requirements found in Title 46 of the United States Code (U.S.C.), Chapter 32, directing the Coast Guard to prescribe for certain vessels (including vessels transporting more than 12 passengers on foreign voyages) SMS regulations that were consistent with the ISM Code.[7] The Coast Guard issued those regulations in 1997, creating Title 33 of the Code of Federal Regulations (CFR) part 96.[8] The requirements of part 96 are discussed in the next section.

In 2010, Congress amended 46 U.S.C. Chapter 32 by expanding the applicability to include a passenger vessel or small passenger vessel transporting more passengers than a number prescribed by the Secretary based on the number of individuals on the vessel that could be killed or injured in a marine casualty.[9] In this ANPRM, the Coast Guard is seeking information to help us specify a number consistent with 46 U.S.C. 3202.

Existing Requirements for Passenger Vessels in 33 CFR Part 96

Under 33 CFR part 96, as it is currently written and enforced, a vessel must implement an SMS if carrying 12 or more passengers on an international voyage.[10] SMS audits must be conducted as required by 33 CFR 96.320, which includes a requirement that it be consistent with IMO Resolution A.788(19), ''Guidelines on Implementation of the International Safety Management (ISM) Code by Administrations.'' [11] In cases of major non-conformities, the flag state administration (the Coast Guard, for the United States) may require a satisfactory safety management audit by either the Coast Guard or an independent third-party organization.[12] Third-party organizations, such as class societies, authorized by the Coast Guard may issue the Safety Management Certificate onboard the vessel, which certifies that the vessel has implemented a functioning SMS that meets the requirements of 33 CFR part 96.[13] Additionally, some Passenger Vessel Association (PVA) members have voluntarily implemented the Coast Guard-recognized Flagship SMS,[14] developed by the PVA.

IV. Advance Notice of Proposed Rulemaking Discussion

The 2010 amendments to 46 U.S.C. 3202 limit the scope of regulations to passenger vessels that are ''transporting more passengers than a number prescribed by the Secretary based on the number of individuals on the vessel that could be killed or injured in a marine casualty.'' Further, in prescribing implementing regulations, the Secretary must consider ''(1) the characteristics, methods of operation, nature of the service of these vessels; and, (2) with respect to ferries, the sizes of the ferry systems within which the vessels operate.'' [15] The Secretary has delegated to the Coast Guard the authority to develop and issue these regulations.[16]

The Coast Guard is seeking public comment regarding which operations and types of passenger vessels would benefit from an SMS and why. We anticipate that regulations developed to implement the 2010 amendments would affect some or all domestically-operated vessels inspected under 46 CFR Chapter I subchapters H, K, and T.[17] These passenger vessels are already required to implement an SMS when carrying more than 12 passengers on international voyages.[18] We are considering whether a potential new rule should be limited based on: (1) Presence of overnight accommodations; (2) operational risk factors such as number of passengers, type of service, or size of ferry system; (3) age of vessel; and (4) vessel design, including hull material. We believe that a limited scope would address the intent of the SMS-related recommendations from numerous National Transportation Safety Board and Coast Guard casualty investigations on passenger vessels.[19] The Coast Guard

[7] Public Law 104–324, 110 Stat. 3901 (Oct. 19, 1996), as amended by Public Law 108–293, 118 Stat. 1028 (Aug. 9, 2004). Prior to its amendment in 2010, 46 U.S.C. Chapter 32 applied to a vessel that is (1) transporting more than 12 ''passengers'' as that term is now defined in 46 U.S.C. 2101(29)(A), or is a tanker, freight vessel, or self-propelled mobile offshore drilling unit of at least 500 gross tons as measured under 46 U.S.C. 14302; and (2) is engaged on a foreign voyage, or is a foreign vessel departing from a place under the jurisdiction of the United States on a voyage, any part of which is on the high seas.

[8] 62 FR 67506 (Dec. 24, 1997).

[9] Public Law 111–281, 124 Stat. 2969 (Oct. 15, 2010).

[10] 33 CFR 96.210.

[11] Section 4.7 of the ISM Code, and 33 CFR 96.320(c)(2).

[12] 33 CFR 96.330(h).

[13] 33 CFR part 96, subpart D.

[14] Letter from Captain J.F. Williams, U.S. Coast Guard, to John Groundwater, Passenger Vessel Association (June 12, 2017), *available at https://bit.ly/2sIcT7m* (last visited July 21, 2020); *see also* Nick Blenkey, MarineLog, PVA's Flagship SMS gains Coast Guard recognition (June 26, 2017), *https://www.marinelog.com/shipping/safety-and-security/pvas-flagship-sms-gains-coast-guard-recognition/*(last visited July 21, 2020).

[15] 46 U.S.C. 3203(c).

[16] DHS Delegation No. 0170.1, Rev. 01.1, paragraph II (92)(b) (last revised May 21, 2018).

[17] Subchapter H applies to passenger vessels, subchapter K applies to small passenger vessels carrying more than 150 passengers or having overnight accommodations for more than 49 passengers, and subchapter T applies to small passenger vessels carrying fewer passengers than subchapter K denotes, but more than 6.

[18] *See* 33 CFR 96.210.

[19] *See* NTSB Recommendation M05–06 (*https://www.ntsb.gov/safety/safety-recs/recletters/M05_04_06.PDF*) (recommending that the Coast Guard Seek legislative authority to require all U.S.-flag ferry operators to implement safety management systems, and once obtained, require all U.S.-flag ferry operators to do so); NTSB Recommendation M12–03 (*https://www.ntsb.gov/safety/safety-recs/recletters/M-12-001-003.pdf*) (recommending that the Coast Guard require all operators of U.S.-flag passenger vessels to implement safety management systems, taking into account the characteristics, methods of operation, and nature of service of these

Continued

seeks public comment on vessel characteristics, including the size of vessel, that would make an SMS appropriate.

The Coast Guard also seeks public comment on additional industry standards, best practices, and regulations that should be considered or reviewed but are not already mentioned in this ANPRM. We are particularly interested in input regarding potential oversight, inspection, or auditing schemes for the SMSs as related to passenger vessel and small passenger vessel operations. When considering the content of a possible regulation, the Coast Guard may look to the current requirements of 33 CFR part 96, to the ISM Code, and to the Towing Safety Management System in 46 CFR part 138 which provides the option of having a recognized third-party conduct audits of the SMS program. The Coast Guard will use the best available information on costs and benefits to inform any future regulations for passenger vessels and small passenger vessels.

V. Information Requested

Your responses to the following questions will help the Coast Guard develop a more informed rulemaking. The questions are not all-inclusive, and any supplemental information is welcome. In responding to each question, please identify the question you are responding to and explain the reasons for your answer. If responding to a question and your response includes a monetary or numerical figure, please provide us with sufficient information, data, and transparency to be able to re-create any calculations. We encourage you to let us know your specific concerns with respect to any of the requirements under consideration.

1. For which types of passenger vessels should the Coast Guard require an SMS? How should the Coast Guard consider factors such as vessel size (including but not limited to length, tonnage, or capacity), design, age, type of service, hull material, overnight accommodations, size of ferry system, or number of passengers?

2. What benefits would a scalable and structured SMS provide passenger vessel owners, managers, and operators? Should fleet size be a consideration? If you have any studies or data on whether SMSs improve safety or reduce costs, please provide it with your submission.

3. Have you encountered situations in which information about safety risks or best practices was known to one vessel, or operational division of a vessel or business, but not shared with others that might use it to prevent incidents? To what extent would an SMS encourage sharing or prevent the isolation (''siloing'') of information? If your answer changes depending on the nature or size of the business, please include that information.

4. When a passenger vessel operator has a multi-vessel fleet, how is an SMS best implemented across the fleet?

5. Should the Coast Guard consider the ISM Code (IMO Resolution A.741(18) as amended), sections of 46 CFR parts 136–144 (Subchapter M), International Organization for Standardization 9001:2015, or any other process-based safety management alternatives or equivalencies? If so, what alternatives or equivalencies should the Coast Guard consider? Do sections of these process-based safety management standards apply to the passenger vessel industry more or less than to other industries? Please provide specific details, if possible.

6. In lieu of an SMS, should 46 CFR parts 78, 121, 122, 184, or 185 be expanded to cover items commonly found in an SMS, such as a preventative maintenance program, emergency preparedness and response procedures, and procedures for key shipboard operations?

7. If a comprehensive SMS is required, are there more prescriptive USCG regulations currently in the CFR that could be removed because the SMS would serve a similar function in promoting safety? If so, which regulations?

8. If a comprehensive SMS is not necessary or justified, what aspects of an SMS would be appropriate to include in this regulatory framework? Why would you recommend including these aspects in this regulatory framework and not others?

9. Which industry standards, such the ISM Code, should be incorporated by reference? To what extent should an industry standard SMS, such as the PVA's Flagship SMS, be recognized?

10. What guidance should the Coast Guard make available to the passenger vessel industry in order to help owners and operators implement an SMS? Would such guidance save costs or time implementing an SMS?

11. If you are a vessel owner or operator with a Safety Management Certificate issued under the ISM Code, or if you employ another type of SMS (for example, PVA Flagship), have you seen improvements in safety and operation from implementing the SMS? Please provide any supporting data, if available.

12. How many new or additional employees would be needed to implement an SMS? What would be the potential position titles, roles, responsibilities, and training requirements of these employees? How many hours of work would be associated with each position? What additional costs would companies incur related to these employees? In your response, please indicate how company size or fleet size affects the estimate.

13. If you are an operator that has chosen not to implement an SMS, what are reasons not to use an SMS? What type of operations may not benefit from an SMS, and why? Would the implementation of an SMS have any detrimental effects on passenger vessel operations? In addition to possibly needing to hire new employees, what other costs would be incurred by an operator implementing an SMS?

14. How long do you estimate it would take to develop and fully implement an SMS in your organization? Would the SMS be developed by someone within your organization or would outside experts be contracted? In your response, please indicate how company size or fleet size affects the estimate.

15. Should the Coast Guard require a certification process, an audit process, or both? If so, why, and who should certify or audit the SMS, how often, and what should the inspection or audit entail? Should the certification or audit requirement be limited to certain vessels? If not, why not?

16. Should the Coast Guard-required SMS be subject solely to independent third-party audits? If so, how frequently should audits take place?

17. What training or knowledge requirements are appropriate for crewmembers on passenger vessels with an SMS?

18. If you are a small business, what economic impact would an SMS requirement have on you, your business, or your organization? In your comments, please explain how and to what degree the requirement would have an economic impact. Also, please explain why these requirements affect your small business differently than it might affect a larger business.

19. How would the costs and benefits of expanding other existing regulations, as detailed in question 4, differ from the costs and benefits of requiring SMSs for all passenger vessels?

20. What costs and benefits are associated with internal or third-party audits of SMSs? To what extent is there already capacity to audit systems through industry associations? Where possible, please break down the costs

vessels, and, with respect to ferries, the sizes of the ferry systems within which the vessels operate).

and benefits associated into the different elements of SMS audits.

21. What incentives could the Coast Guard provide passenger vessel companies to adopt an SMS? And what is the most appropriate means or method for the Coast Guard to incentivize these companies to adopt an SMS?

22. Are there any additional factors that we should consider?

Dated: January 12, 2021.

Karl L. Schultz,

Admiral, U.S. Coast Guard, Commandant.

[FR Doc. 2021–01058 Filed 1–14–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

[NPS–GUIS–28979; PPMPSAS1Z.YP0000]

RIN 1024–AE55

Gulf Islands National Seashore; Personal Watercraft

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to revise special regulations governing the use of personal watercraft at Gulf Islands National Seashore. The proposed rule would reduce the distance of flat wake speed zones from certain shorelines and codify existing closures at West Petit Bois Island and the Fort Pickens ferry pier.

DATES: Comments on the proposed rule must be received by 11:59 p.m. EST on March 16, 2021.

ADDRESSES: You may submit comments, identified by Regulation Identifier Number (RIN) 1024–AE55, by either of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *www.regulations.gov.* Follow the instructions for submitting comments.

(2) *By hard copy:* Mail or hand deliver to: Superintendent, 1801 Gulf Breeze Parkway, Gulf Breeze, FL 32563.

Instructions: Comments will not be accepted by fax, email, or in any way other than those specified above. All submissions received must include the words ''National Park Service'' or ''NPS'' and must include the RIN 1024–AE55 for this rulemaking. Comments received may be posted without change to *www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov* and search for ''1024–AE55''.

FOR FURTHER INFORMATION CONTACT: Daniel R. Brown, Superintendent, Gulf Islands National Seashore, *daniel_r_brown@nps.gov,* (850) 934–2613.

SUPPLEMENTARY INFORMATION:

Background

Gulf Islands National Seashore (the Seashore) encompasses the longest stretch of federally protected seashore in the United States. The Seashore includes seven barrier islands that span nearly 160 miles, coastal mainland, and adjacent waters in the northeastern part of the Gulf of Mexico. The Seashore comprises 139,175 acres within Mississippi and Florida, 4,630 acres of which (consisting of Horn and Petit Bois Islands) are designated wilderness. The resources of the Seashore vary widely, including marine, bayou, salt marsh, live oak, and southern magnolia forests.

Congress established the Seashore in 1971 in order to preserve for public use and enjoyment areas possessing outstanding natural, historic, and recreational values. 16 U.S.C. 459h(a). The National Park Service (NPS) administers the Seashore as a unit of the National Park System and has the authority to regulate the use of and management of the Seashore as it considers necessary or proper. 54 U.S.C. 100751(a). This includes the authority to regulate boating and other activities on water located within NPS units that is subject to the jurisdiction of the United States. 54 U.S.C. 100751(b).

The Seashore is one of the most heavily visited units in the National Park System. The Seashore attracts several million visitors from throughout the nation, who come to enjoy the beach and cultural and historic features. More than 80% of the Seashore is marine habitat and accessible only by boat or other watercraft. Many visitors use personal watercraft (PWC) to access and enjoy the Seashore.

Compliance and PWC Regulations

NPS general regulation 36 CFR 3.9 states that PWC may be used only where authorized by special regulation and that special regulations authorizing PWC use may be promulgated only for the 21 NPS units that are identified in that regulation, including the Seashore. In 2006, the NPS promulgated special regulations to manage the use of PWC at the Seashore. 71 FR 26244 (May 4, 2006). These regulations, which are found at 36 CFR 7.12, establish where PWC may be used, how they may be operated, and where they may be landed. Among other things, they permit PWC use in all waters of the Seashore where other motorized vessels are allowed.

In 2008, Bluewater Network and other environmental groups filed a lawsuit claiming that the Environmental Assessment (EA) supporting the special regulations was inadequate and violated the National Environmental Policy Act, the NPS Organic Act, and the Administrative Procedure Act. In 2010, the U.S. District Court for the District of Columbia held that the impact analysis in the EA was inadequate and remanded the EA to the NPS. *Bluewater Network* v. *Salazar,* 721 F. Supp.2d 7 (D.D.C. 2010). However, the court did not vacate the special regulations, which have continued to govern the use of PWC within the Seashore.

In June 2019, consistent with the court's decision, the NPS completed a Final Personal Watercraft Plan/Environmental Impact Statement (FEIS) that contains a more comprehensive analysis of the impacts of PWC use within the Seashore. The Record of Decision (ROD) for this project was originally approved by the NPS Regional Director of Interior Region 2 on August 13, 2019. Since that time, NPS revised the selected alternative to remove a prohibition on PWC landing below the mean high tide on Horn and Petit Bois Islands. On December 17, 2020, the Acting Regional Director signed an amended ROD with the PWC landing prohibition removed but all other elements of the original selected action retained. The NPS believes the selected alternative will continue to protect natural and cultural resources at the Seashore, minimize conflicts between various users, and promote visitor safety while allowing for a variety of recreational experiences. A copy of the FEIS, ROD, and amended ROD which contain a full description of the purpose and need for taking action, the alternatives considered, maps, the environmental impacts associated with the proposed rule, and the basis for the selected alternative, can be found online at *http://parkplanning.nps.gov/guis,* by clicking on the link entitled ''Personal Watercraft (PWC) Use Management Plan/EIS'' and then clicking on the link entitled ''Document List''.

Proposed Rule

The proposed rule would implement the selected alternative identified in the amended ROD for the management of PWC use within the Seashore. The selected alternative would maintain the existing special regulation at 36 CFR 7.21, except as explained below.

Flat Wake Zones

The existing special regulations prohibit the use of PWC at more than flat wake speed less than 0.5 miles from (i) either side of the pier of West Ship Island, and (ii) the shorelines of West Ship Island and the designated wilderness islands of Horn and Petit Bois. The existing flat wake speed zone extends 300 yards from all other shorelines within the Seashore. The proposed rule would reduce the size of the flat wake zone to (i) 300 yards from any shoreline in Mississippi (including the shorelines of Ship, Horn and Petit Bois islands) and (ii) 150 yards from any shoreline in Florida. Establishing consistent flat-wake zone distances within each district of the Seashore (Florida and Mississippi) should result in easier enforcement of and increased compliance with flat-wake zones. The 150-yard flat-wake zone in the Florida District would minimize impacts to commercial PWC rental businesses and visitor experience for PWC users. The proposed boundaries of the flat wake zones are based on near-shore bathymetric information and research on PWC impacts to submerged aquatic vegetation and shorebird nesting that shows that in a water depth of 3 feet or more, PWC have little negative impact to seagrass beds (Continental Shelf Associates 1997; MDNR 2002). The average distance from shorelines in the Florida district to the 3-foot depth contour is 150 yards. Because similar 3-foot bathymetric data were not available for Mississippi, the proposed 300 yard flat wake zone in this district is based on the average distance to the 4-foot depth contour. NPS law enforcement staff may place temporary floating buoys in the water as reference points to show PWC users what 150 yards and 300 yards from the shoreline looks like. This would be done on an as-needed basis, determined by NPS personnel, and would likely occur on select high-use days and weekends.

Other Modifications

The existing special regulations allow PWC use anywhere within the Seashore except at specific locations listed in the regulations. 36 CFR 7.12(c)(1). The proposed rule would add two locations to the list of closed areas: (i) The lakes, ponds, lagoons, and inlets of West Petit Bois Island; and (ii) within 200 feet of the ferry pier at Fort Pickens. West Petit Bois Island is a fast changing barrier island. According to historic aerial imagery at the time the existing special regulations were promulgated in 2006, West Petit Bois Island did not have lakes, ponds, or inlets as it does now. The Fort Pickens ferry pier did not exist in 2006. Construction was completed in 2012. These closures have been implemented by the NPS for years under the Superintendent's authorities in 36 CFR 1.5. They are consistent with existing closures for the lakes, ponds, lagoons, and inlets of other islands within the Seashore and for areas within 200 feet of the fishing piers at Fort Pickens.

The proposed rule would also replace references to West Ship Island and East Ship Island in the current regulations with a reference to Ship Island. In 2019, West Ship Island and East Ship Island were restored to a single island as part of the Mississippi Coastal Improvements Program Comprehensive Barrier Island Restoration Project.

Compliance With Other Laws, Executive Orders and Department Policy Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The OIRA has waived review of this proposed rule and, at the final rule stage, will make a separate decision as to whether the rule is a significant regulatory action as defined by Executive Order 12866.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771)

Enabling regulations are considered deregulatory under guidance implementing E.O. 13771 (M–17–21). This rule would authorize the use of personal watercraft within Gulf Islands National Seashore in a manner that would otherwise be prohibited.

Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the economic analyses found in the report entitled ''Economic Analysis of the Personal Watercraft Proposed Rule at Gulf Islands National Seashore.'' The document can be found online at *http://parkplanning.nps.gov/guis-PWC-EIS,* by clicking on the link entitled ''Document List.''

Congressional Review Act (CRA)

This rule is not a major rule under 5 U.S.C. 804(2), the CRA. This rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. It addresses public use of national park lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

This rule does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This proposed rule only affects use of federally-administered lands and waters. It has no outside effects on other areas. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. This rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175 and Department Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's tribal consultation policy and have determined that tribal consultation is not required because the rule will have no substantial direct effect on federally recognized Indian tribes. Nevertheless, in support of the Department of Interior and NPS commitment for government-to-government consultation, the NPS submitted a letter to 14 Indian tribes during the development of the FEIS. The Choctaw Nation of Oklahoma responded that the locations considered in the FEIS are within the Nation's area of historic interest, and because of the potential adverse impact to the coastal sites, requested to be a consulting party. NPS staff held a conference call with representatives of the Muscogee Creek Nation, Jena Band of Choctaw Indians, and Choctaw Nation of Oklahoma to discuss their concerns. The tribal representatives expressed concern over looting and vandalism, but were not very concerned about wakes from PWC damaging resources. The NPS explained how law enforcement actions and the Superintendent's closure authority could help address their concerns.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

This rule implements, in part, a comprehensive management action for PWC at the Seashore that constitutes a major Federal action significantly affecting the quality of the human environment. The NPS has prepared the FEIS, ROD and amended ROD under the National Environmental Policy Act of 1969. A copy of the FEIS, ROD and amended ROD, which contain a full description of the purpose and need for taking action, the alternatives considered, maps, the environmental impacts associated with the proposed rule, and the basis for the selected alternative can be found online at *http://parkplanning.nps.gov/guis,* by clicking on the link entitled ''Personal Watercraft (PWC) Use Management Plan/EIS'' and then clicking on the link entitled ''Document List''.

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211; the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the rule has not otherwise been designated by the Administrator of OIRA as a significant energy action. A Statement of Energy Effects is not required.

Clarity of This Rule

We are required by Executive Orders 12866 (section 1(b)(12)) and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use common, everyday words and clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Drafting Information

The primary authors of this regulation are Julia Larkin and Jay Calhoun, Division of Regulations, Jurisdiction, and Special Park Uses, National Park Service.

Public Participation

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule by one of the methods listed in the **ADDRESSES** section of this document.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 36 CFR Part 7

National parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as set forth below:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 54 U.S.C. 100101, 100751, 320102; Sec. 7.96 also issued under D.C. Code 10–137 and D.C. Code 50–2201.07.

■ 2. Amend § 7.12 by revising paragraphs (c)(1)(i) and (iii), (c)(2), (c)(3) introductory text and (c)(3)(i) to read as follows:

§ 7.12 Gulf Islands National Seashore.

* * * * *

(c) * * *

(1) * * *

(i) The lakes, ponds, lagoons, and inlets of Cat Island, Ship Island, Horn Island, West Petit Bois Island, and Petit Bois Island;

* * * * *

(iii) The areas within 200 feet from the remnants of the old fishing pier and within 200 feet from the new fishing pier and the ferry pier at Fort Pickens; and

* * * * *

(2) PWC may not be operated at greater than flat wake speed in the following locations:

(i) Within 300 yards from all shorelines in Mississippi; and

(ii) Within 150 yards from all shorelines in Florida.

(3) PWC are allowed to land at any point along the shore except as follows:

(i) PWC are prohibited on any shoreline adjacent to the closed areas listed in paragraph (c)(1) of this section; and

* * * * *

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2021–00312 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–EJ–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2020–0532; FRL–10018–49–OAR]

RIN 2060–AU64

National Emission Standards for Hazardous Air Pollutants: Cyanide Chemicals Manufacturing Residual Risk and Technology Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing the results of the residual risk and technology review (RTR) for the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Cyanide Chemicals Manufacturing source category as required under the Clean Air Act (CAA). We are proposing to find that risk from emissions of air toxics from this source category is acceptable, and that the current standards provide an ample margin of safety to protect public health. We are also proposing to find that there are no developments in practices, processes, and control technologies, and, as such, we are not proposing any development-based changes to the current standards pursuant to the technology review. The EPA is, however, proposing new emissions standards to address emissions from process wastewater at existing sources. We are proposing to amend provisions addressing startup, shutdown, and malfunction (SSM), to add electronic reporting, and to update the reporting and recordkeeping requirements. We do not expect these proposed amendments to result in changes in emissions from the source category but anticipate improved monitoring, compliance, and implementation of the existing standards.

DATES: Comments must be received on or before March 1, 2021. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before February 16, 2021.

Public hearing: If anyone contacts us requesting a public hearing on or before January 21, 2021, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0532, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0532 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0532.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0532, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Nathan Topham, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0483; fax number: (919) 541–4991; and email address: *topham.nathan@epa.gov.* For specific information regarding the risk modeling methodology, contact James Hirtz, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *Hirtz.James@epa.gov.*

SUPPLEMENTARY INFORMATION: *Participation in virtual public hearing.* Please note that the EPA is deviating from its typical approach for public hearings because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* If requested, the virtual hearing will be held on February 1, 2021. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen* or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* The last

day to pre-register to speak at the hearing will be January 27, 2021. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to *topham.nathan@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by January 22, 2021. The EPA may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2020–0532. All documents in the docket are listed in *https://www.regulations.gov.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0532. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0532. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for

reference purposes, the EPA defines the following terms and acronyms here:

AEGL acute exposure guideline level
AERMOD air dispersion model used by the HEM–3 model
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
CFR Code of Federal Regulations
EPA Environmental Protection Agency
ERPG emergency response planning guideline
ERT Electronic Reporting Tool
HAP hazardous air pollutant(s)
HCl hydrochloric acid
HEM–3 Human Exposure Model, Version 1.5.5
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
IRIS Integrated Risk Information System
km kilometer
MACT maximum achievable control technology
mg/kg-day milligrams per kilogram per day
mg/m3 milligrams per cubic meter
MIR maximum individual risk
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NESHAP national emission standards for hazardous air pollutants
NRC National Research Council
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PAH polycyclic aromatic hydrocarbons
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PM particulate matter
POM polycyclic organic matter
ppm parts per million
REL reference exposure level
RFA Regulatory Flexibility Act
RfC reference concentration
RfD reference dose
RTR residual risk and technology review
SAB Science Advisory Board
SBA Small Business Administration
SSM startup, shutdown, and malfunction
SV screening value
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure model
UF uncertainty factor
µg/m3 microgram per cubic meter
URE unit risk estimate
VCS voluntary consensus standards

Organization of this document. The information in this preamble is organized as follows:

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A. Does this action apply to me?
B. Where can I get a copy of this document and other related information?
II. Background
A. What is the statutory authority for this action?
B. What is this source category and how does the current NESHAP regulate its HAP emissions?
C. What data collection activities were conducted to support this action?
D. What other relevant background information and data are available?
III. Analytical Procedures and Decision-Making
A. How do we consider risk in our decision-making?
B. How do we perform the technology review?
C. How do we estimate post-MACT risk posed by the source category?
IV. Analytical Results and Proposed Decisions
A. What actions are we taking pursuant to CAA sections 112(d)(2) and 112(d)(3)?
B. What are the results of the risk assessment and analyses?
C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?
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E. What other actions are we proposing?
F. What compliance dates are we proposing?
V. Summary of Cost, Environmental, and Economic Impacts
A. What are the affected sources?
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VI. Request for Comments
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A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
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E. Unfunded Mandates Reform Act (UMRA)
F. Executive Order 13132: Federalism
G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA)
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does this action apply to me?

The source category that is the subject of this proposal is cyanide chemicals manufacturing major sources regulated under 40 CFR 63, subpart YY. The North American Industry Classification System (NAICS) codes for the cyanide chemicals manufacturing industry are 325188 and 325199. This list of categories and NAICS codes is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities would not be affected by this proposed action. As defined in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (see EPA–450/3–91–030, July 1992), the Cyanide Chemicals Manufacturing source category is any facility engaged in the production of hydrogen cyanide or sodium cyanide. Hydrogen cyanide production includes, but is not limited to, production of hydrogen cyanide using any of the following methods: Reaction of methane and ammonia over a platinum catalyst, reaction of methane and ammonia over a platinum-rhodium catalyst, co-production with acrylonitrile (via Sohio process), or pyrolysis of formaldehyde. Sodium cyanide production includes, but is not limited to, production of sodium cyanide via the neutralization process, or so-called wet process. In this process, hydrogen cyanide reacts with sodium hydroxide solution usually in a reactor that involves evaporation of water and crystallization of the product, commonly called white cyanide.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website. Information on the overall RTR program is available at *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

The proposed changes to the CFR that would be necessary to incorporate the changes proposed in this action are set out in an attachment to the memorandum titled *Proposed Regulation Edits for 40 CFR part 63, subpart YY,* available in the docket for this action (Docket ID No. EPA–HQ–

OAR–2020–0532). The document includes the specific proposed amendatory language for revising the CFR and, for the convenience of interested parties, a redline version of the regulation. Following signature by the EPA Administrator, the EPA will also post a copy of this memorandum and the attachments to *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

II. Background

A. What is the statutory authority for this action?

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a two-stage regulatory process to develop standards for emissions of hazardous air pollutants (HAP) from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on maximum achievable control technology (MACT) to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years and revise the standards as necessary taking into account any ''developments in practices, processes, or control technologies.'' This review is commonly referred to as the ''technology review.'' When the two reviews are combined into a single rulemaking, it is commonly referred to as the ''risk and technology review.'' The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements. A more comprehensive discussion appears in the document titled *CAA Section 112 Risk and Technology Reviews: Statutory Authority and Methodology,* in the docket for this rulemaking.

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are ''area sources.'' For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT ''floor.'' In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. For area sources, CAA section 112(d)(5) gives the EPA discretion to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.

The second stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk pursuant to CAA section 112(f). For source categories subject to MACT standards, section 112(f)(2) of the CAA requires the EPA to determine whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. Section 112(d)(5) of the CAA provides that this residual risk review is not required for categories of area sources subject to GACT standards. Section 112(f)(2)(B) of the CAA further expressly preserves the EPA's use of the two-step approach for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the Residual Risk Report that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and the United States Court of Appeals for the District of Columbia Circuit (the court) upheld the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008).

The approach incorporated into the CAA and used by the EPA to evaluate residual risk and to develop standards under CAA section 112(f)(2) is a two-step approach. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [1] of approximately 1 in 10 thousand.'' (54 FR 38045). If risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs. In the second step of the approach, the EPA considers whether the emissions standards provide an ample margin of safety to protect public health ''in consideration of all health information, including the number of persons at risk levels higher than approximately 1 in 1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety to protect public health or determine that the standards being reviewed provide an ample margin of safety without any revisions. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

CAA section 112(d)(6) separately requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less often than every 8 years. In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the

[1] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk if an individual were exposed to the maximum level of a pollutant for a lifetime.

standards pursuant to CAA section 112(d)(6). The EPA is required to address regulatory gaps, such as missing standards for listed air toxics known to be emitted from the source category. *Louisiana Environmental Action Network (LEAN)* v. *EPA,* 955 F.3d 1088 (D.C. Cir. 2020).

B. What is this source category and how does the current NESHAP regulate its HAP emissions?

The MACT standards for the Cyanide Chemicals Manufacturing source category are contained in the Generic Maximum Achievable Control Technology (GMACT) NESHAP which also includes MACT standards for several other source categories. The cyanide chemicals manufacturing standards were promulgated on July 12, 2002, (67 FR 46258) and codified at 40 CFR part 63, subpart YY. As promulgated in 2002, the cyanide chemicals manufacturing standards regulate HAP emissions from cyanide chemicals manufacturing units located at major sources. The HAP emitted from the source category include cyanide compounds (hydrogen cyanide and sodium cyanide), acetonitrile, and acrylonitrile.

The NESHAP defines the affected source as each cyanide chemicals manufacturing process unit (CCMPU). The rule states that the CCMPU is the equipment assembled and connected by hard-piping or duct work to process raw materials to manufacture, store, and transport a cyanide chemicals product. A CCMPU shall be limited to any one of the following: An Andrussow process unit, a Blausaure Methane Anlage process unit, a sodium cyanide process unit, or a Sohio hydrogen cyanide process unit. For the purpose of this subpart, a CCMPU includes reactors and associated unit operations, associated recovery devices, and any feed, intermediate and product storage vessels, product transfer racks, and connected ducts and piping. A CCMPU also includes pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, instrumentation systems, and control devices or systems.

The NESHAP established emissions standards for process vents, storage vessels, transfer racks, and equipment leaks. Cyanide process vents are subject to a 98 weight-percent reduction of total HAP [2] performance standard or 20 parts per million by volume (ppmv) total HAP outlet exit concentration limit. For storage vessels in the Cyanide Chemicals Manufacturing source category, sources may either choose to comply with a 98 weight-percent reduction of hydrogen cyanide performance standard, a 20 ppmv hydrogen cyanide exit outlet concentration limit, or equipment standards (*e.g.,* use a flare). Transfer racks are subject to equipment standards or the same performance standard or concentration limit [3] as cyanide process vents. Equipment leaks are subject to work practice standards required by either 40 CFR part 63, subpart TT or subpart UU.

C. What data collection activities were conducted to support this action?

The EPA used a variety of resources to obtain data about facilities and their emissions for use in our risk assessment. We used the EPA's Enforcement and Compliance History Online (ECHO) database to develop a list of potentially subject facilities. Using this list, we searched state environmental agency websites and correspondence with industry to obtain copies of title V permits to confirm whether facilities have cyanide chemicals manufacturing subject to the NESHAP. Once the facility list was finalized, the EPA used the 2017 National Emissions Inventory (NEI) to get emissions data for each facility. We compared the NEI data to title V permits to provide additional information regarding the applicability of the Cyanide Chemicals Manufacturing NESHAP. Further discussion of the methodology used to develop the emissions dataset for the risk assessment can be found in the memorandum titled *Technical Support Document for the Cyanide Chemicals Manufacturing NESHAP Residual Risk and Technology Review Proposal,* which is available in the docket for this action.

D. What other relevant background information and data are available?

We searched for information from the Reasonably Available Control Technology, Best Available Control Technology, and Lowest Achievable Emission Rate Clearinghouse (RBLC) database, reviewed title V permits for each cyanide chemicals manufacturing facility, and reviewed regulatory actions related to emissions controls at similar sources that could be applicable to cyanide chemicals manufacturing. We reviewed the RBLC to identify potential additional control technologies. No additional control technologies applicable to cyanide chemicals manufacturing were found using the RBLC. Additional information related to the promulgation and subsequent amendments of the NESHAP is available in docket ID: No. EPA–HQ–OAR–2004–0041.

III. Analytical Procedures and Decision-Making

In this section, we describe the analyses performed to support the proposed decisions for the RTR and other issues addressed in this proposal.

A. How do we consider risk in our decision-making?

As discussed in section II.A of this preamble and in the Benzene NESHAP, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step approach to determine whether or not risks are acceptable and to determine if the standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.'' (54 FR at 38046). Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. The EPA conducts a risk assessment that provides estimates of the MIR posed by emissions of HAP that are carcinogens from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects, and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health

[2] ''Dry end'' process vents at sodium cyanide units must meet a 98 percent reduction performance standard for emissions of sodium cyanide since this is the form of cyanide compounds emitted from these emission points. The HAP emitted from other process vents that make up the ''total HAP'' emitted from these sources are hydrogen cyanide, acetonitrile, and acrylonitrile.

[3] Transfer racks emissions limits are expressed in terms of hydrogen cyanide as this is the only HAP emitted from these sources.

effects.[4] The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The scope of the EPA's risk analysis is consistent with the explanation in EPA's response to comments on our policy under the Benzene NESHAP:

> The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing his expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in his judgment, believes are appropriate to determining what will ''protect the public health.

(54 FR at 38057). Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risk. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes an MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. In other words, risks that include an MIR above 100-in-1 million may be determined to be acceptable, and risks with an MIR below that level may be determined to be unacceptable, depending on all of the available health information. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify the HAP risk that may be associated with emissions from other facilities that do not include the source category under review, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in the category.

The EPA understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing noncancer risk, where pollutant-specific exposure health reference levels (*e.g.,* reference concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse noncancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in an increased risk of adverse noncancer health effects. In May 2010, the Science Advisory Board (SAB) advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.'' [5]

In response to the SAB recommendations, the EPA incorporates cumulative risk analyses into its RTR risk assessments. The Agency (1) conducts facility-wide assessments, which include source category emission points, as well as other emission points within the facilities; (2) combines exposures from multiple sources in the same category that could affect the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzes the ingestion route of exposure. In addition, the RTR risk assessments consider aggregate cancer risk from all carcinogens and aggregated noncancer HQs for all noncarcinogens affecting the same target organ or target organ system.

Although we are interested in placing source category and facility-wide HAP risk in the context of total HAP risk from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Estimates of total HAP risk from emission sources other than those that we have studied in depth during this RTR review would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

B. How do we perform the technology review?

Our technology review primarily focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emissions reduction;
- Any work practice or operational procedure that was not identified or

[4] The MIR is defined as the cancer risk associated with a lifetime of exposure at the highest concentration of HAP where people are likely to live. The HQ is the ratio of the potential HAP exposure concentration to the noncancer dose-response value; the HI is the sum of HQs for HAP that affect the same target organ or organ system.

[5] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *https://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

considered during development of the original MACT standards;

- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards; and
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed (or last updated) the NESHAP, we review a variety of data sources in our investigation of potential practices, processes, or controls. We also review the NESHAP and the available data to determine if there are any unregulated emissions of HAP within the source category and evaluate this data for use in developing new emission standards. See sections II.C and II.D of this preamble for information on the specific data sources that were reviewed as part of the technology review.

C. How do we estimate post-MACT risk posed by the source category?

In this section, we provide a complete description of the types of analyses that we generally perform during the risk assessment process. In some cases, we do not perform a specific analysis because it is not relevant. For example, in the absence of emissions of HAP known to be persistent and bioaccumulative in the environment (PB–HAP), we would not perform a multipathway exposure assessment. Where we do not perform an analysis, we state that we do not and provide the reason. While we present all of our risk assessment methods, we only present risk assessment results for the analyses actually conducted (see section IV.B of this preamble).

The EPA conducts a risk assessment that provides estimates of the MIR for cancer posed by the HAP emissions from each source in the source category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the HQ for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule.* The methods used to assess risk (as described in the seven primary steps below) are consistent with those described by the EPA in the document reviewed by a panel of the EPA's SAB in 2009;[6] and described in the SAB review report issued in 2010. They are also consistent with the key recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

The list of facilities subject to the NESHAP was created through searching the EPA's ECHO database, the 2017 NEI, and state databases of title V permits. The list of facilities is available in the memorandum titled *Technical Support Document for the Cyanide Chemicals Manufacturing NESHAP Residual Risk and Technology Review Proposal.* Once the facility list was finalized, available emissions data were obtained from the NEI. Title V permits were used to determine which emission points at each facility are subject to the Cyanide Chemicals Manufacturing NESHAP.

We compared the NEI data to title V permits to confirm that the NEI included all emission points listed as subject to the NESHAP according to the permit. We evaluated latitudes and longitudes listed in the NEI to ensure their accuracy using satellite imagery. All of the latitudes and longitudes used in our dispersion modeling are in the modeling file used for the proposed rule, which is available in Docket ID No. EPA–HQ–OAR–2020–0532. Corrections were made to emission point characteristics for one non-category emission point that appeared to have erroneous stack velocity entered into the NEI. This emission point's stack velocity was corrected to a default maximum value. All corrections made to emission point parameters are documented in the modeling file, available in Docket ID No. EPA–HQ–OAR–2020–0532.

[6] U.S. EPA. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* June 2009. EPA–452/R–09–006. *https://www3.epa.gov/airtoxics/rrisk/rtrpg.html.*

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during a specified annual time period. These ''actual'' emission levels are often lower than the emission levels allowed under the requirements of the current MACT standards. The emissions allowed under the MACT standards are referred to as the ''MACT-allowable'' emissions. We discussed the consideration of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 19992, 19998 and 19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTR (71 FR 34421, 34428, June 14, 2006, and 71 FR 76603, 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risk at the MACT-allowable level is inherently reasonable since that risk reflects the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044).

We have determined that the actual emissions data are reasonable estimates of the MACT-allowable emissions levels for the Cyanide Chemicals Manufacturing source category. The ability to estimate MACT-allowable emissions from the actual emissions dataset is largely dependent on the format of the standard for a given emissions source as well as the types of controls employed for the source. With respect to the various types of controls used within the Cyanide Chemicals Manufacturing source category, the most prevalent is the use of a flare as a combustion control device. A flare can be used to control emissions for a single emissions source, or, as is generally the case, to control emissions from multiple emission sources/emission source types. Flares are designed to handle a wide range of flowrates and compositions of combustible waste gases. Within the Cyanide Chemicals Manufacturing source category, flares generally control emissions from multiple emission source types. Consideration of this, along with not having a specific limit on how much gas can be combusted in a flare (given that in many cases multiple emissions sources are being controlled by this control device), means that it is extremely difficult to determine an allowable emission rate for flares. We have determined that flares in the Cyanide Chemicals Manufacturing

source category are currently complying with design and operational requirements that are generally expected to achieve 98 percent destruction efficiencies or control, which is the level of control required by the NESHAP. HAP emissions inventories for flares in the Cyanide Chemicals Manufacturing source category are developed using engineering knowledge and, in many instances, presume this 98 percent level of control. The Agency is unaware of any data that suggest that flares used as controls in the Cyanide Chemicals Manufacturing source category are consistently overcontrolling HAP emissions beyond 98 percent control. Thus, weighing all of these factors for flares, we determined that the actual emission levels are a reasonable estimation of the MACT-allowable emissions levels where the performance standards allow the use of a flare as an air pollution control device (*e.g.,* storage vessels, process vents, and transfer racks).

For equipment leaks, which are currently subject to work practice standards, there would be no difference between actual and MACT-allowable emissions for facilities in the Cyanide Chemicals Manufacturing source category, provided the facilities are complying with the MACT standards as well as not conducting additional work practices that would reduce emissions beyond those required by the rule. We are aware of only one rule in the state of Texas, the Texas Commission of Environmental Quality (TCEQ) Highly Reactive Volatile Organic Compounds (HRVOC) Rule (*i.e.,* 30 TAC Chapter 115, Subchapter H, Division 3), that may contain more stringent leak definitions and/or monitoring frequencies for certain pieces of equipment for the three facilities located in Texas that might be subject to this rule. However, based on our review of the Texas rule, we note the following: (1) Specific facilities located in the Houston-Galveston-Brazoria area still conduct a leak detection and repair (LDAR) program using EPA Method 21; (2) the vast majority of equipment, including almost all pieces of equipment in gas and vapor service that would tend to contribute considerably to the overall equipment leak air emissions, are complying with the same leak definition as in the MACT standards; and (3) the TCEQ HRVOC Rule generally requires quarterly monitoring while the MACT standards have varying monitoring frequencies depending on the percentage of leaking equipment that could lead to more stringent, the same, or less stringent frequencies that would require an EPA Method 21 measurement and repair of a leaking component (if measured). Therefore, considering these factors for equipment leaks, we determined that the actual emission levels for equipment leaks are a reasonable estimation of the MACT-allowable emissions levels.

3. How do we conduct dispersion modeling, determine inhalation exposures, and estimate individual and population inhalation risk?

Both long-term and short-term inhalation exposure concentrations and health risk from the source category addressed in this proposal were estimated using the Human Exposure Model (HEM–3).[7] The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources, and (3) estimating individual and population-level inhalation risk using the exposure estimates and quantitative dose-response information.

a. Dispersion Modeling

The air dispersion model AERMOD, used by the HEM–3 model, is one of the EPA's preferred models for assessing air pollutant concentrations from industrial facilities.[8] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2016) of hourly surface and upper air observations from 826 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[9] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant-specific dose-response values is used to estimate health risk. These are discussed below.

b. Risk From Chronic Exposure to HAP

In developing the risk assessment for chronic exposures, we use the estimated annual average ambient air concentrations of each HAP emitted by each source in the source category. The HAP air concentrations at each nearby census block centroid located within 50 km of the facility are a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

For each facility, we calculate the MIR as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, 52 weeks per year, 70 years) exposure to the maximum concentration at the centroid of each inhabited census block. We calculate individual cancer risk by multiplying the estimated lifetime exposure to the ambient concentration of each HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper-bound estimate of an individual's incremental risk of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use UREs from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) UREs, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate. The pollutant-specific dose-response values used to estimate health risk are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

No data are available on the carcinogenic effects of cyanide compounds in humans via inhalation. Under the U.S. EPA (2005a) *Guidelines for Carcinogen Risk Assessment,* there is ''inadequate information to assess the carcinogenic potential'' of cyanide compounds.

To estimate individual lifetime cancer risks associated with exposure to HAP emissions from each facility in the

[7] For more information about HEM–3, go to *https://www.epa.gov/fera/risk-assessment-and-modeling-human-exposure-model-hem.*

[8] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[9] A census block is the smallest geographic area for which census statistics are tabulated.

source category, we sum the risks for each of the carcinogenic HAP [10] emitted by the modeled facility. We estimate cancer risk at every census block within 50 km of every facility in the source category. The MIR is the highest individual lifetime cancer risk estimated for any of those census blocks. In addition to calculating the MIR, we estimate the distribution of individual cancer risks for the source category by summing the number of individuals within 50 km of the sources whose estimated risk falls within a specified risk range. We also estimate annual cancer incidence by multiplying the estimated lifetime cancer risk at each census block by the number of people residing in that block, summing results for all of the census blocks, and then dividing this result by a 70-year lifetime.

To assess the risk of noncancer health effects from chronic exposure to HAP, we calculate either an HQ or a target organ-specific hazard index (TOSHI). We calculate an HQ when a single noncancer HAP is emitted. Where more than one noncancer HAP is emitted, we sum the HQ for each of the HAP that affects a common target organ or target organ system to obtain a TOSHI. The HQ is the estimated exposure divided by the chronic noncancer dose-response value, which is a value selected from one of several sources. The preferred chronic noncancer dose-response value is the EPA RfC, defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime'' (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*). In cases where an RfC from the EPA's IRIS is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic noncancer dose-response value can be a value from the following prioritized sources, which define their dose-response values similarly to the EPA: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*https://www.atsdr.cdc.gov/mrls/index.asp*); (2) the CalEPA Chronic Reference Exposure Level (REL) (*https://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*); or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA. The pollutant-specific dose-response values used to estimate health risks are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

Cyanide is extremely toxic to humans. Acute (10-minute) inhalation exposure to 579 milligrams per cubic meter (mg/m^3) of hydrogen cyanide will cause death in 50 percent of exposed humans. Nonlethal exposures to hydrogen cyanide gas will cause a variety of effects in humans, such as headache, dizziness, upper respiratory irritation, cough, altered sense of smell, nasal congestion, nosebleed, and difficulty breathing. Chronic (long-term) inhalation exposure of humans to cyanide results primarily in effects on the central nervous system. Other effects in humans include cardiovascular and respiratory effects, effects to the endocrine system (*e.g.,* thyroid enlargement, altered iodine uptake), and irritation to the eyes and skin. However, short term exposure levels below the acute REL and chronic exposures below the RfC are not likely to cause adverse effects.

c. Risk From Acute Exposure to HAP That May Cause Health Effects Other Than Cancer

For each HAP for which appropriate acute inhalation dose-response values are available, the EPA also assesses the potential health risks due to acute exposure. For these assessments, the EPA makes conservative assumptions about emission rates, meteorology, and exposure location. As part of our efforts to continually improve our methodologies to evaluate the risks that HAP emitted from categories of industrial sources pose to human health and the environment,[11] we revised our treatment of meteorological data to use reasonable worst-case air dispersion conditions in our acute risk screening assessments instead of worst-case air dispersion conditions. This revised treatment of meteorological data and the supporting rationale are described in more detail in *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* This revised approach has been used in this proposed rule and in all other RTR rulemakings proposed on or after June 3, 2019.

To assess the potential acute risk to the maximally exposed individual, we use the peak hourly emission rate for each emission point,[12] reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile), and the point of highest off-site exposure. Specifically, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions co-occur and that a person is present at the point of maximum exposure.

To characterize the potential health risks associated with estimated acute inhalation exposures to a HAP, we generally use multiple acute dose-response values, including acute RELs, acute exposure guideline levels (AEGLs), and emergency response planning guidelines (ERPG) for 1-hour exposure durations, if available, to calculate acute HQs. The acute HQ is calculated by dividing the estimated acute exposure concentration by the acute dose-response value. For each HAP for which acute dose-response values are available, the EPA calculates acute HQs.

An acute REL is defined as ''the concentration level at or below which no adverse health effects are anticipated

[10] The EPA's 2005 *Guidelines for Carcinogen Risk Assessment* classifies carcinogens as: ''carcinogenic to humans,'' ''likely to be carcinogenic to humans,'' and ''suggestive evidence of carcinogenic potential.'' These classifications also coincide with the terms ''known carcinogen, probable carcinogen, and possible carcinogen,'' respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). In August 2000, the document, *Supplemental Guidance for Conducting Health Risk Assessment of Chemical Mixtures* (EPA/630/R–00/002), was published as a supplement to the 1986 document. Copies of both documents can be obtained from *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=20533&CFID=70315376&CFTOKEN=71597944.* Summing the risk of these individual compounds to obtain the cumulative cancer risk is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at *https://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

[11] See, *e.g.,* U.S. EPA. *Screening Methodologies to Support Risk and Technology Reviews (RTR): A Case Study Analysis* (Draft Report, May 2017. *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html*).

[12] In the absence of hourly emission data, we develop estimates of maximum hourly emission rates by multiplying the average actual annual emissions rates by a factor (either a category-specific factor or a default factor of 10) to account for variability. This is documented in *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* Both are available in the docket for this rulemaking.

for a specified exposure duration.'' [13] Acute RELs are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. They are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact. AEGLs represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.[14] They are guideline levels for ''once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. The AEGL–1 is specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or mg/m^3 (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes that ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* AEGL–2 are defined as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

ERPGs are ''developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.'' [15] *Id.* at 1. The ERPG–1 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' *Id.* at 1.

An acute REL for 1-hour exposure durations is typically lower than its corresponding AEGL–1 and ERPG–1. Even though their definitions are slightly different, AEGL–1s are often the same as the corresponding ERPG–1s, and AEGL–2s are often equal to ERPG–2s. The maximum HQs from our acute inhalation screening risk assessment typically result when we use the acute REL for a HAP. In cases where the maximum acute HQ exceeds 1, we also report the HQ based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1).

For this source category, we used acute factors between 2 and 10, depending on the type of source, to estimate peak hourly emissions from annual emissions estimates for input into the risk assessment modeling analysis. Specifically, we used a factor of 2 for process vents and equipment leaks, a factor of 4 for storage vessels, and a factor of 10 for transfer racks. A further discussion of why these factors were chosen can be found in the memorandum, *Technical Support Document for the Cyanide Chemicals Manufacturing NESHAP Residual Risk and Technology Review Proposal,* available in the docket for this rulemaking.

In our acute inhalation screening risk assessment, acute impacts are deemed negligible for HAP for which acute HQs are less than or equal to 1, and no further analysis is performed for these HAP. In cases where an acute HQ from the screening step is greater than 1, we assess the site-specific data to ensure that the acute HQ is at an off-site location. For this source category, no data were conducted.

4. How do we conduct the multipathway exposure and risk screening assessment?

The EPA conducts a tiered screening assessment examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determine whether any sources in the source category emit any HAP known to be persistent and bioaccumulative in the environment, as identified in the EPA's Air Toxics Risk Assessment Library (see Volume 1, Appendix D, at *https://www.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library).*

For the Cyanide Chemicals Manufacturing source category, we identified potential PB–HAP emissions of arsenic, cadmium, lead, mercury, and polycyclic organic matter (POM) based on entries in the NEI. We note that for the Cyanide Chemicals Manufacturing source category, we modeled these pollutants to provide a conservative assessment of risks because these pollutants are included in the NEI. However, we do not believe these HAP are emitted from the cyanide chemicals manufacturing process. Very small amounts of these HAP are included in the NEI as byproducts of fuel combustion and are unrelated to cyanide chemicals manufacturing.

After identifying potential PB–HAP emissions, the next step of the evaluation is a tiered screening assessment. Except for lead, the human health risk screening assessment for PB–HAP consists of three progressive tiers. In a Tier 1 screening assessment, we determine whether the magnitude of the facility-specific emissions of PB–HAP warrants further evaluation to characterize human health risk through ingestion exposure. To facilitate this step, we evaluate emissions against previously developed screening threshold emission rates for several PB–HAP that are based on a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with screening threshold emission rates are arsenic compounds, cadmium compounds, chlorinated dibenzodioxins and furans, mercury compounds, and POM. Based on the EPA estimates of toxicity and bioaccumulation potential, these pollutants represent a conservative list for inclusion in multipathway risk assessments for RTR rules. (See Volume

[13] CalEPA issues acute RELs as part of its Air Toxics Hot Spots Program, and the 1-hour and 8-hour values are documented in *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* which is available at *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.*

[14] National Academy of Sciences, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2. Available at *https://www.epa.gov/sites/production/files/2015-09/documents/sop_final_standing_operating_procedures_2001.pdf.* Note that the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

[15] *ERPGS Procedures and Responsibilities.* March 2014. American Industrial Hygiene Association. Available at: *https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERPG%20Committee%20Standard%20Operating%20Procedures%20%20-%20March%202014%20Revision%20%28Updated%2010-2-2014%29.pdf.*

1, Appendix D at *https://www.epa.gov/sites/production/files/2013-08/documents/volume_1_reflibrary.pdf.*) In this assessment, we compare the facility-specific emission rates of these PB–HAP to the screening threshold emission rates for each PB–HAP to assess the potential for significant human health risks via the ingestion pathway. We call this application of the TRIM.FaTE model the Tier 1 screening assessment. The ratio of a facility's actual emission rate to the Tier 1 screening threshold emission rate is a ''screening value (SV).''

We derive the Tier 1 screening threshold emission rates for these PB–HAP (other than lead compounds) to correspond to a maximum excess lifetime cancer risk of 1-in-1 million (*i.e.,* for arsenic compounds, polychlorinated dibenzodioxins and furans, and POM) or, for HAP that cause noncancer health effects (*i.e.,* cadmium compounds and mercury compounds), a maximum HQ of 1. If the emission rate of any one PB–HAP or combination of carcinogenic PB–HAP in the Tier 1 screening assessment exceeds the Tier 1 screening threshold emission rate for any facility (*i.e.,* the SV is greater than 1), we conduct a second screening assessment, which we call the Tier 2 screening assessment. The Tier 2 screening assessment separates the Tier 1 combined fisher and farmer exposure scenario into fisher, farmer, and gardener scenarios that retain upper-bound ingestion rates.

In the Tier 2 screening assessment, the location of each facility that exceeds a Tier 1 screening threshold emission rate is used to refine the assumptions associated with the Tier 1 fisher and farmer exposure scenarios at that facility. A key assumption in the Tier 1 screening assessment is that a lake and/or farm is located near the facility. As part of the Tier 2 screening assessment, we use a U.S. Geological Survey (USGS) database to identify actual waterbodies within 50 km of each facility and assume the fisher only consumes fish from lakes within that 50 km zone. We also examine the differences between local meteorology near the facility and the meteorology used in the Tier 1 screening assessment. We then adjust the previously-developed Tier 1 screening threshold emission rates for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with the use of local meteorology and the USGS lakes database.

In the Tier 2 farmer scenario, we maintain an assumption that the farm is located within 0.5 km of the facility and that the farmer consumes meat, eggs, dairy, vegetables, and fruit produced near the facility. We may further refine the Tier 2 screening analysis by assessing a gardener scenario to characterize a range of exposures, with the gardener scenario being more plausible in RTR evaluations. Under the gardener scenario, we assume the gardener consumes home-produced eggs, vegetables, and fruit products at the same ingestion rate as the farmer. The Tier 2 screen continues to rely on the high-end food intake assumptions that were applied in Tier 1 for local fish (adult female angler at 99th percentile fish consumption [16]) and locally grown or raised foods (90th percentile consumption of locally grown or raised foods for the farmer and gardener scenarios [17]). If PB–HAP emission rates do not result in a Tier 2 SV greater than 1, we consider those PB–HAP emissions to pose risks below a level of concern. If the PB–HAP emission rates for a facility exceed the Tier 2 screening threshold emission rates, we may conduct a Tier 3 screening assessment.

There are several analyses that can be included in a Tier 3 screening assessment, depending upon the extent of refinement warranted, including validating that the lakes are fishable, locating residential/garden locations for urban and/or rural settings, considering plume-rise to estimate emissions lost above the mixing layer, and considering hourly effects of meteorology and plume-rise on chemical fate and transport (a time-series analysis). If necessary, the EPA may further refine the screening assessment through a site-specific assessment.

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening threshold emission rate, we compare maximum estimated chronic inhalation exposure concentrations to the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[18] Values below the level of the primary (health-based) lead NAAQS are considered to have a low potential for multipathway risk.

For further information on the multipathway assessment approach, see the *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

5. How do we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect, Environmental HAP, and Ecological Benchmarks

The EPA conducts a screening assessment to examine the potential for an adverse environmental effect as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

The EPA focuses on eight HAP, which are referred to as ''environmental HAP,'' in its screening assessment: six PB–HAP and two acid gases. The PB–HAP included in the screening assessment are arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. The acid gases included in the screening assessment are hydrochloric acid (HCl) and hydrogen fluoride (HF).

HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The acid gases, HCl and HF, are included due to their well-documented potential to cause direct damage to terrestrial plants. In the environmental risk screening assessment, we evaluate the following four exposure media: terrestrial soils, surface water bodies (includes water-column and benthic sediments), fish consumed by wildlife, and air. Within these four exposure media, we evaluate nine ecological assessment endpoints, which are defined by the ecological

[16] Burger, J. 2002. *Daily consumption of wild fish and game: Exposures of high end recreationists. International Journal of Environmental Health Research,* 12:343–354.

[17] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

[18] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring, among other things, that the standard provide an ''ample margin of safety to protect public health''). However, the primary lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

entity and its attributes. For PB–HAP (other than lead), both community-level and population-level endpoints are included. For acid gases, the ecological assessment evaluated is terrestrial plant communities.

An ecological benchmark represents a concentration of HAP that has been linked to a particular environmental effect level. For each environmental HAP, we identified the available ecological benchmarks for each assessment endpoint. We identified, where possible, ecological benchmarks at the following effect levels: probable effect levels, lowest-observed-adverse-effect level, and no-observed-adverse-effect level. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

For further information on how the environmental risk screening assessment was conducted, including a discussion of the risk metrics used, how the environmental HAP were identified, and how the ecological benchmarks were selected, see Appendix 9 of the *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

b. Environmental Risk Screening Methodology

For the environmental risk screening assessment, the EPA first determined whether any facilities in the Cyanide Chemicals Manufacturing source category emitted any of the environmental HAP. For the Cyanide Chemicals Manufacturing source category, we identified potential emissions of arsenic, cadmium, lead, mercury, POM, and one acid gas, HCl, based on entries in the NEI. Because one or more of the environmental HAP evaluated may be emitted by at least one facility in the source category, we proceeded to the second step of the evaluation. As noted above, we modeled these emissions to err on the side of an overly conservative analysis because they are included in the NEI; however, we do not believe these HAP are emitted from the Cyanide Chemicals Manufacturing source category. The NEI entries for these HAP from these sources are likely the result of emissions factors that are used for fuel combustion and are unrelated to cyanide chemicals manufacturing.

c. PB–HAP Methodology

The environmental screening assessment includes six PB–HAP, arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. With the exception of lead, the environmental risk screening assessment for PB–HAP consists of three tiers. The first tier of the environmental risk screening assessment uses the same health-protective conceptual model that is used for the Tier 1 human health screening assessment. TRIM.FaTE model simulations were used to back-calculate Tier 1 screening threshold emission rates. The screening threshold emission rates represent the emission rate in tons of pollutant per year that results in media concentrations at the facility that equal the relevant ecological benchmark. To assess emissions from each facility in the category, the reported emission rate for each PB–HAP was compared to the Tier 1 screening threshold emission rate for that PB–HAP for each assessment endpoint and effect level. If emissions from a facility do not exceed the Tier 1 screening threshold emission rate, the facility ''passes'' the screening assessment, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening threshold emission rate, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening assessment, the screening threshold emission rates are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screening assessment. For soils, we evaluate the average soil concentration for all soil parcels within a 7.5-km radius for each facility and PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening threshold emission rate, the facility ''passes'' the screening assessment and typically is not evaluated further. If emissions from a facility exceed the Tier 2 screening threshold emission rate, we evaluate the facility further in Tier 3.

As in the multipathway human health risk assessment, in Tier 3 of the environmental screening assessment, we examine the suitability of the lakes around the facilities to support life and remove those that are not suitable (*e.g.,* lakes that have been filled in or are industrial ponds), adjust emissions for plume-rise, and conduct hour-by-hour time-series assessments. If these Tier 3 adjustments to the screening threshold emission rates still indicate the potential for an adverse environmental effect (*i.e.,* facility emission rate exceeds the screening threshold emission rate), we may elect to conduct a more refined assessment using more site-specific information. If, after additional refinement, the facility emission rate still exceeds the screening threshold emission rate, the facility may have the potential to cause an adverse environmental effect.

To evaluate the potential for an adverse environmental effect from lead, we compared the average modeled air concentrations (from HEM–3) of lead around each facility in the source category to the level of the secondary NAAQS for lead. The secondary lead NAAQS is a reasonable means of evaluating environmental risk because it is set to provide substantial protection against adverse welfare effects which can include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

d. Acid Gas Environmental Risk Methodology

The environmental screening assessment for acid gases evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF and HCl. The environmental risk screening methodology for acid gases is a single-tier screening assessment that compares modeled ambient air concentrations (from AERMOD) to the ecological benchmarks for each acid gas. To identify a potential adverse environmental effect (as defined in section 112(a)(7) of the CAA) from emissions of HF and HCl, we evaluate the following metrics: the size of the modeled area around each facility that exceeds the ecological benchmark for each acid gas, in acres and square kilometers; the percentage of the modeled area around each facility that exceeds the ecological benchmark for each acid gas; and the area-weighted average SV around each facility (calculated by dividing the area-weighted average concentration over the 50-km modeling domain by the ecological benchmark for each acid gas). For further information on the environmental screening assessment approach, see Appendix 9 of the *Residual Risk Assessment for the Cyanide Chemicals Manufacturing*

Source Category in Support of the Risk and Technology Review 2020 Proposed Rule, which is available in the docket for this action.

6. How do we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAP from all other emission sources at the facility for which we have data. For this source category, we conducted the facility-wide assessment using a dataset compiled from the 2017 NEI. The source category records of that NEI dataset were removed, evaluated, and updated as described in section II.C of this preamble: What data collection activities were conducted to support this action? Once a quality assured source category dataset was available, it was placed back with the remaining records from the NEI for that facility. The facility-wide file was then used to analyze risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of the facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

For this source category, we conducted the facility-wide assessment using a dataset that the EPA compiled from the 2017 NEI. We used the NEI data for the facility and did not adjust any category or ''non-category'' data. Therefore, there could be differences in the dataset from that used for the source category assessments described in this preamble. We analyzed risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, we made a reasonable attempt to identify the source category risks, and these risks were compared to the facility-wide risks to determine the portion of facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

7. How do we consider uncertainties in risk assessment?

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Also included are those uncertainties specific to our acute screening assessments, multipathway screening assessments, and our environmental risk screening assessments. A more thorough discussion of these uncertainties is included in the *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action. If a multipathway site-specific assessment was performed for this source category, a full discussion of the uncertainties associated with that assessment can be found in Appendix 11 of that document, *Site-Specific Human Health Multipathway Residual Risk Assessment Report.*

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations. We also note that the selection of meteorology dataset location could have an impact on the risk estimates. As we continue to update and expand our library of meteorological station data used in our risk assessments, we expect to reduce this variability.

c. Uncertainties in Inhalation Exposure Assessment

Although every effort is made to identify all of the relevant facilities and emission points, as well as to develop accurate estimates of the annual emission rates for all relevant HAP, the uncertainties in our emission inventory likely dominate the uncertainties in the exposure assessment. Some uncertainties in our exposure assessment include human mobility,

using the centroid of each census block, assuming lifetime exposure, and assuming only outdoor exposures. For most of these factors, there is neither an under nor overestimate when looking at the maximum individual risk or the incidence, but the shape of the distribution of risks may be affected. With respect to outdoor exposures, actual exposures may not be as high if people spend time indoors, especially for very reactive pollutants or larger particles. For all factors, we reduce uncertainty when possible. For example, with respect to census-block centroids, we analyze large blocks using aerial imagery and adjust locations of the block centroids to better represent the population in the blocks. We also add additional receptor locations where the population of a block is not well represented by a single location.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties are generally expressed quantitatively, and others are generally expressed in qualitative terms. We note, as a preface to this discussion, a point on dose-response uncertainty that is stated in the EPA's *2005 Guidelines for Carcinogen Risk Assessment;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (the EPA's *2005 Guidelines for Carcinogen Risk Assessment,* pages 1 through 7). This is the approach followed here as summarized in the next paragraphs.

Cancer UREs used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk.[19] That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit). In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[20] Chronic noncancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. To derive dose-response values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach,[21] which considers uncertainty, variability, and gaps in the available data. The UFs are applied to derive dose-response values that are intended to protect against appreciable risk of deleterious effects.

Many of the UFs used to account for variability and uncertainty in the development of acute dose-response values are quite similar to those developed for chronic durations. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute dose-response value at another exposure duration (*e.g.,* 1 hour). Not all acute dose-response values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the dose-response value or values being exceeded. Where relevant to the estimated exposures, the lack of acute dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Uncertainty also exists in the selection of ecological benchmarks for the environmental risk screening assessment. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. We searched for benchmarks for three effect levels (*i.e.,* no-effects level, threshold-effect level, and probable effect level), but not all combinations of ecological assessment/environmental HAP had benchmarks for all three effect levels. Where multiple effect levels were available for a particular HAP and assessment endpoint, we used all of the available effect levels to help us determine whether risk exists and whether the risk could be considered significant and widespread.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective dose-response value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified dose-response value, we also apply the most protective dose-response value from the other compounds in the group to estimate risk.

e. Uncertainties in Acute Inhalation Screening Assessments

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and the presence of a person. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile) co-occur. We then include the additional assumption that a person is located at this point at the same time. Together, these assumptions represent a reasonable worst-case actual exposure scenario. In most cases, it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and reasonable worst-case air dispersion conditions occur simultaneously.

f. Uncertainties in the Multipathway and Environmental Risk Screening Assessments

For each source category, we generally rely on site-specific levels of PB–HAP or environmental HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary or whether it is necessary to perform an environmental screening assessment. This determination is based on the results of a three-tiered screening assessment that relies on the outputs from models—TRIM.FaTE and AERMOD—that estimate environmental pollutant concentrations and human exposures for five PB–HAP (dioxins, POM, mercury, cadmium, and arsenic) and two acid gases (HF and HCl). For lead, we use AERMOD to determine ambient air concentrations, which are then compared to the secondary NAAQS standard for lead. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on

[19] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[20] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[21] See *A Review of the Reference Dose and Reference Concentration Processes,* U.S. EPA, December 2002, and *Methods for Derivation of Inhalation Reference Concentrations and Application of Inhalation Dosimetry,* U.S. EPA, 1994.

environmental modeling are model uncertainty and input uncertainty.[22]

Model uncertainty concerns whether the model adequately represents the actual processes (*e.g.,* movement and accumulation) that might occur in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screening assessments are appropriate and state-of-the-art for the multipathway and environmental screening risk assessments conducted in support of RTRs.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway and environmental screening assessments, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water, soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway and environmental screening assessments, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screening assessment. In Tier 3 of the screening assessments, we refine the model inputs again to account for hour-by-hour plume-rise and the height of the mixing layer. We can also use those hour-by-hour meteorological data in a TRIM.FaTE run using the screening configuration corresponding to the lake location. These refinements produce a more accurate estimate of chemical concentrations in the media of interest, thereby reducing the uncertainty with those estimates. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all three tiers.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For all tiers of the multipathway and environmental screening assessments, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do not exceed screening threshold emission rates (*i.e.,* screen out), we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do exceed screening threshold emission rates, it does not mean that impacts are significant, only that we cannot rule out that possibility and that a refined assessment for the site might be necessary to obtain a more accurate risk characterization for the source category.

The EPA evaluates the following HAP in the multipathway and/or environmental risk screening assessments, where applicable: Arsenic, cadmium, dioxins/furans, lead, mercury (both inorganic and methyl mercury), POM, HCl, and HF. These HAP represent pollutants that can cause adverse impacts either through direct exposure to HAP in the air or through exposure to HAP that are deposited from the air onto soils and surface waters and then through the environment into the food web. These HAP represent those HAP for which we can conduct a meaningful multipathway or environmental screening risk assessment. For other HAP not included in our screening assessments, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond these that we are evaluating may have the potential to cause adverse effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

IV. Analytical Results and Proposed Decisions

A. What actions are we taking pursuant to CAA sections 112(d)(2) and 112(d)(3)?

We are proposing standards pursuant to CAA section 112(d)(2) for process wastewater from existing cyanide chemical manufacturing process units, which was previously unregulated.[23] During development of the initial MACT standards, we identified process wastewater at existing sources as a potential source of emissions of hydrogen cyanide, acetonitrile, and acrylonitrile. See 65 FR 76408, 76411, and 76413, December 6, 2000, for a discussion of the HAP emitted from cyanide chemicals manufacturing. At that time, we identified measures undertaken at cyanide chemicals manufacturing facilities to comply with other NESHAP as the ''MACT floor,'' but we did not include these measures in 40 CFR part 63, subpart YY for existing cyanide chemical manufacturing process units. Based on our review, we are proposing to find that these measures reflect the best performing sources in the source category. The results and proposed decisions based on the analyses performed pursuant to CAA section 112(d)(2) and (3) are presented below.

For this proposal, we reviewed title V permits for facilities subject to the Cyanide Chemicals Manufacturing NESHAP and determined that all cyanide chemicals manufacturing facilities are co-located with processes subject to the Hazardous Organic NESHAP (HON) or substantively similar requirements. In the 2000 NESHAP proposal, we stated that wastewater treatment units at cyanide chemicals manufacturing facilities are typical of synthetic organic chemicals manufacturing facilities subject to the HON. The wastewater requirements of the HON are already an approved means of compliance for wastewater emission sources subject to 40 CFR part 63, subpart YY as stated in 40 CFR 63.1100(g)(5). We are proposing to require compliance with HON wastewater requirements for process

[22] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

[23] The EPA not only has authority under CAA section 112(d)(2) and (3) to set MACT standards for previously unregulated HAP emissions at any time, but is required to address any previously unregulated HAP emissions as part of its periodic review of MACT standards under CAA section 112(d)(6). *LEAN* v. *EPA,* 955 F3d at 1091–1099.

wastewater at existing sources, which will ensure all affected sources at cyanide chemicals manufacturing facilities are subject to MACT standards. We are proposing these requirements for cyanide chemicals manufacturing existing sources because such requirements represent: (1) The measures employed by the best performing sources in the category; and (2) an already acceptable means of compliance for wastewater emissions at sources subject to subpart YY. We believe that these requirements will not require additional controls or emissions reductions since existing sources we have identified as subject to the Cyanide Chemicals Manufacturing NESHAP are already subject to the HON or substantively identical wastewater requirements in another NESHAP.

We are also adding the HON requirements for waste management units upstream of an open or closed biological treatment process to the new source standard to ensure demonstrable compliance measures are in place for these sources; however, we believe these measures would already be employed by any new sources to achieve the combined 93 percent capture and control of HAP emissions from wastewater required for process wastewater emissions at new sources subject to the Cyanide Chemicals Manufacturing NESHAP.

We have identified three HAP that may be present in process wastewater streams at cyanide chemicals manufacturing facilities: Hydrogen cyanide, acetonitrile, and acrylonitrile. We are proposing to include hydrogen cyanide in the calculations required to determine compliance with the wastewater standard for the Cyanide Chemicals Manufacturing source category to ensure all HAP potentially present in process wastewater are subject to MACT standards. The other two HAP that may be present in cyanide chemicals manufacturing wastewater (acetonitrile and acrylonitrile) are already included in the list of compounds subject to the HON wastewater provisions. We do not expect significant amounts of hydrogen cyanide to be present in these process wastewater streams. When developing the 2002 NESHAP, facilities that were surveyed reported very low levels of hydrogen cyanide in their wastewaters with one exception. The only facility that had high levels of hydrogen cyanide in its wastewater used add-on controls to remove the hydrogen cyanide prior to discharge. That facility was the basis for the ''new source'' MACT floor. We expect any facilities with high levels of hydrogen cyanide in their wastewater would already possess add-on controls similar to those present at the single existing source with high levels of hydrogen cyanide in order to meet effluent discharge limits and protect the biological wastewater treatment systems used at these facilities. We are including hydrogen cyanide in these calculations to ensure that all HAP emitted by the source category are subject to MACT standards.

Nevertheless, we are seeking comment on whether facilities would need to install additional controls, achieve additional emissions reductions, or incur significant costs as a result of the proposed standards for process wastewater. For this proposed rule, we did not identify any new control technologies or developments in existing technologies to evaluate as ''beyond-the-floor'' controls other than the controls evaluated during the initial MACT standards. We did not find any data to support changing the conclusion that application of the new source MACT limit for process wastewater emissions to existing sources is unreasonable (See 65 FR 76419 and Docket Item No. EPA–HQ–OAR–2004–0041–0003).

B. What are the results of the risk assessment and analyses?

1. Chronic Inhalation Risk Assessment Results

The EPA estimated inhalation risk based on actual and allowable emissions, which we determined are the same for this category. The estimated baseline inhalation MIR posed by the source category is 5-in-1 million based on actual emissions and MACT-allowable emissions. The total estimated cancer incidence based on actual or allowable emission levels is 0.004 excess cancer cases per year, or one case every 250 years. Emissions of acrylonitrile from process vents account for 95 percent of the cancer incidence. Approximately 61,653 people are exposed to cancer risk greater than or equal to 1-in-1 million based upon actual and allowable emissions (see Table 1 of this preamble).

The maximum chronic noncancer TOSHI values for the source category were estimated to be 1 for neurological effects based on actual and allowable emissions. For both actual and allowable emissions, risk was driven by hydrogen cyanide emissions from process vents, wastewater, and equipment leaks.

TABLE 1—INHALATION RISK ASSESSMENT SUMMARY FOR CYANIDE CHEMICALS MANUFACTURING [1] SOURCE CATEGORY (40 CFR PART 63, SUBPART YY)

Risk assessment	Number of facilities [2]	Maximum individual cancer risk (1-in-1 million) [3]	Estimated population at increased risk of cancer ≥ 1-in-1 million	Estimated annual cancer incidence (cases per year)	Maximum chronic noncancer TOSHI [4]	Maximum screening acute noncancer HQ [5]
Baseline Actual Emissions						
Source Category	13	5	61,653	0.004	1 (neurological) ...	1 (REL)
Facility-Wide	13	200	266,532	0.04	1 (neurological) ...	
Baseline Allowable Emissions						
Source Category	13	5	61,653	0.004	1 (neurological) ...	

[1] Based on actual and allowable emissions.
[2] Number of facilities evaluated in the risk assessment. Includes 13 operating facilities subject to 40 CFR part 63, subpart YY.
[3] Maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[4] Maximum TOSHI. The target organ with the highest TOSHI for the Cyanide Chemicals Manufacturing source category is the neurological system.
[5] The maximum estimated acute exposure concentration was divided by available short-term threshold values to develop an array of HQ values. The acute HQ shown was based upon the lowest acute 1-hour dose-response value, the REL for hydrogen cyanide. When an HQ exceeds 1, we also show the HQ using the next lowest available acute dose-response value.

2. Screening Level Acute Risk Assessment Results

Based on our screening analysis of reasonable worst-case acute exposure to actual emissions from the category, no HAP exposures result in an HQ greater than 1 based upon the 1-hour REL. As discussed in section III.C.3.c of this preamble, for this source category, we used acute factors between 2 and 10, depending on the type of source. Specifically, we used a factor of 2 for process vents and equipment leaks, a factor of 4 for storage vessels, and a factor of 10 for transfer racks. A further discussion of why these factors were chosen can be found in the memorandum, *Technical Support Document for the Cyanide Chemicals Manufacturing NESHAP Residual Risk and Technology Review Proposal,* available in the docket for this rulemaking.

3. Multipathway Risk Screening Results

Three of the 13 facilities in this source category reported emissions of PB–HAP in the NEI which include POM (of which polycyclic aromatic hydrocarbons is a subset), lead compounds, arsenic compounds, cadmium compounds, and mercury compounds. We note that for the Cyanide Chemicals Manufacturing source category, while we modeled these emissions, none of these HAP are expected to be emitted from the source category and they were only modeled to provide a conservative estimate of risk because they were included in the NEI. To identify potential multipathway health risks from PB–HAP other than lead, we first performed a tiered screening assessment (Tiers 1, 2, and 3) based on emissions of PB–HAP emitted from each facility in the source category. Arsenic emissions from a single facility exceeded the Tier 1 cancer screening threshold emission rate with a maximum SV of 2. No facilities had POM emissions exceeding the Tier 1 cancer screening threshold emission rate. Mercury emissions from a single facility exceeded the Tier 1 noncancer screening threshold emission rate with a maximum SV of 2. No facilities had cadmium emissions exceeding the Tier 1 noncancer screening threshold emission rate. For the facilities and HAP for which the Tier 1 threshold emissions rates were exceeded (*i.e.,* SV greater than 1), we conducted a Tier 2 screening analysis. In the Tier 2 screening analysis, no facilities had an SV greater than 1. Specifically, the maximum Tier 2 cancer SV was less than 1 for both the farmer scenario for arsenic (0.4) and the fisher scenario for mercury (0.3).

Further facility details on the multipathway screening analysis can be found in Appendix 10 of the *Residual Risk Assessment for the Cyanide Chemical Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule.*

An SV in any of the tiers is not an estimate of the cancer risk or a noncancer HQ. Rather, an SV represents a high-end estimate of what the risk or HQ may be. For example, facility emissions resulting in an SV of 2 for a non-carcinogen can be interpreted to mean that we are confident that the HQ would be lower than 2. Similarly, facility emissions resulting in a cancer SV of 20 for a carcinogen means that we are confident that the cancer risk is lower than 20-in-1 million. Our confidence comes from the health-protective assumptions that are incorporated into the screens: We choose inputs from the upper end of the range of possible values for the influential parameters used in the screens and we assume food consumption behaviors that would lead to high total exposure. This risk assessment estimates the maximum hazard for mercury and cadmium through fish consumption based on upper bound screens and the maximum excess cancer risks from POM and arsenic through ingestion of fish and farm produce.

In evaluating the potential for adverse health effects from emissions of lead, the EPA compared modeled annual lead concentrations to the secondary NAAQS level for lead (0.15 $\mu g/m^3$, arithmetic mean concentration over a 3-month period). The highest annual average lead concentration, 0.00000065 $\mu g/m^3$, is orders of magnitude below the NAAQS level for lead, indicating a low potential for adverse health impacts.

4. Environmental Risk Screening Results

As described in section III.A of this preamble, we conducted an environmental risk screening assessment for the Cyanide Chemical Manufacturing source category for the following pollutants: arsenic, cadmium, HCl, lead, mercury (methyl mercury and mercuric chloride), and POM. As noted in our discussion of the multipathway risk assessment results, these HAP are not associated with cyanide chemicals manufacturing and are not emitted from the source category. There were NEI entries for small amounts of these pollutants and we chose to model these emissions to err on the side of an overly conservative assessment.

In the Tier 1 screening analysis for the above PB–HAP (other than lead, which was evaluated differently), the maximum Tier 1 SV was less than or equal to 1 for all PB–HAP.

For lead, we did not estimate any exceedances of the secondary lead NAAQS. For HCl, the average modeled concentration around each facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, for the one facility that reported HCl emissions, each individual modeled concentration of HCl (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks for HCl.

Based on the results of the environmental risk screening analysis, we do not expect an adverse environmental effect as a result of HAP emissions from this source category.

5. Facility-Wide Risk Results

The EPA estimated inhalation risk based on facility-wide emissions. The estimated maximum individual excess lifetime cancer risk based on facility-wide emissions was 200-in-1 million, with 0.04 excess cancer cases per year, or one case every 25 years. This cancer risk is driven by emissions sources that are not in the Cyanide Chemicals Manufacturing source category; specifically, emissions of ethylene oxide and coke oven emissions from non-category sources account for 95 percent of the cancer incidence. Approximately 150 people are exposed to an excess cancer risk greater than or equal to 100-in-1 million, with 266,532 people exposed to an excess cancer risk above 1-in-1 million (see Table 1 of this preamble). The estimated maximum chronic noncancer TOSHI values for the facility-wide assessment was the same as estimated based on actual and allowable emissions from the source category—a TOSHI equal to 1 for neurological effects driven by hydrogen cyanide emissions from process vents, wastewater, and equipment leaks.

Regarding the facility-wide risks due to ethylene oxide, which are emitted by sources that are not part of the Cyanide Chemicals Manufacturing source category, we intend to continue to evaluate those facility-wide estimated emissions and risks further and may address these in separate actions, as appropriate. In particular, the EPA is addressing ethylene oxide in response to the results of the latest NATA released in August 2018, which identified the chemical as a potential concern in several areas across the country (NATA is the Agency's nationwide air toxics screening tool, designed to help the EPA and state, local, and tribal air agencies identify areas, pollutants, or types of sources for

further examination). The latest NATA estimates that ethylene oxide significantly contributes to potential elevated cancer risks in some census tracts across the U.S. (less than 1 percent of the total number of tracts). These elevated risks are largely driven by an EPA risk value that was updated in late 2016. The EPA will work with industry and state, local, and tribal air agencies as the EPA takes a two-pronged approach to address ethylene oxide emissions by: (1) Reviewing and, as appropriate, revising CAA regulations for facilities that emit ethylene oxide—starting with air toxics emissions standards for miscellaneous organic chemical manufacturing facilities (85 FR 49084, August 12, 2020) and commercial sterilizers; and (2) conducting site-specific risk assessments and, as necessary, implementing emission control strategies for targeted high-risk facilities. The EPA will post updates on its work to address ethylene oxide on its website at: *https://www.epa.gov/ethylene-oxide.*

6. What demographic groups might benefit from this regulation?

To examine the potential for any environmental justice issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risk to individual demographic groups of the populations living within 5 km and within 50 km of the facilities. In the analysis, we evaluated the distribution of HAP-related cancer and noncancer risk from the Cyanide Chemicals Manufacturing source category across different demographic groups within the populations living near facilities.[24]

The results of the demographic analysis are summarized in Table 2 below. These results, for various demographic groups, are based on the estimated risk from actual emissions levels for the population living within 50 km of the facilities.

TABLE 2—CYANIDE CHEMICALS MANUFACTURING DEMOGRAPHIC RISK ANALYSIS RESULTS

	Nationwide	Population with cancer risk at or above 1-in-1 million due to cyanide chemicals manufacturing	Population with chronic HI above 1 due to cyanide chemicals manufacturing
Total Population	317,746,049	61,653	0
Race by Percent			
White	62	73	
All Other Races	38	27	
Race by Percent			
White	62	73	
African American	12	19	
Native American	0.8	0.4	
Other and Multiracial	7	4	
Ethnicity by Percent			
Hispanic	18	3	
Non-Hispanic	82	97	
Income by Percent			
Below Poverty Level	14	16	
Above Poverty Level	86	84	
Education by Percent			
Over 25 and without High School Diploma	14	16	
Over 25 and with a High School Diploma	86	84	

The results of the Cyanide Chemicals Manufacturing source category demographic analysis indicate that emissions from the source category expose approximately 61,653 people to a cancer risk at or above 1-in-1 million and nobody to a chronic noncancer TOSHI greater than 1. The percentages of the at-risk population in the White, African American, Below Poverty, and Over 25 without High School Diploma demographic groups are greater than their respective nationwide percentages.

The methodology and the results of the demographic analysis are presented in a technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Cyanide Chemicals Manufacturing,* available in the docket for this action.

C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?

1. Risk Acceptability

As explained in section II.A of this preamble, the EPA sets standards under

[24] Demographic groups included in the analysis are: White, African American, Native American, other races and multiracial, Hispanic or Latino, children 17 years of age and under, adults 18 to 64 years of age, adults 65 years of age and over, adults without a high school diploma, people living below the poverty level, people living two times the poverty level, and linguistically isolated people.

CAA section 112(f)(2) using ''a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual risk (MIR) of approximately 1-in-10 thousand.'' (54 FR 38045, September 14, 1989). The EPA weighed all health risk measures and information, including science policy assumptions and estimation uncertainties, in determining whether risk posed by emissions from the source category is acceptable.

The estimated maximum cancer risk for inhalation exposure to actual and allowable emissions from the Cyanide Chemicals Manufacturing source category was 5-in-1 million, 20 times below 100-in-1 million, which is the presumptive upper limit of acceptable risk. The EPA estimates emissions from the category would result in a cancer incidence of 0.004 excess cancer cases per year, or one case every 250 years. Inhalation exposures to HAP associated with chronic noncancer health effects result in a TOSHI of 1 based on actual and allowable emissions, an exposure level that the EPA has determined is without appreciable risk of adverse health effects. Exposures to HAP associated with acute noncancer health effects also are below levels of health concern with no HAP exposures resulting in an HQ greater than 1 based upon the 1-hour REL.

Maximum cancer risk due to ingestion exposures, estimated using health-protective risk screening assumptions, is below 1-in-1 million for the Tier 2 farmer exposure scenario. Tier 2 screening analyses of mercury exposure due to fish ingestion determined that the maximum HQ for mercury would be less than 1 as explained in section III.C.4 of this preamble.

Considering all of the health risk information and factors discussed above, as well as the uncertainties discussed in section III of this preamble, we propose that the risks posed by emissions from the Cyanide Chemicals Manufacturing source category are acceptable.

2. Ample Margin of Safety Analysis

As directed by CAA section 112(f)(2), we conducted an analysis to determine whether the current emissions standards provide an ample margin of safety to protect public health. Under the ample margin of safety analysis, we evaluated the cost and feasibility of available control technologies and other measures (including the controls, measures, and costs reviewed under the technology review) that could be applied to this source category to further reduce the risks (or potential risks) due to emissions of HAP from the source category. In light of the low cancer and noncancer risk posed to individuals exposed to HAP emitted from this source category and lack of additional control technologies, we are proposing to conclude that the existing standards under the NESHAP provide an ample margin of safety to protect public health.

3. Adverse Environmental Effect

Based on the results of our environmental risk screening analysis, we do not anticipate an adverse environmental effect as a result of HAP emissions from this source category. Therefore, the EPA is proposing that it is not necessary to set a more stringent standard to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

D. What are the results and proposed decisions based on our technology review?

As part of the technology review, we identified a previously unregulated process, and are proposing a MACT standard for the process under CAA section 112(d)(2) and (3), as described in Section IV.A of this preamble, above. We did not identify any developments in processes, practices, or control technologies for cyanide chemicals manufacturing facilities during our analysis for this proposal. Facilities subject to this NESHAP use flares to control emissions from point sources and LDAR programs to address emissions from equipment leaks. As discussed in the memorandum titled *Technical Support Document for the Cyanide Chemicals Manufacturing NESHAP Residual Risk and Technology Review Proposal,* we did not identify any developments in these technologies during our technology review.

E. What other actions are we proposing?

In addition to the proposed actions described above, we are proposing additional revisions to the NESHAP. We are proposing revisions to the SSM provisions of the MACT rule in order to ensure that they are consistent with the decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (DC Cir. 2008), in which the court vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We note that for the Cyanide Chemicals Manufacturing source category, the NESHAP currently does not include an exemption for SSM events, and already includes standards that apply at all times, including periods of SSM. Therefore, we have determined that the NESHAP is already consistent with the court decision mentioned above. However, we are making revisions to the MACT rule at 40 CFR 63.1108 through 40 CFR 63.1112 to ensure this is clearly and consistently communicated throughout and no confusion results from referenced subparts associated with the GMACT that may contain SSM exemptions for other source categories. We also are proposing other changes to add electronic reporting. Our analyses and proposed changes related to these issues are discussed below.

Electronic Reporting. The EPA is proposing that owners and operators of cyanide chemicals manufacturing facilities submit electronic copies of required notifications of compliance, performance test reports, and periodic reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action. The proposed rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [25] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT. The proposed rule requires that Notification of Compliance Status (NOCS) be submitted as a PDF upload in CEDRI.

For periodic reports, the proposed rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. A draft version of the proposed template for these reports is included in the docket for this action.[26] The EPA specifically requests comment on the content, layout, and overall design of the template.

Additionally, the EPA has identified two broad circumstances in which

[25] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[26] See *Draft Form_5900–485_Subpart_YY_Cyanide_Draft_Periodic_Report_Template_Proposal.xlsm,* available at Docket ID No. EPA–HQ–OAR–2020–0532.

electronic reporting extensions may be provided. These circumstances are (1) outages of the EPA's CDX or CEDRI which preclude an owner or operator from accessing the system and submitting required reports and (2) *force majeure* events, which are defined as events that will be or have been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevent an owner or operator from complying with the requirement to submit a report electronically. Examples of *force majeure* events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [27] to implement Executive Order 13563 and is in keeping with the EPA's Agency-wide policy [28] developed in response to the White House's Digital Government Strategy.[29] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* referenced earlier in this section.

F. What compliance dates are we proposing?

The EPA is proposing that existing affected sources and affected sources that commenced construction or reconstruction on or before January 15, 2021, must comply with the proposed process wastewater standards no later than 365 days after the effective date of the final rule and all of the other amendments no later than 180 days after the effective date of the final rule. The final action is not expected to be a ''major rule'' as defined by 5 U.S.C. 804(2), so the effective date of the final rule will be the promulgation date as specified in CAA section 112(d)(10). For existing sources, we are proposing a change that would impact ongoing compliance requirements for 40 CFR part 63, subpart YY. As discussed elsewhere in this preamble, we are proposing to change the requirements for SSM by removing references to exemptions in other subparts. Our experience with similar industries shows that this sort of regulated facility generally requires a time period of 180 days to read and understand the amended rule requirements; to evaluate their operations to ensure that they can meet the standards during periods of startup and shutdown as defined in the rule and make any necessary adjustments; and to update their operations to reflect the revised requirements.

From our assessment of the timeframe needed for compliance with the revised requirements, the EPA considers a period of 180 days to be the most expeditious compliance period practicable, and, thus, is proposing that existing affected sources be in compliance with this regulation's revised requirements within 180 days of the regulation's effective date. We solicit comment on this proposed compliance period, and we specifically request submission of information from sources in this source category regarding specific actions that would need to be undertaken to comply with the proposed amended requirements, including the proposed amendments related to recordkeeping and reporting and the time needed to make the adjustments for compliance with them. We note that information provided may result in changes to the proposed compliance date; however, we expect the proposed compliance time to be sufficient given that cyanide chemicals manufacturing facilities are already subject to standards during these periods. We are proposing that facilities will have 1 year to comply with the proposed process wastewater standards for existing sources. We note that we do not expect the proposed wastewater standards for existing sources to require installation of any additional controls. We believe that all affected sources are already complying with the proposed wastewater requirements or requirements that are substantively identical. We are proposing that facilities must comply within 365 days in order to provide time to evaluate wastewater operations, perform compliance calculations, and adjust plans and reports as necessary. We are seeking comment on the assumption that facilities will not need to install additional add-on controls and whether facilities would require more or less time to comply with the proposed process wastewater requirements. Affected sources that commence construction or reconstruction after January 15, 2021, must comply with all requirements of the subpart, including the amendments being proposed, no later than the effective date of the final rule or upon startup, whichever is later. All affected facilities would have to continue to meet the current requirements of 40 CFR part 63, subpart YY, until the applicable compliance date of the amended rule.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected sources?

There are 13 cyanide chemicals manufacturing facilities currently operating as major sources of HAP subject to the proposed amendments. A list of facilities that are currently subject to the MACT standards is available in the memorandum titled *Technical Support Document for the Cyanide Chemicals Manufacturing NESHAP Residual Risk and Technology Review Proposal,* available in Docket ID No. EPA–HQ–OAR–2020–0532.

B. What are the air quality impacts?

We do not anticipate that the proposed amendments to this subpart will impact air quality. We are not proposing changes to the standard that

[27] EPA's Final Plan for Periodic Retrospective Reviews, August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[28] E-Reporting Policy Statement for EPA Regulations, September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[29] Digital Government: Building a 21st Century Platform to Better Serve the American People, May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

will result in additional emission reductions beyond the levels already achieved by the NESHAP.

C. What are the cost impacts?

The proposed amendments will have a limited cost impact on affected facilities. Total estimated costs are $47,527 based on a $3,656 per facility cost for all 13 facilities. The costs result from reading and understanding rule requirements and adjusting compliance plans based on the rule proposal. All costs are one-time expenses expected to occur in the first year after the rule is finalized. Costs are based on Agency knowledge and experience with the NESHAP program, related ICRs, and Bureau of Labor Statistics data.

D. What are the economic impacts?

Economic impact analyses focus on changes in market prices and output levels. If changes in market prices and output levels in the primary markets are significant enough, impacts on other markets may also be examined. Both the magnitude of costs associated with the proposed requirements and the distribution of these costs among affected facilities can have a role in determining how the market will change in response to a proposed rule.

Economic costs to owners of cyanide chemicals manufacturing facilities were measured in present value (PV) total costs and equivalent annual value (EAV) costs. All cyanide chemicals manufacturing facilities were estimated to have similar costs. All costs are presented in 2019 dollars. See section V.C of this preamble for additional information on costs.

PV total costs and EAV costs were measured at the 3 percent and 7 percent discount rates. The duration of analysis was 8 years. Per facility PV total cost estimate is $3,656 at the 3 percent and 7 percent discount rates. The similarity in both discount rates is due to the costs all occuring in the first year after the rule is finalized. EAV costs per facility are measured to be $521 and $612 at the 3 percent and 7 percent discount rates, respectively. Combined total PV cost of the proposed requirements for all facilities is measured to be $47,527 at the 3 percent and 7 percent discount rates. The similarity in both discount rates is due to the costs all coming in the first year that the rule will be finalized. Combined EAV costs of the proposed requirements for all facilities are measured to be $6,771 and $7,959 at the 3 percent and 7 percent discount rates, respectively.

As required by the Regulatory Flexibility Act (RFA), we performed an analysis to determine if any small entities would be unduly burdened by the proposed amendments. We determined that all facilities subject to the NESHAP are owned by large parent entities based on Small Business Administration standards. No significant economic impacts from the proposed amendments are anticipated because the PV and EAV costs associated with the proposed revisions are minimal.

E. What are the benefits?

As discussed in section V.B of this preamble, we do not anticipate the proposed amendments to this subpart to impact air quality. The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements, and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public.

VI. Request for Comments

We solicit comments on this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data used in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR website at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR website, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2020–0532 (through the method described in the **ADDRESSES** section of this preamble).

5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility (or facilities). We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the project website at *https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen.*

VIII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Orders 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to OMB for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2678.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The EPA is proposing amendments that revise provisions pertaining to emissions during periods of SSM, add requirements for electronic reporting of NOCS, periodic reports, and performance test results, and make other minor clarifications and corrections. This information will be collected to assure compliance with the Cyanide Chemicals Manufacturing NESHAP.

Respondents/affected entities: Owners or operators of cyanide chemicals manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart YY).

Estimated number of respondents: 13 (assumes no new respondents over the next 3 years).

Frequency of response: Initially, occasionally, and annually.

Total estimated burden: 160 hours (per year) to comply with all of the requirements in the NESHAP. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $15,800 (per year), including no annualized capital or operation and maintenance costs, to comply with all of the requirements in the NESHAP.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than February 16, 2021. The EPA will respond to any ICR-related comments in the final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. There are no small entities among the eight ultimate parent companies impacted by this proposed action given the Small Business Administration small business size definition for this industry (1,000 employees or greater for NAICS 325180—Other Basic Inorganic Chemical Manufacturing), and no significant economic impact on any of these entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. None of the cyanide chemicals manufacturing production facilities that have been identified as being affected by this proposed action are owned or operated by tribal governments or located within tribal lands. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because the EPA does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in section IV.B of this preamble and the document, *Residual Risk Assessment for the Cyanide Chemicals Manufacturing Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this rulemaking.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This action involves technical standards. Therefore, the EPA conducted a search to identify potentially applicable voluntary consensus standards. However, the Agency identified no such standards. A thorough summary of the search and results are included in the memorandum titled *Voluntary Consensus Standard Results for Cyanide Chemicals Manufacturing Residual Risk and Technology Review,* which is available in the docket for this action.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in section IV.B of this preamble and in the technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Cyanide Chemicals Manufacturing Facilities,* available in the docket for this action.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Andrew Wheeler,

Administrator.

[FR Doc. 2021–00374 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2020–0725; FRL–10019–09–OAR]

RIN 2060–AV07

Extension of 2019 and 2020 Renewable Fuel Standard Compliance and Attest Engagement Reporting Deadlines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to modify certain compliance dates under the Renewable Fuel Standard (RFS). First, EPA proposes to extend the RFS compliance deadline for the 2019 compliance year and the associated deadline for submission of attest engagement reports for the 2019 compliance year for small refineries. The new deadlines would be November 30, 2021, and June 1, 2022, respectively. Second, EPA proposes to extend the RFS compliance deadline for the 2020 compliance year and the associated deadline for submission of attest engagement reports for the 2020 compliance year for obligated parties and RIN-generating renewable fuel producers and importers, and other parties holding RINs. The new deadlines would be January 31, 2022, and June 1, 2022, respectively.

DATES: *Comments:* Comments must be received on or before March 11, 2021.

Public Hearing: EPA will hold a virtual public hearing on February 9, 2021. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: *Comments.* You may send your comments, identified by Docket ID No. EPA–HQ–OAR–2020–0725, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0448 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Air Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Public Hearing. The virtual public hearing will be held on February 9, 2021. The hearing will begin at 9:00 a.m. Eastern Time (ET) and end when all parties who wish to speak have had an opportunity to do so. All hearing attendees (including even those who do not intend to provide testimony) should notify the contact person listed under **FOR FURTHER INFORMATION CONTACT** by February 2, 2021. Additional information regarding the hearing appears below under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: For questions regarding this proposed action, contact Lauren Michaels, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4640; email address: *michaels.lauren@epa.gov.* To register for the virtual public hearing, contact Nick Parsons at (734) 214–4479 or *ASD-Registration@epa.gov.*

SUPPLEMENTARY INFORMATION:

Does this action apply to me?

Entities potentially affected by this rule, should it become final, are those involved with the production, distribution, and sale of transportation fuels, including gasoline, diesel, and renewable fuels such as ethanol, biodiesel, renewable diesel, and biogas. Potentially affected categories include:

Category	NAICS [1] code	Examples of potentially affected entities
Industry	324110	Petroleum refineries.
Industry	325193	Ethyl alcohol manufacturing.
Industry	325199	Other basic organic chemical manufacturing.
Industry	424690	Chemical and allied products merchant wholesalers.
Industry	424710	Petroleum bulk stations and terminals.
Industry	424720	Petroleum and petroleum products merchant wholesalers.
Industry	221210	Manufactured gas production and distribution.
Industry	454319	Other fuel dealers.

[1] North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposed action. This table lists the types of entities that EPA is now aware could potentially be affected by this proposed action. Other types of entities not listed in the table could also be affected. To determine whether your entity would be affected by this proposed action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this proposed action to

a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Participation in Virtual Public Hearing

Please note that EPA is deviating from its typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, EPA cannot hold in-person public meetings at this time.

EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The last day to pre-register to speak at the hearing will be February 2, 2021.

Each commenter will have 3 minutes to provide oral testimony. EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. EPA recommends submitting the text of your oral comments as written comments to the rulemaking docket. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/renewable-fuel-standard-program/news-notices-and-announcements-renewable-fuel-standard.* While EPA expects the hearing to go forward as set forth above, please monitor the website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by February 2, 2021. EPA may not be able to arrange accommodations without advance notice.

Outline of This Preamble

I. Background and Extension of Deadlines
A. Extension of the 2019 RFS Compliance Deadline for Small Refineries
B. Extension of the 2020 RFS Compliance Deadline
C. Corresponding Attest Engagement Report Deadlines
II. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
C. Paperwork Reduction Act (PRA)
D. Regulatory Flexibility Act (RFA)
E. Unfunded Mandates Reform Act (UMRA)
F. Executive Order 13132: Federalism
G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR part 51
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
III. Statutory Authority

I. Background and Extension of Deadlines

EPA is proposing to amend existing regulatory deadlines for small refineries under the Renewable Fuel Standard (RFS) program to submit reports demonstrating compliance with their 2019 RFS obligations, and to submit corresponding attest engagement reports. We are also proposing to amend existing regulatory deadlines for all obligated parties to submit reports demonstrating compliance with their 2020 RFS obligations, and to submit corresponding attest engagement reports. Finally, we also propose to modify the attest engagement report deadline for RIN-generating renewable fuel producers, RIN-generating importers of renewable fuel, and other parties owning RINs in order to maintain a single attest report deadline for 2020.

For small refineries, we are proposing to extend the 2019 compliance deadline in light of ongoing uncertainty surrounding small refinery exemptions (SREs) under the RFS program. We are proposing a 2019 compliance deadline for small refineries of November 30, 2021. For the 2020 compliance year, we are proposing to extend the compliance deadline for all obligated parties because we have not yet promulgated an annual rulemaking establishing the 2021 RFS standards. We are proposing a 2020 compliance deadline of January 31, 2022. We are proposing a June 1, 2022, attest engagement report deadline for both small refineries for 2019 and all relevant parties for 2020.

TABLE I.A–1—CURRENT AND PROPOSED ANNUAL COMPLIANCE AND ATTEST ENGAGEMENT REPORTING DEADLINES BY REGULATED PARTY FOR THE 2019 (AS APPLICABLE) AND 2020 COMPLIANCE YEARS

Regulated party category	Current annual compliance deadline	Current attest engagement reporting deadline	Proposed revised annual compliance deadline	Proposed revised attest engagement reporting deadline
2019 Compliance Year				
Small refineries	March 31, 2020	June 1, 2020	November 30, 2021	June 1, 2022.
2020 Compliance Year				
Small refineries	March 31, 2021	June 1, 2021	January 31, 2022	June 1, 2022.
Obligated parties	March 31, 2021	June 1, 2021	January 31, 2022	June 1, 2022.

A. Extension of the 2019 RFS Compliance Deadline for Small Refineries

The RFS regulations establish deadlines for obligated parties with renewable volume obligations (RVOs) to submit annual compliance demonstration reports to EPA, and later deadlines for the same parties to submit associated attest engagement reports. Under existing RFS regulations (40 CFR 80.1451(a) and 80.1464(d)), obligated parties must submit compliance demonstration reports for each calendar year by March 31 of the following year,

and associated attest engagements by June 1 of the following year. In this action, we are proposing to revise certain reporting deadlines applicable to the 2019 and 2020 compliance years.

On January 24, 2020, the U.S. Court of Appeals for the Tenth Circuit issued a decision in *Renewable Fuels Association (RFA)* v. *EPA* invalidating several SREs granted by EPA.[1] The small refineries whose SREs were invalidated by the court in the *RFA* case sought rehearing from the Tenth Circuit, which was denied on April 7, 2020.[2] Thus, the Tenth Circuit's decision was not final until after the compliance reporting deadline for the 2019 compliance year had already passed on March 31, 2020. Moreover, although the rehearing petitions have now been resolved in the Tenth Circuit, on September 4, 2020, the small refinery intervenors in that suit filed a petition for a writ of certiorari from the U.S. Supreme Court.[3] This case is pending on the Supreme Court's docket at this time. The resolution of the appeals process for the RFA case has the potential to impact the availability of SREs going forward. Because of the uncertainty both leading up to the March 31, 2020, deadline and of SREs going forward, we do not believe it would be appropriate to require small refineries to demonstrate compliance with their 2019 obligations pending ongoing appeals of the *RFA* decision.[4]

Therefore, we are proposing to extend the 2019 compliance deadline for small refineries. We believe that it is appropriate to do so only for small refineries because it is only the compliance requirements of these parties that would be affected by the outcome of the *RFA* case.[5] All other obligated parties' compliance obligations for 2019 remain the same regardless of the *RFA* decision.

We intend to allow small refineries to revisit their compliance reports in the time period after this rule is finalized and by the new compliance date established by this rulemaking. This means that if a small refinery had decided to carry forward a deficit for 2019 at the time of the March 31, 2020 compliance deadline, but then later receives an SRE for 2019 or retires RINs in accordance with its obligation, that initial decision to carry forward a deficit will not constitute a carry-forward deficit (*i.e.,* failing to meet the requirement to retire sufficient RINs as described in 40 CFR 80.1427(a)(1)) that would make the small refinery ineligible to do the same for the following compliance year (*i.e.,* 2020) under 40 CFR 80.1427(b). For small refineries that did not submit a compliance report as of the March 31, 2020, compliance deadline, we intend to treat those refineries as having carried forward a deficit for purposes of compliance status and do not intend to treat these refineries as being in noncompliance pending the implementation of this action to extend the compliance date for small refineries. Such small refineries would need to submit a compliance report to comply with the new compliance deadline, unless they receive an exemption.

This proposed extension would apply only to those parties who meet the definition of small refinery in CAA section 211(o)(1)(k) and 40 CFR 80.1441(e)(2)(iii) for the 2019 compliance year. This proposal to extend only the deadline for parties that meet the definition of small refinery is appropriate because only a presently unknown number of small refineries' compliance obligations will be affected by ongoing litigation and it is consistent with our eligibility requirements regarding SREs. We recognize that in recent years we have determined that some parties who have petitioned for SREs have been deemed ineligible by EPA, often due to the refinery's throughput (*i.e.,* more than 75,000 barrels of crude per day) or the nature of their business (*i.e.,* not a refinery). We are proposing that the parties that EPA has found ineligible because they do not meet the definition of small refinery in recent years would similarly not be eligible for the proposed compliance date extension for small refineries.

We note that all of the existing regulatory flexibilities for small refineries, including the ability to satisfy up to 20 percent of their 2019 RVOs using 2018 carryover RINs under 40 CFR 80.1427(a)(4), and the ability to carry forward a deficit from 2019 to 2020 if they did not carry forward a deficit from 2018 under 40 CFR 80.1427(b), would continue to be available to them to demonstrate compliance for 2019 at the proposed later compliance deadline. Due to the ongoing litigation, we take no position on the availability of SREs for the 2019 compliance year.

B. Extension of the 2020 RFS Compliance Deadline for All Obligated Parties

We are proposing to modify the 2020 compliance deadline for all obligated parties. We are doing so because we have yet to promulgate the 2021 RFS standards, and we recognize the importance to obligated parties of planning their compliance for a given calendar year by understanding their obligations for the years before and after.[6] That is, prior to demonstrating compliance with their 2020 obligations, obligated parties have a valid interest in knowing their 2021 compliance obligations. This is particularly true given the two-year ''lifespan'' for RINs; such that 2020 RINs can be used for compliance with either 2020 or 2021 obligations. Compliance obligations for 2021 will remain unknown until EPA finalizes the 2021 standards, and at this time, EPA has not yet proposed the 2021 standards.

We are also proposing to modify the 2020 compliance deadline to allow small refineries who have not yet demonstrated compliance with their 2019 obligations sufficient time between each year's compliance obligation demonstration. Modifying the 2020 compliance deadline to a date after the proposed 2019 compliance deadline for small refineries will allow for complete compliance for 2019 by all obligated parties, including these small refineries, prior to demonstrating compliance for 2020. Requiring full compliance with the 2019 standards prior to the 2020 compliance deadline will provide all obligated parties and market participants with an accurate picture of the RIN market, including the availability of 2019 carryover RINs for compliance with the 2020 standards.

We are proposing a 2020 compliance date of January 31, 2022, for all obligated parties. This deadline would allow several things to occur prior to that compliance date. First, it would allow small refineries to complete compliance with their 2019 obligations. Second, it would provide 60 days between 2019 and 2020 compliance deadlines to allow for obligated parties to make additional RIN acquisitions, transfers, transactions, and retirements

[1] *Renewable Fuels Ass'n* v. *EPA,* 948 F.3d 1206 (10th Cir. 2020).

[2] Order, *RFA* v. *EPA,* No. 18–9533 (10th Cir. Apr. 7, 2020).

[3] *RFA,* Petition for Certiorari, No. 20–472 (U.S. Sept. 4, 2020).

[4] EPA received a letter from the Small Refineries Coalition dated July 30, 2020, requesting that EPA modify the 2019, 2020, and 2021 compliance deadlines and corresponding attest engagement reporting deadlines. The letter suggests that uncertainty due to the lack of 2019 and 2020 SRE decisions and the unknown 2021 RFS standards ''make it practically impossible for small refineries to plan for compliance.'' This letter is available in the docket for this action.

[5] Most small refineries currently have pending 2019 SRE petitions before the agency. We are proposing to extend this flexibility to all small refineries because others may submit petitions in the future.

[6] See 80 FR 33100, 33149 (June 10, 2015); 78 FR 49823 (August 15, 2013) for discussion of obligated parties' interests in extensions in past actions.

prior to the 2020 compliance deadline. Finally, this deadline would provide 60 days between 2020 and 2021 compliance deadlines, allowing the 2021 compliance deadline to remain on March 31, 2022, as currently prescribed in our regulations.[7]

C. Corresponding Attest Engagement Report Deadlines

We are proposing to revise the deadline for attest engagement reports in 40 CFR 80.1464(g) for small refineries for 2019 compliance demonstrations and for all obligated parties as well as RIN-generating renewable fuel producers, RIN-generating importers of renewable fuel, and other parties owning RINs for 2020 compliance demonstrations.

For small refineries, given the short period of time between when small refineries will have to demonstrate compliance with their 2019 and 2020 obligations, we do not believe it is feasible for them to conduct an attest engagement for 2019 between the proposed 2019 and 2020 compliance deadlines. As such, we are proposing that small refineries conduct their 2019 attest engagement by June 1, 2022. For all obligated parties, as well as RIN-generating renewable fuel producers, RIN-generating importers of renewable fuel, and other parties owning RINs, we are proposing that the 2020 attest engagement report deadline would also be June 1, 2022. We believe this will provide all relevant parties with the time necessary to conduct their attest engagement in a timely manner and on a similar schedule. Because attest engagements are based on the information in the submitted compliance reports, sequencing the attest engagement to occur after the compliance deadline is a reasonable approach. We believe that this sequencing of reports, and the time allowed between them, will allow obligated parties to proceed to demonstrate their compliance with both 2019 and 2020 RVOs in a logical and orderly fashion with all relevant information available and with sufficient intervening time so as not to pose an increased burden. Although up to three years of attest engagements will be due on the same day, obligated parties would need to submit a separate attest reports covering each year. For RIN-generating renewable fuel producers, RIN-generating importers of renewable fuel, and other parties owning RINs, maintaining a single attest report date for 2020 will alleviate any confusion for these parties who also need to submit attest engagements. We intend to also provide additional reporting instructions on our fuels reporting web page for the attest engagement reports prior to the revised deadlines.

Given the potential for different reporting schedules for the 2019 and 2020 compliance years that we are proposing for obligated parties, and the multiple considerations we are trying to balance across regulated parties, we seek comment on whether the proposed deadlines are appropriate in light of the considerations identified in this action and whether there are other specific considerations that we should evaluate when establishing the 2019 and 2020 compliance demonstration and attest engagement reporting deadlines.

II. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0725 and 2060–0723. This action proposes only to make a one-time change in the compliance dates for certain regulated parties and adjusts the due date of their compliance reports and attest engagements to reflect this change. It does not change the information to be collected or increase the frequency of collection.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action proposes to extend the RFS compliance deadlines. We do not anticipate that there will be any costs associated with these proposed changes. We have therefore concluded that this action will have no regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments. Requirements for the private sector do not exceed $100 million in any one year.

F. Executive Order 13132: Federalism

This proposed action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. This proposed rule only affects RFS obligated parties. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

[7] See 40 CFR 80.1464.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR part 51

This proposed action does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12989 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

III. Statutory Authority

Statutory authority for this action comes from section 211(o) of the Clean Air Act, 42 U.S.C. 7545(o).

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedure, Air pollution control, Diesel fuel, Fuel additives, Gasoline, Imports, Oil imports, Penalties, Petroleum, Renewable fuel, Reporting and recordkeeping requirements.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 80 as follows:

PART 80—REGISTRATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7521, 7542, 7545, and 7601(a).

Subpart M—RENEWABLE FUEL STANDARD

■ 2. Amend § 80.1451 by adding paragraphs (a)(1)(xiv)(E) and (F) to read as follows:

§ 80.1451 What are the reporting requirements under the RFS program?

(a) * * *

(1) * * *

(xiv) * * *

(E) For obligated parties that meet the requirements for a small refinery under § 80.1441(e)(2)(iii), for the 2019 compliance year, annual compliance reports must be submitted no later than November 30, 2021.

(F) For obligated parties, for the 2020 compliance year, annual compliance reports must be submitted no later than January 31, 2022.

* * * * *

■ 3. Amend § 80.1464 by adding paragraphs (g)(7), (8) and (9) to read as follows:

§ 80.1464 What are the attest engagement requirements under the RFS program?

(g) * * *

(7) For obligated parties that meet the requirements for a small refinery under § 80.1441(e)(2)(iii), for the 2019 compliance year, reports required under this section must be submitted to the EPA no later than June 1, 2022.

(8) For obligated parties, for the 2020 compliance year, reports required under this section must be submitted no later than June 1, 2022.

(9) For RIN-generating renewable fuel producers, RIN-generating importers of renewable fuel, and other parties owning RINs, for the 2020 compliance year, reports required under this section shall be submitted to the EPA no later than June 1, 2022.

* * * * *

[FR Doc. 2021–00204 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2016–0163; EPA–HQ–OPPT–2016–0387 and EPA–HQ–OPPT–2016–0231; FRL–10018–67]

RIN 2070–AK03; 2070–AK11 and 2070–AK07

Withdrawal of Proposed Rules; Discontinuing Three Rulemaking Efforts Listed in the Semiannual Regulatory Agenda

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of proposed rules.

SUMMARY: The Environmental Protection Agency (EPA) is withdrawing the proposed regulatory requirements described in the three proposed rules that are identified in this document. This document summarizes the proposed rules and provides a brief explanation for the Agency's decision not to finalize the proposed actions.

DATES: As of January 15, 2021, the proposed rule published on December 16, 2016 (81 FR 91592; FRL–9949–86); the proposed rule published on January 19, 2017 (82 FR 7432; FRL–9950–08); and the portion of the proposed rule published on January 19, 2017 (82 FR 7464; FRL–9958–57) that pertains to n-Methylpyrrolidone (NMP) and methylene chloride in commercial paint and coating removal, are withdrawn.

ADDRESSES: The dockets are available at *http://www.regulations.gov* or at the EPA Docket Center (EPA/DC), 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, for the OPP Docket it is (703) 305–5805, and the telephone number for the OPPT Docket is (202) 566–0280.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the information on EPA/DC services, submitting comments and docket access, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Katherine Sleasman (7101M), Mission Support Division, Office of Program Support, Office of Chemical Safety and Pollution Prevention, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–0409; email address: *sleasman.katherine@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action is directed to the public in general and may be of particular interest to those persons who follow proposed rules issued under section 6(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605. Since others may also be interested, the Agency has not attempted to describe all the specific entities potentially interested.

II. Why is EPA issuing this withdrawal of proposed rules?

This document serves the following purposes:

1. It announces to the public that EPA is withdrawing certain proposed rules for which the Agency no longer intends to issue a final rule; and

2. It officially terminates the ongoing rulemaking activities, which allows the Agency to close out the individual rulemaking entries for these actions that appear in EPA's Semiannual Regulatory Agenda.

All agencies publish Semiannual Regulatory Agendas describing regulatory actions they are developing or have recently completed. These agendas are published in the **Federal**

Register, usually during the spring and fall of each year, as part of the Unified Agenda of Federal Regulatory and Deregulatory Actions (Semiannual Regulatory Agenda). The Agency publishes the EPA Semiannual Regulatory Agenda to update the public about: Regulations and major policies currently under development, reviews of existing regulations and major policies, and rules and major policies completed or canceled since the last Semiannual Regulatory Agenda.

The Semiannual Regulatory Agenda is often used as a tool to solicit interest and participation from stakeholders. As such, EPA believes that the public is best served by a Semiannual Regulatory Agenda that reflects active rulemaking efforts. The withdrawal of these inactive rulemaking efforts will streamline EPA's Semiannual Regulatory Agenda and allow the public to better identify and focus on those rulemaking activities that are active.

For the individual reasons described in this document, the Agency has decided not to complete these actions at this time. By withdrawing the proposed rules, the Agency is eliminating the pending nature of those prior regulatory actions and clarifying its intent for future risk management action concerning these chemicals. Specifically, EPA is initiating separate risk management actions to address unreasonable risks identified for these chemicals following the recent issuance of final risk evaluations under TSCA section 6(b) for trichloroethylene (TCE), methylene chloride (MC) (for portions related to commercial paint and coating removal), and NMP.

III. Which proposed rules are being withdrawn?

This unit identifies the proposed regulatory actions that are being withdrawn and provides a summary of what was proposed. The ''RIN'' refers to the regulatory identification number assigned to the rulemaking effort in the Semiannual Regulatory Agenda.

EPA issued three proposed rules under sections 6(a) and 26(l)(4) of the TSCA, 15 U.S.C. 2605(a) and 2625(l)(4) (82 FR 7464; FRL–9958–57); (81 FR 91592; FRL–9949–86); (82 FR 7432; FRL–9950–08). Two of the actions proposed to address unreasonable risks that EPA had preliminarily identified with certain uses of TCE, which is a volatile organic compound widely used in industrial and commercial processes with some uses in consumer and commercial products; and one of the actions proposed to address unreasonable risks that EPA had preliminarily identified with certain uses of NMP and MC, which are solvents used in a variety of applications, including paint and coating removal (although the Agency is only withdrawing the portions related to NMP and MC commercial paint and coating removal).

A. Trichloroethylene (TCE); Regulation of Certain Uses Under TSCA § 6(a); Proposed Rule; RIN 2070–AK03

On December 16, 2016 (81 FR 91592; FRL–9949–86), EPA issued a proposed rule under TSCA section 6(a), 15 U.S.C. 2605(a), to address unreasonable risks that EPA had preliminarily determined exist with certain uses of TCE: Aerosol degreasing and spot cleaning in dry cleaning. EPA proposed to prohibit the manufacture, processing, and distribution in commerce of TCE for use in aerosol degreasing and for use in spot cleaning in dry cleaning facilities; to prohibit commercial use of TCE for aerosol degreasing and for spot cleaning in dry cleaning facilities; to require manufacturers, processors, and distributors, except for retailers of TCE for any use, to provide downstream notification of these prohibitions throughout the supply chain; and to require limited recordkeeping.

The rulemaking docket for this action is available under docket ID number EPA–HQ–OPPT–2016–0163.

B. Trichloroethylene (TCE); Regulation of Use in Vapor Degreasing Under TSCA Section 6(a); Proposed Rule; RIN 2070–AK11

On January 19, 2017 (82 FR 7432; FRL–9950–08), EPA issued a proposed rule under TSCA section 6(a), 15 U.S.C. 2605(a), to address unreasonable risks that EPA had preliminarily determined exist with use of TCE in vapor degreasing. EPA proposed to prohibit the manufacture (including import), processing, and distribution in commerce of TCE for use in vapor degreasing; to prohibit commercial use of TCE in vapor degreasing; to require manufacturers, processors, and distributors, except for retailers of TCE for any use, to provide downstream notification of these prohibitions throughout the supply chain; and to require limited recordkeeping.

The rulemaking docket for this action is available under docket ID number EPA–HQ–OPPT–2016–0387.

C. n-Methylpyrrolidone (NMP); Regulation of Certain Uses Under TSCA Section 6(a); Proposed Rule; RIN 2070–AK07

On January 19, 2017 (82 FR 7464; FRL–9958–57), EPA issued a proposed rule under TSCA section 6(a), 15 U.S.C. 2605(a), to address risks that EPA had preliminarily identified with certain uses of NMP, which is a solvent used in a variety of applications, including paint and coating removal. EPA preliminarily identified significant health risks associated with NMP use in commercial and consumer paint and coating removal and EPA proposed a determination that these are unreasonable risks. EPA co-proposed two different options: one co-proposal was to prohibit the manufacture (including import), processing, and distribution in commerce of NMP for all consumer and commercial paint and coating removal; to prohibit the use of NMP for all commercial paint and coating removal; to require downstream notification of these prohibitions throughout the supply chain; to require recordkeeping; and to provide a time-limited exemption from these proposed regulations on NMP for coating removal uses critical for national security. As an alternate proposal, EPA proposed that (1) commercial users of NMP for paint and coating removal establish a worker protection program for dermal and respiratory protection and not use paint and coating removal products that contain greater than 35 percent NMP by weight (except for product formulations destined to be used by Department of Defense (DoD) or its contractors performing work only for DoD projects); and (2) processors of products containing NMP for paint and coating removal reformulate products such that these products do not exceed a maximum of 35 percent NMP by weight, identify gloves that provide effective protection for the formulation, and provide warning and instruction labels on the products. The rulemaking docket for this action is available under docket ID number EPA–HQ–OPPT–2016–0231. This withdrawal applies to provisions related to NMP of the proposed rule that published on January 19, 2017.

D. Methylene chloride (MC); Regulation of Certain Uses Under TSCA Section 6(a); Proposed Rule; RIN 2070–AK07

The proposed rule on January 19, 2017 (82 FR 7464; FRL–9958–57), which was identified under RIN 2070–AK07, also proposed requirements for MC. Requirements addressing the use of MC for consumer paint and coating removal were subsequently finalized under RIN 2070–AK07 (see 84 FR 11420, March 27, 2019) (FRL–9989–29). The Agency also announced an advance notice of proposed rulemaking on March 27, 2019, (84 FR 11466; FRL–9989–30) to solicit public input on training, certification, and limited access requirements that could address any

unreasonable risks that EPA could potentially find to be presented by MC when used for commercial paint and coating removal. This withdrawal only applies to provisions of the January 19, 2017 proposed rule related to commercial paint and coating removal of MC. The rulemaking docket for this action is available under docket ID number EPA–HQ–OPPT–2016–0231.

IV. Why are these proposed rules being withdrawn?

The 2016 and 2017 proposed rules addressed a limited number of conditions of use (COUs) for TCE, MC and NMP pursuant to TSCA sections 6(a) and 26(l)(4). The COUs not otherwise addressed by final regulatory action that were the subject of the earlier EPA risk assessments and proposed rules, as well as additional COUs for these chemical substances, were evaluated as part of the first ten risk evaluations conducted under TSCA section 6(b). Final risk evaluations for all three substances have been issued recently under TSCA section 6(b) and, consistent with the statute, EPA is proceeding to initiate regulatory action to address the unreasonable risks identified in the final risk evaluations for TCE (85 FR 37942, June 24, 2020; FRL–10011–16); MC (85 FR 75010, November 24, 2020; FRL–10016–91; FRL–9989–29); and NMP (the announcement is scheduled to publish in the **Federal Register** on December 30, 2020 and can be identified under FRL–10017–18). As a result, the retention of the inactive prior proposals on the Agency's regulatory agenda is not necessary; indeed, retaining these inactive proposals could be duplicative or could create unnecessary public confusion about the extent and nature of the regulatory actions the Agency intends to take to address unreasonable risks identified for these chemical substances. Furthermore, EPA is withdrawing the proposed rules to promote regulatory efficiency because it is impossible for EPA to finalize the rules as proposed and at the same time meet its statutory obligation under TSCA section 6 for risk management rulemaking following finalization of risk evaluations in which EPA makes findings of unreasonable risk. If EPA were to finalize the 2016 and 2017 rules as proposed, the Agency would be leaving out efforts to address additional COUs for these chemical substances that were determined to present unreasonable risk as part of the TSCA section 6(b) risk evaluations. EPA would not be able to say that its obligations under TSCA section 6 were met with regard to these chemical substances without issuing supplemental proposed and final rules for the additional COUs determined to present unreasonable risks in the TSCA section 6(b) risk evaluations. While the Agency has discretion to undertake multiple risk management actions with regard to unreasonable risks associated with different COUs for a single chemical substance (and, in fact, did so to address the acute unreasonable risks associated with MC in consumer paint and coating removal), it is more efficient to take risk management action on multiple COUs at once where unreasonable risks are identified, particularly where regulatory approaches to different COUs can be combined. In addition, where EPA has completed risk evaluations for chemical substances, EPA believes the Agency will be able to more efficiently address obligations under TSCA section 6(c) (requirements applicable to promulgation of TSCA section 6(a) rules), section 26 (including requirements related to best available science and weight of scientific evidence), and other requirements applicable to TSCA section 6(a) rulemakings through a single rulemaking process, rather than supplementing prior proposals. Therefore, EPA will initiate regulatory actions to address all of the COUs determined to present unreasonable risks for a given chemical substance and will withdraw the earlier proposed actions.

EPA proposed these rules under TSCA section 6(a), which provides authority for EPA to ban or restrict the manufacture (including import), processing, distribution in commerce, use, and disposal of chemical substances, with certain limitations. TSCA section 26(l)(4) authorizes EPA to issue rules under TSCA section 6(a) for chemicals listed in the 2014 Update to the TSCA Work Plan for Chemical Assessments for which EPA published completed risk assessments prior to June 22, 2016, consistent with the scope of the completed risk assessment and other applicable requirements of TSCA section 6.

In the June 2014 TSCA Work Plan Chemical Risk Assessment for TCE, EPA characterized risks from the use of TCE in commercial degreasing and in some consumer uses. On December 16, 2016, based on the 2014 Risk Assessment for TCE, EPA preliminarily determined that these risks are unreasonable risks and proposed regulatory action; specifically, EPA proposed to prohibit the manufacture, processing, distribution in commerce, or commercial use of TCE in spot cleaning in dry cleaning facilities and aerosol degreasing (81 FR 91592; FRL–9949–86). On January 19, 2017, EPA proposed to address the unreasonable risks from TCE when used in vapor degreasing (82 FR 7432; FRL–9950–08). These uses of TCE were subsequently identified as conditions of use within the scope of the risk evaluation for TCE under TSCA section 6(b). EPA issued the final risk evaluation for TCE in November 2020 (85 FR 75010, November 24, 2020; FRL–10016–91) which determined that 52 out of 54 conditions of use of TCE present unreasonable risks of injury to health. EPA is withdrawing the 2016 and 2017 proposed rules on TCE for the reasons discussed earlier in this section. For more information about TCE and details about the risk evaluation for TCE, see the TSCA website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluation-trichloroethylene-tce-0#riske valuation.*

In the March 2015 TSCA Work Plan Chemical Risk Assessment for NMP, EPA characterized risks from use of this chemical in paint and coating removal. On January 19, 2017, based on the 2015 Risk Assessment for NMP, EPA preliminarily determined that the use of NMP in commercial and consumer paint and coating removal poses an unreasonable risk of injury to health, and proposed options for addressing that risk. The uses of NMP in commercial and consumer paint and coating removal were identified as conditions of use within the scope of the risk evaluation for NMP under TSCA section 6(b). EPA issued the final risk evaluation for NMP in December 2020 (the announcement is scheduled to publish in the **Federal Register** on December 30, 2020 and can be identified under FRL–10017–18). EPA evaluated commercial and consumer use of NMP in paint and coating removal as COUs in the scope of the risk evaluation, along with other COUs for NMP. In response to public and peer review comments on the draft risk evaluation, EPA modified its approach for calculating dose-response, which resulted in a change in the point of departure and modified risk estimates for many COUs, including modified risk estimates for the use of NMP in consumer paint and coating removal. These changes are discussed in the Executive Summary and in Section 3.2, for the points of departure, of the final NMP risk evaluation and differ from the preliminary determination of unreasonable risk in the draft NMP risk evaluation and the 2017 proposed NMP rule. EPA is withdrawing the 2017 proposed rule on NMP, *i.e.,* those portions of the proposal not related to

the final rule on MC in consumer paint and coating removal, for the reasons discussed earlier in this section. The withdrawal of this rulemaking effort may have an immediate effect on other TSCA requirements for NMP. Withdrawal of the proposal would terminate export notification requirements for NMP. However, the Agency believes withdrawing the proposal will clarify which action the Agency is currently pursuing, and reduce the need for additional, piecemeal or supplemental risk management actions as a result of the final determinations in the risk evaluation conducted under TSCA section 6(b). As noted in Unit V., the Agency is initiating risk management action on this chemical. For more information about NMP and details about the risk evaluation for NMP, see the TSCA website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluation-n-methylpyrrolidone-nmp-0.*

On March 27, 2019, in the final rule for MC in consumer paint and coating removal (RIN 2070–AK07), EPA explained that the Agency was not finalizing the proposed risk determination or proposed regulation for MC commercial paint and coating removal as part of that action. Similar to NMP, EPA evaluated commercial use of MC in paint and coating removal as a COU in the scope of the TSCA section 6(b) risk evaluation for MC, along with other COUs. EPA issued the final risk evaluation for MC on June 24, 2020 (85 FR 37942; FRL–10011–16). For more information about MC and details about the risk evaluation for MC, see the TSCA website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/final-risk-evaluation-methylene-chloride.*

V. How does EPA intend to proceed?

Given the subsequent issuance of final risk evaluations under TSCA for TCE, MC and NMP that incorporated the COUs which the three proposed rules would have addressed, and the initiation of new rulemakings for TCE, MC and NMP following issuance of the final risk evaluations in which EPA made findings of unreasonable risk, EPA has determined that the previous proposed rules should be withdrawn. The next step in the process required by TSCA section 6 is addressing the unreasonable risks determined in the risk evaluations through rulemaking. EPA has initiated new rulemaking efforts to address the unreasonable risks determined in the final risk evaluations and has one year to propose and take public comments on any risk management actions. Although these new rulemaking efforts did not commence in time to be included in the Fall 2020 edition of the EPA's Unified Regulatory Plan and Agenda, these rulemaking efforts will appear in the Spring 2021 edition of EPA's semiannual Regulatory Agenda. As part of this effort, EPA will consider comments received on the previously-referenced ANPRM issued in 2019 soliciting input on training, certification and limited access requirements that could address the unreasonable risks associated with methylene chloride in commercial paint and coating removal.

For these reasons, EPA is withdrawing the proposed rule that published on December 16, 2016 (81 FR 91592; FRL–9949–86); the proposed rule that published on January 19, 2017 (82 FR 7432; FRL–9950–08); and the provisions related to NMP and to MC in commercial paint and coating removal in the proposed rule that published on January 19, 2017 (82 FR 7464; FRL–9958–57).

Authority: 15 U.S.C. 2601 *et seq.*

Andrew Wheeler,

Administrator.

[FR Doc. 2021–00115 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 212, 225, and 252

[Docket DARS–2020–0039]

RIN 0750–AL15

Defense Federal Acquisition Regulation Supplement: Improved Energy Security for Main Operating Bases in Europe (DFARS Case 2020–D030)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 that prohibits contracts for the acquisition of furnished energy for a covered military installation in Europe that is sourced from inside the Russian Federation.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before March 16, 2021, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020–D030, using any of the following methods:

○ *Regulations.gov: https://www.regulations.gov.* Search for ''DFARS Case 2020–D030''. Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2020–D030'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2020–D030 in the subject line of the message.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 2821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 2821 prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe. The prohibition applies to all forms of energy ''furnished to a covered military installation'', as that term is defined in the statute, and only to main operating bases as defined and identified by DoD. This means the energy itself must be furnished to the military installation, not to a third party that uses it to create some other form of energy (*e.g.,* heating, cooling, or electricity). The prohibition applies only to Europe, not to Asia; for example, those parts of Turkey located in Asia are not affected by the rule.

DoD will promote the energy security of its European installations by encouraging energy security and energy resilience and will not purchase energy sourced from inside the Russian Federation unless a waiver of the prohibition in section 2821 is approved by the head of the contracting activity.

The approval authority for the waiver may not be further delegated.

II. Discussion and Analysis

This rule proposes to add DFARS section 225.70XX, Prohibition on use of energy sourced from inside the Russian Federation. A new provision and a new clause are provided for use in solicitations and contracts for the acquisition of furnished energy for a covered military installation in Europe, including acquisitions at or below the simplified acquisition threshold, and acquisitions using FAR part 12 procedures for the acquisition of commercial items, unless a waiver is approved by the head of the contracting activity. Per the new solicitation provision, 252.225–70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, an offeror represents, by submission of its offer, that the offeror will not use or supply energy sourced in the Russian Federation in the performance of a contract resulting from the solicitation. The proposed clause, 252.225–70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, prohibits a contractor from using, in the performance of the contract, any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation, unless a waiver is approved.

Definitions for the following terms are included at DFARS 225.70XX–1: ''covered military installation'', ''furnished energy'', and ''main operating base''.

Waiver procedures at DFARS 225.70XX–3 provide that the head of the contracting activity, without power of redelegation, may waive application of section 2821 to a specific contract for the acquisition of furnished energy for a covered military installation, if the head of the contracting activity certifies to the congressional defense committees that the—

- Waiver of the prohibition is necessary to ensure an adequate supply of furnished energy for the covered military installation; and
- The head of the contracting activity has balanced these national security requirements against the potential risk associated with reliance upon the Russian Federation for furnished energy.

Not later than 14 days before the execution of any energy contract for which a waiver is granted, the head of the contracting activity must submit to the congressional defense committees a notice of the waiver. The waiver notice shall include the following:

- The rationale for the waiver, including the basis for the certification required by section 2821 of the NDAA for FY 2020;
- An assessment of how the waiver may impact DoD's European energy resilience strategy; and
- An explanation of the measures DoD is taking to mitigate the risk of using Russian Federation-furnished energy.

A cross-reference is provided to DFARS Procedures, Guidance, and Information 225.70XX–3 that lists factors to take into consideration for granting a waiver.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This DFARS rule implements section 2821 of the NDAA for FY 2020 (Pub. L. 116–92). Section 2821 prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe unless a waiver is approved by the head of the contracting activity.

To implement section 2821, this rule proposes to create a new provision and clause: (1) DFARS 252.225–70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, and (2) DFARS 252.225–70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.

Section 2821 is silent on applicability to contracts and subcontracts in amounts at or below the SAT or for the acquisition of commercial items. Also, the statute does not provide for civil or criminal penalties. Therefore, it does not apply to the acquisition of contracts or subcontracts in amounts not greater than the SAT or to the acquisition of commercial items, including COTS items, unless a written determination is made as provided for in 41 U.S.C. 1905 and 10 U.S.C. 2375, respectively. The Principal Director, Defense Pricing and Contracting, is the appropriate authority to make a determination for regulations to be published in the DFARS, which is part of the FAR system of regulations.

In consonance with the written determination made by the Principal Director, Defense Pricing and Contracting, on May 29, 2020, DoD plans to apply section 2821 to solicitations and contracts below the SAT and to the acquisition of commercial items, including COTS items, as defined at FAR 2.101. Not applying this prohibition guidance to contracts below the SAT and for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule to prohibit use of energy sourced from inside the Russian Federation. Consequently, DoD plans to apply the rule to contracts below the SAT and for the acquisition of commercial items, including COTS items, to promote energy security in Europe and reduce the risk of supply shortages and reliance on energy sourced inside the Russian Federation.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to the requirements of E.O. 13771, because the rule is issued with respect to a national security function of the United States.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Nevertheless, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The rule proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits contracts for the use of energy sourced inside the Russian Federation for military installations in Europe.

The legal basis for the rule is section 2821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, which prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe. The prohibition applies to all forms of

energy ''furnished to a covered military installation'', as that term is defined in the statute and only to main operating bases as defined and identified by DoD.

Based on data obtained from the Federal Procurement Data System (FPDS) for fiscal years 2017 through 2019 for awards coded for product service code S111 (Utilities-Gas) with locations in Europe, 108 awards per year were made on average over the three fiscal years, with an average of 3 awards to unique entities that were other than small businesses. The awardees were listed as foreign contractor consolidated reporting, which is used to report procurement actions awarded to contractors located outside the United States providing utilities goods or services when a unique entity identifier is not available. When a generic entity identifier is used to report these actions, FPDS only allows contracting officers to select ''other than small business'' as the contracting officer's determination of business size. FPDS allows contracting officers to aggregate awards and report one record that includes multiple awards, which masks the identity of the entity. Consequently, reporting awards in this manner is likely to result in an undercount of the number of unique entities, as there is no data available to determine the number of entities or whether the entities are small or other than small. Based on this analysis, DoD estimates it is unlikely that an American small entity would be providing these utility services in Europe.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the requirements of the statute.

DoD invites comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2020–D030), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraphs (f)(ix)(GG) and (HH) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ix) * * *

(GG) Use the provision at 252.225–70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, as prescribed in 225.70XX–4(a), to comply with section 2821 the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

(HH) Use the clause at 252.225–70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, as prescribed in 225.70XX–4(b), to comply with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

* * * * *

PART 225—FOREIGN ACQUISITION

■ 3. Add sections 225.70XX, 225.70XX–1, 225.70XX–2, 225.70XX–3, and 225.70XX–4 to subpart 225.70 to read as follows:

* * * * *

Sec.

225.70XX Prohibition on use of certain energy sourced from inside the Russian Federation.
225.70XX–1 Definitions.
225.70XX–2 Prohibition.
225.70XX–3 Waiver.
225.70XX–4 Solicitation provision and contract clause.

* * * * *

225.70XX Prohibition on use of certain energy sourced from inside the Russian Federation.

225.70XX–1 Definitions.

As used in this section—

Covered military installation means a military installation in Europe identified by DoD as a main operating base.

Furnished energy means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Main operating base means a facility outside the United States and its territories with permanently stationed operating forces and robust infrastructure.

225.70XX–2 Prohibition.

In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), contracts for the acquisition of furnished energy for a covered military installation shall not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation. The prohibition—

(a) Applies to all forms of energy that are furnished to a covered military installation; and

(b) Does not apply to a third party that uses it to create some other form of energy (*e.g.,* heating, cooling, or electricity).

225.70XX–3 Waiver.

(a) The requiring activity may submit to the contracting activity a request for waiver of the prohibition in section 225.70XX–2 for a specific contract for the acquisition of furnished energy for a covered military installation. The head of the contracting activity, without power of redelegation, may approve the waiver, upon certification to the congressional defense committees that—

(1) The waiver of section 2821 is necessary to ensure an adequate supply of furnished energy for the covered military installation; and

(2) National security requirements have been balanced against the potential risk associated with reliance upon the Russian Federation for furnished energy.

(b) Submission of waiver notice.

(1) Not later than 14 days before the execution of any energy contract for which a waiver is granted under paragraph (a) of this section, the head of the contracting activity shall submit to the congressional defense committees a notice of the waiver. See PGI 225.70XX–3 for waiver procedures.

(2) The waiver notice shall include the following:

(i) The rationale for the waiver, including the basis for the certifications required by paragraph (a) of this section.

(ii) An assessment of how the waiver may impact DoD's European energy resilience strategy.

(ii) An explanation of the measures DoD is taking to mitigate the risk of using Russian Federation furnished energy.

225.70XX–4 Solicitation provision and contract clause.

Unless a waiver has been granted in accordance with 225.70XX–3—

(a) Use the provision at 252.225–70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items and solicitations at or below the simplified acquisition threshold, that are for the acquisition of furnished energy for a covered military installation; and

(b) Use the clause at 252.225–70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items and solicitations and contracts at or below the simplified acquisition threshold, that are for the acquisition of furnished energy for a covered military installation.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Add section 252.225–70XX to read as follows:

252.225–70XX Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.

As prescribed in 225.70XX–4(a), use the following provision:

REPRESENTATION REGARDING PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION (DATE)

(a) *Definitions.* As used in this provision—

Covered military installation means a military installation in Europe identified by DoD as a main operating base.

Furnished energy means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Main operating base means a facility outside the United States and its territories with permanently stationed operating forces and robust infrastructure.

(b) *Prohibition.* In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), contracts for the acquisition of furnished energy for a covered military installation shall not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation, unless a waiver is approved. The prohibition—

(1) Applies to all forms of energy that are furnished to a covered military installation; and

(2) Does not apply to a third party that uses it to create some other form of energy (*e.g.,* heating, cooling, or electricity).

(c) *Representation.* By submission of its offer, the Offeror represents that the Offeror will not use or provide any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation.

(End of provision)

■ 5. Add section 252.225–70YY to read as follows:

252.225–70YY Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.

As prescribed in 225.70XX–4(b), use the following clause:

PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION (DATE)

(a) *Definitions.* As used in this clause—

Covered military installation means a military installation in Europe identified by DoD as a main operating base.

Furnished energy means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Main operating base means a facility outside the United States and its territories with permanently stationed operating forces and robust infrastructure.

(b) *Prohibition.* In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), the Contractor shall not use in the performance of this contract any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation unless a waiver is approved. The prohibition—

(1) Applies to all forms of energy that are furnished to a covered military installation; and

(2) Does not apply to a third party that uses it to create some other form of energy (*e.g.,* heating, cooling, or electricity).

(c) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts and other commercial instruments that are for furnished energy at a covered military installation, including subcontracts and commercial instruments for commercial items.

(End of clause)

[FR Doc. 2021–00615 Filed 1–14–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191, 192, and 195

[Docket No. PHMSA–2016–0002]

RIN 2137–AF13

Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: PHMSA is proposing to incorporate by reference more than 20 consensus standards into the Federal pipeline safety regulations. This notice of proposed rulemaking (NPRM) would incorporate by reference a new, updated, or reaffirmed edition of each consensus standard. This NPRM would also make non-substantive corrections to clarify regulatory language in certain provisions. These editorial changes are minor and would not require pipeline operators to undertake new pipeline safety initiatives.

DATES: Persons interested in submitting comments on this NPRM must do so by March 16, 2021.

ADDRESSES: You may submit comments, identified by Docket No. PHMSA–2016–0002, by any of the following methods:

- *E-Gov Web: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the online instructions for submitting comments.
- *Mail:* Docket Management System: U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* DOT Docket Management System: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.
- *Instructions:* Identify the Docket No. PHMSA–2016–0002, at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.*
- *Note:* All comments received are posted without edits to *http://*

www.regulations.gov, including any personal information provided. Please see the Privacy Act heading below.

• *Privacy Act:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

• *Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments in response to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of Federal Regulations (CFR) § 190.343, you may ask PHMSA to provide confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential;'' (2) send PHMSA a copy of the original document with the CBI deleted along with the original, unaltered document; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the Freedom of Information Act and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Amy E. Allen, 1200 New Jersey Avenue SE, DOT: PHMSA—PHP–30, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket.

• *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. Alternatively, you may review the documents in person at the street address listed above.

FOR FURTHER INFORMATION CONTACT:

Technical Information: Rod Seeley by phone at 713–272–2852 or via email at *Rodrick.M.Seeley@dot.gov.*

Regulatory Information: Amy E. Allen by phone at 202–680–2966 or via email at *Amy.Allen@dot.gov.*

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I. Background

A. History of Incorporation by Reference

Voluntary consensus standards are technical standards developed or adopted by domestic and international standards development organizations (SDOs). These organizations use agreed-upon procedures to update and revise their published standards every three to five years to reflect modern technology and best technical practices.

The National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113; March 7, 1996) directs Federal agencies to use voluntary consensus standards and design specifications developed by voluntary consensus standard bodies instead of government-developed voluntary technical standards when appropriate. The Office of Management and Budget (OMB) Circular A–119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities sets the policy for Federal use and development of voluntary consensus standards.[1]

Material that is incorporated by reference (IBR) is treated as if it was published in the **Federal Register** and the CFR. Therefore, like any other rule issued in the **Federal Register**, a voluntary consensus standard that has been incorporated by reference has the force and effect of law. Congress authorized incorporation by reference to reduce the volume of material published in the **Federal Register** and the CFR (*see* 5 U.S.C. 552(a) and 1 CFR part 51) and granted authority to the Director of the Federal Register to determine whether a proposed IBR serves the public interest. Unless expressly provided otherwise in a regulation, if a provision of a standard incorporated by reference conflicts with a regulation, the regulation takes precedence.

New or updated pipeline standards often incorporate new technologies, materials, management practices, and other innovations that improve the safety and operations of pipelines and pipeline facilities. Because the Federal pipeline safety regulations (PSRs), located in 49 CFR parts 190–199, involve a great deal of technical subject matter, PHMSA has incorporated by reference more than 80 standards and specifications into the regulations. PHMSA regularly reviews newer editions of currently referenced consensus standards and issues regulations to incorporate by reference updated standards where appropriate. This ensures that the PSRs incorporate and facilitate use of the latest safety innovations and materials. In addition to the improvements in the documents themselves, adopting more recent editions of consensus standards prevents conflicts with other standards operators and suppliers may be complying with voluntarily and avoids confusion that can arise when standards required by the regulations are out of date. The lists of publications that PHMSA has incorporated by reference into part 192 (regulating the transportation of natural gas and other gas by pipeline) and 195 (regulating the transportation of hazardous liquids by pipeline) are found at §§ 192.7 and 195.3, respectively.

PHMSA employees participate in 25 national SDOs that address the design, construction, maintenance, inspection, operation, and repair of pipeline facilities. These subject matter experts represent the agency and participate in discussions and technical debates, register opinions, and vote in accordance with the procedures of the standards body at each stage of the

[1] OMB (February 10, 1998), *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (Circular No. A–119). Retrieved from: *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf.*

standards development process (unless prohibited from doing so by law). PHMSA participates in this process to ensure that the agency's safety priorities are considered and to avoid the need to develop separate, government-unique standards. PHMSA's participation does not imply that the agency agrees with or endorses all decisions reached by such organizations. PHMSA adopts only those portions of consensus standards that adequately protect public safety and the environment.

PHMSA periodically undertakes a rulemaking to IBR updated consensus standards. The standards proposed in this rulemaking have been reviewed by PHMSA personnel and are considered appropriate to incorporate into the CFR. Previous updates to incorporate consensus standards by reference were published on August 6, 2015 (80 FR 46847 (correction)), January 5, 2015 (80 FR 168), August 11, 2010 (75 FR 48593), February 1, 2007 (72 FR 4655 (correction)), June 9, 2006 (71 FR 33402), June 14, 2004 (69 FR 32886), February 17, 1998 (63 FR 7721), and May 24, 1996 (61 FR 26121).

B. Availability of Materials to Interested Parties

PHMSA currently incorporates by reference into parts 192, 193, and 195 all or parts of more than 80 standards and specifications developed and published by SDOs. In general, SDOs update and revise their published standards every two to five years to reflect modern technology and best technical practices. ASTM International (ASTM, formerly the American Society for Testing and Materials) often updates some of its more widely used standards every year. Sometimes, multiple editions are published in a given year.

In accordance with the NTTAA, PHMSA has the responsibility for determining which standards should be added, updated, or removed. PHMSA handles revisions to materials incorporated by reference in the PSRs via the rulemaking process, which allows the public and regulated entities the opportunity to provide input. During the rulemaking process, PHMSA must also obtain approval from the Office of the Federal Register to make changes regarding materials incorporated by reference.

Pursuant to Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Public Law 112–90, 49 U.S.C. 60102(p), as amended, ''the Secretary may not issue a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge.'' On November 7, 2014, the Office of the Federal Register issued a final rule that revised 1 CFR 51.5 to require that Federal agencies ''discuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties'' (79 FR 66267).

To meet the requirements of Section 24, PHMSA negotiated agreements with all but one of the SDOs with standards incorporated by reference in the PSRs to make viewable copies of those standards available to the public at no cost. The organizations that agreed to the requirements of Section 24 are: The American Petroleum Institute (API), the American Gas Association (AGA), ASTM, the Gas Technology Institute (GTI), the Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS), NACE International (NACE), and the National Fire Protection Association (NFPA). As of the date of publication, PHMSA was not able to reach an agreement with the American Society of Mechanical Engineers (ASME). Each organization's mailing address and website is listed in 49 CFR parts 192, 193 and 195.

In addition, PHMSA will provide temporary access to any standard which is incorporated by reference or proposed for incorporation. To gain temporary access to standards, including those from ASME, please email *phmsastandards@dot.gov* with your request. You must include your phone number and physical address, and an email address where we should send a response. PHMSA will respond within five business days and provide access to the standard.

II. Summary of Standards Incorporated by Reference Proposed To Be Updated

This list includes the title of each standard affected by this NPRM, the edition PHMSA proposes to incorporate, a summary of the standard, the previously incorporated version (if applicable), and the sections in the CFR where the standards are referenced. The omission of a new edition of a standard in this NPRM does not imply that PHMSA has reviewed and rejected that document. In this NPRM, PHMSA proposes to incorporate the following updated editions of technical standards currently incorporated by reference in parts 192 and 195:

A. American Petroleum Institute (API)

1. API Recommended Practice 651, Cathodic Protection of Aboveground Petroleum Storage Tanks

PHMSA proposes to incorporate by reference API Recommended Practice (RP) 651, ''Cathodic Protection of Aboveground Petroleum Storage Tanks,'' 4th edition, September 2014 into §§ 195.565 and 195.573(d). Cathodic protection is a method of protecting metallic pipelines from corrosion. This RP contains: (1) Procedures and practices for effective corrosion control on aboveground storage tank bottoms using cathodic protection; (2) provisions for the application of cathodic protection to existing and new aboveground storage tanks; and (3) information and guidance for cathodic protection specific to aboveground metallic storage tanks in hydrocarbon service.

The amendments in the 4th edition of API RP 651 are primarily minor technical improvements and editorial revisions. These improvements include more specific details throughout and more conservative consideration of cathodic protection based on pad material, product temperature, and tank size. These corrosion-control-requirement updates improve safety and the clarity and technical accuracy of the document.

[Replaces IBR: ANSI/API Recommended Practice 651, ''Cathodic Protection of Aboveground Petroleum Storage Tanks,'' 3rd edition, January 2007, (ANSI/API RP 651).]

2. API Recommended Practice 2026, ''Safe Access/Egress Involving Floating Roofs of Storage Tanks in Petroleum Service''

PHMSA is proposing to incorporate API RP 2026, ''Safe Access/Egress Involving Floating *Roofs* of Storage Tanks in Petroleum Service,'' 3rd edition, June 2017 into § 195.405(b). The 3rd edition of API RP 2026 (formerly API Publication 2026) addresses the hazards associated with access/egress onto external and internal floating roofs of in-service petroleum storage tanks. In a floating roof tank, the roof floats on top of product in the tank and rises and lowers with the level of product in the storage tank. Floating roofs minimize the creation of hazardous vapors above the product. A floating roof can be designed for use on a tank with no fixed roof (an external floating roof) or inside a tank with a fixed roof (internal floating roof).

Work tasks requiring access to floating roofs poses unique safety hazards to maintenance personnel. These include

confined space hazards, hazardous atmospheric conditions such as flammable or toxic vapors, and various physical hazards depending on the design and condition of the tank. The document identifies a number of these potential hazards and prescribes practices, procedures, and tests, which are required to mitigate these hazards and perform work safely. In the regulations, operators are required to use API RP 2026 to consider the hazards associated with performing maintenance on in-service hazardous liquid storage tanks and identify applicable hazardous conditions, safety practices, and procedures in their procedure manual.

The 3rd edition of API RP 2026 includes several minor, primarily editorial updates. These include minor revisions to the definitions, eliminating references to NFPA 70 and NFPA 325M, changes to terminology such as replacing the phrase ''lower flammable limits'' to the phrase ''lower explosive limits,'' and additional clarifications to conditions in Section 7.1.4. The clarified conditions include atmospheric, working, tank service, operating, product loading, and physical conditions. In general, these clarifications mean that individuals must make sure hazards are addressed and potential sources of hazards or vapor ignition have been properly secured before they go onto a tank floating roof. These minor changes improve the usability of the document.

[Replaces IBR: API Publication 2026, ''Safe Access/Egress Involving Floating Roofs of Storage Tanks in Petroleum Tanks,'' 2nd edition, April 1998 (Reaffirmed June 2006).]

3. API Specification 5L, Specification for Line Pipe

PHMSA is proposing to incorporate by reference API Specification (Spec) 5L, ''Specification for Line Pipe,'' 46th edition, April 2018, including Errata 1 (May 2018) into §§ 192.55(e); 192.112(a), (b), (d), (e); 192.113; Item I, Appendix B of part 192; and 195.106(b) and (e). API Spec 5L is the primary manufacturing specification for seamless and welded steel pipe for use in both gas and hazardous liquid pipeline transportation systems. The specification does not cover cast pipe and non-steel pipe. The specification includes requirements for pipe material, manufacturing, quality control and testing, inspection, and pipe marking.

The 46th edition of API Spec 5L includes slightly strengthening the pipe end straightness tolerance requirement from 4 mm maximum of deflection within 1 meter of each end to 3.2 mm maximum of deflection within 1.5 meters of each end, and clarifies how to define and measure end-squareness. Additionally, it includes some editorial revisions consistent with changes to API style guidelines.

The specification also contains two new annexes: (1) Annex M—Specification for Welded Jointers and (2) Annex N—Pipe Ordered for Applications Requiring Longitudinal Plastic Strain Capacity. Annex M adds requirements for pipe manufacturers making welded jointers, which are short pieces of pipe welded together to form one joint. Welded jointers are similar to double jointing except that typically double jointing is not done by the manufacturer. Before this annex, 5L had no requirements for testing the jointed welds nor how they should be marked. Annex N adds baseline requirements for pipe manufactured for strain-based design (SBD) projects. SBD is used for pipelines that may see high levels of strain due to pipe movement from geotechnical forces; few onshore pipelines in the continental United States see these strains and instead use conventional stress-based design. Part 192 does not permit SBD, except under special permit; however, the new annexes do enhance pipeline safety under the circumstances to which they are applicable.

[Replaces IBR: API Specification 5L, ''Specification for Line Pipe,'' 45th edition, July 2013, (ANSI/API Spec 5L).] [2]

4. API Specification 6D, Specification for Pipeline and Piping Valves

PHMSA is proposing to incorporate API Specification (Spec) 6D, ''Specification for Pipeline and Piping Valves,'' 24th edition, August 2014, including Errata 1 (October 2014), Errata 2 (December 2014), Errata 3 (February 2015), Errata 4 (June 2015), Errata 5 (July 2015), Errata 6 (September 2015), Errata 7 (June 2016), Errata 8 (August 2016), Errata 9 (March 2017), Addendum 1 (March 2015), and Addendum 2 (June 2016) into §§ 192.145(a) and 195.116(d). API Spec 6D defines the design, manufacturing, assembly, testing, and documentation requirements for valves used in pipeline systems. PHMSA requires all valves on gas pipeline systems, other than those made of cast-iron or plastic, to meet the requirements of API Spec 6D or a national or international standard that provides an equivalent performance level. Liquid pipeline valves must be shell-tested and seat-tested in accordance with API Spec 6D.

The valve shell test or body test is conducted based on the valve manufacturer's approved test procedure and Section 9.3 of API Spec 6D. In the valve shell test, the valve ends are closed and the valve is put in a partially open position. The valve body is hydrostatically tested with a test pressure of at least 1.5 times the pressure rating of the valve body. The result of the test is satisfactory if no visible leak is observed from the valve body, packing gland, or elsewhere. This test ensures that the valve body will not fail and leak product into the surrounding environment at the pressure rating.

The valve seat leak test is performed after successful completion of valve shell test. During this test, the valve is completely closed. The inlet of the valve is hydrostatically tested with a test pressure of at least 1.1 times the pressure rating of the valve. The valve passes the seat test if the measured leakage does not exceed the maximum values in section 9.4.3 of the standard. Block valves must be seat tested for each intended fluid flow direction. This test ensures that a block valve will adequately stop the flow of product through the valve when it is closed.

The 24th edition of API Spec 6D includes several clarifications, safety improvements, and editorial revisions. Safety improvements include clarified bore tolerance specifications for full-opening valves,[3] and new procedures for installers when no minimum bore tolerances are listed in the specification. Additionally, the 24th edition prohibits designing flanged valves with intermediate pressure ratings. The flanges used to connect such valves to other components have standardized pressure specifications. Prohibiting flanged valves with an intermediate pressure rating avoids potentially dangerous situations, like transferring such a valve to an application with pressure that is within the design limits

[2] On May 1, 2019, PHMSA issued a notice to natural gas and hazardous liquid pipeline operators alerting them that PHMSA would exercise enforcement discretion if an operator did not comply with API Specification 5L, 45th edition, provided that the operator could ''demonstrate compliance with the more stringent provisions of API Spec 5L, 46th edition, April 2018, including Errata 1 (May 2018).'' *[https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/standards-rulemaking/pipeline/71236/stay-enforcement-api-specification-5l.pdf].* PHMSA indicated in the notice of enforcement discretion that it was intended to remain in effect until PHMSA took final action on incorporating the 46th edition in a rulemaking. A copy of the notice of enforcement discretion is included in the docket.

[3] A full opening valve is designed with an opening that is unobstructed when the valve is in the open position. The opening must be not smaller than the inside diameter of the end connections. The bore refers to the minimum inside diameter of valve, including the size of the opening.

of the standard flanges, but exceeds the pressure rating of the valve to which the flanges are attached. Other improvements include adding a requirement that valve body and cover components be chosen based on the pressure-temperature rating of the material used, and requirements for valve cavity pressure relief devices.

The 24th edition also includes new guidance and clarification regarding calibration, marking, and documentation requirements. The calibration provisions were updated to specify that calibration intervals should not exceed one year. The marking provisions were updated to provide more detailed information regarding the location, letter size, and the use of name plate markings for the smaller valves. Also, the provisions on the information that is provided with each valve were updated to include additional information that may be useful for installers, operators, and inspectors.

[Replaces IBR: ANSI/API Specification 6D, ''Specification for Pipeline Valves,'' 23rd edition, October 1, 2008, including Errata 1 (June 2008), Errata 2 (November 2008), Errata 3 (February 2009), Errata 4 (April 2010), Errata 5 (November 2010), Errata 6 (August 2011) Addendum 1 (October 2009), Addendum 2 (August 2011), and Addendum 3 (October 2012), (API Spec 6D).]

5. API Standard 620, Design and Construction of Large, Welded, Low-Pressure Storage Tanks

PHMSA proposes to incorporate by reference API Standard (Std) 620 ''Design and Construction of Large, Welded, Low-Pressure Storage Tanks,'' 12th edition, October 2013, including Addendum 1 (November 2014) into §§ 195.132 (b)(2); 195.205(b)(2); 195.264(b)(1); 195.264(e)(3); 195.307(b); 195.565; and 195.579(d). API Std 620 specifies design, construction, and testing requirements for large, field assembled, welded steel tanks used to store petroleum, petroleum products, or other liquids used in the petrochemical industry. Tanks designed, constructed, and tested in accordance with API Std 620 are rated to operate with a vapor pressure up to 15 psig and a metal temperature below 250 °F.

The primary benefit of incorporating the 12th edition involves incorporating new materials and designs. These revisions include revised requirements for seismic loading design standards and more stringent design and testing standards for refrigerated tank systems. Specifically, the outer shell of double wall tanks must now meet most material and design requirements applicable to the inner shell of refrigerated tanks. Hazardous liquid breakout tanks typically do not require refrigeration and requirements for liquefied natural gas plants in part 193, including standards for refrigerated tanks, are being considered in a separate rule. Finally, the 12th edition adds standards for steel mixed materials storage tanks and duplex stainless-steel storage tanks, which were not previously included in the standard.

[Replaces IBR: API Standard 620, ''Design and Construction of Large, Welded, Low-pressure Storage Tanks,'' 11th edition, February 2008, including addendum 1 (March 2009), addendum 2 (August 2010), and addendum 3 (March 2012), (API Std 620).]

6. API Standard 650, Welded Tanks for Oil Storage

PHMSA is proposing to incorporate API Std 650, ''Welded Tanks for Oil Storage,'' 13th edition, March 1, 2020, into §§ 195.132(b); 195.205(b); 195.264(b), (e); 195.307(c) and (d); 195.565; and 195.579(d). This standard establishes minimum requirements for material, design, fabrication, erection, and inspection for vertical, cylindrical, aboveground, closed- and open-top, welded storage tanks in various sizes and capacities for internal pressures approximating atmospheric pressure. This standard applies only to tanks whose entire bottom is uniformly supported and to tanks in non-refrigerated service that have a maximum design temperature of 93°C (200 °F) or less. In part 195, breakout tanks associated with the transportation of hazardous liquids that are included in the scope of this standard must be designed, constructed, tested, and repaired in accordance with API Std 650.

Many of the changes since the 11th edition of API Std 650 result in enhanced safety. The standard strengthens anchoring requirements by increasing the criteria required to allow a tank to be unanchored and requiring that more welds be examined. In addition, the revised standard contains provisions for considering snow loading on floating roofs to account for increases in internal pressures. Other changes are editorial; for example, throughout the standard, the term ''inspection'' is changed to ''examination'' when referring to NDE. These revisions improve the clarity and technical accuracy of the document.

However, there are sections of the revised standard that may provide a smaller factor of safety than the 11th edition. For example, in the revised standard, the factor used in equations to calculate how high the product in the tank may slosh around during a seismic event in Equation E.7.2–1 changes from 0.5 to 0.42, which is less conservative. Seismic design is not always required in the CFR, but Annex E (Seismic Design of Storage Tanks) must be applied if seismic design is requested by the operator. This revision lowers the minimum freeboard (the space in the tank between maximum operating level of the product and the maximum possible product level) specifications for tanks designated by the operator as Seismic Use Group (SUG) [4] III or tanks designated as SUG II in areas with higher potential vertical acceleration (see Table E.7). Most breakout tanks would be classified as SUG I, where minimum freeboard specifications are recommended but not required. As described in EC.7.2 in the standard, damage to the roof due to sloshing is very unlikely to cause a structural failure of the tank itself; the primary consequences of sloshing damage are the potential for an interruption of operations, repair costs, or, if the roof fails, a small release into secondary containment. This change is also offset by other improvements in the revised standard, including more conservative vertical acceleration parameter in E.6.1.3 (Vertical Seismic Effects). The revised standard sets a parameter value at the maximum of what was previously a range of values.

The majority of the changes in the 13th edition of the standard are editorial and do not substantially change or effect safety. Additional changes include adding new requirements for anchor nuts and bolts; further refining the process for design wind speeds, pressures, and loads; specifying which weld pass (inside/outside) may be applied for various examination methods; further broadening hydrotest requirements; and adding an allowance for the minimum number of inspection hatches to be based on the size of a given tank.

[Replaces IBR: API Standard 650, ''Welded Tanks for Oil Storage,'' 11th edition, June 2007 (effective February 1, 2012), includes addendum 1 (November 2008), addendum 2 (November 2009), addendum 3 (August 2011), and errata (October 2011), (API Std 650).]

[4] Seismic Use Groups (SUGs) are defined in API Std 650 at EC.3 and are used to classify tanks by the potential consequences of failure during a seismic event. Tanks designated as SUG III or SUG II serve public safety or public welfare functions, or pose a hazard to the public and lack secondary containment. SUG I is the default classification and includes most tanks with secondary containment and tanks without containment located in a terminal or industrial area away from public access.

7. API Standard 1104, Welding of Pipelines and Related Facilities

PHMSA is proposing to incorporate by reference API Std 1104, ''Welding of Pipelines and Related Facilities'' 21st edition, September 2013, including Errata 1 (April 2014), Errata 2 (June 2014), Errata 3 (July 2014), Errata 4 (November 2015), Errata 5 (September 2018), Addendum 1 (July 2014), and Addendum 2 (May 2016) into §§ 192.225(a); 192.227(a); 192.229(c); 192.241(c); Item II of Appendix B to part 192; 195.214(a); 195.222(a) and (b); and 195.228(b). API Std 1104 is the primary standard for welding steel piping and for testing welds on steel pipelines. It covers the requirements for welding and nondestructive testing of pipeline welds. In the PSRs, this standard is used for qualifying welders, welding procedures, and welding operators, and interpreting the results of non-destructive tests.

The most significant revisions in the 21st edition of API Std 1104 include safety improvements to sections that are incorporated by reference into the regulations. In Section 5, which addresses welding procedures for processes using filler metals, the updates include: Requirements that electrical characteristics be specified for each specific type and size of electrode, rod, or wire; specifications regarding when and how forced cooling of a recently completed weld can be performed; a new requirement to consider the mechanical compatibility of filler metals; a new requirement to specify the electrode manufacturer and trade name for certain types of shielded metal arc welding electrodes; and modified criteria that allow acceptance of tensile tests if the specimen breaks outside the weld and heat-affected-zone at a value not less than 95 percent of the specified minimum tensile strength of the pipe material.

The 21st edition revises Section 6 to allow ultrasonic testing of welds used for welder qualification. Although Section 10 is not used in the PSRs, it is greatly expanded in the 21st edition to provide more information on repairing welds. The revisions to Section 12 include documentation enhancements like those in Section 5 and a requirement to perform a nick-break test [5] for procedures that include manual or semi-automatic passes. The addition of nick-break tests helps ensure that mechanized welds made with manually deposited passes will meet the workmanship requirements in API 1104.

In addition, the 21st edition adds guidance to both Appendix A and Appendix B. The 21st edition of Appendix A modifies essential variables to better quantify the variability of welding electrodes and pipe materials, clarifies acceptance criteria for tensile tests, and adds a requirement to verify production welding is performed within the parameters of the qualified welding procedure via a quality control program. The 21st edition of Appendix B adds guidance on making in-service welds and expands the section to cover weld deposition pipe repair.

The 21st edition also allows a welder qualified in a fixed position to be qualified for the roll position. Welder qualification in the fixed position requires demonstration of welding skills in multiple positions around a stationary pipe. During roll welding, the welder only welds in one position while the pipe rotates and the welder must only demonstrate welding skills in one position. Since a welder qualified in a fixed procedure has demonstrated the skills necessary to weld in multiple positions, this change has no effect on safety and eliminates duplicative qualification requirements.

[Replaces IBR: API ''Standard 1104, ''Welding of Pipelines and Related Facilities,'' 20th edition, October 2005, including errata/addendum (July 2007) and errata 2 (2008), (API Std 1104).]

8. ANSI/API Standard 2000, Venting Atmospheric and Low-Pressure Storage Tanks

PHMSA is proposing to incorporate by reference API Std 2000, ''Venting Atmospheric and Low-pressure Storage Tanks,'' 7th edition, March 2014, into § 195.264(e)(2) and (e)(3). This standard contains vapor-venting requirements for aboveground liquid petroleum products storage tanks and aboveground and/or underground refrigerated storage tanks, all of which are designed for operation at pressures from full vacuum through 103.4 kPa (or 15 psig). Normal vapor venting refers to the inflow and outflow of vapor related to pressure changes inside the storage tanks. Emergency vapor venting relates to the inflow or outflow of vapor that may occur due to unforeseen circumstances. Vapor-venting requirements deal with the operation of vapor vents in response to temperature and pressure changes both inside and outside of a tank. Pressure normally accumulates inside most production or breakout storage tanks that contain various types of hazardous liquid. The new edition of this standard provides more information on equipment that stabilizes pressure within the tank by venting or depressurizing once the pressure within the tank reaches a certain level. The vapor-venting requirements in this standard elaborate on pipeline owners' obligations, including providing vapor-venting equipment guidelines.

The 7th edition of API Std 2000 contains several minor revisions since the currently incorporated 6th edition. These include greater in-breathing and out-breathing calculation requirements, modified reduction factor for double-wall tanks, and eliminating the need to calculate evaporation rates. The 7th edition also includes more stringent requirements to ensure that vapor releases from relief devices and vents do not create hazards for nearby workers, equipment, or structures. These requirements increase safety by not allowing the accumulation of potentially flammable vapors at grade level or in enclosed spaces, and the new requirements for vapor releases from relief devices and vents provide greater protection for workers and properties during venting operations.

[Replaces IBR: ANSI/API Standard 2000, ''Venting Atmospheric and Low-pressure Storage Tanks,'' 6th edition, November 2009, (API Std 2000).]

9. API Standard 2350, Overfill Prevention for Storage Tanks in Petroleum Facilities

PHMSA proposes to incorporate by reference API Standard (Std) 2350, ''Overfill Prevention for Storage Tanks in Petroleum Facilities,'' 5th edition, September 1, 2020, into § 195.428(c). This standard is intended for storage tanks associated with facilities that receive flammable and combustible petroleum liquids, such as refineries, marketing terminals, bulk plants, and pipeline terminals. It addresses minimum overfill and damage-prevention practices for aboveground storage tanks in petroleum facilities, including refineries, marketing terminals, bulk plants, and pipeline terminals that receive flammable and combustible liquids.

The revised edition is a major rewrite of the document that includes the development of policies and procedures to incorporate management of an overfill protection process (OPP) and risk assessment. The most significant changes include new requirements for: (1) A written management system for overfill prevention processes; (2) overfill risk-assessment processes; (3) expanded requirements for the testing of OPP systems and related procedures; and (4) the use of safety-instrumented systems (instruments that collect data used to

[5] A nick-break test is a destructive test for evaluating the quality of a weld. In the test, a weld specimen is prepared and then fractured. The exposed surface is then visually examined for weld imperfections.

keep the overfill prevention systems operating safely) on new automatic overfill prevention systems. The 5th edition revises the scope of the standard to include dedicated pipeline relief tanks on breakout tanks to the extent practicable. These additional requirements will result in safer operation of applicable tanks.

[Replaces IBR: API Recommended Practice 2350, ''Overfill Protection for Storage Tanks in Petroleum Facilities,'' 3rd edition, January 2005, (API RP 2350).]

B. The American Society of Mechanical Engineers (ASME)

ASME BPVC (Section VIII, Divisions 1 and 2) were previously approved for incorporation by reference and appears in the regulatory text unchanged.

1. ASME B31.8, Gas Transmission and Distribution Piping Systems

PHMSA is proposing to incorporate by reference ASME B31.8–2018, ''Gas Transmission and Distribution Piping Systems,'' November 20, 2018, (ASME B31.8), into §§ 192.112(b); 192.619(a); 195.5(a); and 195.406(a). This standard covers safety requirements associated with the design, fabrication, installation, inspection, testing, and operation and maintenance of pipeline facilities used for the transportation of natural gas and liquefied petroleum gases when they are vaporized and used as gaseous fuels.

More specifically, ASME B31.8 addresses the following requirements associated with the design, fabrication, installation, inspection, testing, and operation and maintenance of pipeline facilities that are referenced through the regulations. The revisions related to these requirements are also summarized below:

- Fracture control for steel pipe using alternative maximum allowable operating pressure in gas pipelines (§ 192.112(b)).
  - The 2016 version made editorial changes such as numbering the paragraphs associated with fracture control and arrest in 841.1. Some relatively minor technical changes were made, such as adding a clarification note regarding application of equations associated with ductile facture.
  - The 2018 version revises the equations for Charpy energy values (aka Charpy V-notch absorbed energy or Charpy V-notch toughness (CVN)) to use diameter instead of radius as a variable. This version also includes a note that addresses situations in which the CVN exceeds a certain value and full-sized test pieces are used. The note expands already-existing requirements related to API 5L testing.
- Test pressure for determining maximum allowable operating pressure in steel or plastic gas pipelines (§ 192.619(a)), testing the pipeline for conversion to service for hazardous liquid pipelines (§ 195.5(a)), and test pressure for determining maximum operating pressure for liquid pipelines (§ 195.406(a)), which all reference ASME B31.8 Appendix N–5.
  - The revised version includes some editorial changes in Appendix N–5 associated with renumbering of other referenced sections. There are no technical changes in Appendix N–5.

[Replaces IBR: ASME/ANSI B31.8–2007, ''Gas Transmission and Distribution Piping Systems,'' November 30, 2007, (ASME/ANSI B31.8).]

2. ASME B31.8S, Supplement to B31.8 on Managing System Integrity of Gas Pipelines

PHMSA is proposing to incorporate by reference ASME B31.8S–2016, ''Managing System Integrity of Gas Pipelines, Supplement to ASME B31.8,'' October 31, 2016, (ASME/ANSI B31.8S) into §§ 192.903 note to the definition of *Potential impact radius;* 192.907 introductory text, (b); 192.911 introductory text, (i), (k), (l), (m); 192.913(a), (b), (c); 192.917 (a), (b), (c), (d), (e); 192.921(a); 192.923(b); 192.925(b); 192.927(b), (c); 192.929(b); 192.933(c), (d); 192.935 (a), (b); 192.937(c); 192.939(a); and 192.945(a). ASME B31.8S describes the foundations for an effective integrity management (IM) program for gas transmission pipelines. Along with subpart O of part 192, ASME B31.8S provides the essential features of an integrity management program. Section 3.2 of B31.8S addresses the potential impact factor for gases other than standard quality natural gas that may be transported through a gas transmission pipeline. Other sections are as follows: Section 4—Gathering, Reviewing and Integrating Data; Section 5—Risk Assessment and Reassessment Intervals; Section 6.2—Selection of In-line Inspection Tools (ILI); Section 6.4—Direct Assessment Requirements for External Corrosion and Internal Corrosion; Section 7—Remediation Schedule and Immediate Repair Requirements; Section 9—Performance Plan and Program Effectiveness; Section 10—Communications Plan; Section 11—Management of Change Process; Section 12—Quality Assurance Process; Appendix A—Data Requirements of Each Threat; Appendix A3—Direct Assessment requirements for the Stress Corrosion Cracking (SCC) Threat; Appendix 4.3 and 4.4—Criteria and Risk Assessment and Integrity Assessment for the Manufacturing Threat; and Appendix A7—Criteria and Risk Assessment and Integrity Assessment, Response and Mitigation and Performance Measures for the Third Party Damage Threat.

The standard applies to onshore pipeline systems constructed with ferrous materials (such as iron and steel) that transport gas. It is frequently referenced throughout subpart O and is designed to provide the operator with the information necessary to develop and implement an effective integrity management program utilizing proven industry practices and processes.

Revisions to ASME B31.8S relative to the 2004 edition that is currently incorporated by reference include added information on Stress Corrosion Cracking Direct Assessments (SCCDA), an assessment method for identifying stress corrosion cracking. The 2016 edition also provides additional guidance on managing cracking threats. Other changes since the 2004 edition include adding performance metrics for block valve failures in Table 9.4, requiring examinations for immediate and 1-year repair conditions discovered by direct assessment, and updates and additions for references to secondary standards. In addition to the above, each revision since 2004 includes other minor technical changes, editorial revisions, and added or revised guidance. Together, PHMSA expects these additions, updates, and clarifications to improve the effectiveness of the Federal gas transmission integrity management requirements.

PHMSA is not proposing the incorporation by reference of the 2018 edition of ASME B31.8S, ''Managing System Integrity of Gas Pipelines, Supplement to ASME B31.8,'' November 28, 2018, (ASME/ANSI B31.8S), into §§ 192.7(c)(6). The 2018 edition includes several minor editorial changes that PHMSA found to be acceptable; however, the changes in section 10 remove nearly all communications plan requirements included in § 192.911(m). PHMSA has not, therefore, proposed incorporation of the 2018 edition. The 2016 version, in contrast, retains the communication plan requirement in section 10 of ASME B31.8S–2016. PHMSA requests comments regarding whether it should incorporate by reference ASME B31.8S–2018.

[Replaces IBR: ASME/ANSI B31.8S–2004, ''Supplement to B31.8 on Managing System Integrity of Gas Pipelines,'' 2004 edition, issued January 14, 2005, (ASME/ANSI B31.8S–2004).]

3. ASME B36.10M, Welded and Seamless Wrought Steel Pipe

PHMSA is proposing to incorporate by reference ASME B36.10M–2018, ''Welded and Seamless Wrought Steel Pipe,'' 2018 edition, October 12, 2018, into § 192.279. This standard is proposed to replace the current reference in § 192.279 to Table C1 of ASME/ANSI B16.5. The 2003 and subsequent editions of ASME B16.5 remove Table C1;[6] that information is now in ASME B36.10M–2018. Therefore, PHMSA is proposing to revise § 192.279 to replace the phrase ''listed in Table C1 of ASME/ANSI B16.5'' to ''listed in ASME B36.10M.''

C. ASTM International (Formerly American Society for Testing and Materials)

ASTM A672/A672M–09 was previously approved for incorporation by reference and appears in the regulatory text unchanged.

1. ASTM A53/A53M, Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless

PHMSA is proposing to incorporate by reference ASTM A53/A53M–20, ''Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless,'' July 1, 2020, into § 192.113; Item II, Appendix B to part 192; and § 195.106(e). ASTM A53/A53M specifies the design for seamless and welded black and hot-dipped galvanized steel pipe in nominal pipe size (NPS) ⅛ to NPS 26. The standard also specifies requirements for tests of material properties, hydrostatic tests, and non-destructive tests. The revised standards published since the 2010 edition currently incorporated by reference only incorporate minor editorial revisions or clarifications that are expected to provide an equal or increased level of safety. The 2012 edition clarifies the chemical requirements table to allow additional manganese content if carbon content is reduced (both carbon and manganese increase the hardness and strength of steel but may lead to welding issues with excessive content), the 2018 edition removes language prescribing the method for measuring wall thickness and allowing other engineering-acceptable methods, and the 2020 edition states that galvanized pipe must be completely and evenly covered with zinc. These revisions add some flexibility to the specifications.

[Replaces IBR: ASTM A53/A53M–10, ''Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless,'' 2010 edition, approved October 1, 2010, (ASTM A53/A53M).]

2. ASTM A106/106M, Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service

PHMSA is proposing to incorporate by reference ASTM A106/A106M–19A, ''Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service,'' November 1, 2019, into §§ 192.113; Item 1, Appendix B to part 192; and 195.106(e). This specification covers seamless carbon steel pipe for high-temperature service in NPS ⅛ to NPS 48. The updates added since the 2010 edition currently incorporated by reference include clarifying the supplementary requirements in the ordering information, as well as the definition of single or double random lengths of pipe with single random joints allowed from 17 to 24 foot lengths and double random joints being between 36 and 44 feet. The updates also allow heat treatment of hot-finished pipe, require that any tests be performed after heat treatment to ensure the tests are on the finished product, add a note to the chemical requirements table to allow additional maximum manganese content if maximum carbon content is reduced (both carbon and manganese increase the hardness and strength of steel but may lead to welding issues with excessive content), and include other minor editorial changes. These revisions provide additional flexibility and clarity to the specification.

[Replaces IBR: ASTM A106/A106M–10, ''Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service,'' 2010 edition, October 1, 2010 (ASTM A106/A106M).]

3. ASTM A333/A333M, Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications With Required Notch Toughness

PHMSA is proposing to incorporate by reference ASTM A333/A333M–18, ''Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications with Required Notch Toughness,'' November 1, 2018, into §§ 192.113; Item 1, Appendix B to part 192; and 195.106(e). This specification covers nominal (average) wall seamless and welded carbon and alloy steel pipe intended for use at low temperatures and covers chemical, tensile strength, mechanical testing, and other requirements. The standards published since the 2011 edition that is currently incorporated by reference only add minor editorial revisions. These include expanding the scope of the standard to other applications with required notch toughness (notch toughness indicates the ability of the steel to absorb an impact without failing when a defect such as a notch, groove, or gouge is present); changing the name of the element Columbium to the more common, internationally used ''Niobium;'' changing ''minimum impact test temperature'' to ''impact test temperature,'' which will help standardize test temperature; clarifying procedures for impact testing, which will help standardize testing; and incorporating changes to the notes for the chemical requirements table. Adopting these updates improves the clarity of the requirements, provides a greater or equivalent level of safety, and ensures compatibility with other standards.

[Replaces IBR: ASTM A333/A333M–11, ''Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service,'' 2011 edition, April 1, 2011, (ASTM A333/A333M).]

4. ASTM A381, Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use With High-Pressure Transmission Systems

PHMSA is proposing to incorporate by reference ASTM A381/A381M–18, ''Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use With High-Pressure Transmission Systems,'' November 1, 2018, into §§ 192.113; Item I, Appendix B to part 192; and 195.106(e). This specification covers straight-seam, double-submerged arc-welded steel pipe (commonly referred to as DSAW pipe as opposed to spiral-welded or electric-resistance-welded pipe) that is intended for the fabrication of fittings and accessories for compressor or pump-station piping and is suitable for high-pressure service at outside diameters of 16 inches or greater. The revised standard incorporates a number of changes, including: Clarifying quench and temper requirements (when requested by a purchaser); updating tensile and guided-bend testing requirements to include the use of ASTM A370 instead of the outdated requirements in the previous edition of the standard; adding two new grades of material, Y70 and Y80, which have similar requirements to API 5L X70 and API 5L X80 but are

[6] ASME (1996), *Pipe Flanges and Flanged Fittings* (ASME B16.5–1996). Retrieved from: *https://www.academia.edu/38001928/ANSI_ASME_B16.5_1996_Pipe_Flanges_and_Flanged_Fittings.*

higher-strength grades that have become more common in the pipeline industry; and numerous editorial changes that update the document to match the current ASTM style guidelines. The added quench and temper requirements in this standard are part of a clause that only takes effect if an operator agrees to enact it. This clause addresses reheating pipe after it is manufactured to ensure that the atoms form in an appropriate formation, and allows for this reheated pipe to be water-quenched or tempered—in addition to the previously approved air-cooling method—if the purchaser requests these cooling methods. In addition, the standard contains references to other ASTM standards that have changed since 1996, and the revised version incorporates these changes. The referenced standards address various test methods and general material and marking requirements for steel pipe in ASTM specifications. These changes update and modernize the document, and the improved testing requirements should provide a greater level of safety.

[Replaces IBR: ASTM A381–96, ''Standard Specification for Metal-Arc Welded Steel Pipe for Use with High-Pressure Transmission Systems,'' 1996 edition (Reaffirmed 2005), October 1, 2005, (ASTM A381).]

5. ASTM A671/671M, Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures

PHMSA is proposing to incorporate by reference ASTM A671/A671M–20, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures,'' March 1, 2020, into §§ 192.113; Item 1, Appendix B to part 192; and 195.106(e). ASTM A671/671M specifies the design, fabrication, and testing requirements for electric-fusion-welded (as opposed to arc-welded) steel pipe with added filler metal. Specifically, the specification applies to pipe fabricated from pressure vessel quality steel plate suitable for use at high pressures at atmospheric and lower temperatures. The updated standard includes minor changes from the 2010 edition—which is currently incorporated by reference—that update and correct the tables for plate specifications and heat-treatment parameters to account for the introduction, revision, or obsolescence of pipe grades and related heat-treatment practices. These revisions allow operators and manufacturers to take advantage of advances in materials and manufacturing technology, as well as to eliminate pipe grades and heat treatments that are no longer used. In addition, the revised standard clarifies tensile-test requirements to help ensure consistent testing methodology. This change represents a minor advancement of the standard and provides an equivalent or greater level of safety.

[Replaces IBR: ASTM A671/A671M–10, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures,'' 2010 edition, April 1, 2010, (ASTM A671/671M).]

6. ASTM A691/691M Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures

PHMSA is proposing to incorporate by reference ASTM A691/A691M–19, ''Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures,'' November 1, 2019, into §§ 192.113; Item 1, Appendix B to part 192; and 195.106(e). This standard specifies the design, composition, fabrication, and testing of carbon and alloy steel pipe. The changes in the revised edition include a requirement that ASTM A387/A387M Grade 91 material be designated and marked by Type 1 or Type 2 when required by that standard, as well as minor revisions to the ordering information specifications to differentiate between plate grades and pipe grades. In addition, the revised edition changes the name of the element with atomic number 41 from Columbium to Niobium. These minor revisions make the specification more consistent with other manufacturing standards and improve the clarity of the document.

[Replaces IBR: ASTM A691/A691M–09, ''Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures,'' 2009 edition, October 1, 2009, (ASTM A691/A691M).]

D. Manufacturers Standardization Society (MSS) of the Valve and Fittings Industry

1. ANSI/MSS SP–44, Steel Pipeline Flanges

PHMSA is proposing to incorporate by reference ANSI/MSS SP–44–2019, ''Steel Pipeline Flanges,'' April 2020 into § 192.147(a). This American National Standard Institute (ANSI)/Manufacturers Standardization Society (MSS) Standard Practice (SP) covers pressure-temperature ratings, materials, dimensions, tolerances, marking, and testing of steel pipeline flanges. The revised edition specifies material chemistry and strength requirements; clarifies definitions; defines flange dimensions for weld-end, flange bolting, and flange-face tolerances for flange raised-face height and bolt-hole diameter marking; clarifies allowable heat-treatment methods; and makes impact testing at –50 degrees F mandatory for grades over F42 for steel pipeline flanges. The revised edition adds a new section on manufacturing and inspection that requires a documented manufacturing procedure and prescribes minimum testing requirements for the forging method, heat treatment, machining and dimensions, mechanical tests, non-destructive examination, and material traceability. Other changes since the 2010 edition, which is currently incorporated by reference, include more specific material chemistry and carbon-equivalent standards for weldability, quality control to maintain strength and dimensional requirements, heat-treatment requirements, and the addition of a hardness-testing requirement. The revised edition also revises requirements for markings and tolerances and includes updates regarding ANSI approval, strength, and inspection-quality assurance. These new or enhanced requirements improve manufacturing quality control and enhance safety through more consistent flange tensile strength, chemistry, and end tolerances for weldability and fit-up with other flanges. This SP is ANSI-approved as a revised American National Standard and was published in April 2020. PHMSA expects the quality improvement requirements in this edition will help ensure more consistent flange properties and dimensions, which should have operational and safety benefits to operators during construction, pressure testing, and operations.

[Replaces IBR: MSS SP–44–2010, ''Standard Practice, Steel Pipeline Flanges,'' 2010 edition, March 1, 2010, including Errata (May 20, 2011), (MSS SP–44).]

2. MSS SP–75, High-Test, Wrought, Butt-Welding Fittings

PHMSA proposes to incorporate by reference MSS SP–75–2019, ''High-Test, Wrought, Butt-Welding Fittings,'' December 2019 into § 195.118(a). This MSS SP specifies requirements for factory-made, seamless, and electric-welded carbon and low-alloy steel butt-welding fittings. The SP states that it is applicable to fittings used in high-pressure gas and oil transmission and distribution systems, including pipelines, compressor stations, metering and regulating stations, and mains.

The revised edition includes revisions to product chemistry, strength,

inspection quality assurance, chemical composition and carbon-equivalent standards, heat-treatment practices, welding procedures for the fittings, and recordkeeping requirements. The product chemistry changes in the standard help ensure that carbon-equivalent computations for modern types of steel are based upon the usage of a lower amount of carbon in the fitting. The standard states that a fitting cannot exceed 0.45 percent of the carbon equivalent, and that operators must identify any fitting in which the carbon equivalent exceeds 0.42 percent. This change will help operators identify whether preheating is necessary prior to welding a fitting to pipe.

The updated standard also edits the heat-treatment standards to require that the heat-treatment furnace must maintain a temperature that is between −25 and 25 degrees Fahrenheit of the required furnace temperature. The edited heat-treatment standards require annual verification, specify the appropriate test standard that operators should use, and compel the manufacturer to maintain test records. Further, the revised standard outlines the heat-treatment processes that operators can use to obtain stress-relieving, normalizing, or quenching and tempering specified material properties. The standard also requires manufacturers to maintain procedures and heat-treatment records.

The revised standard requires operators to review the heat-treatment records for each test lot of heat-treated fittings for consistency with both the fitting specifications and the prior fitting heat-treatment results, as applicable. The standard notes that each fitting must be manufactured in accordance with a manufacturing procedure specification that specifies the fittings' starting material; forming method; welding-procedure specification; heat-treatment procedure with thermal cycles; machining requirements; inspection, dimension, and test requirements; fitting end prep; coating; and markings. The standard states that each manufacturer must have a quality-control program that ensures their fittings conform to all applicable requirements in the standard. Further, the standard requires manufacturers to perform a minimum inspection test plan on each fitting that outlines the type and number of tests that must be performed and the specifications that the test must meet to ensure the quality of the fitting.

The MSS revised the updated edition of this standard with input from PHMSA and other stakeholders. The revised edition includes rewritten proof-test requirements and new requirements for segmentable elbows, and adopts new requirements for manufacturers to have manufacturing procedure specification and inspection test plans. More stringent material requirements and improved manufacturing controls are intended to address problems such as failures due to cracking or insufficient material strength and welding issues caused by variations in the chemistry or dimensions of flanges. PHMSA expects these improvements will enhance safety. PHMSA expects the quality-improvement requirements in this edition will help ensure more consistent fitting properties and dimensions, which is expected to have operational and safety benefits during construction, pressure testing, and operations.

[Replaces IBR: MSS SP–75–2008, ''Specification for High Test Wrought Butt Welding Fittings,'' 2008 edition, (MSS SP–75).]

E. NACE International (Formerly National Association of Corrosion Engineers)

1. NACE SP0204, Standard Practice (SP): Stress Corrosion Cracking (SSC) Direct Assessment Methodology

PHMSA is proposing to incorporate by reference NACE SP0204–2015, ''Stress Corrosion Cracking (SCC) Direct Assessment Methodology,'' March 14, 2015, into § 195.588(c). This SP provides a process and a series of required steps for operators to use to assess the extent of stress-corrosion cracking on a section of buried pipeline. The methodology is designed as a screening tool to determine whether SCC is a substantial risk on a pipeline system.

The 2015 edition contains a few minor improvements from the 2008 edition. For example, the 2015 edition provides additional guidance references regarding the susceptibility requirements for near-neutral SCC and adds new references for recommended practices for near-neutral SCC. Near-neutral-pH SCC is a transgranular form of SCC that occurs on underground pipelines and is associated with a near-neutral-pH electrolyte. This form of cracking typically experiences limited branching and is associated with some crack wall corrosion, as well as occasional pipe surface corrosion. It is also referred to as low-pH or non-classical SCC. The SP also defines parameters quantifying SCC severity based on the size and depth of SCC found in the field and notes that fatigue and corrosion fatigue must be considered on liquid pipelines. Some of these revisions have already been integrated in recent industry projects. PHMSA expects these changes will improve the reliability of operators' SCC direct assessment plans and thereby increase efficiency, help remove variables and guesswork, and allow operators to better target potential SCC sites. The additional definitions and guidance also promote more consistent SCC evaluations, as consideration of additional variables will allow operators to further refine or classify suspected SCC and more consistently integrate these classifications into assessment or remediation plans.

[Replaces IBR: NACE SP0204–2008, ''Standard Practice, Stress Corrosion Cracking (SSC) Direct Assessment Methodology,'' 2008 edition, September 18, 2008, (NACE SP0204).]

F. National Fire Protection Association (NFPA)

NFPA–30 (2012) was previously approved for incorporation by reference and appears in the regulatory text unchanged.

1. NFPA 58, Liquefied Petroleum Gas Code

PHMSA is proposing to incorporate by reference NFPA 58, ''Liquefied Petroleum Gas Code,'' 2020 edition, October 25, 2019, into §§ 192.7 and 192.11(a), (b), and (c). NFPA 58 specifies requirements for the ''storage, handling, transportation, and use of liquefied petroleum gas.'' The PSRs require any plant that supplies liquefied petroleum to a pipeline system and any pipeline system that transports only petroleum gas or petroleum gas mixtures to meet the requirements of NFPA 58 in addition to the requirements of part 192. PHMSA did not incorporate prior editions of this standard due to content and requirements that could potentially have conflicted with elements of 49 CFR part 192. The revised edition, however, alleviates or removes the potential conflicts.

The revised edition of NFPA 58 includes more detailed, comprehensive sections covering the design and installation of liquefied petroleum systems. Significant additions include new or revised standards for regulators regarding modified piping, vapor systems, leak detection, containers, and structural supports. Furthermore, the revised edition references more recent editions of almost all the standards referenced in the 2004 edition that is currently incorporated by reference. The new references included in the revised edition are ANSI B1.20.1, ANSI/CSA 6.26(LC1), ANSI Z21.18/CSA 6.3, ANSI Z21.80/CSA 6.22, API 607, ASTM E119, ASTM F1055, ASTM F2945, CAN/ULC

S642, CGA–6.3, CGA–S–1.1, CGA–S–1.3, CSA 6.32(LC4a), CSA B149.5, ISO/NP 19825, NFPA 13, NFPA 55, NFPA 99, UL 21, UL 125, UL 263, UL 514B, UL 569, UL 1337, UL 1660, UL 1769, and UL 2227. The revised edition removes references to ASTM B539, NFPA 50B, and NFPA 251. In addition to the safety improvements, the revised edition reduces the potential for conflict with the code when new systems are designed, built, and maintained in accordance with the more recent version of the standards referenced in NFPA 58.

The 2020 edition of this standard incorporates a number of changes that maintain or enhance the level of safety established in the previous editions of the standard. These changes include allowing operators to use additional types of steel pipe, including schedule 10 steel (solely for aboveground vapor service) or austenitic stainless steel pipes. The revised standard allows for the use of schedule 10 steel in limited applications, which aids the pipeline industry by allowing them to use schedule 10 pipe that they might already plan to purchase for another application for aboveground vapor service as well. This change benefits industry while maintaining an equivalent level of safety. The revised standard also allows for the use of austenitic stainless steel, which is a type of stainless steel that has a specific austenitic crystal structure (a face-centered cubic structure) that results in higher heat and corrosion resistance. This steel is commonly used in extreme temperature applications, and can be found as a component in duplex stainless steels. Pipe manufacturers often provide mixed steel types in piping batches, and the exclusion of this steel in previous versions of this standard was based on the potential for variation. However, the characteristics of the steel have since been reviewed and determined to be within tolerance for general LP applications.

Further, the standard revises both fire extinguisher requirements and the scope of chapter 15. The chapter 15 revisions enhance safety by deleting superfluous installation requirements, incorporating operations and maintenance requirements, and removing duplicative language applicable to U.S. DOT-regulated systems. The fire extinguisher revisions confirm that operators must be able to quickly shut off access to a fuel source if they intend to use fire extinguishers in the event of a liquefied petroleum gas fire. This change streamlines NFPA 58 and other relevant industry standards.

Finally, the 2020 edition of the standard includes requirements regarding face-seal inspections, fire-resistance-rated materials, and noncombustible materials. Regarding the face-seal inspections, the updated standard requires that operators must inspect face seals for CGA 791 and 793 connections before filling a cylinder. Additionally, the standard notes that operators must refrain from filling cylinders and replace the relevant valve if they find that the face seal is defective. The standard also notes that operators must ensure that noncombustible and specific fire-resistance-rated materials fulfill specific requirements.

[Replaces IBR: NFPA–58, ''Liquefied Petroleum Gas Code (LP-Gas Code),'' 2004 edition, April 1, 2004, (NFPA–58).]

2. NFPA 59, Utility LP-Gas Plant Code

PHMSA is proposing to incorporate by reference NFPA 59, ''Utility LP-Gas Plant Code,'' 2018 edition, August 17, 2017, into § 192.11(a), (b), and (c). In the PSRs, the requirements for liquefied petroleum gas facilities are mostly defined in NFPA 59 and NFPA 58, as applicable. NFPA 59 specifies the design, construction, location, installation, operation, and maintenance of utility gas plants. Compared to NFPA 58, NFPA 59 generally covers larger facilities.

Four editions of NFPA 59 have been issued since 2004 (2008, 2012, 2015, and 2018). The revisions made from the 2008 edition to the 2015 edition include provisions on corrosion protection; personnel training relative to the operation or maintenance of propane-air mixing equipment; and provisions for sizing pressure-relief devices for propane installations over 300 psig. These provisions are included in the 2018 edition. Further, the 2018 edition of NFPA 59 includes more detailed, comprehensive sections covering the design and maintenance of liquefied petroleum plants. Significant changes include adding and clarifying definitions, removing out-of-scope topics conflicting with part 192, such as vehicle fuel systems, and expanding the scope of protected components previously not covered, such as the protection of in-plant piping. Adopting the 2018 edition reduces the potential for conflict with the code when new systems are designed, built, or maintained to the specifications of the more recent version of such referenced standards in NFPA 59.

[Replaces IBR: NFPA–59, ''Utility LP-Gas Plant Code,'' 2004 edition (NFPA–59).]

3. NFPA 70, National Electrical Code (NEC)

PHMSA proposes to incorporate by reference NFPA 70, ''National Electrical Code (NEC),'' 2017 edition, August 23, 2016, into §§ 192.163(e) and 192.189(c). NFPA 70, also known as the National Electrical Code (NEC), covers the installation and removal of electrical equipment, conductors, and conduits in structures and outdoor areas. The NEC is a foundational standard for electrical safety in residential, commercial, and industrial implementations. It is referenced in the PSRs to provide requirements for the safe installation of electrical equipment at compressor stations in natural gas pipeline facilities.

The 2017 edition includes several revisions from the 2011 edition that is currently incorporated by reference. Changes include new provisions for energy-storage systems, labeling requirements for equipment consistent with NFPA 70E, and clearance requirements for certain electrical equipment. The 2017 edition also expands marking and maintenance requirements for emergency electrical systems and requires a minimum temperature rating for fire alarm cables. The improvements in the 2017 edition of NFPA 70 enhance the safety of electrical systems and equipment in compressor stations, mitigating potential ignition risks.

[Replaces IBR: NFPA–70, ''National Electrical Code,'' 2011 edition, September 24, 2010, (NFPA–70).]

III. Miscellaneous Amendments

PHMSA is also proposing editorial amendments and corrections to the PSRs. The most significant of these revisions responds to a petition for rulemaking from the American Gas Association (AGA). In addition to petitioning PHMSA to incorporate the most recent edition of NFPA 59 by reference, AGA suggested edits to § 192.11 to clarify the scope of NFPA 58 and NFPA 59. The regulations currently require operators of liquefied petroleum plants and pipelines to meet the requirements of both NFPA 58 and NFPA 59. The proposed change clarifies that operators must only meet the requirements for the NFPA standard that is applicable to the type of facility they operate, based on the scope and applicability statements in those standards. Generally, NFPA 58 applies to liquefied petroleum pipeline systems and NFPA 59 to utility-scale liquefied petroleum gas plants.

Another revision corrects the minimum wall thickness tables for plastic pipe made of polyethylene (PE),

polyamide (PA) 11, and polyamide 12 in § 192.121 to include specifications for pipe with a copper tubing size (CTS) of 1¼ inches and correct the minimum wall thickness for 1 inch CTS pipe. The minimum wall thickness and, more specifically, the dimension ratio (DR; the ratio of outside diameter to wall thickness) being proposed for these sizes is consistent with values already specified for adjacent sizes. Plastic pipe, especially PE, is very common on gas distribution systems. On November 20, 2018, PHMSA published a final rule (83 FR 58694) that allowed plastic pipe to operate with a design factor (a derating factor) of 0.4 rather than 0.32 provided it met various requirements, including having a minimum wall thickness as defined in the tables in § 192.121. As described in the final rule, the Regulatory Impact Analysis, and AGA's petition for rulemaking, the revised design factor allows the use of approximately 17 percent less material or 11 percent higher capacity for a given outside specification.

The NPRM included listings for CTS sizes of ½ and ¾ inch for PE pipe. In response to comments, PHMSA included CTS sizes for PA11 and PA12 pipe and IPS sizes below 1 inch for all materials. However, stakeholders have subsequently requested PHMSA consider including 1¼ inch CTS as well. This amendment would allow the use of 1¼ inch CTS pipe with a 0.4 design factor provided the pipe wall is at least 0.121 inches thick. A wall thickness of 0.121 corresponds to a dimension ratio of approximately 11. This is the same SDR as what is currently permitted for 1¼ inch Iron Pipe Size (IPS) and 1 inch CTS and 1 inch IPS. This change would reduce the cost to produce this size of plastic pipe by approximately 10 percent. The revised design factor is already permitted for similar, adjacent sizes such as 1¼ inch IPS pipe. It was not PHMSA's intent to exclude specifications such as 1¼ inch CTS. The costs and benefits of this proposal were accounted for in the RIA for the 2018 final rule.

Other proposed editorial revisions that PHMSA proposes are:

- Update references to PHMSA's website at *https://portal.phmsa.dot.gov/* in §§ 191.22 (b) and (c), and 195.64;
- Copy the definition for ''master meter system'' used in part 191 to part 192. The term ''master meter system'' is referenced in both part 191 and part 192, however it is only defined in part 191 at § 191.3. The definition would be added to part 192 at § 192.3;
- Correct a reference to flange requirements in § 192.147(a) to clarify that flanges must meet ASME B16.5 *or* ANSI/MSS SP–44, not both;
- Correct the placement of the word ''in'' in § 192.153(d);
- Remove reference to an inactive phone number for the NPMS program in §§ 192.727(g) and 195.59(a);
- Remove references to § 195.242(c) and (d) in § 195.1(c) because this section no longer exists in the regulations;
- Correct § 195.3(c)(3) to reflect that ASME B31.4 is no longer referenced in § 195.452(h); and
- Add the house number to the address for DOT headquarters in § 192.805.

IV. Regulatory Analyses and Notices

A. Summary/Legal Authority for This Rulemaking

This NPRM is published under the authority of the Federal Pipeline Safety Laws (49 U.S.C. 60101 *et seq.*). Section 60102 authorizes the Secretary of Transportation to issue regulations governing the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. Further, section 60102(l) states that the Secretary shall, to the extent appropriate and practicable, update incorporated industry standards that have been adopted as a part of the PSRs. This NPRM proposes to incorporate by reference 25 updated editions of standards currently incorporated by reference and one new standard. In addition, this NPRM proposes to make several other minor clarifying and editorial changes to the PSRs.

Executive Order 12866 and DOT Policies and Procedures for Rulemaking

Executive Order 12866 (''Regulatory Planning and Review'') (58 FR 51735; Oct. 4, 1993) requires agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' This NPRM is not considered a significant regulatory action under Executive Order 12866. Accordingly, this NPRM was not reviewed by OMB. DOT also considers this NPRM to be non-significant under its Policies and Procedures for Rulemakings (49 CFR part 5).

In this NPRM, PHMSA is proposing to incorporate by reference updated editions of 25 standards currently referenced in parts 192 and 195 and one new standard. According to the annual reports pipeline that operators submit to PHMSA, there are more than 3,244 entities operating hazardous liquid, natural gas transmission, gathering, distribution systems, and liquefied natural gas facilities as of September 12, 2018. The amendments in this NPRM should enhance safety and reduce the compliance burden on the regulated industry. However, the anticipated cost savings and benefits have not been quantified. PHMSA expects the cost savings and benefits of incorporating these standards to be negligible. The industry standards developed and adopted by consensus are largely accepted by the pipeline industry.

In addition to updating consensus standards, PHMSA is proposing miscellaneous non-substantive amendments and clarifications of regulatory language in certain provisions. Since these editorial changes are relatively minor, the proposed changes would not require pipeline operators to undertake new pipeline safety initiatives and are expected to have negligible cost implications. To the extent that the changes have an impact, they are expected to increase the clarity of the PSRs and help improve the safety of the Nation's pipeline systems.

In accordance with the NTTAA and OMB Circular A–119, PHMSA reviews new editions and revisions to relevant standards and publishes a NPRM approximately every two years to incorporate by reference new or updated consensus standards. This practice is consistent with the intent of the NTTAA and OMB directives to avoid the need for developing government-written standards that could potentially result in regulatory conflicts with updated industry standards and an increased compliance burden on industry.

Executive Order 13771

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866. Details on the estimated cost savings of this proposed rule can be found in the Executive Order 12866 section above.

Executive Order 13132

PHMSA analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132, ''Federalism,'' (64 FR 43255; Aug. 10, 1999). Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the

distribution of power and responsibilities among the various levels of government.'' While the proposed rule may operate to preempt some State requirements, it does not impose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The pipeline safety laws, specifically 49 U.S.C. 60104(c), prohibit State safety regulation of interstate pipeline facilities. However, under the pipeline safety laws, States can augment pipeline safety requirements for intrastate pipeline facilities, but may not approve safety requirements less stringent than those required by Federal law. A State may also regulate an intrastate pipeline facility PHMSA does not regulate. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13175

PHMSA has analyzed this NPRM according to the principles and criteria in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' (65 FR 67249; Jan. 29, 2014). Because this NPRM does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply. We invite Indian tribal governments to provide comments on the costs and effects that this or a future rulemaking could potentially have on tribal communities.

Regulatory Flexibility Act, Executive Order 13272 and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), requires an agency to review regulations to assess their impact on small entities, unless the agency determines the rule is not expected to have a significant impact on a substantial number of small entities. PHMSA estimates the costs of incorporating these standards to be negligible as industry standards developed and adopted by consensus are largely accepted and followed by the pipeline industry, which assures that the industry is not forced to comply with several different standards to accomplish the same safety goal. Most pipeline operators already purchase and apply industry standards as part of common business practice.

Based on the information available about the anticipated impact of this NPRM, PHMSA does not anticipate that this NPRM will have a significant economic impact on a substantial number of small entities, under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605), because the costs of the NPRM are expected to be negligible.

This NPRM was also developed in accordance with Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' (68 FR 7990; Feb. 19, 2003), and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

Paperwork Reduction Act

PHMSA has analyzed this NPRM in accordance with the Paperwork Reduction Act of 1995 (PRA) (Pub. L. 104–13; May 22, 1995). The PRA requires Federal agencies to minimize paperwork burden imposed on the American public by ensuring maximum utility and quality of Federal information, ensuring the use of information technology to improve the Federal Government's performance and accountability for managing information collection activities. This NPRM does not impose any new information collection requirements or modify any existing information collections requirements.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Unfunded Mandates Reform Act of 1995

This NPRM will not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4; March 22, 1995). The statutory thresholds established in UMRA were $50 million for intergovernmental mandates and $100 million for private-sector mandates in 1996. According to the Congressional Budget Office, the thresholds for 2019, which are adjusted annually for inflation, are $82 million and $164 million, respectively, for intergovernmental and private-sector mandates.[7] The NPRM is not expected to exceed these thresholds in any one year to either State, local or tribal governments, in the aggregate, or to the private sector, and would be the least burdensome alternative that achieves the objective of this NPRM. Therefore, PHMSA is not required to prepare a written statement.

[7] *https://www.cbo.gov/publication/51335.*

Privacy Act Statement

Anyone may search the electronic form of comments received in response to any of our dockets by the name of the individual submitting the comment (or signing the comment if submitted for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *www.transportation.gov/privacy.*

Environmental Assessment

The National Environmental Policy Act of 1969, 42 U.S.C. 4321–4375, requires Federal agencies to analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality regulations require Federal agencies to conduct an environmental review considering: (1) The need for the proposed action; (2) alternatives to the proposed action; (3) probable environmental impacts of the proposed action and alternatives; and (4) the agencies and persons consulted during the consideration process (40 CFR 1508.9(b)). In this NPRM, PHMSA proposes to incorporate 25 updated editions of currently referenced standards and one new standard.

Description of Action: The NTTAA directs Federal agencies to use voluntary consensus standards and design specifications developed by voluntary consensus standard bodies instead of government-developed voluntary technical standards, when applicable. There are currently more than 80 standards incorporated by reference in parts 192, 193, and 195 of the PSRs.

PHMSA engineers and subject matter experts participate on 25 standards development committees to keep current on committee actions. PHMSA will only propose to adopt standards into the Federal regulations that meet the agency's directive(s) to ensure the best interests of public and environmental safety are served.

Purpose and Need: Many of the industry standards currently incorporated by reference in the PSRs have been revised and updated to incorporate and promote new technologies and methodologies. This

NPRM will allow operators to use new technologies by incorporating new editions of the standards into the PSRs.

PHMSA's technical and subject matter experts continually review the actions of pipeline standards developing committees and study industry safety practices to ensure that their endorsement of any new editions or revised standards incorporated into the PSRs will improve public safety, as well as provide protection for the environment. If PHMSA does not amend the PSRs to keep up with industry practices, it could potentially have an adverse effect on the safe transportation of energy resources.

These proposed amendments would make the regulatory provisions more consistent with current technology and would therefore promote the safe transportation of hazardous liquids, natural and other gases, and liquefied natural gas by pipeline.

Alternatives Considered: In developing this NPRM, PHMSA considered two alternatives:

Alternative (1): Take no action and continue to incorporate only the existing standards currently referenced in the PSRs. Because PHMSA's goal is to facilitate pipeline safety and incorporate appropriate and up to date consensus standards, PHMSA rejected the no action alternative. This alternative would potentially result in forgoing the safety and environmental improvements in the updated standards.

Alternative (2): Adopt the above-described amendments and incorporate updated editions of voluntary consensus standards to allow pipeline operators to use current technologies. This is the proposed alternative. PHMSA's goal is to incorporate by reference all or parts of updated editions of voluntary consensus standards into the PSRs to allow pipeline operators to use current technology, new materials, and other industry and management practices. Another goal is to update and clarify certain provisions in the regulations.

Environmental Consequences: The Nation's pipelines are located throughout the United States, both onshore and offshore, and traverse a variety of environments—from highly populated urban sites to remote, unpopulated rural areas. The Federal pipeline regulatory system is a risk management system that is prevention-oriented and focused on identifying safety hazards and reducing the probability and quantity of a natural gas or hazardous liquid release. Pipeline operators are required to develop and implement IM programs to enhance safety by identifying and reducing pipeline integrity risks.

Pipelines subject to this NPRM transport hazardous liquids and natural gas, and therefore a spill or leak of the product could affect the physical environment as well as the health and safety of the public. The release of hazardous liquids or natural gas can cause the loss of cultural and historical resources (*e.g.,* properties listed on the National Register of Historic Places), biological and ecological resources (*e.g.,* coastal zones, wetlands, plant and animal species and their habitats, forests, grasslands, offshore marine ecosystems), special ecological resources (*e.g.,* threatened and endangered plant and animal species and their habitats, national and State parklands, biological reserves, wild and scenic rivers), and the contamination of air, water resources (*e.g.,* oceans, streams, lakes), and soil that exist directly adjacent to and within the vicinity of pipelines. Incidents involving pipelines can result in fires and explosions, causing damage to the local environment. Depending on the size of a spill or gas leak and the nature of the failure zone, the potential impacts could vary from property damage or environmental damage to injuries or, on rare occasions, fatalities.

Compliance with the PSRs substantially reduces the possibility of an accidental release of product. Updating new industry standards or those already incorporated into the PSRs can provide operators with the advantages and added safety that can accompany the application of newer technologies. These standards are based on the accumulated knowledge and experience of owners, operators, manufactures, risk management experts and others involved in the pipeline industry as well as government agencies who write the regulations to ensure the products are moved safely throughout the country. PHMSA staff actively participates in the standards development process to ensure each standard incorporated will enhance safety and environmental protection. Newer editions are not automatically incorporated but reviewed in detail. PHMSA reviewed each of the standards described in this proposed rule and have determined that most of the updates involve minor changes such as editorial changes, inclusion of a best practices, or similar changes.

The majority of updates proposed for incorporation into this NPRM increase safety standards with the direct intent to decrease risk. In a small number of instances, standards organizations relax standards to reduce industry burden where justified by low risk, overlapping protections, or technological innovation. One provision that allows for relaxation are the less conservative design sloshing wave height calculations in the revised edition of API Std 650, allowing welders qualified in a fixed position to be qualified also to weld in the roll position in the 21st edition of API Std 1104, and eliminating the need to calculate evaporation rates in the 7th edition of API Std 2000. PHMSA has determined that the safety improvements in API Std 650, API Std 1104, and API Std 2000 offset those changes.

Conclusion—Degree of Environmental Impact: PHMSA incorporates consensus standards that will allow the pipeline industry to use improved technologies, new materials, performance-based approaches, manufacturing processes, and other practices to enhance public health, safety, and welfare. PHMSA's goal is to ensure hazardous liquids, natural and other gases, and liquefied natural gas transported by pipeline will arrive safely to their destinations.

PHMSA invites comments on the potential impact on human health or the environment that would result if this rule was issued.

Executive Order 13211

Executive Order 13211 (''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'') (66 FR 28355; May 22, 2001) requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, ANPRM, and NPRM) that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

Transporting gas and petroleum affects the Nation's available energy supply. However, this NPRM would not be a significant energy action under Executive Order 13211. It also would not be a significant regulatory action under Executive Order 12866 and would not likely have a significant adverse effect on the supply, distribution, or use of energy. This NPRM has not been designated as a significant energy action.

National Technology Transfer and Advancement Act

As discussed above, the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) directs Federal agencies to use voluntary consensus standards in their regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specification of materials, test methods, or performance requirements) that are developed or adopted by voluntary consensus standards bodies. This proposed rule updates 26 voluntary consensus standards, which are discussed in detail in the ''Summary of Standards Incorporated by Reference'' section.

List of Subjects

49 CFR Part 191

Pipeline safety, Reporting and recordkeeping requirements.

49 CFR Part 192

Incorporation by reference, Pipeline safety, Natural gas.

49 CFR Part 195

Incorporation by reference, Pipeline safety, Anhydrous ammonia, Carbon dioxide, Petroleum.

In consideration of the foregoing, PHMSA is proposing to amend 49 CFR parts 191, 192 and 195 as follows:

PART 191—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 1. The authority citation for part 191 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3), 49 U.S.C. 5121, 60101 *et seq.,* and 49 CFR 1.97.

■ 2. In § 191.22, revise paragraph (b) and the introductory text of paragraph (c) to read as follows:

§ 191.22 National Registry of Operators.

* * * * *

(b) *OPID validation.* An operator who has already been assigned one or more OPID by January 1, 2011, must validate the information associated with each OPID through the National Registry of Pipeline, Underground Natural Gas Storage Facility, and LNG Operators at *https://portal.phmsa.dot.gov,* and correct that information as necessary, no later than June 30, 2012.

(c) *Changes.* Each operator of a gas pipeline, gas pipeline facility, underground natural gas storage facility, LNG plant, or LNG facility must notify PHMSA electronically through the National Registry of Pipeline, Underground Natural Gas Storage Facility, and LNG Operators at *https://portal.phmsa.dot.gov* of certain events.

* * * * *

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 3. The authority citation for part 192 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3), 49 U.S.C. 5103, 60101 *et seq.,* and 49 CFR 1.97.

■ 4. In part 192, wherever they occur, remove the words ''ASME/ANSI B31.8S'' and ''ANSI/ASME B31.8S'' and add in their place the words ''ASME B31.8S''.

■ 5. In § 192.3 add the definition for ''Master Meter System'' in appropriate alphabetical order to read as follows:

§ 192.3 Definitions

* * * * *

Master Meter System means a pipeline system for distributing gas within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex, where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system. The gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means, such as by rents.

* * * * *

■ 6. Amend § 192.7 as follows:

■ a. Revise the paragraph (b) introductory text and paragraphs (b)(7) through (9);

■ b. Republish the paragraph (c) introductory text, revise paragraphs (c)(2), (5), and (6), redesignate paragraphs (c)(7) through (10) as (c)(8) through (11), and add new paragraph (c)(7);

■ c. Revise the paragraph (e) introductory text and paragraphs (e)(1), (2), (3), (5), (7), and (9);

■ d. Republish the paragraph (g) introductory text, revise paragraph (g)(1); and

■ e. Republish paragraph (i) introductory text and paragraph (i)(1), and revise paragraphs (i)(2), (i)(3), and (i)(4).

The revisions and addition read as follows:

§ 192.7 What documents are incorporated by reference partly or wholly in this part?

* * * * *

(b) American Petroleum Institute (API), 200 Massachusetts Avenue NW, Suite 1100, Washington, DC 20001, phone: 202–682–8000, *http://api.org/.*

* * * * *

(7) API Specification 5L, ''Specification for Line Pipe,'' 46th edition, April, 2018, including Errata 1 (May 2018), (API Spec 5L), IBR approved for §§ 192.55(e); 192.112(a), (b), (d), (e); 192.113; and Item I, Appendix B to this part.

(8) API Specification 6D, ''Specification for Pipeline Valves,'' 24th edition, August 2014, including Errata 1 (October 2014), Errata 2 (December 2014), Errata 3 (February 2015), Errata 4 (June 2015), Errata 5 (July 2015), Errata 6 (September 2015), Errata 7 (June 2016), Errata 8 (August 2016), Errata 9 (March 2017), Addendum 1 (March 2015), and Addendum 2 (June 2016), (API Spec 6D), IBR approved for § 192.145(a).

(9) API Standard 1104, ''Welding of Pipelines and Related Facilities,'' 21st edition, September 2013, including Errata 1 (April 2014), Errata 2 (June 2014), Errata 3 (July 2014), Errata 4 (2015), Errata 5 (September 2018) and Addendum 1 (July 2014), Addendum 2 (May 2016), (API Std 1104), IBR approved for §§ 192.225(a); 192.227(a); 192.229(c); 192.241(c); and Item II, Appendix B to this part.

* * * * *

(c) ASME International (ASME), Three Park Avenue, New York, NY 10016, 800–843–2763 (U.S./Canada), *http://www.asme.org/.*

* * * * *

(2) ASME B16.5–2003, ''Pipe Flanges and Flanged Fittings, ''October 2004, (ASME B16.5), IBR approved for § 192.147(a).

* * * * *

(5) ASME B31.8–2018, ''Gas Transmission and Distribution Piping Systems,'' November 20, 2018, (ASME B31.8), IBR approved for §§ 192.112(b) and 192.619(a).

(6) ASME B31.8S–2016, ''Managing System Integrity of Gas Pipelines, Supplement to ASME B31.8,'' October 31, 2016, (ASME B31.8S), IBR approved for §§ 192.903 note to *Potential impact radius;* 192.907 introductory text, (b); 192.911 introductory text, (i), (k) through (m); 192.913(a) through (c); 192.917 (a) through (e); 192.921(a); 192.923(b); 192.925(b); 192.927(b), (c); 192.929(b); 192.933(c), (d); 192.935(a), (b); 192.937(c); 192.939(a); and 192.945(a).

(7) ASME B36.10M–2018, ''Welded and Seamless Wrought Steel Pipe,'' 2018 edition, October 12, 2018, (ASME B36.10M), IBR approved for § 192.279.

* * * * *

(e) ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428, phone: (610) 832–9585, website: *http://www.astm.org/.*

(1) ASTM A53/A53M–20, ''Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless,'' July 1, 2020, (ASTM A53/A53M), IBR approved for § 192.113; and Item II, Appendix B to this part.

(2) ASTM A106/A106M–19A, ''Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service,'' November 1, 2019, (ASTM A106/A106M), IBR approved for § 192.113; and Item I, Appendix B to this part.

(3) ASTM A333/A333M–18, ''Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications with Required Notch Toughness,'' November 1, 2018, (ASTM A333/A333M), IBR approved for § 192.113; and Item I, Appendix B to this part.

* * * * *

(5) ASTM A381/A381M–18, ''Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use With High-Pressure Transmission Systems,'' November 1, 2018, (ASTM A381), IBR approved for § 192.113; and Item I, Appendix B to this part.

* * * * *

(7) ASTM A671/A671M–20, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures,'' March 1, 2020, (ASTM A671/A671M), IBR approved for § 192.113; and Item I, Appendix B to this part.

* * * * *

(9) ASTM A691/A691M–19, ''Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures,'' November 1, 2019, (ASTM A691/A691M), IBR approved for § 192.113; and Item I, Appendix B to this part.

* * * * *

(g) Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS), 127 Park St. NE, Vienna, VA 22180, phone: 703–281–6613, website: *http://www.mss-hq.org/.*

(1) ANSI/MSS SP–44–2019, Standard Practice, ''Steel Pipeline Flanges,'' 2020, (ANSI/MSS SP–44), IBR approved for § 192.147(a).

(2) [Reserved]

* * * * *

(i) National Fire Protection Association (NFPA), 1 Batterymarch Park, Quincy, Massachusetts 02169, phone: 617–984–7275, website: *http://www.nfpa.org/.*

(1) NFPA–30 (2012), ''Flammable and Combustible Liquids Code,'' 2012 edition, June 20, 2011, including Errata 30–12–1 (September 27, 2011) and Errata 30–12–2 (November 14, 2011), (NFPA–30), IBR approved for § 192.735(b).

(2) NFPA–58, ''Liquefied Petroleum Gas Code,'' 2020 edition, October 25, 2019, (NFPA 58), IBR approved for § 192.11(a) through (c).

(3) NFPA–59 (2018), ''Utility LP-Gas Plant Code,'' 2018 edition, August 17, 2018, (NFPA–59), IBR approved for § 192.11(a) through (c).

(4) NFPA–70, ''National Electrical Code (NEC),'' 2017 edition, August 23, 2016, (NFPA 70), IBR approved for §§ 192.163(e); and 192.189(c).

* * * * *

■ 7. Revise § 192.11 to read as follows;

§ 192.11 Petroleum gas systems.

(a) Each plant that supplies petroleum gas by pipeline to a natural gas distribution system must meet the requirements of this part and NFPA 58 or NFPA 59 (incorporated by reference, *see* § 192.7) based on the scope and applicability statements in those standards.

(b) Each pipeline system subject to this part that transports only petroleum gas or petroleum gas/air mixtures must meet the requirements of this part and NFPA 58 or NFPA 59 (incorporated by reference, *see* § 192.7), based on the scope and applicability statements in those standards.

(c) In the event of a conflict between this part and NFPA 58 or NFPA 59 (incorporated by reference, *see* § 192.7), NFPA 58 or NFPA 59 shall prevail if applicable based on the scope and applicability statements in those standards.

§ 192.112 Underground natural gas storage facilities.

■ 8. In § 192.112(e)(3), remove the words ''ANSI/API Spec 5L'' and add in their place the words ''API Spec 5L''.

■ 9. In § 192.121, revise paragraphs (c)(2)(iv), (d)(2)(iv), and (e)(4) to read as follows:

§ 192.121 Design of plastic pipe.

* * * * *

(c) * * *

(2) * * *

(iv) The wall thickness for a given outside diameter is not less than that listed in the following table:

TABLE 1 TO PARAGRAPH (c)(2)(iv)—PE PIPE: MINIMUM WALL THICKNESS AND SDR VALUES

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding DR (values)
½″ CTS	0.090	7
½″ IPS	0.090	9.3
¾″ CTS	0.090	9.7
¾″ IPS	0.095	11
1″ CTS	0.099	11
1″ IPS	0.119	11
1¼″ CTS	0.121	11
1¼″ IPS	0.151	11
1½″ IPS	0.173	11
2″	0.216	11
3″	0.259	13.5
4″	0.265	17
6″	0.315	21
8″	0.411	21
10″	0.512	21
12″	0.607	21

* * * * *

(d) * * *

(2) * * *

(iv) The minimum wall thickness for a given outside diameter is not less than that listed in the following table:

TABLE 2 TO PARAGRAPH (d)(2)(iv)—PA—11 PIPE: MINIMUM WALL THICKNESS AND SDR VALUES

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding DR (values)
½″ CTS	0.090	7.0
½″ IPS	0.090	9.3
¾″ CTS	0.090	9.7
¾″ IPS	0.095	11
1″ CTS	0.099	11
1″ IPS	0.119	11
1¼″ CTS	0.121	11
1¼″ IPS	0.151	11
1½″ IPS	0.173	11
2″ IPS	0.216	11
3″ IPS	0.259	13.5
4″ IPS	0.333	13.5
6″ IPS	0.491	13.5

* * * * *

(e) * * *

(4) The minimum wall thickness for a given outside diameter is not less than that listed in the following table.

TABLE 3 TO PARAGRAPH (e)(4)—PA–12 PIPE: MINIMUM WALL THICKNESS AND SDR VALUES

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding DR (values)
½″ CTS	0.090	7
½″ IPS	0.090	9.3
¾″ CTS	0.090	9.7
¾″ IPS	0.095	11
1″ CTS	0.099	11
1″ IPS	0.119	11
1¼″ CTS	0.121	11
1¼″ IPS	0.151	11
1½″ IPS	0.173	11
2″ IPS	0.216	11
3″ IPS	0.259	13.5
4″ IPS	0.333	13.5
6″ IPS	0.491	13.5

* * * * *

§ 192.145 [AMENDED]

■ 10. In § 192.145(a), remove the words ''ANSI/API Spec 6D'' and add in their place the words ''API Spec 6D''.

■ 11. In § 192.147, revise paragraph (a) to read as follows:

§ 192.147 Flanges and flange accessories.

(a) Each flange or flange accessory (other than cast iron) must meet the minimum requirements of ASME/ANSI B16.5 (incorporated by reference, *see* § 192.7), ANSI/MSS SP–44 (incorporation by reference, *see* § 192.7), or the equivalent.

* * * * *

■ 12. In § 192.153, revise paragraph (d) to read as follows:

§ 192.153 Components fabricated by welding.

* * * * *

(d) Except for flat closures designed in accordance with the ASME BPVC (Section VIII, Division 1 or 2) (incorporated by reference, *see* § 192.7), flat closures and fish tails may not be used on pipe that either operates at 100 p.s.i. (689 kPa) gage or more, or is more than 3 inches (76 millimeters) in nominal diameter.

* * * * *

■ 13. Revise § 192.279 to read as follows:

§ 192.279 Copper pipe.

Copper pipe may not be threaded except that copper pipe used for joining screw fittings or valves may be threaded if the wall thickness is equivalent to the comparable size of Schedule 40 or heavier wall pipe listed in ASME B36.10M (incorporated by reference, *see* § 192.7).

■ 14. In § 192.727, revise the second sentence in paragraph (g)(1) to read as follows

§ 192.727 Abandonment or deactivation of facilities.

* * * * *

(g) * * *

(1) * * * To obtain a copy of the NPMS Standards, please refer to the NPMS homepage at *https://www.npms.phmsa.dot.gov/*. * * *

■ 15. In 192.805, revise paragraph (i) to read as follows:

§ 192.805 Qualification Program.

* * * * *

(i) After December 16, 2004, notify the Administrator or a State agency participating under 49 U.S.C. Chapter

601 if the operator significantly modifies the program after the administrator or State agency has verified that it complies with this section. Notifications to PHMSA may be submitted by electronic mail to *InformationResourcesManager@dot.gov,* or by mail to ATTN: Information Resources Manager DOT/PHMSA/OPS, East Building, 2nd Floor, E22–321, 1200 New Jersey Avenue SE, Washington, DC 20590.

PART 195—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

■ 16. The authority citation for part 195 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3), 49 U.S.C. 5103, 60101 *et seq.,* and 49 CFR 1.97.

■ 17. In § 195.1, revise paragraph (c) to read as follows:

§ 195.1 Which pipelines are covered by this part?

* * * * *

(c) *Breakout tanks.* Breakout tanks subject to this part must comply with requirements that apply specifically to breakout tanks and, to the extent applicable, with requirements that apply to pipeline systems and pipeline facilities. If a conflict exists between a requirement that applies specifically to breakout tanks and a requirement that applies to pipeline systems or pipeline facilities, the requirement that applies specifically to breakout tanks prevails. Anhydrous ammonia breakout tanks need not comply with §§ 195.132(b), 195.205(b), 195.264(b) and (e), 195.307, 195.428(c) and (d), and 195.432(b) and (c).

■ 18. Amend § 195.3 as follows

■ a. Revise the paragraph (b) introductory text, redesignate paragraphs (b)(1) through (20), (22), and (23) according to the following table, and revise newly redesignated paragraphs (b)(4), (11) through (13), (16), (17), (19), paragraph (21), and newly redesignated paragraph (22);

Old paragraph	New paragraph
(b)(1)	(b)(11).
(b)(2) through (11)	(b)(1) through (10).
(b)(12)	(b)(22).
(b)(13) through (20)	(b)(12) through (b)(19).
(b)(22)	(b)(23).
(b)(23)	(b)(20).

■ b. Republish the paragraph (c) introductory text and revise paragraphs (c)(3) and (4);

■ c. Revise paragraph (e) and (f); and

■ d. Republish the paragraph (g) introductory text and revise paragraph (g)(4).

The additions, revisions, and republications read as follows:

§ 195.3 What documents are incorporated by reference partly or wholly in this part?

* * * * *

(b) American Petroleum Institute (API), 200 Massachusetts Avenue NW, Suite 1100, Washington, DC 20001 and phone: 202–682–8000, website: *http://api.org/.*

* * * * *

(4) API Recommended Practice 651, ''Cathodic Protection of Aboveground Petroleum Storage Tanks,'' 4th edition, September 2014, (API RP 651), IBR approved for §§ 195.565 and 195.573(d).

* * * * *

(11) API Recommended Practice 2026, ''Safe Access/Egress Involving Floating Roofs of Storage Tanks in Petroleum Service,'' 3rd edition, June 2017, (API Pub 2026), IBR approved for § 195.405(b). (12) API Specification 5L, ''Specification for Line Pipe,'' 46th edition, April 2018, including Errata 1 (May 2018), (API Spec 5L), IBR approved for § 195.106(b) and (e)

(13) API Specification 6D, ''Specification for Pipeline Valves,'' 24th edition, August 2014, including Errata 1 (October 2014), Errata 2 (December 2014), Errata 3 (February 2015), Errata 4 (June 2015), Errata 5 (July 2015), Errata 6 (September 2015), Errata 7 (June 2016), Errata 8 (August 2016), Errata 9 (March 2017), Addendum 1 (March 2015), and Addendum 2 (June 2016), (API Spec 6D), IBR approved for § 195.116(d).

* * * * *

(16) API Standard 620, ''Design and Construction of Large, Welded, Low-Pressure Storage Tanks,'' 12th edition, effective October 2013, including Addendum 1 (November 2014), (API Std 620), IBR approved for §§ 195.132(b); 195.205(b); 195.264(b) and (e); 195.307(b); 195.565; and 195.579(d).

(17) API Standard 650, ''Welded Tanks for Oil Storage,'' 13th edition, effective March 1, 2020, (API Std 650), IBR approved for §§ 195.132(b); 195.205(b); 195.264(b), and (e); 195.307(c) and (d); 195.565; and 195.579(d).

* * * * *

(19) API Standard 1104, ''Welding of Pipelines and Related Facilities,'' 21st edition, September 2013, including Errata 1 (April 2014), Errata 2 (June 2014), Errata 3 (July 2014), Errata 4 (November 2015), Errata 5 (September 2018), Addendum 1 (July 2014), and Addendum 2 (May 2016), (API Std 1104), IBR approved for §§ 195.214(a), 195.222(a) and (b), 195.228(b).

* * * * *

(21) API Standard 2000, ''Venting Atmospheric and Low-pressure Storage Tanks,'' 7th edition, Mach 2014, (API Std 2000), IBR approved for § 195.264(e).

(22) API Standard 2350, ''Overfill Prevention for Storage Tanks in Petroleum Facilities,'' 5th, September 1, 2020, (API Std 2350), IBR approved for § 195.428(c).

* * * * *

(c) ASME International (ASME), Two Park Avenue, New York, NY 10016, 800–843–2763 (U.S./Canada), website: *http://www.asme.org/.*

* * * * *

(3) ASME B31.4–2006, ''Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids'' October 20, 2006, (ASME B31.4), IBR approved for § 195.110(a).

(4) ASME B31.8–2018, ''Gas Transmission and Distribution Piping Systems,'' November 20, 2018, (ASME B31.8), IBR approved for §§ 195.5(a) and 195.406(a).

* * * * *

(e) ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 119428, phone: 610–832–9585, website: *http://www.astm.org/.*

(1) ASTM A53/A53M–20, ''Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless,'' July 1, 2020, (ASTM A53/A53M), IBR approved for § 195.106(e).

(2) ASTM A106/A106M–19A, ''Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service,'' November 1, 2019, (ASTM A106/A106M), IBR approved for § 195.106(e).

(3) ASTM A333/A333M–18, ''Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications with Required Notch Toughness,'' November 1, 2018, (ASTM A333/A333M), IBR approved for § 195.106(e).

(4) ASTM A381/A381M–18, ''Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use With High-Pressure Transmission Systems,'' November 1, 2018, (ASTM A381), IBR approved for § 195.106(e).

(5) ASTM A671/A671M–20, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures,'' March 1, 2020, (ASTM A671/A671M), IBR approved for § 195.106(e).

(6) ASTM A672/A672M–09, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for High-Pressure Service at Moderate

Temperatures,'' approved October 1, 2009, (ASTM A672/A672M), IBR approved for § 195.106(e). (7) ASTM A691/A691M–19, ''Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures,'' November 1, 2019, (ASTM A691/A691M), IBR approved for § 195.106(e).

(f) Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS), 127 Park St. NE, Vienna, VA 22180, phone: 703–281–6613, website: *http://www.mss-hq.org/.*

(1) MSS SP–75–2019 Standard Practice, ''High-Test, Wrought, Butt-Welding Fittings,'' December 2019, (MSS SP–75), IBR approved for § 195.118(a).

(2) [Reserved]

(g) NACE International (NACE), 1440 South Creek Drive, Houston, TX 77084, phone: 281–228–6223 or 800–797–6223, website: *http://www.nace.org/Publications/.*

* * * * *

(4) NACE SP0204–2015, ''Standard Practice, Stress Corrosion Cracking (SSC) Direct Assessment Methodology'' March 14, 2015, (NACE SP0204), IBR approved for § 195.588(c).

§ 195.5 [AMENDED]

■ 19. In § 195.5(a)(1)(i), remove the words ''ASME/ANSI B31.8'' and add, in their place, the words ''ASME B31.8''.

■ 20. In § 195.58, revise paragraph (a) to read as follows,

§ 195.58 Reporting submission requirements

(a) *General.* Except as provided in paragraphs (b) and (e) of this section, an operator must submit each report required by this part electronically to PHMSA at *https://portal.phmsa.dot.gov* unless an alternative reporting method is authorized in accordance with paragraph (d) of this section.

* * * * *

■ 21. In § 195.59, amend paragraph (a) by revising the second sentence to read as follows,

§ 195.59 Abandonment and deactivation of facilities

* * * * *

(a) * * * To obtain a copy of the NPMS Standards, please refer to the NPMS homepage at *https://www.npms.phmsa.dot.gov.* * * *

§ 195.64 [AMENDED]

■ 22. In § 195.64(b) and (c) remove the words ''*http://opsweb.phmsa.dot.gov*'' and add, in their place, the words ''*https://www.portal.phmsa.dot.gov*''.

§ 195.106 [AMENDED]

■ 23. In § 195.106(b)(1)(i) and (e)(1) remove the words ''ANSI/API Spec 5L'' and add, in their place, the words ''API Spec 5L''.

§ 195.110 [AMENDED]

■ 24. In § 195.110 remove the words ''ASME/ANSI B31.4'' and add, in their place, the words ''ASME B31.4''.

§ 195.116 [AMENDED]

■ 25. In § 195.116(d) remove the words ''ANSI/API Spec 6D'' and add, in their place, the words ''API Spec 6D''.

■ 26. In § 195.307, paragraph (c) is revised to read as follows:

§ 195.307 Pressure testing aboveground breakout tanks.

* * * * *

(c) For aboveground breakout tanks built to API Standard 650 (incorporated by reference, see § 195.3), that were first placed into service after October 2, 2000, testing must be in accordance with sections 7.3.6 and 7.3.7 of API Standard 650.

* * * * *

§ 195.406 [AMENDED]

■ 27. In § 195.406(a)(1)(i) remove the words ''ASME/ANSI B31.8'' and add, in their place, the words ''ASME B31.8''.

§ 195.428 [AMENDED]

■ 28. In § 195.428(c) remove the words ''API RP 2350'' and add, in their place, the words ''API Std 2350''.

§ 195.565 [AMENDED]

■ 29. Amend § 195.565 to remove the words ''ANSI/API RP 651'' and add in their place the words ''API RP 651''

§ 195.588 [AMENDED]

■ 30. In § 195.588, amend paragraph (c) to remove the words ''NACE SP0204–2008'' and add in their place the words ''NACE SP0204'' in each instance they appear.

Issued in Washington, DC, on December 22, 2020, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2020–28785 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 192 and 195

[Docket No. PHMSA–2020–0086]

Pipeline Safety: Operator Qualification Frequently Asked Questions

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notification and request for comments.

SUMMARY: PHMSA is making available for public comment a revised set of operator qualification frequently asked questions (FAQs) that will replace its current operator qualification FAQs. The proposed revisions will provide greater clarity regarding PHMSA's operator qualification regulations. The revised FAQs would replace current FAQs that are outdated or no longer relevant, and will ensure that each FAQ is tied to a specific regulatory requirement.

DATES: Individuals who are interested in submitting comments on the proposed revisions to the FAQs must do so by February 16, 2021.

ADDRESSES: You may submit comments identified by Docket No. PHMSA–2020–0086 by any of the following methods:

- *E-Gov Web: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the online instructions for submitting comments.
- *Mail:* Comments may be submitted by mailing them to: U.S. Department of Transportation, Docket Management System—Docket Operations (M–30), 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Comments may be hand-delivered to the U.S. Department of Transportation at 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except federal holidays.
- *Instructions:* Identify Docket No. PHMSA–2020–0086 at the beginning of your comments. You must provide two copies of your comments if you submit by mail. If you would like confirmation that PHMSA received your comments, please include a self-addressed stamped postcard. Internet users should submit comments at *https://www.regulations.gov.*
- *Privacy Act Statement:* In accordance with 5 U.S.C. 553(c), the

DOT solicits comments from the public to better inform its rulemaking process. The DOT posts these comments without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

• *Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments in response to this document contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this document, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 CFR 190.343, you may ask PHMSA to provide confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential;'' (2) send PHMSA a copy of the original document with the CBI deleted along with the original, unaltered document; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the Freedom of Information Act and they will not be placed in the public docket of this notification. Submissions containing CBI should be sent to James Reynolds, 1200 New Jersey Avenue SE, E24–452, Washington, DC 20590–0001, or emailed to *James.Reynolds@dot.gov.* Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this guidance.

• *Docket:* For access to the docket or to read background documents or comments, go to *https://www.regulations.gov.* Alternatively, you may review the documents in person at the U.S. Department of Transportation at 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: General: James Reynolds, General Engineer, Office of Pipeline Safety, by phone at (202) 366–2786 or via email at *James.Reynolds@dot.gov.* Technical: Gregory Ochs, Central Region Director, Office of Pipeline Safety, by phone at (816) 329–3814 or via email at *Gregory.Ochs@dot.gov.*

SUPPLEMENTARY INFORMATION: PHMSA uses FAQs and other guidance materials to clarify the Federal pipeline safety regulations (PSRs) found in 49 CFR parts 190–199. PHMSA-developed FAQs include operator qualification FAQs that address the PSRs in 49 CFR part 192, subpart N, and 49 CFR part 195, subpart G. These FAQs are currently available at *https://www.phmsa.dot.gov/pipeline/operator-qualifications/oq-frequently-asked-questions.*

PHMSA proposes revisions to the operator qualification FAQs by modifying and eliminating some of the current FAQs. PHMSA requests public comment on the proposed revisions, which were developed by a team of PHMSA operator qualification subject matter experts (SMEs). The proposed revisions are intended to tie each FAQ to a specific operator qualification regulatory requirement and to eliminate obsolete FAQs.

PHMSA created these FAQs to help the regulated community better understand how to comply with the PSRs. Like all PHMSA guidance, FAQs are not rules, nor do they create legally enforceable rights, assign duties, or impose new obligations that are not contained in the existing regulations and standards. Pipeline operators must comply with the underlying safety standards referred to in the FAQs.

PHMSA's operator qualification PSRs are codified in 49 CFR part 192, subpart N, and 49 CFR part 195, subpart G. PHMSA originally developed pipeline operator qualification FAQs following a series of public meetings in 2003. The FAQs address PHMSA's operator qualification PSRs, which help to ensure that qualified individuals perform covered tasks on pipeline facilities and reduce the probability and consequences of pipeline incidents caused by human error. The PSRs state that each pipeline operator is responsible for developing and following an operator qualification program, establishing a covered task list that is applicable to their system, and defining the training and qualification requirements for personnel who perform covered tasks on pipeline facilities. Each operator is responsible for ensuring that its contractors and vendors comply with the requirements of the operator's qualification program.

PHMSA assembled a team of SMEs to develop the revised operator qualification FAQs based on the existing FAQs, the compliance questions received from operators and the public, and the requirements of the code. PHMSA SMEs reviewed the 63 current FAQs to determine whether any should be revised, added, or deleted. As a result of this review, PHMSA proposes publishing a total of 40 FAQs for public notice. The draft FAQs are available online on the Federal eRulemaking Portal, *https://www.regulations.gov;* search for Docket No. PHMSA–2020–0086. Once finalized, PHMSA will post the revised FAQs on its public website in place of the current FAQs.

Issued in Washington, DC, on January 5, 2021, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2021–00152 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 232

[Docket No. FRA–2019–0072; Notice No. 1]

RIN 2130–AC82

Amendments to Brake System Safety Standards Governing Operations Using an Electronic Air Brake Slip System

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to amend its brake system safety standards to address operations using an electronic air brake slip (eABS) system, which is a system that tracks details related to individual freight car brake tests. The proposed rule would provide an alternative regulatory framework for railroads to utilize when choosing to use an eABS system, but would not require railroads to use such a system. The NPRM proposes to extend the distance certain individual rail cars may travel (from 1,500 to 2,500 miles) without stopping for brake and mechanical tests, if the cars have a valid eABS record. The NPRM also proposes to allow railroads to add or remove multiple cars from a train without conducting additional brake tests, if the train is solely made up of cars with eABS records.

DATES: Comments are requested no later than March 16, 2021. FRA will consider comments received after that date to the extent possible without incurring additional expense or delay.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2019–0072 may be submitted by going to *http://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket number (FRA–2019–0072), and Regulation Identifier Number (RIN) for this rulemaking (2130–AC82). All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Steven Zuiderveen, Senior Safety Specialist, Motive & Power Equipment Division, Office of Railroad Safety, Federal Railroad Administration, RRS–14, West Building 3rd Floor, Room W35–204, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone: 202–493–6337, email: *Steven.Zuiderveen@dot.gov;* or Jeffrey Frank, Attorney Adviser, Office of the Chief Counsel, Federal Railroad Administration, RCC–10, West Building 3rd Floor, Room W31–201, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone: (202) 493–8957, email: *Jeffrey.Frank@dot.gov.*

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I. Executive Summary

A. Purpose of Regulatory Action

In a March 1, 2019, petition (Petition), the Association of American Railroads (AAR) asked FRA to amend the existing brake system safety standards (49 CFR part 232) to increase the mileage individual freight cars are allowed to operate between required brake tests if the cars have a valid eABS system record.[1] AAR requested that a car with a ''valid'' eABS system record [2] be allowed to move up to 2,500 miles between brake tests if the car had received a Class I brake test conducted by a qualified mechanical inspector (QMI), as defined in 49 CFR 232.5, and a freight car inspection performed by a designated inspector, as defined in 49 CFR 215.11, similar to the existing requirements for extended haul trains in 49 CFR 232.213. AAR requested all other cars with eABS system records (*i.e.,* cars with Class I brake tests not performed by QMIs and/or freight car inspections not performed by designated inspectors) be allowed to move up to 1,500 miles between required brake tests, as opposed to the currently allowed limit of 1,000 miles.

In its Petition, AAR also asked FRA to amend part 232 to remove the existing restrictions on ''block swapping'' and permit railroads to add or remove single cars or multiple cars from single or multiple locations in trains solely made up of cars with eABS system records without conducting an additional Class I brake test. This rulemaking responds to AAR's Petition.

B. Major Provisions of the Regulatory Action

In response to AAR's Petition, this NPRM proposes to amend part 232 to address operations using eABS systems. This proposed rule would provide an alternative regulatory framework to existing part 232 requirements for railroads utilizing eABS systems. As proposed, an eABS system would track detailed brake test information for individual rail cars, including each car's identifying information; identification and qualification of the person performing the last Class I brake test on the car; the date, time, and location of that test; the distance the car can travel before its next brake test; and other information showing that the car meets the requirements of part 232.[3] Consistent with AAR's Petition, FRA proposes that railroads using an eABS system would only be required to inspect individual cars before these cars exceed their prescribed mileage limits, whereas currently railroads must inspect the entire train consist before any car in that train exceeds its prescribed mileage limit. The alternative regulatory framework proposed would replace the conditions triggering the Class I, Class IA, and II inspections of entire trains under §§ 232.205, 232.207, and 232.209. However, all other requirements of part 232, as well as the existing requirements of part 215, would continue to apply to cars operated under this alternative regulatory framework. For example, a car operated under proposed § 232.221 must comply with the off-air limits of § 232.205(a)(3), must not be overdue its single car air brake test under § 232.305(c), and must have received a part 215 freight car inspection when placed in a train.

In addition, consistent with AAR's Petition, for a railroad operating a train using an eABS system, FRA is proposing to extend the distance for travel between Class I brake tests from 1,500 miles to 2,500 miles for cars receiving brake tests by QMIs and freight car inspections by designated inspectors. All other cars would be permitted to move a maximum distance of 1,000 miles between Class I brake tests.

Finally, FRA is proposing to exempt trains in which all cars have valid eABS system records from those requirements to perform a Class I, Class IA, or Class II brake test that are due to adding or removing multiple blocks of cars to or from the train. When a train's consist changes en route, part 232 currently requires effective recordkeeping and a Class I brake test of the entire train. Under the proposed rule, a train consisting entirely of cars operating under an eABS system would undergo a single Class I brake test of the entire

[1] FRA has placed the Petition in the public docket for this rulemaking (Docket No. FRA–2019–0072) available at *www.regulations.gov.*

[2] AAR defined a ''valid'' eABS as an electronic record containing a car's identification information; date, time, and location of the last Class I brake test; the identity and qualifications of the person(s) who performed the last Class I brake test; and the mileage until the equipment reaches the limit it is allowed to travel.

[3] This is similar to the existing requirements of § 232.205(e), which requires railroads to maintain records of brake tests for entire trains (as opposed to individual cars within those trains). Existing § 232.205(e) requires brake inspection records to contain the date, time, and location of a train's Class I brake test, the identification of the qualified person(s) conducting the test, and because the record tracks the brake inspections of the train as a whole, the number of freight cars inspected. *See* § 232.205(e). However, this record is not required to be retained once the train reaches its destination. The proposed rule would require retention of this information for a period of time, allowing for more detailed insight into the effectiveness of individual brake tests.

train at its initial terminal. Following set-off or pick-up, only those cars in the train lacking sufficient mileage to proceed to the subsequent destination would require a Class I brake test. However, the requirement to undergo a Class III brake test (brake pipe continuity test) would continue to apply to the train following each set-out or pick-up. In other words, under the proposed rule, an eABS system would create the conditions necessary to permit block swapping, because the timeliness of inspections would be documented in a manner that ensures accuracy and reviewability. Therefore, FRA proposes to relieve all cars operating under an eABS with sufficient remaining mileage from the requirement to undergo a Class I or Class IA brake test following the pick-up or set-off of cars.

FRA is not, however, proposing to amend part 232 to address all aspects of AAR's Petition. FRA does not propose to extend the maximum permitted mileage of a car inspected by a qualified person (QP) (who is not QMI-qualified) from the present 1,000 miles to 1,500 miles as AAR requests because FRA has not identified sufficient safety data to justify such an extension. In addition, FRA is proposing to require railroads to maintain eABS records for one year after creation, rather than AAR's request to permit records to be overwritten after the next Class I air brake test. Retention of eABS records for one year will provide data that can be used to measure compliance with the eABS rule, and that same data can be used by FRA and railroads to evaluate the possibility of future regulatory changes allowing additional operation flexibilities (*e.g.,* the AAR request to extend mileage for equipment inspected by a QP, as opposed to a QMI).

C. Costs and Benefits of the Proposed Regulatory Action

FRA analyzed the economic impacts of this NPRM over a 10-year period, and estimated its cost savings, costs, and benefits. Over the 10-year period of analysis, the total cost savings range from $128.1 million to $259.6 million (using a 3-percent discount rate) and $105.1 million to $217.3 million (using a 7-percent discount rate). The annualized cost savings range from $15.0 million to $30.4 million (using a 3-percent discount rate) to $15.0 million to $30.9 million (using a 7-percent discount rate). The cost savings of this proposed rule are displayed in the table below.

NET COST SAVINGS, LOW ESTIMATE, IN MILLIONS

[2018 Dollars]

Section	Present value 3%	Present value 7%	Annualized 3%	Annualized 7%
Total Cost Savings	$185.6	$156.6	$21.8	$22.3
Total New Costs	57.5	51.4	6.7	7.3
Net Cost Savings	128.1	105.1	15.0	15.0

NET COST SAVINGS, HIGH ESTIMATE, IN MILLIONS

[2018 Dollars]

Section	Present value 3%	Present value 7%	Annualized 3%	Annualized 7%*
Total Cost Savings	$286.1	$241.4	$33.5	$34.4
Total New Costs	26.4	24.1	3.1	3.4
Net Cost Savings	259.6	217.3	30.4	30.9

* Numbers may not tabulate due to rounding.

II. Background

A. The Basics of Train and Freight Car Air Brake Systems

Each train air brake system consists of three major parts: A locomotive brake valve, a brake pipe (also known as a trainline), and the individual car control valves. The locomotive brake valve adds or releases air to or from the brake pipe, which is connected by flexible air hoses between each car, and is sealed at the rear of the train by a pneumatic end-of-train (EOT) device. The locomotive brake valve's pressure changes create signals that are received by each car's air brake system via the brake pipe, and induce application or release of the brake.

When the engineer ''sets the brakes,'' the locomotive air brake valve releases air from the brake pipe, reducing the brake pipe pressure, causing the brakes to apply. While the air pressure change usually occurs first at the front of the train, the locomotive may send a radio signal to the EOT device to command an emergency brake air pressure reduction from the other end. Similarly, when the brakes are released, the locomotive brake valve is positioned to pump air back into the brake pipe and re-stabilize the air pressure. The air brake system also applies car brakes automatically in an emergency, because a derailment typically causes a break in the brake pipe that results in a sudden loss of air pressure, causing an irretrievable, higher pressure application of the brakes.

Each individual car's air brake system can be further broken down into several major components, including an assemblage of car control valves, air reservoirs, cylinder(s), rigging, beams, and shoes. When a brake application signal is received by the car's air brake control valve, it transfers air from the auxiliary reservoir to the brake cylinder, causing the cylinder's piston to pull the brake rigging (a series of rods and levers designed to increase the braking ratio), the brake beam, and then the brake shoe against the wheel to create the braking action. The degree of brake pipe pressure drop governs the degree of braking effort. A full-service brake occurs when the control valve balances all of the auxiliary reservoir air into the cylinder. An emergency brake application occurs when the brake pipe is reduced faster than the normal rate, which causes the control valve to add emergency reservoir air to the auxiliary reservoir air in the cylinder. This creates 15 percent more braking, and cannot be released by the locomotive without completely restoring the full pressure in the brake pipe and reservoirs.

The control valve also ''charges the train'' by providing sufficient air to each car's air reservoirs, which then store the

air to maintain a brake application. Because each application reduces the air in the car reservoirs, and some time must elapse before those reservoirs are fully recharged, an engineer has a limited number of brake applications that can be made in a short period of time. Several brake applications in a short time interval will sharply reduce the system's braking effectiveness.

The railroad must charge the train prior to each air brake test, which may take up to six minutes per empty car air reservoir. However, numerous cars can be charged simultaneously. Taking simultaneous charging into account, a fifty-car train can be charged in approximately twenty minutes, although this time can be longer depending on factors that affect the integrity of the brake line, including environmental factors such as temperature and the amount of brake pipe leakage.

Today, in addition to the statutorily required air brakes,[4] railroads use distributed power locomotive units (DPUs) and dynamic brakes to aid in controlling in-train forces and to provide additional braking capability. Distributed power units are locomotives that are physically distributed at intermediate points throughout the length of a train. These locomotives are remotely controlled from the leading locomotive. The use of DPUs permits quicker application of air brakes and localized control of in-train forces. With braking on a conventional train controlled at the head-end, it can take from several seconds (on a short train) to more than twenty seconds on a train exceeding 200 cars for the brake pipe pressure signal to propagate the length of the train.[5] Using DPUs, however, brake pipe signals are initiated at the remote locomotives almost simultaneously with the command of the lead locomotive, providing a more rapid and uniform air brake response.

Presently, most mainline locomotives are equipped with dynamic brakes, a supplementary braking system that can be used to control train speed without engaging a train's air brakes. Dynamic brakes use the kinetic energy of a moving train to generate electric current at the locomotive traction motors. By engaging dynamic brakes, the normally powered traction motors on a locomotive's axles are changed to generators, and the power generated is dissipated through resistance grids, similar to what happens when a motor vehicle driver shifts a vehicle into a lower gear when descending a steep grade. The primary benefits of dynamic brakes are the ability to reduce freight car brake shoe wear and wheel overheating, and to preserve freight car auxiliary air pressure on long downgrades. Dynamic brakes are also useful to control in-train forces on continuous (but varying) downhill grades and, as a result, effective use of a locomotive's dynamic brakes leads to fuel savings by reducing the need to power or stretch brakes through grade variations.[6] Due to these benefits, dynamic braking is often reflected in railroads' operating rules as the preferred method of controlling a train, especially in heavy grade territory.

Dynamic brakes, however, cannot be relied upon as a train's primary braking system for a number of reasons. First, dynamic brakes provide braking force only on powered locomotive axles and are incapable of controlling in-train forces in the same way as air brakes in undulating grade territories. Second, dynamic brakes are effective only within a certain speed range and have no capability to physically stop and hold a train. Third, dynamic brakes are not fail-safe, and can fail without warning. When dynamic brakes fail, all braking force is lost. By comparison, air brakes are designed to be fail-safe and a loss of air brake system integrity will result in an emergency brake application. For these reasons, FRA, by statute and regulation, has long considered dynamic brakes secondary devices used for supplemental braking, and not as a safety-critical device. Nonetheless, railroads rely on dynamic brakes to control train speed and to aid in controlling trains on heavy grades.

FRA's regulations do not mandate the use of dynamic brakes, but require that if the railroad operates a locomotive equipped with dynamic brakes, the railroad adopt appropriate operating rules and any locomotive engineer assigned to operate such a locomotive be informed of the operational status of the dynamic brakes on all units in the consist at the initial terminal for the train. *See* § 232.109(j). Overreliance on dynamic brakes may lead to the inability to stop a train short of an obstruction or control point, result in very long trains pushing head-end cars out of the train due to excessive buff forces, or for an engineer not being able to recover a train from an overspeed situation.

B. Brake Test Frequency

Part 232 includes brake system test performance and frequency requirements. A central premise of Part 232's existing inspection requirements is that the capability of rail equipment to travel to its destination is contingent on the condition of the equipment when it begins operation and on the nature of the equipment's planned operation. For rail equipment to travel extended distances between inspections, the condition and planned operation of the equipment must be thoroughly assessed at the beginning of a train's journey through high quality inspections.

The regulations provide for five primary types of brake system tests: Class I (a complete test of the brake equipment on each car, which is required to be performed at the location where a train is originally assembled, when the consist is changed in certain ways, and when a train is off-air for more than four hours); Class IA (a test that is less stringent than a Class I inspection and is required every 1,000 miles); Class II (a less detailed test used for cars that have not received a compliant Class I test that are picked up by a train); Class III (a test that must be performed any time the brake pipe is opened to atmosphere on an operating train); and a single car air brake test (a comprehensive test used to validate the air brake effectiveness of individual cars every five years or when certain events or conditions trigger a testing requirement). Each test must be performed based on different circumstances. For instance, a train must receive a Class I brake test at its initial terminal and an intermediate test, such as a Class IA brake test, every 1,000 or, for trains designated as extended haul trains, 1,500 miles. 49 CFR 232.205, 232.207, 232.213.[7]

The frequency of required brake tests also depends on the qualifications of the person(s) conducting the brake tests. Brake tests may be performed by either a QP or a QMI. A QP is a person who

[4] 49 U.S.C. 20302.

[5] Air brake propagation is at the degraded speed of sound, accounting for friction due to pipe length and elbows, at approximately 950 feet per second for emergency braking. AAR Standard S–469, incorporated at § 232.103(l), states at a service reduction of 10 psi, the 150th cars will apply at ''nominally 20 seconds or less'' from the application of the first car (S–469–01 § 5.3).

[6] To power or stretch air brakes means to apply locomotive power against an applied brake.

[7] One exception to these mileage limits is for trains operating with electronically controlled pneumatic (ECP) brake systems. In 2008, FRA issued a final rule that allows such trains to travel up to 3,500 miles between brake tests. *See* 49 CFR 232.607(b). FRA noted that this relief was provided in large part based on the ECP brake system's self-monitoring and data reporting capabilities—capabilities not present in traditional air brake systems. Another exception is granted for a unit or cycle train, which may travel in a continuous loop up to 3,000 miles, although such trains must receive a Class IA brake test. 49 CFR 232.205(a)(4). *See* 85 FR 2494, 2495–2496 (Jan. 15, 2020) for a more detailed discussion of the different types of brake system tests.

has received instruction and training necessary to perform one or more functions required by part 232. 49 CFR 232.5. In the context of this rulemaking, a QP generally would be a conductor or a brakeman assigned to operate a train who has also received training to perform a limited pre-departure inspection under appendix D to part 215,[8] and required brake tests. A QMI, however, is a QP who has received additional instruction and training that includes ''hands-on'' experience in ''troubleshooting, inspection, testing, maintenance or repair of specific train brake components and systems for which the person is assigned responsibility.'' *Id.* As defined in § 232.5, a QMI must understand what is required to repair and maintain properly the safety-critical brake components for which the person is assigned responsibility. Further, a QMI's primary responsibilities must include work troubleshooting, inspecting, testing, maintaining or repairing brake components and systems. A QMI is also typically a designated inspector under part 215, and in the context of this rulemaking, would generally be a carman or a machinist.[9]

Part 232 generally requires a train to undergo a brake test every 1,000 miles unless the train has a Class I air brake test performed by a QMI and an initial terminal part 215 freight car inspection performed by an inspector designated under § 215.11, and is designated as an extended haul train under § 232.213. With certain exceptions, if a train that does not meet the requirements for an extended haul train (*e.g.,* if a QP performs the train's Class I brake test), part 232 limits the train's movement to 1,000 miles between brake tests.[10]

The mileage-based test requirements, which are based, in part, on historical agreements among all stakeholders (*i.e.,* railroads, labor organizations, and FRA) and railroad accident/incident data,[11] serve an important role in each freight train's safe operation. Together with other requirements of part 232 designed to ensure the integrity of a train's brake system throughout its journey, the mileage limits are designed to ensure that a train's brake system, including all mechanical components, remains safely intact. 66 FR 4104 (Jan. 17, 2001).

Federal statute authorizes FRA to amend the regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety. 49 U.S.C. 20302(d)(2). As such, FRA can increase the mileage permitted between brake tests only when supported by sufficient data demonstrating that doing so is in the interest of safety. FRA last addressed the mileage limits between brake tests in a rulemaking in 2001, and prior to that in a notice of proposed rulemaking in 1982, adopted as a final rule that same year. 47 FR 7286 (Feb. 18, 1982); 47 FR 36792 (Aug. 23, 1982); and 66 FR 4104 (Jan. 17, 2001).

FRA's 2001 final rule permitted ''extended haul trains'' to move up to 1,500 miles between brake tests, while other trains remained subject to the 1,000-mile limit. 49 CFR 232.213. To qualify as an extended haul train under § 232.213, the train must be designated in writing to FRA, receive at its initial terminal a freight car inspection under part 215 by an inspector designated under § 215.11 and a Class I air brake test by a QMI, as defined in § 232.5, and must otherwise comply with parts 215 and 232. Since 2006, FRA has, in certain circumstances, granted conditional waivers from the 1,500-mile limitation.[12] Such waivers have permitted trains to operate up to 1,800 miles between brake tests provided that the qualifications under § 232.213 for extended haul trains continue to be met (including the performance of Class I brake tests by QMIs and part 215 freight car inspections by designated inspectors). In addition, FRA required the railroads operating under the waivers to provide certain data, including data comparing defects identified on trains operating under the waivers as compared to typical 1,500-mile extended haul trains.

Those data, along with the service history of railroads operating trains under the waivers, demonstrate that trains meeting the existing requirements for extended haul trains (*i.e.,* Class I brake tests performed by QMIs and freight car inspections performed by designated inspectors) can operate at least as safely at longer distances between brake tests as at distances currently allowed by the regulations. Generally, the data garnered from these waivers demonstrates that trains inspected by QMIs and designated inspectors that travel up to 1,800 miles experience the same number of brake anomalies and defects as extended haul trains limited to 1,500 miles.[13] The service history, with no reportable accidents caused by brake systems defects on trains operating under the waivers providing for extended mileage, suggests that a train with a thoroughly-inspected brake system is capable of traveling longer distances than allowed by the regulations without developing a significant defect en route.

Allowing trains to move longer distances between Class I brake tests will reduce the number of tests required to be conducted. As discussed in Section II.F below, a reduced number of tests may effectively lower the incidence of employee injuries by reducing employees' exposure to risks arising from working in close proximity to movable equipment. Reducing the number of required brake tests may have additional benefits. These include environmental benefits, as locomotives will spend less idle time awaiting or undergoing brake tests, and economic benefits, as railroads may be able to allocate certain resources more efficiently (*e.g.,* additional labor resources previously devoted to brake tests are freed up to perform other duties). Certain reallocations may have the potential to improve safety, such as through increasing specialization of safety inspection functions. Reducing the number and frequency of brake tests, however, makes the quality and comprehensiveness of the remaining tests critical. As FRA has stated before, for brake equipment to travel extended distances between brake tests, the conditions and planned operation of the equipment must be assessed thoroughly at the beginning of the equipment's journey through high quality inspections. 66 FR at 4117.

C. Block Swapping

Part 232 currently requires a Class I brake test be performed if multiple individual cars or blocks of cars are added to or removed from a train's consist. This is commonly referred to as

[8] An ''Appendix D Inspection'' is an inspection designed to identify ''imminently hazardous conditions . . . likely to cause an accident or casualty before a train arrives at its destination.'' These conditions include conditions ''readily discoverable by a train crew.'' *See* 49 CFR part 215, appendix D.

[9] Section 232.5 defines a QMI as a QP with certain additional experience and assigned responsibilities. Accordingly, by definition, a QMI is also a QP. The section-by-section analysis of proposed § 232.211, below, contains a more detailed discussion of the differences between QMIs and QPs, but in this NPRM, FRA uses the term QP to refer only to individuals who do not meet the additional requirements of a QMI.

[10] *See* fn. 3, *supra.*

[11] *See e.g.,* 66 FR 4104, 4107–4108.

[12] *See* FRA docket numbers FRA–2006–24812, FRA–2014–0070, and FRA–2015–0036.

[13] As an added condition to ensure the safety of operations conducted under these waivers, FRA required the QMIs inspecting these waiver trains to have access to wayside detection data to assist in their inspections. This summary data, which measures conditions such as wheel impact loads, stiffness of railcar trucks and bearing temperatures, enables properly trained QMIs to focus their inspections on areas needing attention. When used as part of a comprehensive inspection by a QMI, the data provides a greater opportunity to detect brake and other defects and other potential areas of concern.

''block swapping.'' Existing part 232 permits the addition or removal of a single car or a solid block of cars from a train without the performance of a brake test on the entire train. 49 CFR 232.205(a)(5)(i) through (ii). With certain exceptions, however, any single car or solid block of cars from a single, previous train must receive a Class I brake test at the location where the car or cars are added to a train unless the car or cars have ''previously received a Class I brake test and have remained continuously and consecutively coupled together with the train line remaining connected,'' and have not been off-air for more than four hours. 49 CFR 232.205(b). The rationale underlying this rule is that when cars added to a train are known to have passed a thorough brake test without a subsequent opportunity for degradation of their brake systems, there is little cause for concern that the added cars will cause any significant reduction in the train's braking effectiveness. However, when cars without proper brake tests are added to a train, the brake health of the entire train may become compromised.

When a Class I air brake test is performed, § 232.205(e) requires a valid written or electronic record of the brake test. This record is commonly referred to as a ''brake slip'' and, because a Class I brake test must be performed at the location where the train is originally assembled (the ''initial terminal''), it serves as proof that at the initial terminal for the train, the brake pipe and each of the individual cars in that train were inspected and found to be effective. Because the brake slip applies to the train as a whole and does not track the individual cars in a train, a subsequent change to the consist renders the initial brake slip inaccurate, often necessitating handwritten changes in addition to the brake slip. Each change to a train consist, however, increases the likelihood of an inaccurate brake slip and decreases the traceability of brake system tests.

In the 2001 final rule, FRA discussed the possibility of multiple consist changes without the requirement for a new Class I brake test. In that rule, FRA expressed concern that unlimited additions and removals of cars from trains would blur the distinction between a limited change in the train's consist and the assembly (or classification) of an entirely new train. If the distinction between the original train and new train were blurred, FRA concluded that the circumstances under which a Class I brake test would be required would also be blurred, potentially resulting in newly assembled trains never receiving Class I brake tests. Class I brake tests are intended to be comprehensive inspections of the brake equipment of each car in an assembled train and to ensure that a train's brakes are in proper working condition and capable of traveling to the train's destination with minimal problems en route. Accordingly, ensuring all equipment in a train receives a proper Class I brake test is critical. 66 FR 4104 at 4119. FRA concluded that if railroads were allowed to change a train consist substantially without the requirement for a new brake test, trains would not be required to receive comprehensive brake tests at their initial terminal. Second, FRA noted that if cars are permitted to be moved in and out of trains at will, Class IA brake tests, which rely upon the mileage of the most restrictive car, would likewise be impossible to track. *Id.*

D. AAR Petition

In its Petition, available in the docket to this rulemaking, AAR notes its member railroads developed a prototype eABS system to track brake tests of freight cars, and AAR asserts that the information that ''can be obtained from the eABS exceeds'' the existing regulatory requirements of part 232. An eABS system electronically tracks detailed brake test information for individual rail cars and the distance individual rail cars travel between brake tests. For cars with a valid eABS, AAR requests that FRA permit each individual freight car to move the maximum mileage permitted by the qualification of the car's inspector, regardless of the distance cars may be moved without an initial (Class I) or intermediate (Class IA) brake test. AAR also requests that FRA provide flexibility to railroads adding or removing cars with valid eABS systems in and out of trains made up of solely of cars with a valid eABS.

Under the existing requirements, a train's allowed travel distance is limited to the distance the car in the train with the highest mileage is allowed to travel before becoming due for its next brake test. § 232.207(a) (''The most restrictive car or block of cars in the train shall determine the location of [the Class I or IA brake] test.''). In its Petition, AAR requests that FRA propose to require an intermediate brake test not on the entire train, but only on each car whose mileage exceeds the permitted amount. Adoption of this recommendation would allow movement up to 1,500 miles between Class I and Class IA brake tests performed by a QP or up to 2,500 miles between such tests if each car brake test is conducted by a QMI. AAR also requests FRA propose that each car operating under an eABS be exempt from the additional brake tests required when one or more blocks of cars with valid brake tests are added to or removed from a train (known as ''block swapping,'' discussed further below).

In its Petition, AAR posits that eABS systems have the potential to eliminate the stated safety concerns that form the basis for the block swapping restriction. According to AAR, a properly designed and implemented system tracking each car's individual brake test record would provide increased information accuracy and confidence in tracking brake tests. AAR asserts that because an eABS system would track brake test information for each car (as opposed to whole trains), reclassification of the cars in a train (*i.e.,* changing the position of individual cars or adding or removing single or multiple cars from a consist) would no longer hold the potential to result in a railroad avoiding or delaying brake tests for individual cars. AAR also states that the ability to block swap cars without the constraints of additional required brake tests would allow for the movement of a greater number of cars with fewer train stops, increasing rail network efficiency and reducing railroad employees' exposure to safety hazards that may result in injuries from actions related to the performance of required brake tests, such as climbing cars in order to engage and disengage handbrakes. In its Petition, AAR also presents proposals and supporting data regarding eABS systems, information protection, eABS system integrity maintenance, and availability of records requirements. A more detailed description of AAR's Petition and the supporting data provided is included below in the Section-by-Section Analysis. FRA requests comment on AAR's Petition and on FRA's proposals in this NPRM.

E. Technological Improvements

FRA has long recognized the relationship between a train brake system's effectiveness and integrity and the mileage traveled between brake tests. *E.g.,* 47 FR 7286 (Feb. 18, 1982). Since FRA last addressed the mileage limits between brake tests in 2001, technological improvements have increased the reliability of, and monitoring capability for, key brake system components. As AAR notes in a separate petition for rulemaking requesting a change in the number of hours a train may be permitted to remain off-air between brake tests, welded brake piping and fittings and

ferrule-clamped air hoses (instead of the previously used grip-type fittings now prohibited by interchange rules) have reduced the severity of brake pipe leaks in standing trains. FRA Docket Number FRA–2018–0093. In that same petition, AAR also notes continuous improvements in car control valves, increased compliance with Federal biannual yard air systems inspection requirements, and the installation of oil and contaminant separators in most locomotives to keep compressed air clean. AAR also asserts that improvements in air leakage reduction reduce each brake system's exposure to such contaminants, helping to reduce wear and preserve its effective lifespan.

According to AAR, improvements in other brake system components have continued to increase overall brake system lifespan and reliability. For example, AAR contends that brake shoe composition improvements have reduced stopping distances, smoothed brake applications, and reduced brake shoe and car wheel wear. Dynamic and blended braking, in which applications of the air brake are replaced or greatly supplemented by motors converting mechanical energy to electricity, are in widespread use. As a result, AAR contends that frequency of use of trains' air brake systems, and therefore the long-term rate of wear on those systems, has been reduced. AAR has provided additional justification, in the form of a presentation available in the docket, titled ''QMI versus QP Air Brake Inspections,'' further detailing both technological improvements and changes to industry standards to retire obsolete components.

AAR also notes that wayside detectors implemented along railroad track include sensors designed to recognize and alert railroads of conditions associated with mechanical defects. Wayside detectors most commonly collect information on the physical measurements and impact load of individual car wheels, and the temperature of individual car components including wheels, axles, and bearings. High temperatures can be indicative of a locked or sticking brake, while low temperatures may indicate that a car's brake system is inoperative.[14]

FRA notes that although significant advancements have been made to air brake system technologies in recent years, and many obsolete components have been retired from the system population, many components remain essentially unchanged over the years. FRA seeks comment on the impact technological advancements have had on the reliability and durability of specific components of train air brake systems and those systems as a whole. FRA also seeks comment on how any existing or expected future technological advancements may impact the proposals in this NPRM.

F. Supporting Data

The number of accidents caused by brake system failures that FRA considers to be identifiable through the conduct of brake tests has historically been a small proportion of all reported accidents, injuries, and fatalities. Between 1976 and 1980, there were 1,168 accidents identified as attributable to brake-related causes, resulting in no fatalities and 62 injuries.[15] 47 FR at 7288 (Feb. 18, 1982). By comparison, during the same period, there were a total of 50,078 accidents reported to FRA, resulting in 62 fatalities and 5,114 injuries. *Id.*[16]

As Table 1 below shows, the number of reportable accidents and injuries attributable to brake-related causes has declined significantly over time, while fatalities remain relatively rare.[17] For example, between 2014 and 2018 the number of accidents attributable to brake-related causes, and particularly brake-related causes that are the result of defects that likely could have been identified by effective brake tests, declined to 158 accidents. Reported injuries have also declined significantly.

[14] For a description of various wayside detector implementations and their potential uses, see *An Implementation Guide for Wayside Detector Systems,* from FRA's Office of Research, Development, and Technology available at *https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/18667/Wayside%20Detector%20Implementation%20Guide.pdf.*

[15] Accident reports may be amended for five years from the initial report, in order to reflect updated information. As a result, current FRA accident statistics for the period show 1,175 accidents and 63 injuries due to brake-related causes. Although there was one reported fatality, FRA previously reviewed the report and concluded that power brake failure was not the primary cause of the fatality. *See* 47 FR 7283 at 7288 (Feb. 18, 1982).

[16] FRA notes that the 2001 final rule published data on brake-related incidents from 1994 to 1998 that included brake-related human-factor caused accidents (*e.g.,* train handling and improper use of brakes). 66 FR 4108. In developing this proposed rule, which would impact the frequency and tracking of brake tests, FRA has assessed only causes considered to be a result of defects that likely could have been identified by effective brake tests (*see* footnote 11).

[17] The only reported fatalities since 1999 occurred in an accident in Granite Canyon, Wyoming on October 14, 2018, discussed below. Although FRA concluded that brake-related component malfunction was a contributing cause of the accident, additional causes that could not have been identified by brake testing or pre-departure inspections also contributed to the accident, including the failure of an EOT device to activate. Moreover, FRA notes that the report of 91 injuries during the period of 1994–1998 is overstated. On reviewing the accident reports from this period, FRA has concluded that 61 of the reported injuries resulted from human error that could not have been identified by brake tests. The 61 reported injuries resulted from a single accident, Railroad Accident No. 295963, that took place on June 17, 1995. The railroad reported that a flatcar of railroad ties rolled away 5 miles unsecured during a switching operation and struck an excursion train head-on. During switching operations, the car air brake system remains uncharged with air, and securement is by handbrakes or chocks/skates under the wheels of the car. The proximate cause of the accident was human error for not properly securing the flatcar.

TABLE 1—ACCIDENTS RELATED TO BRAKE SYSTEMS FAILURES RESULTING FROM DEFECTS POTENTIALLY IDENTIFIABLE BY INSPECTION [18]

Years	Number of accidents	Injuries	Fatalities
1984–1988	318	21	0
1989–1993	236	27	0
1994–1998	184	91	1
1999–2003	198	9	0
2004–2008	212	9	0
2009–2013	159	0	0
2014–2018	158	7	2
Total	1,465	163	3

Since 1994, FRA has received fewer than 200 accident reports in each five-year period attributable to brake-related causes (aside from 2004–2008), and fewer than ten reported injuries.[19] This amounts to fewer than 40 accident reports per year and fewer than two reported injuries per year that are related to causes that could have been identified in the course of an effective brake test. By contrast, FRA has typically received between 11,000 and 23,000 accident reports per year over the same period. Given the relief granted in the 1982 final rule, and in the 2001 final rule for extended haul trains, the trend of diminishing brake-caused reportable accidents leads FRA to conclude that the relief provided by those rules did not adversely impact safety and the proposed regulatory relief is possible without adversely impacting safety.

AAR provided data with its Petition that it says demonstrates that the rate of brake-related or other defects observed in trains that travel greater than 1,500 miles between brake tests is not greater than the rate observed for trains that travel less than 1,500 miles between such tests. This data is from certain operations with trains traveling up to 1,680 miles and 1,702 miles between brake tests under waivers granted to Union Pacific Railroad (UP) and BNSF Railway (BNSF), respectively (*see* Docket Nos. FRA–2015–0036 and FRA–2006–24812; and FRA–2019–0072–0001, Appendix B). FRA generally agrees with AAR that this data shows that the increased mileage allowed under the waivers does not impact the safe operation of the trains. FRA notes, however, that both waivers require QMIs to conduct the required brake tests and designated inspectors to conduct the required freight car inspections on trains subject to the waivers. Out of 7,827 UP trains operated 1,500 to 1,680 miles between brake inspections between November 2015 and June 2018, there were two reportable accidents, neither of which was caused by a defect in the air brake system. According to AAR, of 15,480 BNSF trains operated 1,500 to 1,702 miles between inspections from July 2015 to June 2018, there was only one accident, which was caused by a broken car axle. FRA recognizes that such accident rates suggest that the extension of miles traveled between brake tests likely would not increase the rate of accidents due to causes the brake test would be expected to detect.

AAR also provided wayside detection data related to operations under the BNSF 1,702-mile waiver, and to Canadian National Railway (CN) operations in Canada. This wayside detection data includes a comparison of wheel impact load detector anomaly data from trains operating under the BNSF waiver and traveling over 1,500, but not exceeding 1,702 miles (waiver trains) versus trains traveling 1,500 miles or less (non-waiver trains). CN provided data from detectors of stuck brakes (*i.e.,* indications of increased wheel temperature due to increased friction). *See* Docket No. FRA–2019–0072–0001, Appendix C. The subject CN trains included trains traveling in Canada for distances between brake testing exceeding the maximum of 1,702 miles permitted for the longest distance in a waiver issued for any train in the United States. AAR concluded that the CN data showed that longer trip miles were associated with fewer stuck brake defects detected and asserted that, overall, the data provided suggests that there is little or no correlation between mileage traveled and additional defects.

FRA, however, does not reach the same conclusion as AAR based on the data provided. While wayside detection data provides indications of possible defects, a QMI follow-up inspection is generally required to verify that a defect actually exists. Moreover, the accuracy of wayside detection data would better serve this analysis if AAR could provide a measurement of false positives/false negatives of wayside detection indications versus actual defects detected and repaired by QMIs. In light of these shortcomings, FRA seeks comment on the accuracy and predictive value of the wayside detection data provided by AAR in support of its Petition. For example, FRA seeks comment and data on the extent to which wayside detector indications are already being utilized to accurately identify and/or predict brake defects. Two railroads are presently conducting hot/cold wheel wayside detector waivers [20] that could provide preliminary information on the efficacy of wayside detection to provide indications of defects. FRA also seeks comment and data on potential ways wayside detection data could be factored into determinations of rail equipment's overall brake health and on alternative sources of data or methodologies that could be employed

[18] For these accident statistics, FRA used the following cause codes: Air hose uncoupled or burst (E00C and E00L), Hydraulic hose uncoupled or burst (E01C), Broken brake pipe or connections (E02C and E02L), Obstructed brake pipe (E03C and E03L), Other brake component damage (E04C and E04L), Brake valve malfunction/undesired emergency (E05C and E05L), Brake valve malfunction/stuck brake (E06C and E06CL), Rigging down or dragging (E07C), Hand brake broken or defective (E08C and E08L), Other brake defects (E09C and E09L), Hand brake link and/or connect defect (E0HC and E0HL), and Failure to release hand brakes on car(s), railroad employee (H019). The numbers reported above are current as of February 2020. FRA believes accidents using these cause codes are the result of defects that could be identified by effective brake tests.

[19] Under 49 CFR part 225, railroads are required to report certain accidents or incidents to FRA including (1) highway-rail grade crossings accidents, (2) rail equipment accidents resulting in damages above a current reporting threshold; and (3) death, injury, and occupational illnesses that arise from an event or exposure arising from the operation of a railroad that is a discernable cause of the resulting condition or a significant aggravation to a pre-existing accident or incident. 49 CFR 225.19.

[20] AAR-Union Pacific, at Docket No. FRA–2016–0018; and BNSF Railway, at Docket No. FRA–2018–0049.

to determine the effect of Class I brake tests on defects more accurately.

AAR also provided monthly data from 2017 on the number of brake system-related defects and bad-ordered cars discovered in outbound inspection data compiled for certain Class I railroad yards in Birmingham, Alabama; Elkhart, Indiana; Kirk, Indiana; and Symington, Manitoba, Canada. *See* Docket Number FRA–2017–0130–0001, Attachment 3. According to AAR's data, over 500,000 cars were inspected at each yard in the United States and more than one million cars inspected at the Canadian yard. Notably, in Canada there is no limit on the miles trains or individual rail cars may travel between brake inspections.[21] The resulting inspection data shows a difference that is not statistically significant in the defect and bad order rates between the cars found in the U.S. and Canada. However, this data is of limited use in the context of this rulemaking because it is not clear whether these locations are truly representative of the global population of railcars. FRA believes that comparison of these numbers to a true national sample of car repair billing records could help to illuminate the usefulness of this data to the analysis. Alternatively, absent a true national sample, a smaller sample size could be used provided an analysis of any potential sampling bias is conducted and provided any such potential bias is effectively mitigated. In addition, it is also not clear whether the cars were inspected by QMIs or QPs, or their Canadian equivalents. FRA requests that AAR provide information clarifying the distance these trains traveled, the qualifications of the individual inspectors who inspected the subject equipment, and either an analysis comparing the existing data to a true national sample of car repair billing records, or other appropriate analysis that identifies and mitigates any potential sampling bias.

In further support of its Petition, AAR and some of its member railroads have provided data (available in the docket) purporting to show no significant difference in the critical incident rate discovered between inspections conducted by QPs and inspections conducted by QMIs. FRA disagrees with AAR's findings, because the data does not indicate how inspections conducted by individuals qualified as QMIs (who are typically designated mechanical employees) were distinguished from individuals qualified only as QPs (who are typically train crew members).[22] Currently, there is no requirement for railroads to differentiate between QMI and QP inspections in their records, other than for extended haul trains and trains operated under certain waivers, and QMIs meet the regulatory criteria to be designated as QPs. Accordingly, the methodology described by UP for eliminating QMI inspections would not have removed from the data any inspections conducted by more highly-qualified QMIs who were acting in their capacity as QPs. If a clear delineation between QP and QMI inspections can be made in this data so that the resulting data does not commingle the two types of inspections, the data could potentially be more compelling.

In addition, the AAR data is from two unnamed Class I railroads, one of which AAR indicates operates in the eastern United States while the other AAR indicates operates in the western United States. FRA cannot determine from the information provided whether the data is generally representative of the industry for variables that can affect braking equipment, such as weather, general equipment conditions, or geography. Relatedly, UP provided data it stated showed that QP-only inspections resulted in bad orders for cars (orders to send a car for repairs) for less than 0.2% of car trips. FRA notes that the methodology described by UP also fails to distinguish QMI-trained inspectors from QPs, resulting in the commingling of data. In addition, FRA notes that the data cannot be interpreted without contextual information about the true defect rate.

In sum, given the shortcomings of the data related to QP inspections as described above, FRA finds that it does not have sufficient data to consider allowing an extension of the mileage permitted between brake tests when those tests are performed by QPs due to the requirements of 49 U.S.C. 20302(d)(2). When trains undergo comprehensive Class I brake tests by QMIs and freight car inspections by designated inspectors, however, FRA finds that a mileage extension up to 2,500 miles between brake tests may be justified at this time. FRA's finding is based on the data discussed above gathered through the ongoing waivers permitting certain trains to travel up to 1,702 miles between brake tests and preliminary data from separate, newer waivers involving trains inspected by QMIs and designated inspectors and traveling up to 2,600 miles between brake tests. *See* docket numbers FRA–2016–0018 and FRA–2018–0049. Although data from each of these waivers is preliminary, coupled with FRA's and industry's experience operating trains equipped with electronically controlled pneumatic (ECP) brakes up to 5,000 miles between brake tests,[23] FRA finds that an incremental increase in mileage on non-ECP brake trains inspected by QMIs and designated inspectors may be justified.

Finally, AAR provides results of its analysis of FRA data on employee incidents that it concludes show that from 2015 to 2017 there were 277 employee injuries related to the use of handbrakes, and an additional 200 injuries associated with getting on or off standing equipment or related activities. Over the three-year period, this amounts to 159 annual employee injuries. Citing this data, AAR asserts that ''the reduction of unnecessary brake tests, including any additional train stops and car handling, will in turn reduce exposure to risk of injury from walking on track, as well as from applying and releasing handbrakes and climbing on and off railcars to do so.''

FRA finds that AAR's conclusion may overestimate injuries related to brake testing to the extent that some of the injuries may have occurred during activities not performed for the purpose of conducting brake tests. AAR's estimate, however, demonstrates that there may be opportunity to reduce the incidence of employee injury through a reduction in the frequency of required brake tests. FRA concludes from this information that the proposed rule would likely reduce the number of employee injuries related to brake tests, but FRA cannot estimate the reduction in incidence of employee injury that would result without more information.

G. Safety Improvements

Because the overall reliability of brake systems has increased through technological and operational improvements and no measurable

[21] *See* Transport Canada, Train Brake Rules, TC O–0–165, published November 17, 2017.

[22] *See* Section II.B. Brake Test Frequency for a more detailed discussion of the differences between QMIs and QPs. *See* also the section-by-section analysis of proposed § 232.211, below, also contains a discussion of the differences between QMIs and QPs.

[23] FRA's regulations allow trains equipped with ECP brakes and operating in ECP brake mode to travel up to 3,500 miles between Class I brake tests. 49 CFR 232.607. FRA has additionally authorized railroads to operate trains in ECP brake mode up to 5,000 miles between brake tests with QMI inspections. *See* Docket No. FRA–2009–0088. Although ECP brake control valves are designed to electronically operate and self-report defective brake components in real time, the brake pipe, brake cylinders, and foundational brake rigging of an ECP brake system are the same components that make up traditional air brake systems. Successful operation of trains with ECP brakes demonstrates that these components can safely operate at extended distances between brake tests.

decrease in safety resulted from the increase in allowed mileage in 2001, FRA believes that reducing the frequency or extent of brake tests as proposed in this rule may be warranted. This would have the benefit of reducing the risk of injury for employees charged with inspection and testing duties. Increasing overall brake system reliability results in decreasing the expected number of defects discovered during a brake test. FRA expects the flexibility proposed in this NPRM would have the potential to increase the overall quality of brake tests, because the flexibility provided incentivizes the increased use of more-qualified inspectors, QMIs, and the data collection and retention requirements permit FRA and the railroad industry to analyze the effectiveness of brake tests closely to discover best practices and areas for improvement. FRA also recognizes the potential that added flexibility in the reallocation of resources could result in increased safety through such channels as increasing specialization in safety inspection functions.

FRA expects data generated by eABS systems may provide information useful to further maintain safe car brake systems, and may promote railroad safety generally by encouraging the use of eABS systems and therefore identifying and resolving potential brake problems before brakes fail. For example, electronic tracking of factors that are correlated with brake system defects such as car age and load weight, train length, locomotive power, quantity, and distribution, and applicable routes and terrain, may lead to identification of defects without a brake test.

III. Section-by-Section Analysis

Unless otherwise noted, all section references below refer to sections in title 49 of the Code of Federal Regulations (CFR). FRA seeks comments on all proposals made in this NPRM.

Section 232.5 Definitions

FRA proposes to add to this section definitions for the following terms: ''*Electronic air brake slip*'' *or* ''*eABS,*'' and ''*eABS system.*'' The terms ''*Electronic air brake slip*'' or ''*eABS*'' are intended to refer to the record that must be stored for the car in order for the railroad to avail itself of the relief granted in the proposed rule. The term ''*eABS system*'' would describe the electronic system that stores the record.

Sections 232.205, 232.207, and 232.209 Class I Brake Test—Initial Terminal Inspection, Class IA Brake Tests—1,000-Mile Inspection, and Class II Brake Tests—Intermediate Inspection

Under the proposed rule, FRA would provide railroads an option to comply with new § 232.221 in lieu of §§ 232.205, 232.207, and 232.209.[24] Specifically, FRA proposes to revise each of these sections to reference § 232.221 as an alternative means of compliance. Proposed § 232.221 (discussed in more detail below) would set forth the proposed requirements for operations using an eABS system and would also specify the conditions under which proposed §§ 232.205, 232.207, and 232.209 would apply.

Section 232.221 Electronic Air Brake Slip (eABS) System Requirements

Proposed § 232.221 would set forth the requirements for eABS systems and railroad operations under those systems. As proposed, this section would allow railroads to move cars with a compliant eABS up to either 1,000 or 2,500 miles between brake tests provided certain conditions are met. FRA intends the proposed requirements of this section (*e.g.,* automatic tracking of individual car's mileage, testing prior to exceeding the permitted mileage, and recordkeeping) to support the ability of an eABS system to ensure that cars operated under this proposed rule would be appropriately inspected with the parameters of the rule.

Proposed paragraph (a)

If a railroad has implemented an eABS system and is operating a train using the eABS system, proposed paragraph (a) would allow the railroad to move an individual freight car in that train up to 1,000 miles between brake tests provided certain conditions are met. First, proposed paragraph (a)(1) would require that the mileage the car travels since its last Class I brake test be automatically tracked in the eABS system. Second, consistent with AAR's petition, proposed paragraph (a)(2) would require the car to be moved only as part of a train consist consisting entirely of cars being operated under proposed § 232.221. Third, proposed paragraph (a)(3) would require the eABS system to retain a record of the car's Class I brake test containing certain required information.

The alternative framework outlined in paragraph (a) replaces the conditions that trigger Class I, Class IA, and Class II inspections of entire trains under §§ 232.205, 232.207, and 232.209. As proposed, any car that meets the requirements of paragraph (a) may be moved up to 1,000 miles between Class I air brake inspections, whether that car moves in one train or multiple trains. Although this reframing of brake test requirements from the level of the train to the individual car is a major departure from historical practice, it reflects the recognition that a Class I brake test is at the core a detailed, visual inspection of the functioning of the brake systems of the cars that compose the train. This shift, from a single, whole-train inspection to timely inspections of individual cars in a train's consist on a separately-tracked basis, is possible due to technological improvements in the ability to track large amounts of information reliably.

Paragraph (a)(3)'s proposed brake test record requirement is based on AAR's Petition, and follows current Class I brake test recordkeeping requirements and industry practices. FRA proposes to require the eABS records contain the following additional information to preserve existing requirements and industry practices and to facilitate effective oversight: (1) Identification and railroad affiliation of the person creating the eABS record and inputting the record into the eABS system (the ''author'' of the record); (2) identification and railroad affiliation of the person who performed the brake test, if different from the author; (3) record creation date and time; and (4) a certification that the requirements of §§ 232.205(a)(3) and 232.305(c) have been met. FRA expects that, for railroads utilizing eABS systems, the individual putting the record of a brake test into the eABS system may not be the individual who conducted the test. FRA also expects that many eABS systems would be interoperable, or alternately, that many railroads would elect to utilize jointly a single eABS system. This may result in one railroad conducting the brake test and reporting information to another railroad for creation of the record. Because the author of the record in either case may be less likely to have firsthand knowledge of the brake test, it is important to ensure that the record identifies, in separate fields, the name and railroad affiliation of the author of the record, and the name and railroad affiliation of the person who performed the last Class I brake test. *See* proposed paragraphs (a)(3)(i) through (ii) and (vi). FRA recognizes that industry practice varies in the identification of railroad employees, with some railroads

[24] Sections 232.205, 232.207, and 232.209 set forth the requirements for Class I, Class IA, and Class II brake tests, respectively.

providing for the use of employee names and others requiring the use of employee identification numbers. Under the proposed rule, any effective method of identification is permitted.

Consistent with AAR's Petition, and for the reasons explained in more detail below, proposed paragraph (a)(3)(vii) would require the eABS to identify the qualifications of the person conducting each car's Class I brake test (*i.e.,* whether the person who conducted the brake test is a QP or QMI as defined in § 232.5). The proposed requirement to record the qualifications of individuals performing the brake tests is intended to ensure that only individuals possessing sufficient knowledge and ability do so, and that the specific qualifications of each person are known. As discussed below, the recording of this qualification information will also permit the collection of information on which to determine more accurately the relative benefit to safety of inspections by a QMI compared to inspections by a QP. Such information is necessary to conclude whether a future extension of the miles traveled between brake tests would be appropriate where an inspection was conducted by a QP.

Consistent with AAR's petition, proposed paragraph (a)(3)(viii) would require an eABS record to contain an ''accurate calculation of the mileage remaining until the next Class I brake test is required.'' Further description of such a calculation has been proposed as part of paragraph (h). Proposed paragraph (a)(3)(ix)'s requirement that railroads record adherence to existing off-air requirements and existing single car air brake testing timeframes is intended to reinforce the requirement for continued compliance with those rules, even under the alternative regulatory framework of § 232.221. FRA notes it made changes to these requirements in a recent final rule that extends the time-off-air limits and provides additional flexibility as to the frequency of single car air brake tests. 85 FR 80544 (Dec. 11, 2020). The requirements in this paragraph complement the changes in that final rule. Since added flexibilities in the timing and frequency of air brake tests have been implemented, timely adherence to the revised requirements as well as all other brake inspection and testing requirements will take on greater importance.

FRA notes that proposed paragraph (a)(3)(v)'s requirement that the eABS include the date and time of the last Class I brake test may provide sufficient information that the car has not triggered a testing requirement based on time-off-air, because each Class I test requires that a car be placed on a source of air during testing. Similarly, because operation of a train requires a locomotive to provide air to each car in the train, the time of each car's most recent arrival and/or departure in a train may likewise serve as sufficient information. For this reason, proposed paragraph (a)(3)(ix) does not require an eABS to contain specific information showing that a car has met the off-air requirements of § 232.205(a)(3) if the maximum time the car has been off air can be determined from other information on the eABS record. Accordingly, as proposed, specific information showing that a car has not been off air in excess of the time allowed by § 232.205(a)(3) would not be required except where it cannot be determined from the other required information on the eABS (*e.g.,* time and location of the last Class I brake test) whether or not the car has been off air for more than 24 hours. FRA expects that railroads will be able to track time-off-air by reference to this or other information commonly maintained in the railroad industry or required by regulation. FRA requests comment on whether the proposed provisions are sufficient to track individual cars' time-off-air or if a separate record keeping requirement for time-off-air as part of the eABS is necessary.

FRA expects that for a significant majority of cars, information based on the most recently recorded arrival and departure of a car may be included in the eABS to provide sufficient information for this proposed recordkeeping requirement. This is based on AAR's assertion that the proposal in its Petition would result in higher car utilization rates. AAR also states that the large majority of freight cars use Automatic Equipment Identification (''AEI'') tags that already facilitate automatic recording of arrival and departure data. Accordingly, FRA considers that the burden of this requirement will not be significant.

Proposed Paragraph (b)

Consistent with AAR's petition, proposed paragraph (b) would allow a railroad to move individual freight cars up to 2,500 miles between Class I brake tests if they meet the requirements of paragraph (a) and meet certain additional conditions designed to ensure the cars remain in proper condition for the extended mileage. First, proposed paragraphs (b)(1) and (2) would require the cars to have their part 215 inspections performed by designated inspectors as defined in § 215.11 and their Class I brake tests performed by QMIs as defined in § 232.5. The proposed requirements mirror the existing requirements applicable to extended haul trains. 49 CFR 232.213. As noted in the 2001 final rule that first allowed for extended haul trains, greater distances provide a greater risk of brake failure, and therefore it is important to ensure high quality inspections are performed prior to extended haul trips. Such inspections must be performed by individuals who can identify defective conditions, have the knowledge and experience to know how a particular defective condition affects other parts of the brake system or mechanical components, and have an understanding of what might have caused a particular defective condition to arise.

As noted earlier in section II.B of this preamble, part 232 requires only that a QP receive the instruction and training required to perform the specific brake test function that the QP will perform under part 232. §§ 232.5 and 232.203. For the purpose of a Class I brake test under § 232.205, a QP is expected to be able to identify those observable defects that would cause the train or any car in the train to fail the test. For example, a QP would be expected to have the training necessary to identify whether brake rigging is unsecured, binding or fouling, and engaged or released under appropriate conditions. In general, a QP is unlikely to be qualified as a designated inspector for purposes of the pre-departure inspection under part 215. As a result, a QP would only perform a limited pre-departure inspection focused on apparent safety hazards (*i.e.,* an Appendix D inspection). 49 CFR 215.13; appendix D to 49 CFR part 215.

As also discussed in section II.B above, to meet the requirements for designation as a QMI, a QP must additionally have primary, ''hands-on'' responsibility for troubleshooting, inspecting, testing, maintaining, or repairing of specific train brake components and systems. This required, additional experience is intended to ensure that such individuals provide a high-quality train air brake inspection. 66 FR at 4104. In addition, a QMI is generally qualified as a designated inspector for purposes of a pre-departure inspection. Such inspectors are required by regulation to determine whether each car inspected is in compliance with part 215. As a result, QMIs generally possess the additional experience and responsibility to identify a wider range of mechanical defects and equipment conditions that may adversely affect safety. For example, a QMI must be able to recognize not only the presence of unsafe conditions, but

also will, through experience, be able to recognize indications of developing conditions that could become safety defects.

In the absence of convincing data for inspections by QPs comparable to that available for inspections by QMIs, FRA proposes to maintain the current mileage between inspections for cars inspected by QPs. Because cars operating under an eABS would be permitted to be added to or removed from a train without limitation, FRA expects that a larger number of cars would be operated closer to the maximum permitted distance between inspections. FRA notes that the requirement to record each inspector's qualification would provide an opportunity to establish more firmly the comparable safety benefit of inspections by QPs and QMIs. Should data and experience demonstrate a continued safety benefit to the use of QMIs, FRA expects that the significant extension of mileage afforded for inspections by QMIs would result in a corresponding increase in the proportion of QMI inspections. FRA seeks comments on proposed paragraph (b), as well as information and data that may affect this proposal.

Proposed Paragraph (c)

This proposed paragraph would allow, in certain circumstances, a car that does not have an eABS record meeting the requirements of paragraph (a) to move under the provisions of proposed § 232.211. Proposed paragraph (c) operates in conjunction with proposed paragraph (d), which sets conditions on the movement of trains with eABS cars. However, proposed paragraph (c) not only applies in the event of a disruption in communication with the eABS system but also to other events leading to a delay in the recording of eABS information prior to a train movement (*e.g.,* including both delays in the creation of a new eABS and delays in the update of mileage remaining under proposed paragraph (a)(3)(viii)). The AAR Petition did not request provisions for flexibility in the event of eABS system disruption. However, some flexibility may be necessary to facilitate adoption of electronic recordkeeping, to promote interoperability of eABS systems, and to permit railroads to better adapt recordkeeping under eABS to existing business practices. FRA requests comment on the issue of providing appropriate flexibility in recordkeeping under an eABS system while maintaining timely and accurate records.

To perfect a car movement under proposed paragraph (c), the railroad must enter an eABS record for the car into its system as soon as practicable after departure from one location, but no later than the time at which the car departs any further location in a new train. This means proposed paragraph (c) would permit a railroad to convert a train with a Class I brake test under § 232.205 into an eABS train at a subsequent location, provided that the train consist has remained intact prior to entering records for the cars in the eABS system and a record of all necessary car information is available. However, a railroad would not be permitted under the proposed rule to convert subsequently an eABS train to a train operating under a § 232.205 brake slip without complying with both rules at the initial terminal.

A railroad could split an eABS train at a location without requiring compliance with the proposed requirement to enter the eABS record before departure. Under present policy, FRA considers the splitting of a train to be the classification of two new trains, of which one may continue if it has mileage remaining on its brake test. Under the framework of eABS, FRA does not consider the splitting of a train to create a new train because any train movement that occurs after the splitting of the train remains dependent upon each individual car's mileage since its last qualifying brake test, and would be contemporaneous with a train movement of the original train had the split not occurred.

FRA notes that operation under proposed paragraph (c) obligates a railroad to perfect the train movement by entering accurate eABS records including the remaining allowable mileage within the proposed limits. This is intended to prevent a railroad from using the flexibility provided in paragraph (c) to avoid the requirements of § 232.205. FRA seeks comment on the effects of this proposal.

Proposed Paragraph (d)

Current regulations for Class I and Class IA brake tests explicitly apply to trains, and the Class I brake test applies separately both to trains and to individual cars traveling in a train. Proposed paragraph (d) clarifies the conditions under which an eABS train is exempted from the requirement to undergo these tests. Specifically, proposed paragraph (d) specifies that a train may move the number of miles that the most restrictive car in the train is authorized to move, provided: (1) A record is maintained in the cab of the controlling locomotive that includes certain information for each car in the train; and (2) the record is updated at each location where the consist is changed to reflect those changes. Proposed paragraph (d) further provides that in the event of a disruption of communication between a train and the eABS system, the train's further movement is limited to the mileage the most restrictive car in the train is permitted to move under either paragraph (a) or (b). Taken together, proposed paragraphs (c) and (d) would allow movement of a train, regardless of whether the eABS for each car is fully up-to-date, if the railroad performs a Class I brake test on each added car requiring such test and timely and accurately records each test. Otherwise, such a train would be required to undergo a new Class I brake test for the entire train under the requirements of part 232. Similarly, where the eABS system fails to recalculate accurately a car's available mileage between stops or fails to capture information about compliance with time-off-air requirements, the error may be corrected through an amended record to restore the validity of the eABS. Such records must be placed in the eABS system as soon as practicable after departure of the car in a train, but no later than the time at which the car departs a location in any subsequent train.

Existing § 232.205(e) requires each railroad to ensure subsequent crews are notified about prior Class I brake test information. While such information may be provided to the locomotive engineer by any written or electronic means determined appropriate by the railroad, it must be retained in the controlling locomotive's cab and contain certain prescribed data. The prescribed data is sufficient for a railroad to create an accurate eABS for each car in the train at a later time, should conditions prevent communication with the eABS system. It is essential for train crews to be notified of relevant train brake test information. Because each car would have its own eABS record, proposed paragraph (d) would require a written or electronic record of all such information for each car in a train be placed in the cab of the controlling locomotive.

To allow the possibility of manually updating the cab record (*e.g.,* in the event of a communications failure), proposed paragraph (d) does not require that the cab record be modified for every car at every location. This applies in particular to information on remaining mileage and compliance with time-off-air requirements, which have the potential to vary for every car at every location. Instead, a cab record would

need only to be updated as to consist changes. An accurate cab record must note the removal of any cars set off from the train, and add all required information for any cars picked up.

In conjunction with proposed paragraph (c), movement under the proposed rule would be permitted based upon this cab record. The railroad would remain responsible for ensuring that no car exceeds its permitted mileage, and that each car picked up as part of a train operated under the proposed rule is in compliance with paragraphs (a), (b), or (c) of this section. FRA expects that most railroads would choose to update the cab record electronically wherever possible in order to minimize compliance risk, promote convenience, and maintain the proposed flexibility in paragraphs (c) and (d) to continue operations during periods of disruption. However, under proposed paragraphs (c) and (d), FRA expects that some railroads for which participation in an eABS system would be impractical would be able to interchange with railroads participating in an eABS system with minimal burden. FRA seeks comment on the proposed paragraph with respect to the likelihood of Class III railroads and other small entities to participate in an eABS system.

Proposed Paragraph (e)

For trains consisting entirely of cars operating under an eABS, proposed paragraph (e) removes the restriction on block swapping, or setting off and picking up more than one car or a solid block of cars at a single location. FRA expects that real-time, accurate tracking of brake tests and testing at the car level, as eABS systems are designed to do, would enable railroads to ensure that cars are tested in a timely manner. The current requirements for block swapping help ensure that any cars that trains pick up en route are in proper condition for continued movement, and help ensure accurate monitoring and recordkeeping functions. At least some brake tests triggered by current block swapping requirements are unnecessary so long as cars picked up en route have had valid brake tests and freight car inspections already performed, and the tests therefore expose railroad employees to potentially unnecessary workplace hazards associated with the stopping, securing, inspecting, and classifying of trains to minimal safety benefit.

Proposed paragraph (e) also permits a change in the motive power for the consist without the requirement of an additional brake test, other than the Class III test. This proposal is consistent with existing regulations that allow for changing the motive power on a consist without a Class I brake test in certain instances (*see e.g.,* § 232.205(a)(5)(iii), § 232.211(a)(1), and § 232.219). FRA does not expect that the changing of motive power as proposed would present any different safety considerations.

Proposed Paragraph (f)

This proposed paragraph would establish the minimum requirements that the eABS system must meet to permit coverage under the proposed rule. The requirements address issues of record integrity, availability, retention, accuracy, and access. FRA intends for the eABS system to provide access to information to maintain a level of information and oversight comparable to current regulations. Additional provisions are designed to enable the development of an adequate body of data to determine whether additional flexibility may be provided in the future (*e.g.,* future mileage extensions between brake tests). The proposed availability and retention requirements under this paragraph are intended to augment more limited direct data generated through FRA inspections with a supply of detailed, auditable data generated by railroads. As the relative sourcing of data shifts from FRA towards regulated entities, a heightened requirement for data integrity and availability is necessary for FRA to remain confident in the safety of railroad testing and inspection programs. While such requirements increase the burden of compliance on participating railroads, FRA expects that the relief provided under the proposed rule would offset such burdens with substantially greater benefits.

FRA expects that participating railroads would maintain the security of the eABS system in a manner consistent with industry standards for cybersecurity. A failure to maintain the integrity or availability of records may be evidenced by events including a significant loss of data required to be retained, an unexplained loss of availability of more than 48 hours, and a pattern or practice of providing inaccurate records or a delayed response to FRA requests. Although many such instances may also reflect violations of other provisions of the proposed rule, FRA may in its discretion treat such evidence as a failure to maintain integrity or availability for purposes of assessing penalties or for suspension or revocation of a railroad's authority to operate under the proposed rule.

Consistent with AAR's Petition, proposed paragraph (f)(1) would require an eABS system to recognize a unique identifier associated with each person that authors records in an eABS system. Use of a unique identifier, combined with restrictions in the proposed rule on destruction or modification of records, is intended to provide confidence in the authorship and accuracy of the records.

Proposed paragraph (f)(2) would require an eABS system to ensure that records stored contain all the information required by paragraph (a)(3). A requirement that records be fully complete before entry into the system would help ensure that the system would not accept a partial record. FRA would consider incomplete records to be ineffective for the purpose of establishing that a car is operating under an eABS. Although FRA recognizes that certain circumstances may require the ability to make amendments to stored records (*e.g.,* to correct identified errors in those records), as proposed, those amendments must be clearly identified and tracked. *See* proposed paragraph (g) of this section.

Paragraph (f)(3) would require a means to ensure that any individual performing inspections is identified as a QMI if he or she meets such requirements. In conjunction with paragraph (b)(3), as proposed, paragraph (f)(3) would prohibit an eABS system from identifying a QMI as a QP, even though current regulations otherwise permit a QMI to be considered a QP. As proposed, an eABS system must ensure that the qualifications of inspectors are accurately designated so that no person who does not meet the requirements of a QMI is designated as such and so that no person who does meet the requirements of a QMI is identified as a QP. This proposed requirement would increase the quality of data collected from eABS records and would provide a method for future comparative analysis between the results of inspections performed by QPs and inspections performed by QMIs.

Although FRA expects that the enhanced training and experience of QMIs result overall in higher quality brake tests, AAR has provided data with its Petition that challenges this expectation (at least as applied to some railroads). Based on that data, AAR asserts that the rate of defect discovery is the same between QMIs and QPs. As discussed in Section II.F, above, FRA disagrees with AAR's conclusion on this issue based on the information provided, but FRA finds that use of eABS systems could provide an opportunity to gather relevant data to better inform the issue and potential future regulatory action.

Proposed paragraph (f)(4) would require that records in an eABS system be made immediately available upon request to FRA and State inspectors. The proposed paragraph provides a general performance standard to replace a requirement to maintain a record in a paper format. Under current regulations, it is common practice for FRA to observe Class I brake tests, and to compare observed activities with the written brake slip to ensure the accuracy of both the brake test and brake slip. There would be reduced time and opportunity both for FRA to observe inspections and to compare submitted records to FRA observations of the corresponding cars because the proposed rule is expected both to increase utilization of cars and to reduce total Class I brake tests. To address this expected reduction of in-person observation, it is essential that FRA inspectors are able to access eABS records quickly.

Access to inspection records may involve use of an internet-accessible portal, a telephone hotline, electronic mail, or other effective means developed by the railroad. In very limited cases such as in areas with limited access to wireless communication, use of railroad-owned computer terminals linked to the eABS system or the use of railroad employees as intermediaries may be sufficient to meet the proposed requirement. However, widespread use of such on-site provision of records risks the curtailment of effective oversight. FRA inspectors would be required to alert railroad employees to their presence prior to obtaining records that may be pertinent to oversight, and this may impede FRA review of ordinary operations absent inspector surveillance. As such, FRA concludes that exclusive use of on-site records access is not consistent with immediate availability. Whatever the method for providing access to inspection records, the railroad may not cause undue delay which would hinder the FRA inspector's ability to provide accurate and enforceable oversight reports regarding eABS compliance.

Proposed Paragraph (g)

This paragraph defines the proposed, permitted exceptions for the modification of an eABS. Although the proposed rule generally would prohibit modification of an eABS once submitted, amendments would be permitted where the amended record will supersede, but not replace, the original. This is based upon AAR's proposal in its Petition. FRA expects that common corrections of records would include an update of the time-off-air or single car testing requirements if circumstances changed for a subject car. An exception is also proposed to allow records to be updated as to mileage on the same record, as this element of the record will change frequently, and must be accurately maintained.

Proposed Paragraph (h)

Proposed paragraph (h) includes the minimum requirements for any methodology for calculating and reporting mileage remaining on an eABS until a car is required to receive a Class I brake test. The proposed rule would tie the tracking of mileage to movements of a train. Movements for purpose of train classification, known as switching movements, would not be required to be recorded as part of the mileage calculation. Consistent with longstanding practice and existing legal precedent, movement of a small number of cars over distances less than one mile is typically considered switching movement, while movement that crosses public highways or another railroad's tracks at grade is typically train movement, even if over short distances and within a yard. FRA requests comment upon the proposal for the calculation and tracking of mileage, and in particular seeks alternative proposals for addressing movements of short distance or low risk for which the recording and calculation of mileage may not be practical.

Proposed paragraph (h) establishes that a car's remaining mileage would be updated as soon as practicable after each car's departure in a train. To align with paragraph (c) and in recognition of the potential need for flexibility in the proposed alternative regulatory framework, proposed paragraph (h) requires as an absolute minimum that mileage be updated prior to a car's departure in a subsequent train. Departure in a subsequent train occurs after a car has been dropped off from one train and picked up in any train at a later time. FRA does not consider that a train can be subsequent to itself absent a train movement; however, a train that leaves a location and subsequently returns to that location to pick up a car would be considered a subsequent train for the purposes of this proposed rule. Accordingly, FRA would not consider the splitting of a train at any location to create a requirement under this proposed paragraph.

If a car exceeds its permitted accumulated mileage between brake tests, proposed paragraph (h)(3) would require the eABS to track this excess mileage as a negative number. FRA is proposing this provision to ensure the eABS clearly reflects instances where cars exceed their permitted mileage.

Proposed Paragraph (i)

This proposed paragraph would require railroads to retain eABS records for a minimum of one year from creation. The proposed retention period would provide an adequate body of data to inform appropriate enforcement of the rule and would provide a basis to evaluate the relative quality of QP and QMI inspections, and may serve to support future safety analyses of additional potential flexibilities under the regulations. The proposed requirements under this paragraph are also intended to augment more limited, direct data generated through FRA inspections with a supply of detailed, auditable data generated by railroads. FRA seeks comment on this proposed record retention period.

Proposed Paragraph (j)

This paragraph would notify railroads that operate eABS trains that FRA reserves the right to revoke, in whole or in part, their authority to operate under proposed § 232.211 if the eABS system utilized fails to meet the requirements of proposed § 232.211 or if a railroad demonstrates a record of repeated or willful noncompliance with applicable regulations. This proposed section is modeled on existing § 232.15(b)(5), which allows railroads to use automated tracking systems to track and monitor the movement of defective equipment. Existing § 232.15(b)(5) provides that if FRA finds a railroad's automated tracking system to be insecure, inaccessible, or inadequate to track and monitor defective equipment, FRA may ''prohibit or revoke'' a railroad's authority to use an approved automated system. When FRA adopted this provision, FRA found that the ability to monitor and prohibit the use of deficient systems was necessary in part because no adequate automated system for tracking defective equipment then-existed on most railroads. 66 FR at 4151. FRA has enacted similar provisions applicable to electronic or automated tracking systems for single car air brake tests and the designation of extended haul trains. *See* §§ 232.303(f)(1) and 232.213(b); *see also* 66 FR at 4142 and 4175.

FRA concludes that the proposed rule merits a similar reservation of the right to revoke, in whole or in part, a railroad's authority to operate cars under an eABS system if FRA subsequently finds issues related to security, access, accuracy, or other inadequacy in properly tracking the movement of equipment using the eABS

system. As with past relief granted for the use of electronic and automated tracking systems, easy availability of records that accurately reflect the testing and inspection of operating equipment is critical to ensure FRA is able to exercise its statutory obligation to oversee compliance with railroad safety requirements. With regard to eABS, FRA's ready access to accurate records is key to enabling the agency to ensure effective oversight, develop data, and support future changes such as the consideration of future regulatory relief.

The combination of proposals in this NPRM that would provide regulatory relief and additional operational flexibility for railroads operating using eABS systems place additional importance on the quality of inspections and on the accuracy of recordkeeping compared with the relief granted in the 2001 final rule discussed above. As AAR states in its Petition, the proposed rule is expected to increase freight traffic flow and reduce overall dwell time. These significant operational and economic benefits come at the cost of reduced opportunity for FRA equipment inspection, which takes place when equipment is not moving.

FRA expects the proposed rule to improve overall safety; it is not clear that the relief proposed would improve safety under all conditions due to the novelty of the AAR proposal. Such conditions are, as a result, not known with enough certainty to merit additional and specific limitations to the proposed relief. FRA therefore considers that a reserved right to revoke the authority to operate under the proposed rule, in whole or in part, would permit FRA to act expeditiously to remedy any specific unsafe condition that may arise that may not have been considered until the enactment of a rule. Such conditions would relate to the suitability of freight equipment for safe transit, which includes not only requirement under part 232, but additionally requirements for freight cars and locomotives under parts 215 and 229, respectively. Although the principal purpose of the brake test and inspection requirement is inspection of the brake system, FRA notes that brake tests indirectly bolster compliance with parts 215 and 229 because their performance provides railroad inspection forces with an additional opportunity to observe the general condition of all tested equipment. FRA proposes that repeated or willful noncompliance with the provisions of parts 215, 229, or 232 would provide sufficient basis upon which to revoke a railroad's authority to utilize the proposed relief. Because FRA expects that the proposed rule would improve safety performance under most conditions, proposed paragraph (j) requires that FRA's Associate Administrator for Railroad Safety establish both the basis for revocation of authority and conditions under which such authority would be restored.

IV. Regulatory Impact and Notices

A. Executive Orders 12866 and 13771 and DOT Regulatory Policies and Procedures

This NPRM is a significant regulatory action in accordance with existing policies and procedures under Executive Order 12866. In addition, this proposed rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the proposed rule's Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket. The RIA details the estimated costs and cost savings that the Class I railroads are likely to see over a 10-year period.

This analysis provides low and high estimates for costs and cost savings. Cost savings would primarily come from the reduction in brake tests that would result from mileage and block-swap relief. The proposed rule would also reduce the filing of waiver renewals by Class I railroads seeking relief from mileage limitations between brake tests. Costs would primarily come from training, acquisition of hardware, and maintenance of the eABS system.

As shown in Table E–1 and Table E–2, over the 10-year period of analysis the proposed rule would result in annualized cost savings ranging between $15.0 million to $30.9 million (discounted at a rate of 7%) and $15.0 million to $30.4 million (discounted at a rate of 3%).

TABLE E–1—NET COST SAVINGS

[Low]

Section	Present value ($)			Annualized ($)	
	Undiscounted	3%	7%	3%	7%
Cost Savings:					
Increased Mileage	91,641,000	79,932,000	67,672,000	9,370,000	9,635,000
Unlimited Block Swapping	121,590,000	105,551,000	88,804,000	12,374,000	12,644,000
Waiver Filing and Review	133,000	118,000	101,000	14,000	14,000
Government Waiver Review	12,000	11,000	10,000	1,000	1,000
Total Cost Savings	213,376,000	185,612,000	156,587,000	21,759,000	22,294,000
New Costs:					
System Development and Maintenance	13,845,000	12,665,000	11,427,000	1,485,000	1,627,000
Training	6,830,000	6,830,000	6,830,000	801,000	972,000
Hardware	42,613,000	37,982,000	33,188,000	4,453,000	4,725,000
Total New Costs	63,288,000	57,477,000	51,445,000	6,738,000	7,325,000
Net Cost Savings	150,088,000	128,135,000	105,142,000	15,021,000	14,969,000

TABLE E–2—NET COST SAVINGS

[High]

Section	Present value ($)			Annualized ($)	
	Undiscounted	3%	7%	3%	7%
Cost Savings:					
Increased Mileage	164,554,000	143,527,000	121,514,000	16,826,000	17,301,000
Unlimited Block Swapping	164,047,000	142,408,000	119,813,000	16,695,000	17,059,000

TABLE E–2—NET COST SAVINGS—Continued
[High]

Section	Present value ($)			Annualized ($)	
	Undiscounted	3%	7%	3%	7%
Waiver Filing	133,000	118,000	101,000	14,000	14,000
Government Waiver Review	12,000	11,000	10,000	1,000	1,000
Total Cost Savings	328,746,000	286,064,000	241,438,000	33,536,000	34,375,000
New Costs:					
System Development and Maintenance	13,845,000	12,665,000	11,427,000	1,485,000	1,627,000
Training	5,126,000	5,126,000	5,126,000	601,000	730,000
Hardware	9,690,000	8,637,000	7,547,000	1,013,000	1,075,000
Total New Costs	28,661,000	26,428,000	24,100,000	3,099,000	3,432,000
Net Cost Savings	300,085,000	259,636,000	217,338,000	30,437,000	30,943,000

In addition to the net cost savings, the RIA identifies non-quantified benefits that may come from issuing the proposed rule. The benefits discussed may maximize and expand freight capacity, increase equipment availability, shorten cycle times, boost on-time performance and incentive greater accountability of employees who perform brake tests.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA seeks comment on the potential small business impacts of the requirements in this NPRM. FRA prepared an IRFA, which is included as an appendix to the accompanying RIA and available in the docket for the rulemaking (FRA 2019–0072), to aid the public in commenting on the potential small business impacts of the requirements proposed in this NPRM.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The sections that contain the proposed and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section [25]	Respondent universe	Total Annual responses	Average time per responses	Total annual burden hours [26]	Total cost equivalent [27]
229.27—Annual tests	30,000 locomotives	30,000 records of tests	30 seconds	250	$18,000
232.3—Applicability—Export, industrial, & other cars not owned by railroads—identification.	708 railroads	8 cards	10 minutes	1	72
232.7—Waivers	708 railroads	2 petitions	160 hours	320	23,040
232.15—Movement of Defective Equipment—Tags/Records.	1,620,000 cars	128,400 tags/records	3 minutes	5,350	385,200
—Written Notification	1,620,000 cars	25,000 notices	3 minutes	1,250	90,000
232.17—Special Approval Procedure—Petitions for special approval of safety-critical revision.	708 railroads	1 petition	100 hours	100	7,200
—Petitions for special approval of pre-revenue service acceptance plan.	708 railroads	1 petition	100 hours	100	7,200
—(d) Service of petitions	708 railroads	1 petition	20 hours	20	1,440
—(d)(2)(ii) Statement of interest	Public/railroads	4 statements	15 minutes	1 hour	72
—(f) Comment	Public/railroads	6 comments	4 hours	24	1,728
232.103(f)(2)—Gen'l requirements—all train brake systems—stickers.	1,200,000 cars	70,000 stickers/stencils/badge plates.	10 minutes	11,667	840,024
(n)(7)—RR Plan identifying specific locations or circumstances where equipment may be left unattended.	708 railroads	1 revised plan	10 hours	10	720
—Notification to FRA when RR develops and has plan in place or modifies existing plan.	708 railroads	1 notice	30 minutes	1 hour	72
—Inspection of Equipment by Qualified Employee after Responder Visit.	708 railroads	12 inspections/records	4 hours	48	3,456
232.107—Air source requirements and cold weather operations—Monitoring Plan (Subsequent Years).	10 new railroads	1 plan	40 hours	40	2,880
—Amendments/Revisions to Plan	50 railroads/plans	10 revisions	20 hours	200	14,400
—Recordkeeping	50 railroads/plans	1,150 records	10 minutes	192	13,824
232.109—Dynamic brake requirements—status/record.	708 railroads	1,656,000 records	4 minutes	110,400	7,948,800
—Inoperative dynamic brakes: repair record	30,000 locomotives	6,358 records	4 minutes	424	30,528
—Tag bearing words "inoperative dynamic brakes".	30,000 locomotives	6,358 tags	30 seconds	53	3,816
—Deactivated dynamic brakes (Sub. Yrs.)	8,000 locomotives	10 markings	5 minutes	1 hour	72
—Operating rules (Subsequent Years)	5 new	5 rules	4 hours	20	1,440
—Amendments/Revisions	708 railroads	15 revisions	1 hour	15	1,080

CFR section [25]	Respondent universe	Total Annual responses	Average time per responses	Total annual burden hours [26]	Total cost equivalent [27]
—Requests to increase 5 mph overspeed restriction.	708 railroads	5 requests	30 min. + 20 hours	103	7,416
—Knowledge criteria—locomotive engineers –Subsequent Years.	5 new	5 amendments	16 hours	80	5,760
232.111—Train information handling	5 new	5 procedures	40 hours	200	14,400
Sub. Yrs.—Amendments/Revisions	100 railroads	100 revisions	20 hours	2,000	144,000
—Report requirements to train crew	708 railroads	2,112,000 reports	5 minutes	176,000	12,672,000
232.203—Training requirements—Tr. Prog.—Sub Yr..	15 railroads	5 programs	100 hours	500	36,000
—Amendments to written program	708 railroads	236 revisions	8 hours	1,888	135,936
—Training records	708 railroads	24,781 records	8 minutes	3,304	237,888
—Training notifications	708 railroads	24,781 notices	1 minute	413	29,736
—Efficiency test plans	708 railroads	708 copies	1 minute	12	864
232.205—Initial terminal inspection: Class I brake tests and notifications/records *(Revised/new burden currently under review with OMB).*	708 railroads	383,840 notices/records.	45 seconds	4,798	345,456
(c)(1)(ii)(B)—RR Development/implementation of operating rules to ensure compliant operation of train if air flow exceeds stipulated section parameters after Class I brake test is completed *(Revised/new burden currently under review with OMB).*	708 railroads	10 revised operating rules.	8 hours	80	5,760
232.207—Class IA brake tests—Designation Lists Where Performed.	708 railroads	1 list	1 hour	1 hour	72
Subsequent Years: Notice of Change	708 railroads	250 notices	10 minutes	42	3,024
232.209—Class II brake tests—intermediate "Roll-by inspection –Results to train driver.	708 railroads	159,740 comments	3 seconds	133	9,576
232.213—Written Designation to FRA of Extended haul trains.	83,000 long	250 letters	15 minutes	63	4,536
—Notification to FRA Associate Administrator for Safety of a change in the location where an extended haul brake test is performed *(Revised/new burden currently under review with OMB).*	7 railroads	250 notices	10 minutes	42	3,024
232.219—Double heading and helper service: Testing/calibration/records of Helper Link devices used by locomotives (formerly under 232.219(c)(3)) *(Revised/new burden currently under review with OMB).*	2 railroads	100 records	5 minutes	8	576
232.221—Inspection and Testing Requirements for Cars with Electronic Air Brake Slip System (eABS) Records (New requirement).	708 railroads	280,203 records and copies.	90 seconds + 30 seconds.	9,341	672,552
232.303—General requirements—single car test: Tagging of Moved Equipment.	1,600,000 frgt.	5,600 tags	5 minutes	467	33,624
—Last repair track brake test/single car test—Stenciled on Side of Equipment.	1,600,000 frgt.	240,000 markings	2 minutes	8,000	576,000
232.307—Modification of single car air brake test procedures: Requests (includes 232.409(e)).	railroads/AAR	1 request + 3 copies	20 hours + 5 minutes	20	1,440
—Affirmation Statement on Mod. Req. To Employee Representatives.	railroads/AAR	1 statement + 4 copies	30 minutes + 5 minutes	1 hour	72
232.309—Repair track brake test equipment and devices used to perform single car air brake tests—Periodic calibration of devices.	640 shops	5,000 records of calibrations.	2 minutes	167	12,024
232.403—Unique Code	245 railroads	12 requests	5 minutes	1 hour	72
232.409—Inspection/Tests/Records EOTs	245 railroads	447,500 recording of tests.	30 seconds	3,729	268,488
—(d)–(e) Telemetry equipment—Testing/Calibration/Rcds/—Documentations of testing (paragraph (d) is a revised requirement; paragraph (e) clarifies the use of § 229.27) *(Revised/new burden currently under review with OMB).*	245 railroads	17,000 records	2 minutes	567	40,824
—(f)(2) Annual report to FRA on radios found with frequency drift *(Revised/new burden currently under review with OMB).*	1 manufacturer	1 report	12 hours	12	864
232.503—Process to introduce new brake technology.	708 railroads	1 letter	1 hour	1 hour	72
—Special approval	708 railroads	1 request	3 hours	3	216
232.505—Pre-revenue service acceptance test plan—Submission of maintenance procedure.	708 railroads	1 procedure	160 hours	160	11,520
—Amendments to maintenance procedure	708 railroads	1 revision	40 hours	40	2,880
—Design description	708 railroads	1 petition	67 hours	67	4,824
—Report to FRA Assoc. Admin. for Safety	708 railroads	1 report	13 hours	13	936
—Brake system technology testing	708 railroads	1 description	40 hours	40	2,880
232.717(c)—Freight and passenger train car brakes—Written maintenance plan (formerly under appendix B, recodified subpart H) *(Revised burden currently under review with OMB).*	40 railroads	40 written plans	6 hours	240	17,280

CFR section [25]	Respondent universe	Total Annual responses	Average time per responses	Total annual burden hours [26]	Total cost equivalent [27]
Total	708 railroads	5,625,811 responses	N/A	343,023	24,697,656

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells, Information Collection Clearance Officer, at 202–493–0440 or via email at *Hodan.Wells@dot.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

D. Federalism Implications

Executive Order (E.O.) 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in E.O. 13132 to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under E.O. 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation. FRA has analyzed this NPRM in accordance with the principles and criteria contained in E.O. 13132. This NPRM establishes an optional alternative to current Federal regulation that reduces certain obligations of railroads to perform brake tests. FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of E.O. 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

E. Environmental Impact

FRA has evaluated this proposed rule in accordance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), FRA's regulations implementing NEPA, and other environmental statues, Executive Orders, and related regulatory requirements. FRA has determined that the proposed rule is categorically excluded from detailed environmental review under 23 CFR 771.116(c)(15). FRA has also evaluated this rule under 23 CFR 771.116(b) to determine whether the proposed rule would involve unusual circumstances including significant environmental impacts; substantial controversy on environmental grounds; significant impact on certain Federally protected properties; or inconsistencies with any Federal, State, or local law, requirement, or administrative determination related to the environmental aspects of the action. FRA has determined that no unusual circumstances exist with respect to this proposed rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that the proposed rule is not a major Federal action significantly affecting the quality of the human environment.

F. Energy Impact

E.O. 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). FRA has evaluated this proposed rule in accordance with E.O. 13211 and determined that this proposed rule is not a ''significant energy action'' within the meaning of E.O. 13211.

E.O. 13783, ''Promoting Energy Independence and Economic Growth,'' requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. 82 FR 16093 (March 31, 2017). FRA determined this proposed rule will not potentially burden the development or use of domestically produced energy resources.

G. Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531 *et seq.*), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Unfunded Mandates Reform Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement

[25] Note: The burden resulting from proposed § 232.221(a)(3) is covered under § 232.205. Proposed § 232.221(d)(2) reflects a usual and customary industry procedure and, consequently, would result in no burden. The burden associated with § 232.205(c)(1)(iii) is covered under OMB Control Number 2130–0004.

[26] Totals may not add due to rounding.

[27] The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75 percent overhead charges.

detailing the effect on State, local, and tribal governments and the private sector. This proposed rule would not result in the expenditure, in the aggregate, of $100,000,000 or more (adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

H. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR Part 232

Power brakes, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 232 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 232—BRAKE SYSTEM SAFETY STANDARDS FOR FREIGHT AND OTHER NON-PASSENGER TRAINS AND EQUIPMENT; END-OF-TRAIN DEVICES

■ 1. The authority citation for part 232 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. Amend § 232.5 by adding the definitions for ''eABS system'' and ''Electronic air brake slip'' or ''eABS'' in alphabetical order to read as follows:

§ 232.5 Definitions.

* * * * *

eABS system means an electronic record keeping system used to track individual cars and air brake tests that meets the requirements of § 232.221.

* * * * *

Electronic air brake slip or *eABS* means the record of inspection, contained in an eABS system.

* * * * *

■ 3. Amend § 232.205 by revising the introductory texts of paragraphs (a) and (b) to read as follows:

§ 232.205 Class I brake test—initial terminal inspection.

(a) Except as provided in § 232.221, each train and each car in the train shall receive a Class I brake test as described in paragraph (c) of this section by a qualified person, as defined in § 232.5, at the following points:

* * * * *

(b) Except as provided in §§ 232.209 and 232.221, each car and each solid block of cars added to a train shall receive a Class I brake test as described in paragraph (c) of this section at the location where it is added to a train unless:

* * * * *

■ 4. Amend § 232.207 by revising the first sentence of paragraph (a) to read as follows:

§ 232.207 Class IA brake tests—1,000-mile inspection.

(a) Except as provided in §§ 232.213 and 232.221, each train shall receive a Class IA brake test performed by a qualified person, as defined in § 232.5, at a location that is not more than 1,000 miles from the point where any car in the train last received a Class I or Class IA brake test. * * *

■ 5. Amend § 232.209 by revising paragraph (a) introductory text to read as follows:

§ 232.209 Class II brake tests—intermediate inspection.

(a) Except as provided in § 232.221, at a location other than the initial terminal of a train, a Class II brake test shall be performed by a qualified person, as defined in § 232.5, on the following equipment when added to a train:

* * * * *

■ 6. Add § 232.221 to subpart C to read as follows:

§ 232.221 Inspection and testing requirements for cars with electronic air brake slip system (eABS) records.

(a) A railroad may move a car for a cumulative distance not exceeding 1,000 miles between the brake tests described in §§ 232.205 through 232.209 if the car meets the following requirements:

(1) The mileage since the car's most recent Class I brake test is automatically tracked in an eABS system;

(2) The car is only moved as part of a train consisting solely of cars operated pursuant to this section; and

(3) A record is retained in the eABS system that includes the following information:

(i) Identification and railroad affiliation of the author of the record;

(ii) A unique identifier exclusively associated with the author of the record;

(iii) The date, time, and location the record was created;

(iv) The reporting mark and car number;

(v) The date, time, and location of the most recent Class I brake test;

(vi) The identification and railroad affiliation of the person who conducted the most recent Class I brake test, if different than the author of the record;

(vii) Identification of the person who conducted the Class I brake test as a ''qualified person'', or a ''qualified mechanical inspector'', as defined in § 232.5;

(viii) An accurate calculation of the mileage remaining until the next Class I brake test is required; and

(ix) Information certifying that the car has met the requirements of § 232.205(a)(3) (if that cannot be determined by the information otherwise required by this paragraph) and is in compliance with § 232.305(c).

(b) A railroad may move a car for a cumulative distance not exceeding 2,500 miles between the brake tests described in §§ 232.205 through 232.209 if the car meets the requirements of paragraph (a) of this section and the following requirements:

(1) A designated inspector as defined in § 215.11 of this chapter inspects the car in accordance with § 215.13 of this chapter at the location at which the car is first authorized to move under this paragraph; and

(2) The Class I brake test that is the basis for the permitted mileage is performed by a qualified mechanical inspector as defined in § 232.5.

(c) A car that does not have a record meeting the requirements of paragraph (a)(3) of this section prior to a train movement may otherwise be operated under this section if the following requirements are met:

(1) The car meets the requirements of paragraph (a)(2) of this section and, if applicable, paragraphs (b)(1) and (2) of this section; and

(2) A record meeting the requirements of paragraph (a)(3) of this section is entered into the eABS system as soon as practicable after departure of the car in a train, but no later than the time at which the car departs in any subsequent train.

(d) A train meeting the following requirements may be operated under this section for a cumulative distance not exceeding the mileage permitted for

the most restrictive car in the train between the brake tests described in §§ 232.205 through 232.207:

(1) A written or electronic record is maintained in the cab of the controlling locomotive that includes the following information for each car:

(i) Its location in the train;

(ii) The reporting mark and car number;

(iii) The date, time, and location of its most recent Class I or IA brake test;

(iv) The identification and qualification of the person who performed the test (qualified person or qualified mechanical inspector, as defined in § 232.5); and

(v) An accurate calculation of the mileage remaining under paragraph (a) or (b) of this section, as applicable;

(2) The copy of this cab record must be updated at each location to reflect changes in the train consist; and

(3) In the event of disruption of communication with the eABS system, a train is permitted to move based upon the mileage permitted to the most restrictive car as reported in the cab record.

(e) Notwithstanding §§ 232.205 through 232.209, a Class I, Class IA, or Class II brake test is not required to be performed at the following locations for a train consisting solely of cars operated under this section:

(1) A location where one or more cars are removed from any location in the train;

(2) A location where any car meeting the requirements of paragraph (a) or (b) of this section is added to a train; or

(3) A location where the motive power for the train consist is changed.

(f) The eABS system must maintain the integrity and availability of records, including but not limited to:

(1) Recognition of a unique identifier associated with each person that authors records in the eABS system, with provisions to ensure that records containing such identifier accurately reflect that the individual associated with the identifier authored the record;

(2) Implementation of means to ensure that stored records contain all information required in paragraph (a)(3) of this section;

(3) Implementation of means to ensure that each record containing the statements described in paragraph (a)(3) of this section identifies as a qualified mechanical inspector any person performing a Class I brake test who meets the criteria for a qualified mechanical inspector, as defined in § 232.5;

(4) Accessibility for FRA review and monitoring at any time. Records in the eABS system must be made immediately available upon request to FRA and State inspectors under part 212 of this chapter for inspection and copying for no less than 30 days after entry or last amendment; and

(5) Procedures to minimize the effect of breakdown or malfunction, including redundant storage of records, and means to communicate and record the information required by paragraph (a)(3) of this section when access to the eABS system is unavailable.

(g) Records in the eABS system may only be modified for the following purposes:

(1) Correction of records, provided the eABS system stores amended records separately from the original records and the amended record clearly identifies the information being amended; and

(2) To update the calculation of mileage remaining until the next Class I brake test is required.

(h) An accurate calculation of the mileage remaining under paragraph (a) or (b) of this section must, at minimum:

(1) Be based upon the number of miles the car has traveled as part of a train;

(2) Be updated for the car as soon as practicable after departure of the car in a train, but no later than the time at which the car departs in any subsequent train; and

(3) Be inclusive of any excess mileage accumulated between brake tests. Such excess mileage shall be reported as a negative number.

(i) The eABS system must retain records for a minimum of one year from the records' creation.

(j) FRA's Associate Administrator for Railroad Safety may revoke a railroad's authority to utilize the provisions of this section, in whole or in part, if:

(i) FRA finds that the railroad's eABS system or the records contained in the railroad's eABS system are not properly secure, are inaccessible to FRA or the railroad's employees, or fail to adequately track and monitor the movement of equipment operating pursuant to this section; or

(ii) The railroad demonstrates a record of repeated or willful noncompliance with the provisions of this part or parts 215 and 229 of this chapter.

(2) Revocation may be limited to specific locations, equipment, environmental conditions, train routes, employees, or eABS systems.

(3) FRA will record such a determination in writing, state the basis for such action, establish conditions of revocation, including a specific period of suspension or conditions for the restoration of the authority to utilize the provisions of this section, and provide a copy of the document to the railroad.

Issued in Washington, DC.

Quintin C. Kendall,

Deputy Administrator.

[FR Doc. 2020–28870 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R5–ES–2019–0056; FF09E22000 FXES11130900000 201]

RIN 1018–BD65

Endangered and Threatened Wildlife and Plants; Reclassifying Furbish's Lousewort (Pedicularis furbishiae) From Endangered to Threatened Status With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify (downlist) Furbish's lousewort *(Pedicularis furbishiae)* from an endangered species to a threatened species under the Endangered Species Act of 1973, as amended (Act), and we propose a rule under section 4(d) of the Act to promote the conservation of Furbish's lousewort. This information is based on a thorough review of the best available scientific and commercial information, which indicates the threats to the species have been reduced to the point that the species no longer meets the definition of an endangered species under the Act. We request information and comments from the public on this proposal.

DATES: We will accept comments received or postmarked on or before March 16, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by March 1, 2021.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R5–ES–2019–0056, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this

document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail: Public Comments Processing, Attn: FWS–R5–ES–2019–0056; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

Document availability: This proposed rule and supporting documents including the 5-year review, the Recovery Plan, and the species status assessment (SSA) report are available at *http://www.regulations.gov* under Docket No. FWS–R5–ES–2019–0056, and at the Maine Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Project Leader, Maine Ecological Services Field Office, 306 Hatchery Road, East Orland, ME 04431; telephone 207–902–1567. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek new information not already included in the species status assessment report concerning:

(1) Reasons we should or should not reclassify Furbish's Lousewort (*Pedicularis furbishiae*) under the Act (16 U.S.C. 1531 *et seq.*).

(2) New biological or other relevant data concerning any threat (or lack thereof) to this plant and existing regulations that may be addressing these or any of the threats described in this proposed rule or the species status assessment report.

(3) New information concerning the population size or trends of Furbish's lousewort.

(4) New information or data on the projected and reasonably likely impacts to Furbish's lousewort or its habitat associated with climate change.

(5) New information on planned development activities within the range of Furbish's lousewort that may adversely affect or benefit the plant.

(6) Information on regulations that are necessary and advisable to provide for the conservation of Furbish's lousewort and that the Service can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hard copy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hard copy submissions at *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at *http://www.regulations.gov.*

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for Furbish's lousewort. The SSA team was composed of biologists from the Service and the State of Maine Natural Areas Program. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994), our August 22, 2016, Director's Memo on the Peer Review Process, and the Office of Management and Budget's December 16, 2004, Final Information Quality Bulletin for Peer Review (revised June 2012), we solicited independent scientific reviews of the information contained in the Furbish's lousewort SSA report. We solicited independent peer review of the SSA report by four individuals with expertise in Furbish's lousewort, botany, ice scour and flooding regimes of the St. John River, and landscape ecology; we received comments from three of the four peer reviewers. In addition, we received comments from the State of Maine and Canada. The SSA report can be found at *http://www.regulations.gov* under Docket No. FWS–R5–ES–2019–0056, and on the Maine Ecological Services Field Office website at: *https://www.fws.gov/mainefieldoffice/Furbish_lousewort.html.* In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the final SSA report, which is the foundation for this proposed rule.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is endangered instead of threatened, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. Such final decisions would be a logical outgrowth of this proposal, as

long as we: (1) Base the decisions on the best scientific and commercial data available after considering all of the relevant factors; (2) do not rely on factors Congress has not intended us to consider; and (3) articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion.

Previous Federal Actions

Furbish's lousewort was listed as an endangered species on April 26, 1978 (43 FR 17910). We completed a recovery plan in 1983 (USFWS 1983) and revised it in 1991 (USFWS 1991). The revised recovery plan presented updated life-history and population information, and updated information on the threats to the species. A second revision recovery plan was signed on September 26, 2019 and on February 21, 2019, a 5-year status review was completed (USFWS 2019b) and concluded that Furbish's lousewort should be downlisted to a threatened species under the Act.

I. Proposed Reclassification Determination

Background

A thorough review of Furbish's lousewort is presented in the SSA report (USFWS 2020), found at *http://www.regulations.gov* under Docket FWS–R5–ES–2019–0056, which is briefly summarized here.

Species Information

Furbish's lousewort was first named and described in 1882 (Watson, S. 1882, entire) and is recognized as a valid taxon. A thorough review of the taxonomy, life history, and ecology of Furbish's lousewort is presented in the SSA report.

Furbish's lousewort is an herbaceous perennial plant that occurs on the intermittently flooded, ice-scoured banks of the St. John River. It is endemic to Maine with a few, small subpopulations in northwestern New Brunswick, Canada. The population of Furbish's lousewort is comprised of 20 subpopulations associated with suitable habitat that occurs along portions of a 225-kilometer (140-mile) section of the St. John River. The plant is recognized early in the growing season by a basal rosette of fern-like leaves. By mid-summer, mature plants produce one or more flowering stems that grow to about 50 to 80 centimeters (20 to 30 inches) in height. The stems have alternate, widely spaced, fern-like leaves along their length and are topped by a tight cluster (inflorescence) of small, yellow, tube-like flowers that bloom only a few at a time. Furbish's lousewort has two distinct growth stages: Vegetative (immature, nonflowering) individuals that grow as a basal rosette of leaves and reproductive (flowering) plants.

Furbish's lousewort does not spread clonally, and plants are established exclusively by sexual reproduction and seed (Stirrett 1980, p. 23; Menges 1990, p. 53). Flowering occurs at a minimum of 3 years once plants reach a certain size leaf area. Reproductive plants emerge in May and produce an average of 2 to 3 flowering stems; each stem has one or more inflorescences, and each inflorescence has up to 25 flowers. Flowers bloom several at a time from about mid-July to the end of August (Stirrett 1980, p. 24; Menges et al. 1986). Furbish's lousewort is pollinated by a single species of bumble bee, the half-black bumble bee (*Bombus vagans*) (Macior 1978, entire). About 50 percent of flowers produce egg-shaped seed capsules that ripen in late-September after which the tiny (1 millimeter) seeds are dropped (Menges et al. 1985, 1986; Gawler 1983, p. 27; Gawler et al. 1986, entire). Seeds lack mechanisms for wind or animal dispersal, and most drop near the parent plant. Each mature plant tends to form a colony around itself. During spring floods, it is conceivable that some seeds may disperse down-river (Stirrett 1980, pp. 26–27; Menges 1990, p. 53). The seeds germinate in moist, cool microhabitats having minimal herbaceous or woody plant competition or leaf litter, such as moss-covered soil or parts of the river bank that are constantly wet. Furbish's lousewort lacks seed dormancy; seedlings result only from the previous year's reproduction (Menges 1990, p. 54). Seedlings emerge in June through August and have two true leaves during their first growing season (Gawler et al. 1987, entire). Like most species of *Pedicularis,* seedlings of Furbish's lousewort are obligate hemiparasites and obtain part of their nutrition from root attachments with a perennial host plant. The species seems to be a host-generalist, perhaps relying on nitrogen fixing host plants in the mineral poor soil in which it grows (Macior 1980, entire). The lifespan of adult flowering plants is uncertain.

Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Recovery plans must, to the maximum extent practicable, include ''objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions [of section 4 of the Act], that the species be removed from the list.''

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all of the criteria in a recovery plan being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and that the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all of the guidance provided in a recovery plan.

On June 29, 1983, the Service completed the first recovery plan for Furbish's lousewort (USFWS 1983). Following completion of this recovery plan, recovery activities enhanced our understanding about the life-history of the plant and about the populations. This information and the removal of the primary threat to the species at the time of listing (the proposed Dickey-Lincoln hydropower project) led to a revised recovery plan for Furbish's lousewort, which was made final on July 2, 1991 (USFWS 1991). The revised 1991 recovery plan includes criteria for downlisting Furbish's lousewort from endangered to threatened, but it does

not provide delisting criteria due to lack of information regarding the species' long-term population dynamics and viability. The 2019 5-year review (USFWS 2019a, pp. 2–3) states that, given the revised recovery plan is more than 25 years old, the downlisting criteria are no longer considered adequate; recent population data are not incorporated into the recovery criteria, and the plan lacks recent published and unpublished scientific information on Furbish's lousewort and its habitat. In the 2019 5-year review, we conclude that a change in the species' listing status to threatened is warranted because the Dickey-Lincoln hydropower project is no longer a threat, the species' population rebounded from several severe ice-scour events, the population is widely distributed, and a single catastrophic event is unlikely to extirpate the species.

In September 2019, the Service completed the Recovery Plan for the Furbish's Lousewort (*Pedicularis furbishiae*), Second Revision (USFWS 2019b), which was developed using the information in the SSA report for the species (USFWS 2020). In light of the recommendation to reclassify Furbish's lousewort to a threatened species, the revised recovery plan includes criteria that describe the conditions indicative of a recovered species (delisting criteria). Specifically, the revised recovery plan contains two recovery criteria for delisting based on population status over a period of at least 30 years (three generations). The first criterion states that the metapopulation is viable, comprising a 30-year median of 4,400 flowering stems or greater, and distributed with a 30-year median of 2,800 flowering stems or greater upriver in at least 6 subpopulations with at least 3 good and 3 fair subpopulations, and a 30-year median of 1,600 flowering stems or greater downriver in at least 9 subpopulations with at least 3 good and 6 fair subpopulations. Once the upriver and downriver criteria are reached, the median number of flowering stems for each respective river section will remain stable or increase over a period of at least 30 years without augmentation, reintroduction, or hand-pollinating of plants. Additionally, in New Brunswick, there is a 30-year median of 1,100 plants distributed among at least 5 subpopulations. The second criterion states there is long-term habitat protection for all subpopulations in Maine that provides for the species' needs throughout its life cycle (USFWS 2019b, pp. 8–9).

Based on the latest census (2018–2019), for criterion 1, the 30-year median for upriver subpopulations is 1,817 flowering stems and 983 for downriver subpopulations. In 2018–2019 there were 6 subpopulations, 5 good and 1 fair, in the upriver region and 3 subpopulations, 1 good and 2 fair, in the downriver region. In 2018–2019, the Maine population increased by 970 flowering stems (43%). Canadian subpopulations remain at or below historic lows of about 150 plants at 5 subpopulations, but few plants are flowering. For criterion 2, in 2019, The Maine Chapter of The Nature Conservancy purchased several areas of the St. John River corridor in 3 upriver townships. Currently, there is long-term habitat protection in 4 of 15 subpopulations. A total of 9.26 miles of 22.89 miles of Furbish's lousewort habitat is protected, mostly in the upriver region.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those

threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological status review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether Furbish's lousewort should be reclassified under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found online, see Supporting Documents.

To assess Furbish's lousewort viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochastic events (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

To assess the resiliency of Furbish's lousewort, we reviewed the abundance of flowering and nonflowering individuals and colonization of populations through seed dispersal mechanisms; the dependency of populations on periodic ice scour and flooding; and the effects of climate change, and development. To assess the redundancy of Furbish's lousewort, we evaluated how the distribution and biological status of subpopulations contribute to the species' ability to withstand catastrophic events. Specifically, we examined how climate change and current and future development are likely to affect the number, sizes, and distribution of populations (USFWS 2020, pp. 38–39; 42–48; 52–59). To assess representation, we evaluated the environmental diversity within and among subpopulations.

Summary of Current Condition

Furbish's lousewort functions as a metapopulation. Unlike a continuous population, a metapopulation has spatially discrete local subpopulations, in which migration between subpopulations is significantly restricted. In the SSA report, we define subpopulations as separated by a mile or more of unsuitable habitat based primarily on the limitations of the species' pollinator, the half-black bumblebee. Studies of *Bombus* species typically exhibit foraging distances of less than 1 kilometer (0.62 miles) from their nesting sites. Based on this criterion, we identify 15 subpopulations of Furbish's lousewort in Maine and 5 in New Brunswick, Canada, that form the basis for our analysis of the current condition of the species. For our analysis, we first qualitatively assessed the subpopulations as ''good,'' ''fair,'' or ''poor,'' including the subpopulations attributes: abundance, density, and current status as compared to the site history. We designated sites where Furbish's lousewort is currently absent (locally extirpated) as ''very poor.''

Next, we evaluated each subpopulation according to three habitat criteria: The amount of potential habitat, the condition of the forested riparian buffer, and the prevalence of shoreline erosion. We selected these habitat criteria to describe habitat quality because of their influence on the species resource needs (USFWS 2020, p.11, table 2). We assigned a score of 3 (good), 2 (fair), 1 (poor), or 0 (very poor) to each subpopulation and habitat criterion (USFWS 2020, pp. 31–32). The rankings for the 15 subpopulations in Maine are 2 good, 2 fair to good, 3 fair, and 8 poor. On average, the upriver subpopulations rank higher than the downriver subpopulations because of the high quality habitat and low pressures from development. Six of the 15 subpopulations in Maine are currently extirpated (all downriver subpopulations). In New Brunswick, all 5 subpopulations rank as poor (USFWS 2020, pp. 33–36). There is marked difference in habitat conditions and stressors upriver and downriver. Upriver habitat is more extensive and occurs in a managed industrial forest. Downriver habitats (including New Brunswick) are smaller and more fragmented.

Risk Factors

Based on the life-history and habitat needs of Furbish's lousewort, and in consultation with species' experts, as well as experts in botany, ice scour and flooding of the St. John River, and landscape ecology, we identify the potential stressors (negative influences), the contributing sources of those stressors, and how conservation measures to address those stressors are likely to affect the species' current condition and viability (USFWS 2020, pp. 21–31). We evaluate how these stressors may be currently affecting the species and whether, and to what extent, they would affect the species in the future (USFWS 2020, pp. 40–57). The stressors most likely to affect the viability of Furbish's lousewort are: (1) Development resulting in habitat loss, erosion, and fragmentation; and (2) climate change that causes the current trends of warmer winters that affect the ice dynamics, flooding, and overall disturbance regime of the St. John River.

Historical land use patterns influence Furbish's lousewort habitat today; the land use upriver of the town of Allagash is undeveloped, while the downriver landscapes in Maine and farther downriver in New Brunswick are dominated by agriculture and small villages. Changes in land use on the

banks of the St. John River in downriver areas have occurred through the clearing of vegetation, especially trees, for agriculture, individual house lots, and roads. These land use changes within the St. John River valley may have negatively affected habitat of some Furbish's lousewort subpopulations through removal or reduction of forested riparian buffers and subsequent loss of shade critical to the species' growth and reproduction. Areas cleared of forest, and impermeable surfaces associated with development, have led to the erosion and subsidence of the unconsolidated glacial till soils, and caused slumping and erosion of Furbish's lousewort habitat. There are modest predicted trends of future development for the St. John River Valley that are described in the SSA Report (USFWS 2020, p. 47). Future development will likely occur in the center of larger towns and expand into some areas currently in agricultural land use, this could cause slumping and erosion in Furbish's lousewort habitat.

Furbish's lousewort is identified as one of Maine's plant species most vulnerable to climate change (Jacobson *et al.* 2009, p. 33). The species depends on periodic disturbance of the riverbank from ice scour that is not too frequent or too infrequent and not too severe. Climate change is expected to affect the ice regime of northern rivers, including the St. John, by increasing the frequency and severity of ice scour and flood events (USFWS 2020, p. 23). River ice models for the St. John River demonstrate that key variables influencing the frequency and severity of ice scour, jamming, and flooding are caused by midwinter temperatures above freezing, midwinter precipitation in the form of rain, and increasing river flows (Beltaos and Prowse 2009, pp. 134–137). Beltaos (2002, entire) developed a hydroclimatic analysis for the upper St. John River using long-term climate and flow records. He documented that a small rise in winter air temperatures over the past 80 years has resulted in a substantial increase in the number of mild winter days and the amount of winter rainfall, which were previously rare occurrences in this region. These two factors augment river flows, causing increased breakup of ice cover, increased peak flows in late winter, and a higher frequency of spring ice jams and flooding (USFWS 2020, p. 24). Increasing summer temperatures may also affect Furbish's lousewort. The climate envelope of the species has not been described, but its closest genetic relatives are all arctic plants that require cool, moist environments. We are uncertain about the maximum summer temperatures and moisture deficits that Furbish's lousewort can withstand (USFWS 2020, p. 27).

Several conservation actions are in place and may reduce some of the stressors to Furbish's lousewort or provide habitat protection (see *Conservation Efforts for Furbish's lousewort,* for more information).

Summary of Future Conditions Analysis

We assess two timeframes for characterizing the condition of Furbish's lousewort in the future. We selected the years 2030 and 2060, as a period for which we can reasonably project effects of the stressors and plausible conservation efforts. Climate change information for these timeframes is based on the available information contained in climate predicting models provided through the U.S. Geological Survey (USGS) Climate Change Viewer, Summary of the Upper St. John River Watershed, Aroostook County, Maine (USGS 2017a, b, entire). The timeframes of 2030 and 2060 capture approximately 1 to 2, and 4 to 5 generations of Furbish's lousewort, respectively. Development information for this timeframe is available in municipal comprehensive plans (Town of Fort Kent 2012, entire) and The University of Maine Sustainability Solutions Initiative (USFWS 2020, p. 41).

For each of the two timeframes, 2030 and 2060, we developed three future scenarios: continuation, best case, and a worse case. We provide a range of reasonable, plausible effects for development and climate change. For climate change scenarios, we use data from representative concentration pathways (RCPs) of greenhouse gas (GHG) concentration trajectories adopted by the International Panel on Climate Change (IPCC). The three RCPs selected, RCP 2.6, RCP 4.5, and RCP 8.5, reflect a wide range of possible changes in future anthropogenic greenhouse gas emissions. RCP 2.6 is a scenario that assumes that global greenhouse gas emissions have peaked and will decline after 2020. The continuation scenario assumes moderate increases in GHG emissions (RCP 4.5), moderate increases in development downriver, and conservation measures continuing or being reduced slightly. The best case scenario assumes low GHG emissions (RCP 2.6), conservation measures remaining in place, and no further development downriver. The worse case scenario assumes high GHG emissions and moderate increases of GHG emissions into the future (RCP 8.5), modest levels of development, and reduced conservation measures (USFWS 2020, p. 48). All future predictions are uncertain; therefore, we qualify them using relative terms of likelihood; adopted terminology specified by the IPCC (2014). Based on the future analysis, we predict that by 2030 there is a higher likelihood that, in all three scenarios, the metapopulation of the Furbish's lousewort will continue to decline due to local extirpations of downriver subpopulations. By 2060, we predict that it is likely that the overall viability of the metapopulation will be greatly reduced from current conditions, and a few subpopulations will persist upriver in Maine. We predict that there is a high likelihood that in both the continuation and worse case scenarios the metapopulation will no longer be viable; it will be extirpated throughout most of its range; and the few plants that remain would be concentrated at upriver sites.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and cumulatively. Our current and future condition assessment is iterative because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

The SSA report contains a more detailed discussion on our evaluation of the biological status of the species and the influences that may affect its continued existence. Our conclusions are based upon the best available scientific and commercial data, including the judgments of the species' experts and peer reviewers. See the SSA report for a complete list of the species' experts and peer reviewers and their affiliations.

Existing Regulatory Mechanisms

Section 4(b)(1)(A) of the Act requires that the Service take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.'' In relation to

Factor D under the Act, we interpret this language to require the Service to consider relevant Federal, State, and Tribal laws, regulations, and other such binding legal mechanisms that may ameliorate or exacerbate any of the threats we describe in threat analyses under the other four factors or otherwise enhance the species' conservation. We give the strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations.

Municipal shoreline zoning in Maine now provides partial protection of Furbish's lousewort habitat (USFWS 2020, Appendix 1). As established by State law in 2013, the shoreline zone extends to 250 feet from the high water line all along the St. John River. Zoning prohibits clear cutting within 50 feet of the river; openings located greater than 50 feet from the river (or 75 feet from the river for a few subpopulations in organized towns) are restricted to a maximum of 0.3 acres, and no more than 40 percent of the forest in the 250-foot zone can be harvested in a 10-year period (Maine Department of Environmental Protection Mandatory Shoreland Zoning Title 38, Chapter 3, §§ 435–449). Organized towns have the option to designate lousewort habitats as resource protection subdistricts, which would provide more stringent measures. Currently, no towns have designated any resource protection subdistricts for the lousewort (USFWS 2020, p. 28).

The New Brunswick Clean Water Act provides shoreline protections that convey a benefit to the Furbish's lousewort in Canada. The New Brunswick Department of Environmental and Local Government acts as the regulatory entity responsible for issuing all watercourse alteration permits. Guidelines for implementing the regulations specify that no heavy equipment may be operated within 15 meters of the bank of a watercourse, no ground disturbance may occur within 30 meters of a watercourse, and only 30 percent of the total merchantable trees may be removed from a 30-meter buffer zone every 10 years. All activities taking place within 30 meters of a watercourse that is either one hectare or larger in area or that involve the removal, deposit, or disturbance of the water, soil, or vegetation require a permit (USFWS 2020, p. 29).

Several parcels that support Furbish's lousewort have permanent protection. Since 2001, the New England Forestry Foundation has had a 754,673-acre conservation easement on lands along the St. John River where Furbish's lousewort occurs. The easement protects approximately 6.2 percent of the total population in Maine and restricts development rights in perpetuity. In 2019, The Maine Chapter of The Nature Conservancy purchased several areas of the St. John River corridor. The Maine Bureau of Parks and Lands (Bureau) owns a large unit in the town of Allagash that provides several hundred feet of Furbish's lousewort habitat, approximately 2 percent of the population in Maine. The Bureau's integrated resource policy requires that MBPL promote the conservation of federally listed species. One of the five subpopulations in New Brunswick is permanently protected (USFWS 2020, pp. 29–30).

The Furbish's lousewort was listed on Canada's Schedule 1 of the Species at Risk Act (SARA) in June 2003 and was initially designated as endangered by the Committee on the Status for Endangered Wildlife in Canada (COSEWIC) in 1980. With this proclamation, protection and recovery measures were developed and implemented.

The Furbish's lousewort is protected by New Brunswick's Endangered Species Act. Under this Act, it is prohibited to kill, harm or collect this species or disturb its habitat (Government of New Brunswick 2020).

As discussed, Furbish's lousewort and its habitat receives some protection from regulatory mechanisms in both the United States and Canada. In the U.S., the State of Maine and municipal regulations provide partial protection for shorefronts, which includes protections of riparian habitats where the Lousewort could be located. These state and municipal regulations are enforced through local and state ordinances. They were not designed to protect Furbish lousewort from direct take, and as such, the species is not regulated from direct take on private lands in Maine. In Canada, where populations are at historic lows, the New Brunswick regulates heavy equipment use and buffer zones, as well as, prohibits take of Furbish's lousewort through the New Brunswick Endangered Species Act. Furbish's lousewort is further regulated as a schedule 1 species at risk under SARA. Collectively these regulations provide protections in Canada for the Furbish's lousewort and its habitat.

Conservation Efforts for Furbish's lousewort

Since Furbish's lousewort was listed in 1978, various recovery actions have improved the status of the species. For example:

- In 1986, Congress deauthorized the construction of the Dickey-Lincoln hydropower project (Pub. L. 99–662), which was the primary threat to the species at the time of listing (USFWS 2020, p. 27).
- St. John River Resource Protection Plan (Plan): Industrial forest landowners voluntarily signed the Plan beginning in 1982, with revisions in 1992, 2002, and 2012. The intent of the Plan is to protect the natural values and traditional recreational uses of the river. The primary value of the Plan to the conservation of Furbish's lousewort is that it does not allow commercial and residential development, subdivisions, water impoundments, and utility projects on land along the St. John River owned by signatory landowners.
- Since 2009, the Service's Partners for Fish and Wildlife Program has partnered with a small business owner in Aroostook County, Maine to restore riparian forests that are potential habitat for Furbish's lousewort. Through this partnership, they have collaborated with 37 landowners encompassing 40 parcels). To date, $110,000 has been invested, and trees were planted along 4.6 miles of river, creating 55.2 acres of forested riparian habitat (USFWS 2020, pp. 30–31).
- The Furbish's lousewort occurs only on private lands in Canada. Therefore, private landowner stewardship is vitally important. Several nonprofit organizations collaborated to create the George Stirret Nature Preserve, a protected area around one population of lousewort. The Nature Trust of New Brunswick contacted private landowners surrounding the remaining areas where Furbish's lousewort grows and developed 15 voluntary private landowner stewardship agreements to encourage and support stewardship practices (Dowding 2020).

These recovery actions and other supporting data that we analyzed indicate that some of the threats identified at the time of listing have been ameliorated or reduced in areas occupied by Furbish's lousewort, and that the species' status has improved, primarily due to the Congressional deauthorization of the Dickey-Lincoln hydropower project. However, more recent threats associated with climate change may impede the plant's ability to recover.

Determination of Furbish's Lousewort Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets

the definition of endangered species or a threatened species. The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' For a more detailed discussion on the factors considered when determining whether a species meets the definition of an endangered species or a threatened species and our analysis on how we determine the foreseeable future in making these decisions, please see Regulatory and Analytical Framework.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we determined that the Furbish's lousewort no longer meets the definition of endangered. This determination is based on the following: The removal of the primary threat at the time of listing, the Dickey-Lincoln hydropower project; the ability of the species to rebound after several severe ice scouring events; the species continues to be found at sites beyond its known distribution at the time of the original listing; and over 25 percent of the overall population is located on protected lands. Additionally, long-term census data demonstrate that the Furbish's lousewort is resilient to stochastic events such as periodic ice scour and flooding. Redundancy in the downriver subpopulations has diminished, though the conditions in the upriver subpopulations has remained constant. Thus, after assessing the best available information, we conclude that the Furbish's lousewort no longer meets the Act's definition of an endangered species. Therefore, we proceed with determining whether Furbish's lousewort meets the Act's definition of a threatened species.

The information indicates that, at the species level, development (Factor A), that causes habitat loss, erosion, and fragmentation, and climate change (Factor E), that causes the current trends of warmer winters that affect the ice dynamics, flooding, and the overall disturbance regime of the St. John River, are the most influential factors affecting Furbish's lousewort now and into the future. The existing state and Canadian regulations (Factor D) are not considered adequate to alleviate the identified threats. Furbish's lousewort is listed as endangered by the State of Maine; however, the lack of take prohibitions for plants under this law limits its ability to protect the species from the habitat-based threats that it faces. Canada's SARA and New Brunswick's Act have a provision to protect species designated as endangered when found on federal lands; however, the Furbish's lousewort does not occur on any federal lands in Canada. In both future timeframes, 2030 and 2060, under our projected ''continuation'' and ''worse case'' scenarios, we predict the species' resiliency, redundancy, and representation to diminish significantly, indicating that the species is likely to become in danger of extinction within the next 40 years. While the downriver subpopulations are predicted to experience the most diminishment, even the current upriver stronghold is predicted to decline, indicating an increased risk of extinction of the entire metapopulation beyond the near term. Furbish's lousewort has a particular niche and appears to have very little adaptation potential. Hence, changes to the ice-scour regime, due to climate change, are highly likely to have significant impacts to the species within the foreseeable future. Under both timeframes analyzed, the downriver subpopulations are predicted to be in poor condition, thereby putting extra importance on the upriver subpopulations to maintain the species' viability. However, even under the 2030 timeframe, the upriver subpopulations are predicted to be significantly diminished. Thus, after assessing the best available information, we conclude that Furbish's lousewort is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future, throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson, 2020* WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range-that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for Furbish's lousewort, we choose to address the status question first-we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

The statutory difference between an endangered species and a threatened species is the time horizon in which the species becomes in danger of extinction; an endangered species is in danger of extinction now while a threatened species is not in danger of extinction now but is likely to become so in the foreseeable future. Thus, we considered the time horizon for the threats that are driving the Furbish's lousewort to warrant listing as a threatened species throughout all of its range. We examined the following threats: Development and climate change, including cumulative effects. As stated in the section *Status Throughout All of Its Range* above, we predict the species is likely to become in danger of extinction within the next 40 years. We recognize that the downriver subpopulations are small, and habitat is less extensive and fragmented. However, the risk of extinction to the population is low, and does not currently meet the threshold of endangered. We selected 40 years for the foreseeable future as a period for which we can reasonably project effects of the stressors and potential conservation efforts. The time frame of 2060 will capture approximately four to five generations of the Furbish's lousewort. We believe this timeframe will allow observation of changes in the condition of the species without increasing uncertainty about the nature and intensity of stressors beyond a reasonable level.

The best scientific and commercial data available indicate that the time horizon on which the threats of development and climate change to Furbish's lousewort and the responses to those threats are likely to occur is the foreseeable future. In addition, the best scientific and commercial data available do not indicate that any of threats of development and climate change to Furbish's lousewort and the response to those threats are more immediate in any portions of the species' range. Therefore, we determine that the Furbish's lousewort is not in danger of extinction now in any portion of its range, but that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16-cv-01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that Furbish's lousewort meets the definition of a threatened species. Therefore, we propose downlisting Furbish's lousewort as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

II. Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising this authority under section 4(d), the Service has developed a proposed species-specific 4(d) rule that is designed to address the threats and conservation needs of Furbish's lousewort. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of Furbish's lousewort. As discussed above in the Determination section, the Service has concluded that Furbish's lousewort is likely to become in danger of extinction within the foreseeable future primarily due to climate change and development. The provisions of this proposed 4(d) rule would promote conservation of Furbish's lousewort by deterring certain activities that would negatively impact the species in knowing violation of any law or regulation of the State of Maine, including any State trespass laws. The provisions of this proposed 4(d) rule are one of many tools that the Service would use to promote the conservation of Furbish's lousewort. This proposed 4(d) rule would apply only if and when the Service makes final the reclassification of Furbish's lousewort as a threatened species.

Provisions of the Proposed 4(d) Rule

This proposed 4(d) rule would provide for the conservation of Furbish's lousewort by prohibiting the following activities, except as otherwise authorized: Removal and reduction to possession from areas under Federal jurisdiction; malicious damage or destruction on any such area; or removal, cutting, digging up, or damage or destruction on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.

While removal and reduction to possession from areas under Federal jurisdiction is not identified as an existing threat to Furbish's lousewort, prohibiting this activity would maintain a deterrent that may become necessary in the future to support recovery of the species (*e.g.,* should a Federal agency seek to conserve a population through land or easement acquisition). As discussed above under Summary of Biological Status and Threats, climate change and development are affecting the status of Furbish's lousewort. Indirect effects associated with development, including loss of shade critical to growth and reproduction due to reduction of the forested riparian buffer, and erosion of habitat due to clearing of forested areas and runoff from creation of impermeable surfaces, have the potential to impact Furbish's lousewort. Prohibiting certain activities, when in knowing violation of State law or regulation, would complement State efforts to conserve the species. Providing these protections would help preserve the species' remaining subpopulation; slow its rate of decline; and decrease synergistic, negative effects from other stressors.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened plants under certain circumstances. Regulations governing permits for threatened plants are codified at 50 CFR 17.72, which states that the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened species. That regulation also states that the permit shall be governed by the provisions of § 17.72 unless a special rule applicable to the plant is provided in §§ 17.73 to 17.78. We interpret that second sentence to mean that permits for threatened species are

governed by the provisions of § 17.72 unless a special rule provides otherwise. We recently promulgated revisions to § 17.71 providing that § 17.71 will no longer apply to plants listed as threatened in the future. We did not intend for those revisions to limit or alter the applicability of the permitting provisions in § 17.72, or to require that every special rule spell out any permitting provisions that apply to that species and special rule. To the contrary, we anticipate that permitting provisions would generally be similar or identical for most species, so applying the provisions of § 17.72 unless a special rule provides otherwise would likely avoid substantial duplication. Moreover, this interpretation brings § 17.72 in line with the comparable provision for wildlife at 50 CFR 17.32, in which the second sentence states that such permit shall be governed by the provisions of this section unless a special rule applicable to the wildlife, appearing in §§ 17.40 to 17.48, of this part provides otherwise. Under 50 CFR 17.12 with regard to threatened plants, a permit may be issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for botanical or horticultural exhibition, for educational purposes, or for other purposes consistent with the purposes and policy of the Act. Additional statutory exemptions from the prohibitions are found in sections 9 and 10 of the Act.

The Service recognizes the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and close working relationships with local governments and landowners, are in a unique position to assist the Service in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Service shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, in accordance with 50 CFR 17.71(b), any person who is a qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section (6)(c) of the Act and who is designated by his or her agency for such purposes would be able to conduct activities designed to conserve Furbish's lousewort that may result in otherwise prohibited activities without additional authorization.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of Furbish's lousewort. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service. We ask the public, particularly the State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

III. Required Determinations

Clarity of This Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be a specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with determining and implementing a species' listing status under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244)

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. There are two federally recognized Tribes in northern Maine; however, no subpopulations of Furbish's lousewort occur on Tribal lands.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Maine Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are staff members of the Northeast Regional Office and the Maine Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12(h) by revising the entry for ''*Pedicularis furbishiae*'' under FLOWERING PLANTS in the List of

Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

(h) * * *

* * * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
Flowering Plants				
		* * * * * * * * *		
Pedicularis furbishiae	Furbish's lousewort	Wherever found	T	43 FR 17910, 4/26/1978; [**Federal Register** citation of the final rule]; 50 CFR 17.73(d).[4d]
		* * * * * * * * *		

■ 3. Add § 17.73 to read as follows:

§ 17.73 Special rules—flowering plants.

(a) [Reserved]

(b) [Reserved]

(c) [Reserved]

(d) *Pedicularis furbishiae* (Furbish's lousewort)—(1) *Prohibitions.* Except as provided under paragraph (d)(2) of this section, you may not remove and reduce to possession the species from areas under Federal jurisdiction; maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.

(2) *Exceptions from prohibitions.* The following exceptions from the prohibitions apply to this species:

(i) You may conduct activities authorized by permit under § 17.72.

(ii) Qualified employees or agents of the Service or a State conservation agency may conduct activities authorized under § 17.71(b).

Aurelia Skipwith

Director,U.S. Fish and Wildlife Service.

[FR Doc. 2020–28978 Filed 1–14–21; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register
Vol. 86, No. 10
Friday, January 15, 2021

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2020–0094]

Notice of Availability of a Draft Federal Select Agent Program Policy Statement for Biosafety for Large Animal Study-Related Activities With Brucella abortus and Brucella suis Using Outdoor Containment Spaces

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service (APHIS) is making a draft Federal Select Agent Program (FSAP) policy statement related to brucella available. This policy statement will aid individuals and entities on how to develop biosafety plans for outdoor host animal studies involving swine, elk, bison, and cattle to further brucellosis research in accordance with the select agent and toxin regulations, as well as how to submit such plans to FSAP (administered jointly by the Centers for Disease Control and Prevention (CDC) and APHIS) for approval. We are making this draft policy statement available to the public for review and comment. This notice is being issued as a companion to a notice issued by CDC, which is also published in today's **Federal Register**.

DATES: We will consider all comments that we receive on or before February 16, 2021.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docket Detail;D=APHIS-2020-0094.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0094, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

The draft policy statement and any comments we receive may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0094* or in our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

The draft policy statement is also available at the following internet address: *https://www.selectagents.gov/regulations/policy/animalstudy.htm.*

FOR FURTHER INFORMATION CONTACT: Dr. Jacek Taniewski, DVM, Director, Division of Agricultural Select Agents and Toxins, ERCS, APHIS, 4700 River Road, Riverdale, MD 20737; (301) 851–3352; *jacek.taniewski@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (42 U.S.C. 262a) and the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. 8401) provide for the regulation of certain biological agents and toxins that have the potential to pose a severe threat to human, animal, and plant health, or to animal and plant products. The Animal and Plant Health Inspection Service (APHIS) has the primary responsibility for implementing the provisions of the Agricultural Bioterrorism Protection Act of 2002 within the U.S. Department of Agriculture (USDA). The Centers for Disease Control and Prevention (CDC) has the primary responsibility for implementing the provisions of The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 within the Department of Health and Human Services (HHS). Together, APHIS and CDC comprise the Federal Select Agent Program (FSAP) and oversee the possession, use, and transfer of biological agents and toxins, referred to as select agents and toxins. In accordance with the referenced Acts, APHIS and CDC promulgated the select agent and toxin regulations found in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73. Overlap select agents and toxins, listed in 9 CFR 121.4 and 42 CFR 73.4, are those select agents and toxins that have been determined to pose a severe threat to public health and safety, to animal health, or to animal products. Overlap select agents and toxins are subject to regulation by both APHIS and CDC.

Brucellosis, also known as contagious abortion or Bang's disease, is a contagious, costly disease that has significant animal health, public health, and international trade consequences. While most often found in ruminant animals (*e.g.,* cattle, bison, cervids, and swine), brucellosis can affect other animals and is transmissible to humans. Brucellosis is caused by a group of bacteria known scientifically as the genus *Brucella.* Two species of *Brucella* are of particular concern in the United States: *B. abortus,* principally affecting cattle, bison, and cervids, and *B. suis,* principally affecting swine and reindeer, but also cattle and bison.

Brucellosis can be costly to agriculture production. In 1952, prior to established efforts to eradicate the disease, agriculture production losses due to brucellosis exceeded $400 million. A cautionary indicator of the need for greater understanding of the disease is the expanding range of endemic *B. abortus* in the Greater Yellowstone Area and *B. suis* in feral swine populations throughout various areas of the United States. This disease expansion emphasizes the critical need for improved diagnostics, along with vaccine development for both *Brucella* species, which could be furthered by outdoor research studies.

Both *B. abortus* and *B. suis* are currently listed as overlap select agents in APHIS' and CDC's select agent and toxin regulations (9 CFR 121.4(b) and 42 CFR 73.4(b), respectively). Accordingly, any outdoor research studies must comport with the select agent and toxin regulations. Therefore, APHIS and CDC are issuing a draft FSAP policy statement on biosafety for large animal outdoor containment studies with *B. abortus* and *B. suis* to aid individuals and entities in the development of biosafety plans for such studies that meet the requirements of the select agent and toxin regulations. We are making this draft policy statement available to the public for review and comment on regulations.gov (see **ADDRESSES** above) and at *https://www.selectagents.gov/regulations/*

policy/animalstudy.htm. We will consider all comments that we receive on or before the date listed under the **DATES** section at the beginning of this notice.

Copies of the draft policy statement are also available for public inspection at USDA, room 1620, South Building, 14th Street and Independence Avenue SW, Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT.**

Authority: 7 U.S.C. 8401; 7 CFR 2.22, 2.80, 371.3, and 371.4.

Done in Washington, DC, this 11th day of January 2021.

Mark Davidson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2021–00774 Filed 1–14–21; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

The Emergency Food Assistance Program; Availability of Foods for Fiscal Year 2021

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the surplus and purchased foods that the Department expects to make available for donation to States for use in providing nutrition assistance to the needy under The Emergency Food Assistance Program (TEFAP) in Fiscal Year (FY) 2021. The foods made available under this notice must, at the discretion of the State, be distributed to eligible recipient agencies (ERAs) for use in preparing meals and/or for distribution to households for home consumption.

FOR FURTHER INFORMATION CONTACT: Rachel Schoenian, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, Alexandria, Virginia 22314 or telephone (703) 305–2937.

SUPPLEMENTARY INFORMATION: In accordance with the provisions set forth in the Emergency Food Assistance Act of 1983 (EFAA), 7 U.S.C. 7501, *et seq.,* and the Food and Nutrition Act of 2008, 7 U.S.C. 2036, the Department makes foods available to States for use in providing nutrition assistance to those in need through TEFAP. In accordance with section 214 of the EFAA, 7 U.S.C. 7515, funding for TEFAP foods is allocated among States according to a formula that accounts for poverty and unemployment levels within each State. Section 214(a)(1) of the Act requires that 60 percent of each State's allocation be based on the number of people with incomes below the poverty level within the State; and Section 214(a)(2) requires that the remaining 40 percent be equal to the percentage of the nation's unemployed persons within the State. State officials are responsible for establishing the network through which the foods will be used by ERAs in providing nutrition assistance to those in need and for allocating foods among those ERAs. States have full discretion in determining the amount of foods that will be made available to ERAs for use in preparing meals and/or for distribution to households for home consumption.

Surplus Foods

Surplus foods donated for distribution under TEFAP are Commodity Credit Corporation (CCC) foods purchased under the authority of section 416 of the Agricultural Act of 1949, 7 U.S.C. 1431 (section 416) and foods purchased under the surplus removal authority of section 32 of the Act of August 24, 1935, 7 U.S.C. 612c (section 32). The types of foods typically purchased under section 416 include dairy, grains, oils, and peanut products. The types of foods purchased under section 32 include meat, poultry, fish, vegetables, dry beans, juices, and fruits. Additionally, in FY 2020, the Department used CCC authority in the CCC Charter Act of 1948, 15. U.S.C. 714, for the Food Purchase and Distribution Program (FPDP), under which surplus foods affected by trade retaliation were purchased for distribution through TEFAP and other federal nutrition programs.

Approximately $496.54 million in surplus and $208.32 million in FPDP foods acquired in FY 2020 will be delivered to States in FY 2021. Surplus foods currently scheduled for delivery in FY 2021 include almonds, apples, beans, blueberries, butter, cheese, cherries, chicken, eggs, figs, grapefruit juice, grapes, haddock, hazelnuts, lentils, milk, mixed fruit, orange juice, oranges, peaches, pears, pecans, pistachios, ocean perch, plums, Alaska pollock, Atlantic pollock, pork, potatoes, raisins, raspberry puree, shrimp, tomato sauce, turkey, and walnuts. FPDP foods scheduled for delivery in FY 2021 include apples, beef, butter, cheese, chicken, corn, eggs, dried fruit mix, lamb, milk, mixed fruit, orange juice, oranges, peaches, plums, pork, and potatoes. Other surplus foods may be made available to TEFAP throughout the year. The Department would like to point out that food acquisitions are based on changing agricultural market conditions; therefore, the availability of foods is subject to change.

Purchased Foods

In accordance with section 27 of the Food and Nutrition Act of 2008, 7 U.S.C. 2036, the Secretary is directed to purchase an estimated $322.5 million worth of foods in FY 2021 for distribution through TEFAP. In addition, States will receive supplemental foods provided through the Families First Coronavirus Response Act (Pub. L. 116–127, FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116–136, CARES Act). $309.5 million was provided through the FFCRA and $314.9 million through the CARES Act for supplemental food purchases made in FY 2020 and FY 2021. These foods are made available to States in addition to those surplus and FPDP foods which otherwise might be provided to States for distribution under TEFAP.

For FY 2021, the Department anticipates purchasing the foods listed in the following table for distribution through TEFAP. The amounts of each item purchased will depend on the prices the Department must pay, as well as the quantity of each item requested by the States. Changes in agricultural market conditions may result in the availability of additional types of foods or the non-availability of one or more foods listed in the table.

FY 2021 USDA FOODS AVAILABLE LIST FOR THE EMERGENCY FOOD ASSISTANCE PROGRAM (TEFAP)

Fruits:

- Apples, Braeburn, Fresh
- Apples, Empire, Fresh
- Apples, Fuji, Fresh

FY 2021 USDA FOODS AVAILABLE LIST FOR THE EMERGENCY FOOD ASSISTANCE PROGRAM (TEFAP)—Continued

- Apples, Gala, Fresh
- Apples, Granny Smith, Fresh
- Apples, Red Delicious, Fresh
- Apples, Fresh
- Apple Juice, 100%, Unsweetened
- Apple Slices, Unsweetened, Frozen (IQF)
- Applesauce, Unsweetened, Canned
- Applesauce, Unsweetened, Cups, Shelf-Stable
- Apricots, Halves, Extra Light Syrup, Canned
- Blueberries, Highbush, Frozen
- Cherry Apple Juice, 100%, Unsweetened
- Cranberry Apple Juice, 100%, Unsweetened
- Cranberries, Dried, Individual Portion
- Fruit and Nut Mix, Dried
- Grape Juice, Concord, 100%, Unsweetened
- Grapefruit Juice, 100%, Unsweetened
- Mixed Fruit, Extra Light Syrup, Canned
- Oranges, Fresh
- Orange Juice, 100%, Unsweetened
- Peaches, Freestone, Slices, Frozen
- Peaches, Sliced, Extra Light Syrup, Canned
- Pears, Bartlett, Fresh
- Pears, Bosc, Fresh
- Pears, D'Anjou, Fresh
- Pears, Fresh
- Pears, Extra Light Syrup, Canned
- Plums, Pitted, Dried
- Raisins, Unsweetened, Individual Portion
- Raisins, Unsweetened

Dairy:

- Cheese, American, Reduced Fat, Loaves, Refrigerated
- Cheese, Cheddar, Yellow, Shredded, Refrigerated
- Milk, 1%, Shelf-Stable UHT
- Milk, 1%, Individual Portion, Shelf-Stable UHT
- Milk, Refrigerated

Vegetables:

- Beans, Green, Low-sodium, Canned
- Carrots, Diced, No Salt Added, Frozen
- Carrots, Sliced, Low-sodium, Canned
- Corn, Whole Kernel, No Salt Added, Canned
- Corn, Cream, Low sodium, Canned
- Mixed Vegetables, 7-Way Blend, Low-sodium, Canned
- Peas, Green, Low-sodium, Canned
- Peas, Green, No Salt Added, Frozen
- Potatoes, Dehydrated Flakes
- Potatoes, Round, Fresh
- Potatoes, Russet, Fresh
- Potatoes, Sliced, Low-sodium, Canned
- Pumpkin, No Salt Added, Canned
- Spaghetti Sauce, Low-sodium, Canned
- Spinach, Low-sodium, Canned
- Sweet Potatoes, Fresh
- Tomato Juice, 100%, Low-sodium
- Tomato Sauce, Low-sodium, Canned
- Tomato Sauce, Low-sodium, Canned (K) (H)
- Tomato Soup, Condensed, Low-sodium, Canned
- Tomatoes, Diced, No Salt Added, Canned
- Vegetable Soup, Condensed, Low-Sodium, Canned

Legumes:

- Beans, Black, Low-sodium, Canned
- Beans, Black-eyed Pea, Low-sodium, Canned
- Beans, Black-eyed Pea, Dry
- Beans, Garbanzo, Canned
- Beans, Great Northern, Dry
- Beans, Kidney, Light Red, Low-sodium, Canned
- Beans, Kidney, Light Red, Dry
- Beans, Lima, Baby, Dry
- Beans, Pinto, Low-sodium, Canned
- Beans, Pinto, Dry
- Beans, Refried, Low-sodium, Canned
- Beans, Vegetarian, Low-sodium, Canned
- Lentils, Dry
- Peas, Green Split, Dry

Protein Foods:

FY 2021 USDA FOODS AVAILABLE LIST FOR THE EMERGENCY FOOD ASSISTANCE PROGRAM (TEFAP)—Continued

Alaska Pollock Fish, Whole Grain, Breaded Sticks, Frozen
Alaska Pollock Fish, Fillets, Frozen
Beef, Canned/Pouch
Beef, Fine Ground, 85% Lean/15% Fat, Frozen
Beef, Fine Ground, 85% Lean/15% Fat, Frozen, LFTB OPT, Frozen
Beef Stew, Canned/Pouch
Catfish, Fillets, Frozen
Chicken, Pouch
Chicken, Split Breast, Frozen
Chicken, Whole, Frozen
Eggs, Fresh
Egg Mix, Dried
Peanut Butter, Smooth
Peanut Butter, Smooth (K)
Peanut Butter, Smooth, Individual Portion
Peanuts, Roasted, Unsalted
Pork, Canned/Pouch
Pork, Ham, Frozen
Pork, Chops, Boneless, Frozen
Salmon, Pink, Canned
Salmon, Pink, Canned (K)
Tuna, Chunk Light, Canned (K)
Oils:
Oil, Vegetable
Grains:
Bakery Mix, Lowfat
Cereal, Corn Flakes
Cereal, Corn/Rice Biscuits
Cereal, Corn Squares
Cereal, Oat Circles (WG)
Cereal, Rice Crisp
Cereal, Wheat Bran Flakes (WG)
Cereal, Wheat Farina, Enriched
Cereal, Wheat, Shredded (WG)
Crackers, Unsalted
Flour, All Purpose, Enriched, Bleached
Flour, White Whole Wheat (WG)
Grits, Corn, White
Grits, Corn, Yellow
Oats, Rolled, Quick Cooking (WG)
Pasta, Egg Noodles
Pasta, Macaroni, Enriched
Pasta, Macaroni (WG)
Pasta, Macaroni and Cheese
Pasta, Rotini (WG)
Pasta, Spaghetti, Enriched
Pasta, Spaghetti (WG)
Rice, Brown, Long-Grain, Parboiled (WG)
Rice, Medium Grain
Rice, Long Grain
Tortillas, Frozen (WG)
Other:
Soup, Cream of Chicken, Reduced Sodium
Soup, Cream of Mushroom, Condensed, Reduced Sodium

Key:
H—Halal Certification Required
K—Kosher Certification Required
IQF—Individually Quick Frozen
UHT—Ultra-High Temperature Pasteurization
LFTB OTP—Lean Finely Textured Beef Optional
WG—Whole Grain

Pamilyn Miller,

Administrator, Food and Nutrition Service, USDA.

[FR Doc. 2021–00930 Filed 1–14–21; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Pacific Northwest Region; Oregon; Land Management Plan Amendment; Forest Management Direction for Large Diameter Trees in Eastern Oregon

AGENCY: Forest Service, USDA.

ACTION: Notice of approval for land management plan amendment.

SUMMARY: James Hubbard, Under Secretary for Natural Resources and Environment, United States Department of Agriculture, has signed the final Decision Notice (DN) for Forest Management Direction for Large Diameter Trees in Eastern Oregon. The

DN amends the land management plans for the Deschutes, Fremont-Winema, Malheur, Ochoco, Umatilla, and Wallowa-Whitman National Forests in Oregon and southeast Washington. The DN documents the rationale for approving the amendment.

DATES: The Forest Management Direction for Large Diameter Trees in Eastern Oregon is effective immediately (36 CFR 219.17(a)(2)). To view the final DN, Finding of No Significant Impact (FONSI), environmental assessment (EA), and other related documents, please visit the Forest Service, Region 6 website at: *https://www.fs.usda.gov/detail/r6/landmanagement/planning/?cid=fseprd710229.*

ADDRESSES: The legal notice of approval is being published in the Baker City Herald, Bend Bulletin, Blue Mountain Eagle, East Oregonian, and the Herald and News, which are the newspapers of record for the affected national forests. A copy of the legal notices will be posted on the web page listed above.

FOR FURTHER INFORMATION CONTACT: Emily Platt, Team Leader, at *SM.FS.EScreens21@usda.gov* or at 541–416–6500. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On August 11, 2020 the USDA Forest Service Pacific Northwest Region released a proposal for a 30-day public comment period to amend land management plans on six national forests in eastern Oregon and southeastern Washington. The comment period was extended for an additional 30 days. The agency received approximately 330 unique comments as well as approximately 2,500 form letters. The forest supervisors and the interdisciplinary team considered all comments and supplemented the analysis by analyzing an additional alternative, providing additional details about cumulative effects, summarizing disturbance information in one place within the analysis, and refining the adaptive management framework.

The amendment replaces the 21-inch standard with a guideline that emphasizes recruitment of a combination of old trees and large trees. Analysis of the proposed action resulted in a finding of no significant impact on the quality of the human environment.

Responsible Official: James Hubbard, Under Secretary for Natural Resources and Enviroment, USDA. There is no opportunity to object to the Under Secretary's decision.

A decision signed by the Under Secretary for Natural Resources and Environment constitutes the final administrative determination by the U.S. Department of Agriculture (36 CFR 219.51(b)).

James E. Hubbard,

Under Secretary, Natural Resources and Environment, U.S. Department of Agriculture.

[FR Doc. 2021–00891 Filed 1–14–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket No. RBS–20–BUSINESS–0037]

Inviting Applications for the Rural Energy for America Program; Correction

AGENCY: Rural Business-Cooperative Service, USDA (Rural Development).

ACTION: Notice of solicitation of applications; correction.

SUMMARY: The Rural-Business Cooperative Service (the Agency) published a notice of solicitation of applications in the **Federal Register** of November 25, 2020 entitled ''Inviting Applications for the Rural Energy for America,'' to allow potential applicants time to submit applications for financial assistance under the Rural Energy for America Program (REAP) and allow the Agency time to process applications within the current FY 2021. The document contained an incorrect threshold for awarding points under the ''size of request'' scoring criteria as well as an incorrect number of points available for previous grantees and borrowers who have not received and accepted a grant award or guaranteed loan commitment within the 2 previous federal years.

FOR FURTHER INFORMATION CONTACT: Please contact the applicable USDA Rural Development Energy Coordinator in your respective state, as identified via the following link: *https://www.rd.usda.gov/files/RBS_StateEnergyCoordinators.pdf.*

For information about this Notice, please contact Deb Yocum, Business Loan and Grant Analyst, USDA Rural Development, Program Management Division. Telephone: (402) 499–1198. Email: *debra.yocum@usda.gov.*

SUPPLEMENTARY INFORMATION:

Corrections

(1) In the **Federal Register** of November 25, 2020 in FR Doc. 2020–26086, on page 75292, in the first column, under (d) *Scoring Criteria Previous grantees and borrowers,* correct (ii) to read: If the applicant has not received and accepted a grant award or guaranteed loan commitment under this subpart, or a guaranteed loan commitment under 7 CFR part 5001 of this title within the 2 previous Federal fiscal years, 5 points will be awarded.

(2) In the **Federal Register** of November 25, 2020 in FR Doc. 2020–26086, on page 75292, in the third column, under (g) *Scoring Criteria Size of request,* correct (g) to read: For grant applications requesting $250,000 or less for RES, or $125,000 or less for EEI, an additional 10 points may be awarded such that a maximum score of 100 points is possible. All other applications will have a maximum possible score of 90 points.

Mark Brodziski,

Acting Administrator, Rural Business-Cooperative Service.

[FR Doc. 2021–00134 Filed 1–14–21; 8:45 am]

BILLING CODE 3410–XY–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Arkansas Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Arkansas Advisory Committee (Committee) will hold a virtual (online) meeting Wednesday, February 3, 2021 at 3:00 p.m. Central Time. The purpose of the meeting is for the Committee to discuss civil rights concerns in the state.

DATES: The meeting will be held on Wednesday February 3, 2021 at 3pm Central time.

Web Access (audio/visual): Register at: *https://bit.ly/2MWyF3Z.*

Phone Access (audio only): 800–360–9505, Access Code 199 056 3232.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, Designated Federal Officer, at *mwojnaroski@usccr.gov* or (202) 618–4158.

SUPPLEMENTARY INFORMATION: Members of the public may join online or listen to this discussion through the above call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The

Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Arkansas Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda:

I. Welcome & Roll Call
III. Committee Discussion: Civil Rights Topics in Arkansas
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: January 11, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–00804 Filed 1–14–21; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Small Business Pulse Survey

The Department of Commerce will submit the following non-substantive change request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden.

Agency: U.S. Census Bureau.

Title: Small Business Pulse Survey.

OMB Control Number: 0607–1014.

Form Number(s): None.

Type of Request: Regular Submission, Non-substantive change of a Currently Approved Collection.

Number of Respondents: 738,000 (We anticipate receiving 20,500 responses per week for up to 36 weeks of collection each year).

Average Hours per Response: 6 minutes.

Burden Hours: 73,920 (73,800 + 120 hours for cognitive testing).

Needs and Uses: During the month of November 2020, the Office of Management and Budget authorized clearance of an Information Collection Request (ICR) to the U.S. Department of Commerce, U.S. Census Bureau to conduct a Phase 3 of the Small Business Pulse Survey. The clearance enabled the Census Bureau to continue collecting urgently needed data on the experiences of American small businesses as the coronavirus pandemic prompted business and school closures and widespread stay-at-home orders. This Census Bureau now seeks approval of a non-substantive change request to conduct Phase 3, Cycle 2 of the Small Business Pulse Survey which will occur over 9 weeks stating February 8, 2021.

The continuation of the Small Business Pulse Survey is responsive to stakeholder requests for high frequency data that measure the effect of changing business conditions during the Coronavirus pandemic on small businesses. While the ongoing monthly and quarterly economic indicator programs provide estimates of dollar volume outputs for employer businesses of all size, the Small Business Pulse Survey captures the effects of the pandemic on operations and finances of small, single location employer businesses. As the pandemic continues, the Census Bureau is best poised to collect this information from a large and diverse sample of small businesses.

It is hard to predict when a shock will result in economic activity changing at a weekly, bi-weekly, or monthly frequency. Early in the pandemic, federal, state, and local policies were moving quickly so it made sense to have a weekly collection. The problem is that while we are in the moment, we cannot accurately forecast the likelihood of policy action. In addition, we are not able to forecast a change in the underlying cause of policy actions: the effect of the Coronavirus pandemic on the economy. We cannot predict changes in the severity of the pandemic (*e.g.,* will it worsen in flu season?) nor future developments that will alleviate the pandemic (*e.g.,* vaccines or treatments). In a period of such high uncertainty, the impossibility of forecasting these inflection points underscores the benefits of having a weekly survey. For these reasons, the Census Bureau will proceed with a weekly collection.

For the purposes of referencing prior ICRs, we refer to the initial approval by OMB to conduct the Small Business Pulse Survey as ''Phase 1'' (April–June 2020), the approval as ''Phase 2'' (August—October 2020), and the third approval as ''Phase 3'', which started in November 2020.

Phase 1 of the Small Business Pulse Survey was launched on April 26, 2020 as an effort to produce and disseminate high-frequency, geographic- and industry-detailed experimental data about the economic conditions of small businesses as they experience the coronavirus pandemic. It is a rapid response endeavor that leverages the resources of the federal statistical system to address emergent data needs. Given the rapidly changing dynamics of this situation for American small businesses, the Small Business Pulse Survey has been successful in meeting an acute need for information on changes in revenues, business closings, employment and hours worked, disruptions to supply chains, and expectations for future operations. In addition, the Small Business Pulse Survey provided important estimates of federal program uptake to key survey stakeholders.

In Phase 1, the Census Bureau worked in collaboration with the Bureau of Economic Analysis, Bureau of Labor Statistics, Federal Reserve Board, International Trade Administration, Minority Business Development Agency, and the Small Business Administration to develop questionnaire content. Subsequently, the Census Bureau was approached by Bureau of Transportation Statistics, National Telecommunications and Information Administration, and the Office of Tax Analysis with requests to include additional content to the Small Business Pulse Survey for Phase 2. Understanding that information needs are changing as the pandemic continues, the Census Bureau proposed a revised questionnaire to ensure that the data collected continue to be relevant and broadly useful. Also, in Phase 2, the Census Bureau refined its strategies for contacting businesses in a clear and effective manner while motivating their continued participation.

Anticipating that businesses will continue to be affected by the pandemic, and as new developments are expected this year (including the continuation of

government assistance programs that target small businesses; policy shifts including the loosening or tightening of restrictions on businesses or customers; changing weather or seasons on businesses that rely on serving customers outdoors; and new research, vaccines, and/or medications or treatments for the coronavirus), the Census Bureau moved forward with a Phase 3 cycle 1 and proposes moving forward with Phase 3 cycle 2 as described in this ICR. The questionnaire used in Phase 2 and Phase 3 cycle 1 will continue to be used in this Phase 3 cycle 2. Acknowledging that circumstances may evolve, and information needs on specific topics may intensify, change, or diminish over time, the Census Bureau may propose revisions to the questionnaire via the Non-Substantive Change process. These plans also will be made available for public comment through notice in the **Federal Register**.

In Phase 3 cycle 1 of the Small Business Pulse Survey, we continued collaborating with other federal agencies to produce near real-time experimental data to understand how changes due to the response to the COVID–19 pandemic are affecting American small businesses and the U.S. economy.

The Phase 3 cycle 1 survey carried forward questionnaire content from Phase 2. Content had been provided by the Census Bureau, Small Business Administration, Federal Reserve Board, Minority Business Development Agency, Office of Tax Analysis, Bureau of Transportation Statistics, National Telecommunications and Information Administration, and International Trade Administration. Domains include business closings, changes in employment and hours, disruptions to supply chain, changes in capacity, finances, and expectations for future operations.

The Phase 3 cycle 2 survey will modify the questionnaire content to capture information on concepts such as business closings, changes in revenue, changes in employment and hours, disruptions to supply chain, operating capacity factors, and expectations for future operations. These economic data will be used to understand how changes due to the response to the COVID–19 pandemic have and continue to affect American businesses and the U.S. economy.

The historical circumstances of the pandemic and uncertainty about how it may or may not continue to affect businesses over the period of Phase 3 drives the need for flexibility in Phase 3 of the SBPS.

If required, the Census Bureau would seek approval from OMB through the Non-Substantive Change Request Process to revise, remove or add questionnaire content during this phase to remain relevant in guiding the nation's response and recovery.

All results from the Small Business Pulse Survey will continue to be disseminated as U.S. Census Bureau Experimental Data Products (*https://portal.census.gov/pulse/data/*). This and additional information on the Small Business Pulse Survey are available to the public on census.gov.

Affected Public: Business or other for-profit organizations.

Frequency: Small business will be selected once to participate in a 6-minute survey.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Sections 131 and 182.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0607–1014.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00851 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Quarterly Summary of State & Local Government Tax Revenues

AGENCY: Census Bureau, Commerce.

ACTION: Notice of Information Collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed revisions of the Quarterly Summary of State & Local Government Tax Revenues, prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments by email to *Thomas.J.Smith@census.gov.* Please reference Quarterly Summary of State & Local Government Tax Revenues in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2020–0035, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Kristina Pasquino-Frates, Chief, State Finance and Tax Statistics Branch, Economy-Wide Statistics Division, U.S. Census Bureau, Headquarters, 5K071, Washington, DC 20233; email: *Kristina.marie.pasquino.frates@census.gov,* by phone: 301–763–5034.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the Quarterly Summary of State and Local Government Tax Revenue, using the F–71 (Quarterly Survey of Property Tax Collections), F–72 (Quarterly Survey of State Tax Collections), and F–73 (Quarterly Survey of Non-Property Taxes) forms. The Quarterly Summary of State and Local Government Tax Revenue provides quarterly estimates of state and local government tax revenue at the national level, as well as detailed tax revenue data for individual states. The information contained in this survey is the most current information

available on a nationwide basis for state and local government tax collections.

The Census Bureau needs state and local tax data to publish benchmark statistics on taxes, to provide data to the Bureau of Economic Analysis for Gross Domestic Product (GDP) calculations and other economic indicators, and to provide data for economic research and comparative studies of governmental finances. Tax collection data are used to measure economic activity for the Nation as a whole, as well as for comparison among the various states. Economists and public policy analysts use the data to assess general economic conditions and state and local government financial activities.

The Census Bureau plans to revise the F–72 (Quarterly Survey of State Tax Collections). We plan to add the collection of cannabis and sports betting sales taxes. Sports betting will include pari-mutuels, which were previously shown separately. This will modernize the survey's content to maintain the relevancy and sustainability of these data. License taxes will no longer be collected on a quarterly basis; they will continue to be provided on an annual basis through the related Annual Survey of State Tax Collections, reducing duplication of effort. Additionally, cognitive testing showed the addition and removal of questions did not impact overall response time.

II. Method of Collection

For the Quarterly Survey of Property Tax Collections (Form F–71) the Census Bureau will mail letters quarterly to a sample of approximately 5,500 local tax collection agencies, known to have substantial collections of property tax, requesting their online data submissions.

For the Quarterly Survey of State Tax Collections (Form F–72) the Census Bureau will email letters to each of the 50 state governments and the District of Columbia quarterly requesting their online data submissions or continued coordinated submission through the state government revenue office.

For the Quarterly Survey of Non-Property Taxes (Form F–73) the Census Bureau will mail letters quarterly to a sample of approximately 1,800 local tax collection agencies, known to have substantial collections of local general sales and/or local individual/corporation net income taxes, requesting their online data submissions.

F–71 and F–73 survey data will be collected via the internet. Data for the F–72 survey are collected via email or compilation of data in coordination with the state government revenue office.

In addition to reporting current quarter data, respondents may report data for the previous eight quarters or submit revisions to their previously submitted data. In the event that a respondent cannot report online, they may request a form.

In those instances when the Census Bureau are not able to obtain a response, follow-up operations will be conducted using email and phone calls. Nonresponse weighting adjustments are used to adjust for any unreported units in the sample. These adjustments are based on the latest available data.

III. Data

OMB Control Number: 0607–0112.

Form Number(s): F–71, F–72, F–73.

Type of Review: Regular submission, Request for a Revision of a Currently Approved Collection.

Affected Public: State and Local Governments and the Government of the District of Columbia.

Estimated Number of Respondents: 7,351.

Estimated Time per Response: F–71 = 15 minutes, F–72 = 30 minutes, F–73 = 20 minutes.

Estimated Total Annual Burden Hours: 8002 hours.

Estimated Total Annual Cost to Public: $0 (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Sections 161 and 182.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00872 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Miscellaneous Short Supply Activities

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 16, 2021.

ADDRESSES: Interested persons are invited to submit comments by email to Mark Crace, IC Liaison, Bureau of Industry and Security, at *mark.crace@bis.doc.gov* or to *PRAcomments@doc.gov*). Please reference OMB Control Number 0694–0102 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Mark

Crace, IC Liaison, Bureau of Industry and Security, phone 202–482–8093 or by email at *mark.crace@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection comprises two rarely used short supply activities: ''Registration of U.S. Agricultural Commodities for Exemption from Short Supply Limitations on Export (USAG)'', and ''Petitions for the Imposition of Monitoring or Controls on Recyclable Metallic Materials; Public Hearings (Petitions).'' Under provisions of sections 754.6 and 754.7 of the Export Administration Regulations (EAR), agricultural commodities of U.S. origin purchased by or for use in a foreign country and stored in the United States for export at a later date may voluntarily be registered with the Bureau of Industry and Security for exemption from any quantitative limitations on export that may subsequently be imposed under the EAR for reasons of short supply.

II. Method of Collection

Any entity, including a trade association, firm or certified or recognized union or group of workers, which is representative of an industry or a substantial segment of an industry which processes metallic materials capable of being recycled with respect to which an increase in domestic prices or a domestic shortage, either of which results from increased exports, has or may have a significant adverse effect on the national economy or any sector thereof, may submit a written petition to BIS requesting the monitoring of exports, or the imposition of export controls, or both, with respect to such materials.

III. Data

OMB Control Number: 0694–0102.

Form Number(s): None.

Type of Review: Extension of a current information collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2.

Estimated Time per Response: 100.5 hours.

Estimated Total Annual Burden Hours: 201.

Estimated Total Annual Cost to Public: 0.

Respondent's Obligation: Voluntary.

Legal Authority: 754.6 and 754.7 of the Export Administration Regulations (EAR).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00931 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Discontinuation of Policy To Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Administrative Proceedings

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Notice; discontinuance.

SUMMARY: The U.S. Department of Commerce (Commerce) is announcing that, effective immediately upon publication of this notice, it is discontinuing its policy to issue liquidation instructions in certain segments of antidumping duty (AD) and countervailing duty (CVD) administrative proceedings to U.S. Customs and Border Protection (CBP) 15 days after publication or mailing, whichever applies, of final administrative determinations where no statutory injunction was requested, which was announced on its website August 14, 2002, revised in November 2006, and again modified by an announcement on its website November 9, 2010. Such timeframes for AD/CVD administrative proceedings involving subject merchandise from Canada and Mexico were not affected by the 15-day policy.

DATES: Applicable January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Wendy Frankel, Director, Customs Liaison Unit, Enforcement & Compliance, Department of Commerce, (202) 482–5849, or Elisabeth Urfer, Associate Director, Customs Liaison Unit, Enforcement & Compliance, Department of Commerce (202) 482–0414.

SUPPLEMENTARY INFORMATION: In 2002, Commerce instituted its 15-day policy in response to *International Trading Co.* v. *United States,* 281 F.3d 1268 (Fed. Cir. 2002), in which the six-month deemed liquidation deadline in 19 U.S.C. 1504(d) was made applicable to administrative reviews of AD/CVD orders. The policy, as modified, has required parties to seek consent from the government for statutory injunctions under section 516A(c)(2) of the Tariff Act of 1930, as amended (the Act), no later than 15 days after publication or mailing of applicable final administrative determinations by Commerce, or Commerce will issue liquidation instructions to CBP. The policy has provided CBP with over five months to ensure liquidation at the assessed rate, lessening the risk that entries will be deemed liquidated. Since 2002, parties challenging Commerce's final determinations in AD/CVD administrative proceedings conducted under applicable provisions of Title VII of the Act at the U.S. Court of International Trade who missed the 15-day deadline have run the risk that some or all of their entries would liquidate before receiving any court-ordered statutory injunction.

Notwithstanding any language in preliminary determinations in applicable AD/CVD administrative proceedings indicating Commerce's intent to apply the 15-day policy in corresponding final determinations that have not yet been issued, Commerce is discontinuing this policy immediately upon publication of this notice to effectively administer and enforce the AD/CVD laws. Because the 15-day policy has not applied to AD/CVD administrative proceedings involving subject merchandise from Canada and Mexico, this notice has no effect on AD/

CVD proceedings involving subject merchandise from those countries.

Dated: January 11, 2021.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–00884 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XY117]

Fisheries of the Exclusive Economic Zone off Alaska; Application for an Exempted Fishing Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application for exempted fishing permit.

SUMMARY: This notice announces NMFS' receipt of an application and the public comment period for an exempted fishing permit (EFP) from the Alaska Seafood Cooperative. If issued, this permit would allow the applicant to test methods to minimize bycatch of halibut using an excluder device in the North Pacific's Amendment 80 flatfish fishery. The objective of this EFP, if issued, would be to develop a halibut excluder design that avoids high target species losses with more significant reductions in halibut bycatch. Field testing would be conducted between August 2021 and December 2022. This experiment would have the potential to promote the objectives of the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments on this EFP application must be submitted to NMFS on or before February 12, 2021. The North Pacific Fishery Management Council (Council) will consider the application at its meeting from February 1, 2021 through February 12, 2021.

ADDRESSES: The Council meeting will be held virtually. The agenda for the Council meeting is available at *http://www.npfmc.org.* In addition to submitting public comments during the Council meeting through the Council website, you may submit your comments, identified by NOAA–NMFS–2020–0156, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0156,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Records Office. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address) submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the EFP application and the basis for a categorical exclusion under the National Environmental Policy Act may be obtained from *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Megan Mackey, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the domestic groundfish fisheries in the Bering Sea and Aleutian Islands (BSAI) management area under the Fishery Management Plan for Groundfish of the BSAI Management Area (FMP), which the Council prepared under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing the BSAI groundfish fisheries appear at 50 CFR parts 600 and 679. The FMP and the implementing regulations at §§ 600.745(b) and 679.6 allow the NMFS Regional Administrator to authorize, for limited testing and experimental purposes, fishing or target or incidental harvest of species managed under an FMP that would otherwise be prohibited. Procedures for issuing EFPs are contained in the implementing regulations.

Background and Need for Exempted Fishing Permit

Flatfish fishing is a significant component of the Bering Sea groundfish fishery, annually producing approximately 200,000 metric tons of sole, founders, and plaice. Amendment 80, implemented in 2008, allocates BSAI yellowfin sole, flathead sole, rock sole, Atka mackerel, and Aleutian Islands Pacific ocean perch to trawl catcher processor sector, and allows qualified vessels to form cooperatives. Prior to 2008, halibut prohibited species catch bycatch tended to constrain harvest of much of the total allowable flatfish catches. Bycatch or incidental catch include fish species that are not targeted but are caught and discarded. Certain species taken incidentally in Alaska's groundfish fisheries are called Prohibited Species Catch (PSC). Since 2008, the Amendment 80 sector has been able to make significant improvements to reduce halibut and other bycatch and has increased target fish yields. This has been achieved because the new management program allows fishermen to fish when and where it makes most sense and to make better use of bycatch reduction tools like sharing information to avoid bycatch ''hot spots,'' bycatch avoidance agreements, and gear modifications.

In 2015, following the sector's success under Amendment 80 and in response to a decline in halibut biomass in the Bering Sea, the Council approved a 25 percent reduction in the sector's halibut bycatch mortality cap, which is the total amount of permitted halibut bycatch. To help prevent a return to leaving a large fraction of flatfish un-harvested, the Council approved and NMFS implemented halibut deck sorting on November 14, 2019 (84 FR 55044; October 15, 2019). Through this new program, savings in halibut mortality from deck sorting have been significant. However, over the last two fishing years (possibly due to warming sea temperatures and lack of the cold pool thermal front that tended to spatially separate flatfish from halibut), encounter rates for halibut by the Amendment 80 fleet have increased. The sector is concerned that its ability to continue to fish for flatfish and other groundfish could be impacted by increasing rates of halibut bycatch.

Over the last two decades, Bering Sea flatfish trawlers have been developing and using halibut excluders, which are modifications to the intermediate section of the trawl intended to allow halibut to escape while retaining sufficient levels of target species for operational efficiency. The design of these excluders has been refined over time, but now that halibut bycatch rates have increased in recent years, the sector is interested in further refinement and testing of excluder design.

An initial analysis by the EFP applicant of current halibut excluder designs indicates current excluders are resulting in high loss rates of target fish and less reduction in halibut bycatch than what might be achieved through an improved design. This includes results from a 2006 EFP that was issued to

evaluate the effectiveness of a halibut excluder in the Gulf of Alaska trawl cod fishery, which noted higher than desirable escapement rates of the target species. Therefore, an excluder design that avoids high target species losses with more significant reduction in halibut bycatch would be an improvement and could foster wider adoption of these devices among the fleet. This EFP proposes a collaborative study with the Alaska Seafood Cooperative and Amendment 80 fishermen of halibut excluders in the Bering Sea flatfish trawl fishery to conduct field testing to explore improved designs.

Exempted Fishing Permit

On June 2, 2020, Mr. John Gauvin of the Alaska Seafood Cooperative submitted an application for an EFP to develop and test a halibut excluder in the Amendment 80 flatfish fishery. The objectives of this proposed EFP are as follows:

- Collect escapement rate data on a halibut excluder design.
- Employ appropriate data collections methods to statistically estimate excluder performance.
- Conduct excluder testing in two different target flatfish fisheries (yellowfin sole and flathead/mid-shelf flatfish) to get a broader range of results versus testing in just one fishery.
- Collect caudal fin clips from a sample of halibut encountered during field testing for a pilot study of sex ratios of bycaught halibut.
- Draft EFP reports to effectively communicate key results for excluder testing and pilot study of sex ratios.
- Conduct outreach meetings of key results on halibut excluder performance tailored to the information needs of flatfish fishermen and gear manufacturers interested in the improvement of halibut excluders.

Field testing would be conducted on the 261-foot (79.5 meter) factory trawler, The North Star, using twin trawl nets in the yellowfin sole and flathead sole fisheries. This would involve one trip with 60 to 70 total tows, occurring sometime between August 2021 and December 2022. To address potential differences in catch rates, the excluder device would be switched from one side to the other at the half way point for each part of the EFP testing (*i.e.,* halfway through the tows in the yellowfin target; same for the tows in the flathead target). This would allow a separate analysis of excluder performance in each net, which would help to identify differences in catch rates for halibut and target species between sides.

To understand the effects of the excluder, halibut catch and groundfish total catch data would be collected from each side of the twin trawl separately. Catch would be brought on board from the two nets separately and in conjunction with usual observer deck sorting, after which the contents of each net would be placed into separate tanks. Crew members would collect all halibut that make it to the factory (*i.e.,* are not sorted on deck) for purposes of measuring each of these fish and recording the length data before discarding them using the same conveyor belt pathway that is normally used.

The project manager for the field testing trip would collect up to 100 caudal fins from a random sample of halibut from both the deck and the factory, storing them for later testing to determine sex ratios. This should not disturb the normal workflow of observer desk sorting and data collection. Testing would be done in conjunction with researchers from the International Pacific Halibut Commission (IPHC). This will help to provide data on the sex ratio of halibut taken as bycatch, which is a data gap identified by the IPHC.

Exemptions

Two exemptions are necessary to conduct this experiment. First, an exemption would be necessary from the requirement to minimize catch of prohibited species at § 679.21(a)(2)(i) in the event higher than average catch of halibut is encountered during field testing.

Second would be an exemption from § 679.21(a)(2)(ii) regarding careful handling and immediate release of prohibited species catch. This will allow the collection of caudal fin clips from a sample of the halibut encountered. This will also allow crew members to collect and measure the halibut that make it to the factory, recording length data before releasing the fish via the standard conveyor belt pathway.

Permit Conditions, Review, and Effects

The applicant would be required to submit to NMFS a report of the EFP results six months after completion of field testing. The report would include the halibut excluder device designs tested in the experiment; how the tests were conducted, including operational variables tested (such as towing speeds, water conditions, target catch rates); performance of the device in terms of halibut bycatch reduction, target catch escapement, handling, and maintenance; and the total catch of each groundfish species and Pacific halibut in metric tons during EFP fishing. The activities that would be conducted under this EFP are not expected to have a significant impact on the human environment, as detailed in the categorical exclusion prepared for this action (see **ADDRESSES**).

In accordance with §§ 679.6 and 600.745, NMFS has determined that the application warrants further consideration and has forwarded the application to the Council to initiate consultation. The Council is scheduled to consider the EFP application during its February 2021 meeting, which will be held virtually. The EFP application will also be provided to the Council's Scientific and Statistical Committee for review at the February Council meeting. The applicant has been invited to speak in support of the application.

Public Comments

Interested persons may comment on the application during the February 2021 Council meeting during public testimony or the Federal e-Rulemaking Portal (see **ADDRESSES**) until February 12, 2021 when the comment period ends. Information regarding the meeting is available at the Council's website at *http://www.npfmc.org.* Copies of the application and categorical exclusion are available for review from NMFS (see **ADDRESSES**). Comments may also be submitted directly to NMFS (see **ADDRESSES**) by the end of the comment period (see **DATES**).

Authority: (16 U.S.C. 1801 *et seq.*)

Dated: January 12, 2021.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–00911 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA801]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of SEDAR 73 Assessment Webinar III for South Atlantic Red Snapper.

SUMMARY: The SEDAR 73 assessment of the South Atlantic stock of red snapper will consist of a data scoping webinar,

a workshop, and a series of assessment webinars. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 73 Assessment Webinar III will be held via webinar February 17, 2021, from 9 a.m. until 12 p.m. EST. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice. Additional SEDAR 73 workshops and webinar dates and times will publish in a subsequent issue in the **Federal Register**.

ADDRESSES: The SEDAR 73 Assessment Webinar III will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/6502218609208356366.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4373; email: *Kathleen.howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the Assessment Webinar III:

- Finalize any data decisions remaining
- Finalize modelling issues and decisions

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

(Authority: 16 U.S.C. 1801 *et seq.*)

Dated: January 12, 2021.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–00914 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Tornado Watch/Warning Post-Event Evaluation

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Information Collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Dr. Kim Klockow-McClain, Research Scientist, OU CIMMS/NOAA NSSL, 120 David L. Boren Blvd., Norman, OK 73071, 405–325–0805, *kim.klockow@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Each year over 1000 tornadoes affect communities across the United States, yet very little is known about how individuals receive, interpret, and respond to information from NOAA relating to this hazard. In fact, only a small sample of tornadoes ever receive study, and most often those are only the largest tornadoes. No generalizable information on tornado warning response after real-world events exists. The National Weather Service and National Severe Storms Laboratory have designed this data collection instrument to allow for more routine collection of this information. Respondents will include members of the US public who have recently (within the previous 30 days) been in or near a tornado, and they will be asked questions about the ways they received, understood, and responded to NWS watch/warning information.

The information would be collected by NWS forecasters using their Damage Assessment Tool (DAT), and also by members of the public who voluntarily access a web tool developed by the National Severe Storms Laboratory. The questions will also be included in a

standardized post-event survey tool that will be offered to recipients of Natural Hazards Center Quick Response Grants. The information will be used as part of a pilot study to explore methods for more systematically collecting post-event data in support of program evaluation for NOAA's tornado watch/warning system.

II. Method of Collection

A primary method of data collection intends to gather tornado survivor stories through a web-based interface. Currently a web-based App is under development at NSSL. The aim is for this to be similar to the United States Geological Survey (USGS) 'Did You Feel It' (DYFI) pages used for reporting earthquakes and feeding in to a realistic Modified Mercalli Intensity (MMI) scale report. Specific questions in the web-based App are aimed at discovering whether tornado watches and warnings were received, and if they were, how they were received as well as what action citizens did or did not take. This will help to define value action gaps more completely. Additionally the web-based App allows citizens to be involved as part of the overall scientific endeavor, helping scientists and researchers understand what helps increase survivability to tornadoes as well as what undermines it.

III. Data

OMB Control Number: 0648–XXXX.
Form Number(s): [None].
Type of Review: New information collection.
Affected Public: Individuals or households.
Estimated Number of Respondents: 1000.
Estimated Time per Response: 5 minutes.
Estimated Total Annual Burden Hours: 83 hours.
Estimated Total Annual Cost to Public: None.
Respondent's Obligation: Voluntary.
Legal Authority:

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00879 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–KE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA808]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) will hold public meetings of the Council.

DATES: The meetings will be held Wednesday, February 10, 2021, from 9 a.m. to 4:30 p.m., and Thursday, February 11, 2021, from 9 a.m. to 1 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: This meeting will be conducted entirely by webinar. Webinar registration details will be available on the Council's website at *https://www.mafmc.org/briefing/february-2021.*

Council address: Mid-Atlantic Fishery Management Council, 800 N. State St, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255. The Council's website, *www.mafmc.org* also has details on the meeting location, proposed agenda, webinar listen-in access, and briefing materials.

SUPPLEMENTARY INFORMATION: The following items are on the agenda, though agenda items may be addressed out of order (changes will be noted on the Council's website when possible.)

Wednesday, February 10, 2021

North Atlantic Right Whale Issues

NMFS presentation on Atlantic Large Whale Take Reduction Plan Draft Environmental Impact Statement and proposed rule and Draft Batched Biological Opinion.

Aquaculture Updates

NMFS presentations on Aquaculture Opportunity Areas and EEZ Regional Aquaculture Projects.

Staff River Herring and Shad White Papers

Review staff white papers on river herring and shad issues.

Bluefish Allocation and Rebuilding Amendment

Review and approve joint Public Hearing Document for the Bluefish Allocation and Rebuilding Amendment and (Board only) approve draft Commission amendment document for public comment.

Thursday, February 11, 2021

Offshore Wind Update

Receive staff update on relevant offshore wind activities.

Business Session

Committee Reports; Executive Director's Report (review and approve SOPP updates); Organization Reports; and Liaison Reports.

Continuing and New Business

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c).

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Dr. Christopher

Moore (see **ADDRESSES**), at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 12, 2021.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–00909 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA709]

Whaling Provisions; Aboriginal Subsistence Whaling Quotas

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; notification of quota for bowhead whales.

SUMMARY: NMFS notifies the public of the aboriginal subsistence whaling quota for bowhead whales that it has assigned to the Alaska Eskimo Whaling Commission (AEWC), and of limitations on the use of the quota deriving from regulations of the International Whaling Commission (IWC). For 2021, the quota is 93 bowhead whales struck. This quota and other applicable limitations govern the harvest of bowhead whales by members of the AEWC.

DATES: Applicable January 15, 2021.

ADDRESSES: Office of International Affairs and Seafood Inspection, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Mi Ae Kim, (301) 427–8365.

SUPPLEMENTARY INFORMATION: Aboriginal subsistence whaling in the United States is governed by the Whaling Convention Act (WCA) (16 U.S.C. 916 *et seq.*). Under the WCA, IWC regulations shall generally become effective with respect to all persons and vessels subject to the jurisdiction of the United States, within 90 days of notification from the IWC Secretariat of an amendment to the IWC Schedule (16 U.S.C. 916k). Regulations that implement the WCA, found at 50 CFR 230.6, require the Secretary of Commerce (Secretary) to publish, at least annually, aboriginal subsistence whaling quotas and any other limitations on aboriginal subsistence whaling deriving from regulations of the IWC.

At the 67th Meeting of the IWC, the Commission set catch limits for aboriginal subsistence use of bowhead whales from the Bering-Chukchi-Beaufort Seas stock. The bowhead and other aboriginal subsistence whaling catch limits were based on a joint request by Denmark on behalf of Greenland, the Russian Federation, St. Vincent and the Grenadines, and the United States, accompanied by documentation concerning the needs of the Native groups.

The IWC set a seven-year block catch limit of 392 bowhead whales landed. For each of the years 2019 through 2025, the number of bowhead whales struck may not exceed 67, with unused strikes from the three prior quota blocks carried forward and added to the annual strike quota of subsequent years, provided that no more than 50 percent of the annual strike limit is added to the strike quota for any one year. At the end of the 2020 harvest, there were 33 unused strikes available for carry-forward, so the combined strike quota set by the IWC for 2021 is 100 (67 + 33).

An arrangement between the United States and the Russian Federation ensures that the total quota of bowhead whales landed and struck in 2021 will not exceed the limits set by the IWC. Under this arrangement, the Russian natives may use no more than seven strikes, and the Alaska natives may use no more than 93 strikes.

Through its cooperative agreement with the AEWC, NOAA has assigned 93 strikes to the Alaska Eskimo Whaling Commission. The AEWC will in turn allocate these strikes among the 11 villages whose cultural and subsistence needs have been documented, and will ensure that its hunters use no more than 93 strikes.

At its 67th Meeting, the IWC also provided for automatic renewal of aboriginal subsistence whaling catch limits under certain circumstances. Commencing in 2026, bowhead whale catch limits shall be extended every six years provided: (a) The IWC Scientific Committee advises in 2024, and every six years thereafter, that such limits will not harm the stock; (b) the Commission does not receive a request from the United States or the Russian Federation for a change in the bowhead whale catch limits based on need; and (c) the Commission determines that the United States and the Russian Federation have complied with the IWC's approved timeline and that the information provided represents a status quo continuation of the hunts.

Other Limitations

The IWC regulations, as well as the NOAA regulation at 50 CFR 230.4(c), forbid the taking of calves or any whale accompanied by a calf.

NOAA regulations (at 50 CFR 230.4) contain a number of other prohibitions relating to aboriginal subsistence whaling, some of which are summarized here:

- Only licensed whaling captains or crew under the control of those captains may engage in whaling.
- Captains and crew must follow the provisions of the relevant cooperative agreement between NOAA and a Native American whaling organization.
- The aboriginal hunters must have adequate crew, supplies, and equipment to engage in an efficient operation.
- Crew may not receive money for participating in the hunt.
- No person may sell or offer for sale whale products from whales taken in the hunt, except for authentic articles of Native American handicrafts.
- Captains may not continue to whale after the relevant quota is taken, after the season has been closed, or if their licenses have been suspended. They may not engage in whaling in a wasteful manner.

Dated: January 12, 2021.

Alexa Cole,

Director, Office of International Affairs and Seafood Inspection, National Marine Fisheries Service.

[FR Doc. 2021–00878 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XY074]

Endangered and Threatened Species; Initiation of a 5-Year Review for the Arctic, Okhotsk, Baltic, and Ladoga Subspecies of the Ringed Seal; Extension of Information Request Period

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice; extension of information request period.

SUMMARY: NMFS hereby extends the information request period on the notice of initiation of a 5-year review of the Arctic (*Pusa hispida hispida*), Okhotsk (*Pusa hispida ochotensis*), Baltic (*Pusa hispida botnica*), and Ladoga (*Pusa hispida ladogensis*) subspecies of the ringed seal under the Endangered Species Act (ESA).

DATES: Information must be received by March 26, 2021.

ADDRESSES: Submit your information, identified by docket number NOAA–NMFS–2020–0014, by either of the following methods:

• *Federal e-Rulemaking Portal:* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0014,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your submission of information.

• *Mail:* Submit written information to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: Records Office. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: NMFS may not consider submissions of information if they are sent by any other method, to any other address or individual, or received after the comment period ends. All submissions of information received are a part of the public record and NMFS will post the submissions for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous submissions of information (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Tammy Olson, NMFS Alaska Region, 907–271–2373, *tammy.olson@noaa.gov.*

SUPPLEMENTARY INFORMATION: On November 27, 2020, we announced the initiation of a 5-year review of four subspecies of the ringed seal under the ESA (85 FR 76017). As a part of that notice, we solicited information relevant to the review and announced a 60-day information request period to end on January 26, 2021. NMFS received two requests to extend the information request period to March 26, 2021, in order to provide additional time to gather relevant information and prepare submissions in a thorough manner. We are therefore extending the close of the information request period to March 26, 2021, as requested, to provide additional time for public input.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: January 12, 2021.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–00844 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA806]

Caribbean Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meetings.

SUMMARY: The Caribbean Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) and the Ecosystem-Based Fishery Management Technical Advisory Panel (EBFM TAP) will hold a two-day public virtual meeting each, to address the items contained in the tentative agenda included in the **SUPPLEMENTARY INFORMATION**. The SSC and TAP will hold a one-day joint public virtual meeting.

DATES: The public virtual meetings will be held as follows:

SSC, February 1–2, 2021, from 10 a.m. to 5 p.m.; SSC and EBFM TAP joint meeting, February 3, 2021, from 10 a.m. to 1:30 p.m.; and EBFM TAP meeting, February 4, 2021, from 10 a.m. to 5 p.m. and February 5, from 9 a.m. to 12 noon. All meetings will be at Atlantic Standard Time.

ADDRESSES: You may join the SSC and TAP public virtual meetings via Zoom, from a computer, tablet or smartphone by entering the following address:

Join Zoom Meeting

https://us02web.zoom.us/j/87172662536?pwd=dlR3VnVCem5uV1JHa2hiSGZjTVMwZz09
Meeting ID: 871 7266 2536
Passcode: 998029
One tap mobile
+17879667727,, 87172662536#,,,,*998029# Puerto Rico
+19399450244,, 87172662536#,,,,*998029# Puerto Rico
Dial by your location
+1 787 966 7727 Puerto Rico
+1 939 945 0244 Puerto Rico
+1 787 945 1488 Puerto Rico
Meeting ID: 871 7266 2536
Passcode: 998029
Find your local number: *https://us02web.zoom.us/u/kv014d48Y*

In case there are problems and we cannot reconnect via Zoom, the meeting will continue using GoToMeeting. You may join from a computer, tablet or smartphone by entering the following address:

Please join the meeting from your computer, tablet or smartphone. *https://global.gotomeeting.com/join/715099885*

Join from a video-conferencing room or system.

Dial in or type: 67.217.95.2 or *inroomlink.goto.com* Meeting ID: 715 099 885 Or dial directly: 715099885@67.217.95.2 or 67.217.95.2##715099885 New to GoToMeeting? Get the app now and be ready when the meeting starts: *https://global.gotomeeting.com/install/715099885.*

FOR FURTHER INFORMATION CONTACT: Dr. Graciela García-Moliner, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 403–8337.

SUPPLEMENTARY INFORMATION: The following items included in the tentative agendas will be discussed:

SSC Meeting

February 1, 2021

10 a.m.–10:15 a.m. AST
—Call to Order
—Roll Call
—Adoption of Agenda
10:15 a.m.–12:30 p.m.
—Overview and Discussion SSC's Ecosystem Conceptual Model (ECM) Work to Date—Richard Appeldoorn (Presented at 172nd CFMC Meeting)
12:30 p.m.–1:30 p.m.
—Lunch
1:30 p.m.–3 p.m.
—Review and Finalize Ecosystem Conceptual Model
3 p.m.–3:15 p.m.
—Break
3:15 p.m.–5 p.m.
—Finalize Ecosystem Conceptual Model
—One ECM or 3 ECMs, one each for Puerto Rico, St. Thomas/St. John and St. Croix?
—ECM integration into EBFM
—SSC Recommendations to the CFMC

February 2, 2021

10 a.m.–12 p.m. AST
—Update Spiny Lobster Acceptable Biological Catch—Adyan Rios, SEFSC
—IBFMP Spiny Lobster Amendment—Sarah Stephenson, SERO Review Components of the Draft Framework Amendment to the Puerto Rico, St. Thomas/St. John, and St. Croix Fishery Management Plans (FMP) to Modify Spiny Lobster Management Reference Points Based on SEDAR 57 Stock Assessments.
12 noon–1 p.m.
—Lunch
1 p.m.–3 p.m.
—SSC Recommendations to CFMC on Spiny Lobster
3 p.m.–3:15 p.m.
—Break
3:15 p.m.–5 p.m.
—Other Business

SSC and EBFM TAP Joint Meeting

February 3, 2021

10 a.m.–12:30 p.m. AST
—Call to Order
—Roll Call
—Presentation: Puerto Rico [long-term] Coral Reef Monitoring Program (PRCRMP) data layer in the MBON Data Portal—Miguel Figuerola Hernández, PRDNER/CARICOOS
12:30 p.m.–1:30 p.m.
—General Discussion by SSC/TAP
—Other Business
—Joint SSC/TAP Next Meeting

EBFM TAP Meeting

February 4, 2021

10 a.m.–10:15 a.m. AST
—Call to Order
—Roll Call
—Adoption of the Agenda
—Review of Minutes from Virtual Meeting (August 3–4, 2020).
10:15 a.m.–12:30 p.m.
—Update—Ecosystem-Based Efforts: What is Going on?
a. Lenfest—JJ Cruz Motta, Tarsila Seara, Stacey Williams
b. Stakeholders Meetings—Ori Tzadik
c. Outreach and education Efforts on ECM- Alida Ortiz
d. SEAMAP-Caribbean update—JJ Cruz Motta
e. Status of the Ecosystem (ESR)—Kelly Montenero, SEFSC
f. SSC Report—Richard Appeldoorn, SSC Chair
g. DAPs CMs—Liajay Rivera García/ Graciela García-Moliner
h. Marine Protected Areas Diana Beltrán
i. Other efforts: MBON USVI, MBON Mesophotic data
j. Relationship and Synergy Among All Points Above and IBFMPs
12:30 p.m.–1:30 p.m.
—Lunch Break
1:30 p.m.–2 p.m.
—Development of the Fishery Ecosystem Plan -Update
—Purpose and Need/Goals and Objectives
—Management/Legal Background Update
2 p.m.–5 p.m.
—Island-Based Considerations Update—María López, SERO
—New considerations of Amendments
a. U.S. Virgin Islands
i. St. Croix
ii. St. Thomas/St. John
b. Puerto Rico
—U.S. Caribbean Considerations
a. SERO/NOAA Restoration Center
b. NMFS/SERO Habitat Conservation Division
—Caribbean Basin Considerations
—Regional/Global Considerations
—Management Within an Ecosystem Context
—Research Needs

February 5, 2021

9 a.m.–10:30 a.m. AST
—Continue Discussion from Previous Day
10:30 a.m.–10:45 a.m.
—Break
10:45 a.m.–12 p.m.
—Recommendations to the CFMC
—Other Business
—Adjourn

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meetings will begin on February 1, 2021, at 10 a.m. AST, and will end on February 5, 2021, at 12 p.m. AST. Other than the start time, interested parties should be aware that discussions may start earlier or later than indicated, at the discretion of the Chairs. In addition, the meetings may be completed prior to the date established in this notice.

For any additional information on these public virtual meetings, please contact Dr. Graciela García-Moliner, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone: (787) 403–8337.

(Authority: 16 U.S.C. 1801 *et seq.*)

Dated: January 12, 2021.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–00913 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA802]

South Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Private Recreational Reporting Workgroup evaluating reporting alternatives for the private recreational sector in the snapper grouper fishery.

DATES: The Workgroup meeting will be held from 1 p.m. until 4:30 p.m. on Wednesday, February 17, 2021.

ADDRESSES: The meeting will be held via webinar. Webinar registration is required. Details are included in **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8440 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including the webinar link, agenda, briefing book materials and an online public comment form will be posted on the Council's website at: *https://safmc.net/safmc-meetings/other-meetings/.*

Agenda items include:

1. Develop Workgroup goals and objectives.

2. Review of the Florida Fish and Wildlife Conservation Commission's State Reef Fish Survey.

3. Update on the Marine Recreational Information Program rare event workgroup.

4. Identify topics for discussion or presentation at the next meeting.

Written comments on agenda topics for this meeting may be directed to John Carmichael, Executive Director, South Atlantic Fishery Management Council (see *Further Information* for Council address) or electronically via the Council's website at: *https://safmc.net/safmc-meetings/other-meetings/.* Public comments are due by February 9, 2021.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

(*Authority:* 16 U.S.C. 1801 *et seq.*)

Dated: January 12, 2021.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–00910 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Representative and Address Provisions

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The United States Patent and Trademark Office (USPTO), as required by the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0035 (Representative and Address Provisions). The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

DATES: To ensure consideration, comments regarding this information collection must be received on or before March 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0035 comment'' in the subject line of the message.
- *Federal Rulemaking Portal: http://www.regulations.gov.*
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Parikha Mehta, Legal Advisor, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7728; or by email to *Parikha.Mehta@uspto.gov.* Additional information about this information collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection includes the information necessary to submit a request to grant or revoke power of attorney for an application, patent, or reexamination proceeding, and for a registered practitioner to withdraw as attorney or agent of record. This also includes the information necessary to change the correspondence address for an application, patent, or reexamination proceeding, to request a Customer Number and manage the correspondence address and list of practitioners associated with a Customer Number, and to designate or change the correspondence address or fee address for one or more patents or applications by using a Customer Number.

Under 35 U.S.C. 2 and 37 CFR 1.31–1.32, power of attorney may be granted to one or more joint inventors or a person who is registered to practice before the USPTO to act in an application or a patent. In particular, for an application filed before September 16, 2012, or for a patent which issued from an application filed before September 16, 2012, power of attorney may be granted by the applicant for patent (as set forth in 37 CFR 1.41(b) (pre-AIA)) or the assignee of the entire interest of the applicant. For an application filed on or after September 16, 2012, or for a patent which issued from an application filed on or after September 16, 2012, power of attorney may be granted by the applicant for patent (as set forth in 37 CFR 1.42) or the patent owner. The USPTO provides two different versions of the forms for establishing power of attorney based upon whether the application filing date is before or after September 16, 2012, to thereby reduce applicants' burden in having to determine the appropriate power of attorney requirements for a given application.

37 CFR 1.36 provides for the revocation of a power of attorney at any stage in the proceedings of a case. 37 CFR 1.36 also provides a path by which a registered patent attorney or patent agent who has been given a power of attorney may withdraw as attorney or agent of record.

The USPTO's Customer Number practice permits applicants, patent owners, assignees, and practitioners of record, or the representatives of record for a number of applications or patents, to change the correspondence address of a patent application or patent with one change request instead of filing separate requests for each patent or application. Any changes to the address or practitioner information associated with a Customer Number will be applied to all patents and applications associated with said Customer Number.

The Customer Number practice is optional, in that changes of correspondence address or power of attorney may be filed separately for each patent or application without using a Customer Number. However, a Customer Number associated with the correspondence address for a patent application is required in order to access private information about the application using the Patent Application Information Retrieval (PAIR) system, which is available through the USPTO website. The use of a Customer Number is also required in order to grant power of attorney to more than ten practitioners or to establish a separate ''fee address'' for maintenance fee purposes that is different from the correspondence address for a patent or application.

II. Method of Collection

Items in this information collection may be submitted by mail, facsimile, hand delivery, or online electronic submissions.

III. Data

OMB Control Number: 0651–0035.

Form Number(s): (AIA= American Invents; SB = Specimen Book).

- PTO/AIA/80; PTO/SB/80 (Power of Attorney to Prosecute Applications Before the USPTO)
- PTO/AIA/81 (Power of Attorney to one or More of the Joint Inventors and Change of Correspondence Address)
- PTO/SB/81 (Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address)
- PTO/AIA/81A; PTO/SB/81A (Patent—Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address)
- PTO/AIA/81B (Reexamination or Supplemental Examination—Patent Owner Power of Attorney or Revocation of Power of Attorney With a New Power of Attorney and Change of Correspondence Address for Reexamination or Supplemental Examination and Patent)
- PTO/SB/81B (Reexamination—Patent Owner Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address)
- PTO/SB/81C (Reexamination—Third Party Requester Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address)
- PTO/AIA/82A; PTO/AIA/82B; PTO/AIA/82C (Transmittal for Power of Attorney To One Or More Registered Practitioners/Power Of Attorney By Applicant)
- PTO/AIA/83; PTO/SB/83 (Request for Withdrawal as Attorney or Agent and Change of Correspondence Address)

- PTO/SB/124 (Request for Customer Number Data Change)
- PTO/SB/125 (Request for Customer Number)
- PTO–2248 (Request to Update a PCT Application with a Customer Number)

Type of Review: Revision of a currently approved information collection.

Affected Public: Private sector; individuals or households.

Estimated Number of Respondents: 184,745 respondents per year.

Estimated Number of Responses: 184,745 responses per year.

Estimated Time per Response: The USPTO estimates that the response time for activities related to Representative Address Provisions will take the public between 0.05 hours (3 minutes) to 1.5 hours (90 minutes) to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 11,355 hours.

Estimated Total Annual Respondent Hourly Cost Burden: $ 1,763,775.

TABLE 1—TOTAL HOURLY BURDEN FOR PRIVATE SECTOR RESPONDENTS

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hour)(b) (b)	Estimated annual burden (hour/year) (a) × (b) = (c)	Rate [1] ($/hour) (d)	Estimated annual burden (c) × (d) = (e)
1	Power of Attorney to Prosecute Applications Before the USPTO—PTO/AIA/80 PTO/SB/80.	2,425	2,425	0.05 (3 minutes)	121	$145	$17,545
2	Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence—PTO/AIA/82A; PTO/AIA/82B; PTO/AIA/82C.	165,870	165,870	0.05 (3 minutes)	8,294	145	1,202,630
3	Patent—Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address—PTO/AIA/81; PTO/SB/81; PTO/AIA/81A; PTO/SB/81A.	165	165	0.05 (3 minutes)	8	145	1,160
4	Reexamination—Patent Owner Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address—PTO/AIA/81B PTO/SB/81B.	29	29	0.05 (3 minutes)	1	145	145
5	Reexamination—Third Party Requester Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address—PTO/SB/81C.	24	24	0.05 (3 minutes)	1	145	145
6	Request for Withdrawal as Attorney or Agent and Change of Correspondence Address—PTO/AIA/83 PTO/SB/83.	2,134	2,134	0.20 (12 minutes)	427	400	170,800
7	Petition Under 37 CFR 1.36(a) to Revoke Power of Attorney by Fewer than All the Applicants.	10	10	1.00 (60 minutes)	10	400	4,000
8	Petition to Waive 37 CFR 1.32(b)(4) and Grant Power of Attorney by Fewer than All the Applicants.	10	10	1.00 (60 minutes)	10	400	4,000
9	Request for Customer Number Data Change—PTO/SB/124.	1,067	1,067	0.20 (12 minutes)	213	145	30,885
10	Request for Customer Number—PTO/SB/125.	6,111	6,111	0.20 (12 minutes)	1,222	145	177,190
11	Customer Number Upload Spreadsheet	291	291	1.50 (90 minutes)	437	145	63,365
12	Request to Update a PCT Application with a Customer Number—PTO–2248.	1,067	1,067	0.25 (15 minutes)	267	145	38,715
Totals			179,203	179,203		11,011	1,710,580

[1] 2019 Report of the Economic Survey, published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); *https://www.aipla.org/detail/journal-issue/2019-report-of-the-economic-survey.* The USPTO uses the mean rate for attorneys in private firms which is $400 per hour. The hourly rate for paraprofessional/paralegals is estimated at $145 from data published in the 2018 Utilization and Compensation Survey by the National Association of Legal Assistants (NALA); *https://www.nala.org/paralegals/research-and-survey-findings.*

TABLE 2—TOTAL HOURLY BURDEN FOR INDIVIDUALS OR HOUSEHOLDS RESPONDENTS

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hour) (b)	Estimated annual burden (hour/year) (a) × (b) = (c)	Rate [2] ($/hour) (d)	Estimated annual burden (c) × (d) = (e)
1	Power of Attorney to Prosecute Applications Before the USPTO—PTO/AIA/80 PTO/SB/80.	75	75	0.05 (3 minutes)	4	145	580
2	Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence—PTO/AIA/82A; PTO/AIA/82B; PTO/AIA/82C.	5,130	5,130	0.05 (3 minutes)	257	145	37,265

TABLE 2—TOTAL HOURLY BURDEN FOR INDIVIDUALS OR HOUSEHOLDS RESPONDENTS—Continued

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hour) (b)	Estimated annual burden (hour/year) (a) × (b) = (c)	Rate [2] ($/hour) (d)	Estimated annual burden (c) × (d) = (e)
3	Patent—Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address—PTO/AIA/81; PTO/SB/81; PTO/AIA/81A; PTO/SB/81A.	5	5	0.05 (3 minutes)	1	145	145
4	Reexamination—Patent Owner Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address—PTO/AIA/81B PTO/SB/81B.	1	1	0.05 (3 minutes)	1	145	145
5	Reexamination—Third Party Requester Power of Attorney or Revocation of Power of Attorney with a New Power of Attorney and Change of Correspondence Address—PTO/SB/81C.	1	1	0.05 (3 minutes)	1	145	145
6	Request for Withdrawal as Attorney or Agent and Change of Correspondence Address—PTO/AIA/83 PTO/SB/83.	66	66	0.20 (12 minutes)	13	400	5,200
9	Request for Customer Number Data Change—PTO/SB/124.	33	33	0.20 (12 minutes)	7	145	1,015
10	Request for Customer Number—PTO/SB/125.	189	189	0.20 (12 minutes)	38	145	5,510
11	Customer Number Upload Spreadsheet	9	9	1.50 (90 minutes)	14	145	2,030
12	Request to Update a PCT Application with a Customer Number—PTO–2248.	33	33	0.25 (15 minutes)	8	145	1,160
Totals.		5,542	5,542		344		53,195

[2] 2019 Report of the Economic Survey, published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); *https://www.aipla.org/detail/journal-issue/2019-report-of-the-economic-survey*. The USPTO uses the mean rate for attorneys in private firms which is $400 per hour. The hourly rate for paraprofessional/paralegals is estimated at $145 from data published in the 2018 Utilization and Compensation Survey by the National Association of Legal Assistants (NALA); *https://www.nala.org/paralegals/research-and-survey-findings.*

Estimated Total Annual Non-hour Respondent Cost Burden: $22,868. There are no capital start-up, maintenance, or recordkeeping costs associated with this information collection. However, USPTO estimates that the total annual (non-hour) cost burden for this information collection, in the form of filing fees and postage is $22,868.

Filing Fees

The two petitions in this information collection have associated filing fees under 37 CFR 1.17(f), resulting in $8,000 in filing fees.

Item No.	Item	Estimated annual responses (a)	Filing fee ($) (b)	Total non-hour cost burden (c) = (a) × (b)
8	Petitions Under 37 CFR 1.36(a) to Revoke Power of Attorney by Fewer than All the Applicants	10	$400.00	$4,000
9	Petitions to Waive 37 CFR 1.32(b)(4) and Grant Power of Attorney by Fewer than All the Applicants	10	400.00	4,000
Total				8,000

Postage Costs

Although the USPTO prefers that the items in this information collection be submitted electronically, responses may be submitted by mail through the United States Postal Service (USPS). The USPTO estimates that 1% of the 184,745 items will be submitted in the mail resulting in 1,847 mailed items. The USPTO estimates that the average postage cost for a mailed submission, using a Priority Mail 2-day flat rate legal envelope, will be $8.05. Therefore, the USPTO estimates the total mailing costs for this information collection at $14,868.

Respondent's Obligation: Required to obtain or retain benefits.

IV. Request for Comments

The USPTO is soliciting public comments to:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected; and

(d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personal identifying information in a comment, be aware that the entire comment—including personal identifying information—may be made publicly available at any time. While you may ask in your comment to withhold personal identifying information from public view, USPTO cannot guarantee that it will be able to do so.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2021–00912 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; National Medal of Technology and Innovation Nomination Application

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The United States Patent and Trademark Office (USPTO), in accordance with the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0060 (National Medal of Technology and Innovation Nomination Application). The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

DATES: To ensure consideration, comments regarding this information collection must be received on or before March 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information:

Email: InformationCollection@uspto.gov. Include ''0651–0060 comment'' in the subject line of the message.

- *Federal Rulemaking Portal: http://www.regulations.gov.*
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of John Palafoutas, Program Manager, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, by telephone at 571–272–8400, or by email at *nmti@uspto.gov.* Additional information about this information collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Medal of Technology and Innovation is the highest honor for technological achievement bestowed by the president of the United States on America's leading innovators. Established by an Act of Congress in 1980, the Medal of Technology was first awarded in 1985. The Medal is awarded annually to individuals, teams (of up to four individuals), companies, or divisions of companies. The Medal recognizes outstanding contributions to the Nation's economic, environmental, and social well-being through the development and commercialization of technology products, processes and concepts, technological innovation, and development of the Nation's technological workforce. By highlighting the national importance of technological innovation, the Medal also seeks to inspire future generations of Americans to prepare for and pursue technical careers to keep America at the forefront of global technology and economic leadership.

The National Medal of Technology and Innovation Nomination Evaluation Committee, a distinguished independent committee appointed by the Secretary of Commerce, reviews and evaluates the merit of all candidates nominated through an open, competitive solicitation process. The committee makes its recommendations for Medal candidates to the Secretary of Commerce who, in turn, makes recommendations to the President for final selection. The National Medal of Technology and Innovation Laureates are announced by the White House once the Medalists are notified of their selection.

This information collection covers data gathered in the National Medal of Technology and Innovation Nomination Application, which the public uses to nominate an individual's, team's, or company's extraordinary leadership and innovation in technological achievement and outstanding contribution to strengthening the nation's technological workforce. The application collects general and biographical information about the nominee, general information about the nominator, and a discussion of the nominee's contribution/achievements, and must be accompanied by up to six letters of recommendation or support from individuals who have first-hand knowledge of the cited achievement(s).

II. Method of Collection

The items in this information collection can be submitted electronically through the USPTO website via the online portal on *www.uspto.gov/nmti.*

III. Data

OMB Number: 0651–0060.

Form Number: None.

Type of Review: Revision of a currently approved information collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 50 respondents per year.

Estimated Number of Responses: 50 responses per year.

Estimated Time per Response: The USPTO estimates that it will take approximately 40 hours to gather the necessary information, prepare the nomination application, write the recommendations, and submit the request for the nomination to the USPTO.

Estimated Total Annual Respondent Burden Hours: 2,000 hours.

Estimated Total Annual Respondent Hourly Cost Burden: $97,140.

TABLE 1—TOTAL HOURLY BURDEN FOR INDIVIDUALS OR HOUSEHOLDS RESPONDENTS

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hours) (b)	Estimated annual burden (hour/year) (a) × (b) = c	Rate [1] ($/hour) (d)	Estimated annual burden (c) × (d) = e
1	National Medal of Technology and Innovation Nomination Application.	50	50	40	2,000	$48.57	$97,140
	Totals	50	50	.....	2,000	.....	97,140

Estimated Total Annual (Non-hour) Respondent Cost Burden: $0. There are no filing fees, postage, capital start-up, maintenance, or operation costs associated with this information collection.

Respondent's Obligation: Required to obtain or retain benefits.

IV. Request for Comments

The USPTO is soliciting public comments to:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected; and

(d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personal identifying information in a comment, be aware that the entire comment—including personal identifying information—may be made publicly available at any time. While you may ask in your comment to withhold personal identifying information from public view, USPTO cannot guarantee that it will be able to do so.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2021–00928 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–16–P

[1] The USPTO expects that professors, public relations specialists, civil engineers and research managers will complete this information. The professional hourly rates for these occupations, based on the 2019 rates released by the Bureau of Labor Statistics, are $53.88 for professors (OES 19–2099), $33.75 for public relations specialists (OES 27–3031), $45.36 for civil engineers (OES 17–2051), and $61.28 for research managers (OES 15–1111). The average combined hourly rate is $48.57. *https://www.bls.gov/oes/current/oes_dc.htm.*

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Fastener Quality Act Insignia Recordal Process

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The United States Patent and Trademark Office (USPTO), in accordance with the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0028 (Fastener Quality Act Insignia Recordal). The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

DATES: To ensure consideration, comments regarding this information collection must be received on or before March 16, 2021.

ADDRESSES: Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information:

- *Email: InformationCollection@upsto.gov.* Include ''0651–0028 comment'' in the subject line of the message.
- *Federal Rulemaking Portal: http://www.regulations.gov.*
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Catherine Cain, Attorney Advisor, Office of the Commissioner for Trademarks, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–8946; or by email to *Catherine.Cain@uspto.gov* with ''0651–0028 comment'' in the subject line. Additional information about this information collection is also available at *http://www.reginfor.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

Under Section 5 of the Fastener Quality Act (FQA) of 1999, (15 U.S.C. 5401 *et seq.*), certain industrial fasteners must bear an insignia identifying the manufacturer. It is also mandatory for manufacturers of fasteners covered by the FQA to submit an application to the USPTO for recordal of the insignia on the Fastener Insignia Register. The purpose of requiring both the insignia and the recordation is to ensure that certain fasteners can be traced to their manufacturers and to protect against the sale of mismarked, misrepresented, or counterfeit fasteners. The procedures for the recordal of fastener insignia under the FQA are set forth in 15 CFR 280.300 *et seq.*

This information collection covers data gathered in Applications for Recordal of Insignia and Applications for Renewal/Reactivation of Recordal Under the Fastener Quality Act. Insignias recorded with the USPTO may be sourced from an existing trademark registered at USPTO, from a trademark that is proposed in an application to obtain a registration currently before the USPTO, or from a unique alphanumeric designation issued upon request from the USPTO. After a manufacturer submits a complete application for recordal, the USPTO issues a Certificate of Recordal. These certificates remain

active for 5 years. Applications to renew the certificates must be filed within 6 months of the expiration date or, upon payment of an additional surcharge, within 6 months following the expiration date.

If a recorded alphanumeric designation is assigned by the manufacturer to a new owner, the designation becomes ''inactive'' and the new owner must submit an application to reactivate the designation within 6 months of the date of assignment. If the recordal is based on a trademark application or registration and the registration is assigned to a new owner, the recordal becomes ''inactive'' and cannot be reassigned. Instead, the new owner of the trademark application or registration must apply for a new recordal. Manufacturers who record insignia must notify the USPTO of any changes of address.

III. Method of Collection

The items in this information collection can be submitted by email, mail, facsimile, or hand delivery to the USPTO.

III. Data

OMB Number: 0651–0028.

Form Numbers:

- PTO–1611 (Application for Recordal of Insignia or Renewal/Reactivation of Recordal Under the Fastener Quality Act)

Type of Review: Revision of a currently approved information collection.

Affected Public: Private sector.

Estimated Number of Respondents: 96 respondents per year.

Estimated Number of Responses: 96 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.5 hours) to gather the necessary information, prepare the form, and submit the request for recordal or renewal of a fastener insignia to the USPTO.

Estimated Total Annual Respondent Burden Hours: 48 hours.

Estimated Total Annual Respondent (Hourly) Cost Burden: $19,200.

TABLE 1—TOTAL HOURLY BURDEN FOR PRIVATE SECTOR RESPONDENTS

Item No.	Item	Estimated annual respondents	Estimated annual responses (year) (a)	Estimated time for response (hour) (b)	Estimated annual burden (hour/year) (a) × (b) = (c)	Rate [1] ($/hour) (d)	Estimated annual burden (c) × (d) = (e)
1	Applications for Recordal of Insignia or Renewal/Reactivation of Recordal Under the Fastener Quality Act.	96	96	0.5	48	$400	$19,200
	Totals	96	96		48		19,200

Estimated Total Annual Non-hour Respondent Cost Burden: $2,136. There are no capital start-up, recordkeeping, or maintenance costs associated with this information collection. However, this information collection does have annual (non-hour) costs in the form of filing fees ($2,120) and postage costs ($16) for an estimated total of $2,136 per year.

Customers may incur postage costs when submitting an application for recordal to the USPTO by mail. The USPTO expects that 2 items will be submitted by mail. As the average cost for a first-class Priority Express, legal envelope is $8.05, USPTO estimates that the postage costs for this information collection will total $16.

There are two filing fees associated with this information collection on shown in the table below.

TABLE 2—TOTAL NON-HOUR RESPONDENT COST BURDEN

Item No.	Item	Estimated annual responses (a)	Cost amount (b)	Total non-hour respondent cost burden (a) × (b) = (c)
1a	Filing an application for recordal of insignia or renewal/reactivation of recordal	96	$20.00	$1,920
1b	Surcharge for filing 6 months after the expiration date—Filing an application for recordal of insignia or renewal/reactivation of recordal.	10	20.00	200
	Totals			2,120

Respondent's Obligation: Required to obtain or retain benefits.

IV. Request for Comments

The USPTO is soliciting public comments to:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected; and

(d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

[1] 2019 Report of the Economic Survey, published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); *https://www.aipla.org/detail/journal-issue/2019-report-of-the-economic-survey.* The USPTO uses the mean rate for attorneys in private firms which is $400 per hour.

other forms of information technology, *e.g.,* permitting electronic submission of responses.

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personal identifying information in a comment, be aware that the entire comment—including personal identifying information—may be made publicly available at any time. While you may ask in your comment to withhold personal identifying information from public view, USPTO cannot guarantee that it will be able to do so.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2021–00933 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to the Procurement List.

SUMMARY: The Committee is proposing to add product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Comments must be received on or before: February 14, 2021.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the product(s) and service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following product(s) and service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Product(s)

NSN(s)—Product Name(s):
MR 10789—Pizza Slicer and Server, Includes Shipper 20789
MR 10790—Salad Saver, Includes Shipper 20790
MR 10791—Pot Lid Stand, Includes Shipper 20791
Designated Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: Military Resale-Defense Commissary Agency

Service(s)

Service Type: Base Supply Center
Mandatory for: Vance Air Force Base, Vance AFB OK
Designated Source of Supply: NewView Oklahoma, Inc., Oklahoma City, OK
Contracting Activity: DEPT OF THE AIR FORCE, FA3029 71 FTW CVC VANCE AFB

Service Type: Base Supply Center
Mandatory for: Sierra Army Depot, Herlong CA
Designated Source of Supply: South Texas Lighthouse for the Blind, Corpus Christi, TX
Contracting Activity: DEPT OF THE ARMY, W6QK SIAD CONTR OFF

Service Type: Laundry Service
Mandatory for: US Army, Alabama Army National Guard, Montgomery, AL
Designated Source of Supply: Wiregrass Rehabilitation Center, Inc., Dothan, AL
Contracting Activity: DEPT OF THE ARMY, W7MT USPFO ACTIVITY AL ARNG

Service Type: Custodial and Related Services
Mandatory for: GSA PBS Region 5, John W. Bricker Federal Building Parking Garage, Columbus, OH
Designated Source of Supply: VGS, Inc., Cleveland, OH
Contracting Activity: PUBLIC BUILDINGS SERVICE, PBS R5

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2021–00896 Filed 1–14–21; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the procurement list.

SUMMARY: This action adds service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* February 1, 2021.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 10/9/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service(s) to the Government.

2. The action will result in authorizing small entities to furnish the service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Custodial and Related Services

Mandatory for: GSA PBS Region 4, Josiah House Courthouse, Charleston, SC

Designated Source of Supply: Palmetto Goodwill Services, North Charleston, SC

Contracting Activity: Public Buildings Service, PBS R4 Tennessee/Kentucky Contracts

The Committee finds good cause to dispense with the 30-day delay in the effective date normally required by the Administrative Procedure Act. See 5 U.S.C. 553(d). This addition to the Committee's Procurement List is effectuated because of the expiration of the General Services Administration/Public Building Service (GSA/PBS) contract. The Federal customer contacted, and has worked diligently with the AbilityOne Program to fulfill this service need under the AbilityOne Program. To avoid performance disruption, and the possibility that the GSA/PBS will refer its business elsewhere, this addition must be effective on February 1, 2021, ensuring timely execution for a February 1, 2021, start date while still allowing 17 days for comment. Pursuant to its own regulation 41 CFR 51–2.4, the Committee determined that no severe adverse impact exists. The Committee also published a notice of proposed Procurement List addition in the **Federal Register** on October 9, 2020, and did not receive any comments from any interested persons, including from the incumbent contractor. This addition will not create a public hardship and has limited effect on the public at large, but, rather, will create new jobs for other affected parties—people with significant disabilities in the AbilityOne program who otherwise face challenges locating employment. Moreover, this addition will enable Federal customer operations to continue without interruption.

Deletions

On 12/4/2020 and 12/11/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

5340–00–479–2949—Strap, Webbing, 57″ × 1″

5340–00–543–3271—Strap, Webbing, 9–3/4″ × 1″

5340–00–753–3740—Strap, Webbing, 8″ × 1″

Designated Source of Supply: The Charles Lea Center, Inc., Spartanburg, SC

Contracting Activity: DLA Troop Support, Philadelphia, PA

NSN(s)—Product Name(s):

MR 13120—Set, Container, Pop, 5pc

MR 13130—Set, Bowl, Colander, Large, 3 pc

MR 13131—Container, Rectangle, Pop, 1.5 Qt

MR 13132—Container, Square, Pop, Small, 0.9 Qt.

MR 13133—Container, Rectangle, Pop, 2.5 Qt.

MR 13134—Container, Square, Pop, Small, 0.3 Qt.

Designated Source of Supply: Cincinnati Association for the Blind, Cincinnati, OH

Contracting Activity: Military Resale-Defense Commissary Agency

NSN(s)—Product Name(s):

9905–00–NIB–0001—Link, Hasp and Strap Assembly

9905–00–NIB–0014—Link, Hasp and Strap Assembly

Designated Source of Supply: Mississippi Industries for the Blind, Jackson, MS

Contracting Activity: U.S. Postal Service, Washington, DC, Washington, DC

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2021–00901 Filed 1–14–21; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF EDUCATION

Notice Inviting Applications for Proprietary Institutions Under the Higher Education Emergency Relief Fund (HEERF), Section 314(a)(4); Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary is announcing the availability of new HEERF grant funding under section 314(a)(4) of the CRRSAA and inviting applications from eligible proprietary institutions listed on the Department's section 314(a)(1) allocation table to apply for funding in order for these institutions to make financial aid grants to students. This notice relates to the approved information collection under OMB control number XXXX–XXXX.

DATES:

Applications Available: January 15, 2021.

Deadline for Transmittal of Applications: Applications will be accepted on a rolling basis until April 15, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Karen Epps, U.S. Department of Education, 400 Maryland Avenue SW, Room 250–64, Washington, DC 20202. Telephone: The Department of Education HEERF Call Center at (202) 377–3711. Email: *HEERF@ed.gov.* Please also visit our HEERF website at: *https://www2.ed.gov/about/offices/list/ope/crrsaa.html.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

Background: On December 27, 2020, the President signed into law the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260). This new law makes available approximately $22.7 billion for institutions of higher

education under the Higher Education Emergency Relief Fund (HEERF), with funding devoted to programs previously authorized under the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act (Pub. L. 116–136), as well as funding for certain programs newly authorized under CRRSAA.

With this notice, the Secretary is announcing that proprietary institutions of higher education as defined in section 102(b) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1002(b), may apply for HEERF grant funds under the new CRRSAA section 314(a)(4) program, Proprietary Institution Grant Funds for Students (CFDA 84.425Q). The estimated available funds for this program is approximately $680 million. Allocations for eligible proprietary institutions of higher education will be calculated on the basis of the formula in section 314(a)(1)(A) through (F). Under section 314(d)(7), awards from the Proprietary Institution Grant Funds for Students program may only be used to provide financial aid grants to students (including students exclusively enrolled in distance education), which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care. In making such financial aid grants to students, grantees must prioritize grants to students with exceptional need, such as students who receive Pell Grants.

Proprietary institutions that did not receive a CARES Act section 18004(a)(1) award but are on the Department's published section 314(a)(1) allocation table for CRRSAA may apply for and receive (a)(4) funds. Pursuant to CRRSAA section 314(f), an institution must apply for funds within 90 days of the publication of this notice.

However, please note that institutions that have not yet complied with the reporting requirements of the CARES Act may receive awards with a restriction on the ability to drawdown those awarded funds (stop payment status) until the institution has satisfied its CARES Act HEERF reporting obligations.

Program Authority: Section 314 of Coronavirus Response and Relief Supplemental Appropriations Act, 2021.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) Subparts A through E of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: Approximately $680,914,000 will be used to make awards under this program.

Grant Period: Institutions must expend funds received under this program within 12 months of obligation of the funds by the Department.

III. Eligibility Information

1. *Eligible Applicants:* Proprietary IHEs, as defined in section 102(b) of the HEA.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* Subgrantees are not allowed under this program.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to submit their applications using *Grants.gov*. The *Grants.gov* Funding Opportunity Numbers are ED–GRANTS–041020–003 for the Student Aid Portion and ED–GRANTS–042120–004 for the Institutional Portion. Applications must be submitted by XXX Date [90 days after publication]. To register to use *Grants.gov*, please visit their ''How to Apply for Grants'' web page (*https://www.grants.gov/applicants/apply-for-grants.html*), or call their Applicant Support helpdesk at 1–800–518–4726.

Each completed application for a section 314(a)(4) program grant must consist of:

- A complete SF–424; and
- A Certification and Agreement (the Proprietary Institution Grant Funds For Students) (Red C&A).

Note: The applicant must submit the correct Certificate and Agreement for the funds requested. The Certificate and Agreement must be completed and include the correct OPE ID and DUNS number of the institution for which you are requesting funds. Each grantee will receive the amount calculated for them and listed in Department's published section 314(a)(4) allocation table.

2. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make timely awards.

3. *Funding Restrictions:* Specified in each program's Certification and Agreement or Supplemental Agreement.

4. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* In general, to do business with the Department of Education, you must—

(a) Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

(b) Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

(c) Provide your DUNS number and TIN on your SAM application; and

(d) Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following website: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active. The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. Given the national emergency related to COVID–19, the Department may accept an application without an active SAM registration and may allow registered SAM users whose registrations expire before May 16, 2020, an additional 60 days to update their registration, consistent with the Office of Management and Budget Memo M–20–17. If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more

business days. Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

V. Award Administration Information

1. *Award Notices:* If you receive a grant award under this program, we will send you a Grant Award Notification (GAN), or we may send you an email containing a link to access an electronic version of your GAN.

2. *Reporting:* Specified in each program's Certification and Agreement or Supplemental Agreement.

VI. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Christopher J. McCaghren,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 2021–00936 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Assistance for Arts Education Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for the Assistance for Arts Education (AAE) Program, Assistance Listing Number 84.351A. This notice relates to the approved information collection under OMB control number 1894–0006.

DATES: *Applications Available:* January 15, 2021.

Deadline for Notice of Intent to Apply: February 16, 2021.

Deadline for Transmittal of Applications: March 16, 2021.

Deadline for Intergovernmental Review: May 17, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Bonnie Carter, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E308, Washington, DC 20202–6450. Telephone: (202) 401–3576. Email: *Bonnie.Carter@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Pre-Application Webinar Information: The Department will hold a pre-application meeting via webinar for prospective applicants. For information about the pre-application webinar, visit the Assistance for Arts Education (AAE) programs' websites at: *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/well-rounded-education-programs/arts-in-education-national-program/*; *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/well-rounded-education-programs/arts-in-education-model-development-and-dissemination-grants-program/*; and *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/well-rounded-education-programs/arts-in-education-professional-development-for-arts-educators/.*

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The AAE program promotes arts education for students, including disadvantaged students and students who are children with disabilities, through activities such as (a) professional development for arts educators, teachers, and principals; (b) development and dissemination of accessible instructional materials and arts-based educational programming, including online resources, in multiple arts disciplines; and (c) community and national outreach activities that strengthen and expand partnerships among schools, local educational agencies (LEAs), communities, or centers for the arts, including national centers for the arts.

Background: The Elementary and Secondary Education Act of 1965, as amended (ESEA), authorizes activities under the Assistance for Arts Education (AAE) program that enrich the academic experience of students by promoting art education. Under the Arts in Education (AIE) program, now AAE, the Department implemented three different grant competitions in alignment with the statutory requirements: Arts in Education Development and Dissemination (AAEDD), Professional Development for Arts Educators (PDAE), and the Arts in Education National Program (AENP). The AAEDD program was designed to focus on the development and dissemination of arts-based educational programming, including online resources, in all arts disciplines, such as music, dance, theater, and visual arts, including folk arts. The PDAE program provided professional development opportunities for thousands of teachers, with an emphasis on both providing sustained and intensive professional development and building capacity for continuation and expansion of professional development efforts beyond the Federal grant period. Most recently, the Arts in Education National Program (AENP) emphasized projects that supported community and national outreach activities that strengthened and expanded partnerships among schools, LEAs, communities, or centers for the arts, including national centers for the arts.

After reviewing the implementation of the three programs offered under AAE, the Department found a large overlap in the applicant and grantee pool, and in the services provided across the various programs. At the same time, given how the three programs differ, applicants have been required to design narrower projects to fit each program's specific requirements and to submit separate applications to each of the three grant competitions. In an effort to recognize and encourage different, creative, and innovative approaches that districts, schools, national arts organizations, and other entities use to increase student

access to the arts and integrate arts into the learning process, the Department is now offering the AAE program as one, single competition.

Under one competition, applicants can focus on a more holistic approach to learning that is based on the development and dissemination of arts-based educational programmingand the delivery of sustained and intensive professional development for arts educators, teachers, and principals, while creating new partnerships and strengthening existing partnerships between LEAs and arts organizations. We believe that this change from three competitions to one AAE competition will provide greater flexibility for applicants to design comprehensive arts-focused projects that are based on data and student and community needs.

Priorities: This notice contains two competitive preference priorities and one invitational priority. Competitive Preference Priority 1 is from the Administrative Priorities for Discretionary Grant Programs published in the **Federal Register** on March 3, 2020 (85 FR 13640) (Administrative Priorities) and Competitive Preference Priority 2 is from section 4642 of the ESEA (20 U.S.C. 7292).

Competitive Preference Priorities: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional five points to an application that meets Competitive Preference Priority 1 and an additional five points to an application that meets Competitive Preference Priority 2, for a possible maximum 10 points.

These priorities are:

Competitive Preference Priority 1—Applications From New Potential Grantees (0 or 5 points)

Under this priority, an applicant must demonstrate the following:

(a) The applicant has not had an active discretionary grant under the program from which it seeks funds, including through membership in a group application submitted in accordance with 34 CFR 75.127 through 75.129, in the five years before the deadline date for submission of applications under the program.

(b) For the purpose of this priority, a grant or contract is active until the end of the grant's or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

Note: For purposes of this priority, ''the program'' includes the AENP, AAEDD, and PDAE programs because they are all authorized under AAE.

For new potential grantees unfamiliar with grantmaking at the Department, please consult our funding basics resource at *https://www2.ed.gov/documents/funding-101/funding-101-basics.pdf* or a more detailed resource at *https://www2.ed.gov/documents/funding-101/funding-101.pdf.*

Competitive Preference Priority 2—Applicants That Are National Nonprofit Organizations (0 or 5 points)

Under this priority, the Secretary gives priority to eligible entities that are eligible national nonprofit organizations. The term ''eligible national nonprofit organization'' means an organization of national scope that—

(a) Is supported by staff, which may include volunteers, or affiliates at the State and local levels; and

(b) Demonstrates effectiveness or high-quality plans for addressing arts education activities for disadvantaged students or students who are children with disabilities.

Invitational Priority: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Art Therapy

Under this priority, an applicant must describe how it will include art therapy in their project to improve cognitive and sensory-motor functions, foster self-esteem and self-awareness, cultivate emotional resilience, promote insight, enhance social skills, or reduce and resolve conflicts and distress.

Requirements: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, the following application and program requirements from section 4642 of the ESEA (20 U.S.C. 7292) apply.

Application Requirement. Applicants that are LEAs must provide, in the application, data from the most recent U.S. Census as evidence that the LEAs meet the statutory requirement that 20 percent or more of the students served by the LEA (or for each LEA within a consortium of LEAs) are from families with an income below the Federal poverty line.

Note: Other applicants that are eligible under the definition of an LEA, such as County Offices of Education, Education Service Districts, and Regional Service Education Agencies, must provide the most recent U.S. Census data for each of the individual LEAs served. For charter schools for which U.S. Census data is not available, eligibility will be based on a determination by the State educational agency (SEA), consistent with the manner in which the SEA determines the charter school LEA's eligibility for the Title I allocations, that 20 percent of the students aged 5–17 in the LEA are from families with incomes below the poverty line. Applicants must submit documentation from the State certifying official verifying that the SEA has determined this eligibility requirement is met for each LEA not listed in the Small Area Income Poverty Estimates (SAIPE) data.

Program Requirements. Projects funded under this program must include—

(1) Professional development for arts educators, teachers, and principals;

(2) Development and dissemination of accessible instructional materials and arts-based educational programming, including online resources, in multiple arts disciplines; and

(3) Community and national outreach activities that strengthen and expand partnerships among schools, LEAs, communities, or centers for the arts, including national centers for the arts.

Definitions: The definitions of ''demonstrates a rationale,'' ''logic model,'' ''project component,'' and ''relevant outcome,'' are from 34 CFR 77.1. The definitions of ''child with a disability,'' ''local educational agency,'' and ''State educational agency'' are from section 8101 of the ESEA (20 U.S.C. 7801). The definition for ''national nonprofit'' is from section 4642 of the ESEA (20 U.S.C. 7292).

Child with a disability means a child (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as ''emotional disturbance''), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

Demonstrates a rationale means a key project component included in the project's logic model that is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

Local educational agency means: (A) In general—The term ''local educational agency'' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(B) Administrative Control and Direction—The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(C) Bureau of Indian Education Schools—The term includes an elementary school or secondary school funded by the Bureau of Indian Education but only to the extent that including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this Act with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Education.

(D) Educational Service Agencies—The term includes educational service agencies and consortia of those agencies.

(E) State Educational Agency—The term includes the State educational agency in a State in which the State educational agency is the sole educational agency for all public schools.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

National nonprofit means an organization of national scope that—

(A) Is supported by staff, which may include volunteers, or affiliates at the State and local levels; and

(B) Demonstrates effectiveness or high-quality plans for addressing arts education activities for disadvantaged students or students who are children with disabilities.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Relevant outcome means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

State educational agency means the agency primarily responsible for the State supervision of public elementary schools and secondary schools.

Program Authority: 20 U.S.C. 7292.

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 299. (e) Administrative Priorities.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $16,500,000.

Estimated Range of Awards: $375,000–$2,000,000.

Estimated Average Size of Awards: $675,000.

Estimated Number of Awards: 20–25.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* To be considered for an award under this competition, an applicant must—

(a) Be one of the following:

(1) An LEA in which 20 percent or more of the students served by the local educational agency are from families with an income below the poverty line; [1]

(2) A consortium of such LEAs;

(3) An SEA;

(4) An IHE;

(5) A museum or cultural institution;

(6) The Bureau of Indian Education;

(7) An eligible national nonprofit organization; or

(8) Another private agency, institution, or organization.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This competition involves supplement-not-supplant funding requirements. Under section 4642(b)(2) of the ESEA, funds must be used to supplement, and not supplant, non-Federal funds that would otherwise be used for activities authorized under this program (20 U.S.C. 1221e–3, 3474, and 6511(a)). Accordingly, grantees must comply with 34 CFR 76.564 through 76.569, which apply to agencies of State and local governments that are grantees under programs with a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds.

c. *Indirect Cost Rate Information:* This competition uses a restricted indirect cost rate. For more information regarding indirect costs, or to obtain a

[1] An LEA must show that at least 20 percent of children ages five to 17 that reside within the LEA's boundaries are from low-income families based on the most recent LEA poverty estimates provided by the U.S. Census Bureau. The Census LEA poverty estimates are available at: *www.census.gov/programs-surveys/saipe.html.*

negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

d. *Administrative Cost Limitation:* This competition does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200, subpart E, of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the AAE program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 25 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; the one-page abstract, resumes, bibliography, logic model, or letters of support. However, the recommended page limit does apply to all of the application narrative.

Note: The applicant should include, as an attachment, the logic model used to address selection criterion (a)(5).

6. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply may still apply for funding; applicants that do submit a notice of intent to apply are not bound to apply or bound by the information provided.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Quality of the project design* (up to 30 points).

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(3) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.

(4) The extent to which the proposed project represents an exceptional approach for meeting statutory purposes and requirements.

(5) The extent to which the proposed project demonstrates a rationale (as defined in 34 CFR 77.1(c)).

(b) *Quality of project services* (up to 25 points).

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

(1) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(2) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards.

(3) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(4) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(c) *Quality of project personnel* (up to 10 points).

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the

Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers the qualifications, including relevant training and experience, of key project personnel.

(d) *Quality of the management plan* (up to 20 points).

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(3) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(4) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

(e) *Quality of the project evaluation* (up to 15 points).

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(3) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes.

Note: This selection factor for project evaluation relates only to performance measure (1) under the *Performance Measures* section of this notice.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Promoting the freedom of speech and religious liberty in alignment with *Promoting Free Speech and Religious Liberty* (E.O. 13798) and *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);

(d) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(e) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* The Department has established the following Government Performance and Results Act of 1993 performance measures for the AAE program: (1) The number of grantees that attain or exceed the targets for a majority of the outcome indicators for their projects; (2) The percentage of AAE participants (*e.g.,* arts educators, teachers, principals, and other support staff) who complete 75 percent or more of the total hours of professional development offered; and (3) The number of accessible, arts-based instructional materials that are developed.

All grantees will be expected to submit an annual performance report that includes data addressing these performance measures to the extent that they apply to the grantee's project.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Frank T. Brogan,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2021–00705 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Full-Service Community Schools Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2021 for the Full-Service Community Schools (FSCS) program, Assistance Listing Number 84.215J. This notice relates to the approved information collection under OMB control number 1894–0006.

DATES:

Applications Available: January 15, 2021.

Deadline for Notice of Intent to Apply: February 1, 2021.

Date of Pre-Application Meetings: The Department will hold pre-application meetings via webinars for prospective applicants. Detailed information regarding these webinars will be provided on the FSCS website at *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/school-choice-improvement-programs/full-service-community-schools-programs/.*

Deadline for Transmittal of Applications: March 1, 2021.

Deadline for Intergovernmental Review: April 30, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR–2019–02-13/pdf/2019–02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Elson Nash, U.S. Department of Education, 400 Maryland Avenue SW, Room 4E246, Washington, DC 20202. Telephone: (202) 260–2655. Email: *FSCS@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The FSCS program is authorized by sections 4621–4623 and 4625 of the Elementary and Secondary Education Act of 1965, as amended (ESEA). This program

provides support for the planning, implementation, and operation of full-service community schools that improve the coordination, integration, accessibility, and effectiveness of services for children and families, particularly for children attending high-poverty schools, including high-poverty rural schools.

Background: Full-service community schools provide comprehensive academic, social, and health services for students, students' family members, and community members that are designed to improve education outcomes for children. The growing interest at the State and local level in community schools,[1] also known as full-service community schools, coupled with this competition, present an opportunity for nationwide school improvement. The ESEA offers flexibilities at the State and local levels to implement strategies supported by community schools, such as coordination of school and community resources (ESEA sections 1114(b)(5) and 1115(b)(2)) and afterschool programming and support for a community school coordinator (ESEA section 4108(a)(5)(H)). If a State educational agency (SEA) or local educational agency (LEA) (as defined in this notice) lacks the resources to implement community schools at scale, it can productively begin in neighborhoods where community schools are most needed and, therefore, students are most likely to benefit.[2] The Department, through the FSCS program, provides catalytic support for the planning, implementation, operation, and coordination of effective services for children and families, particularly in high-poverty urban and rural areas, at the local level.

According to a 2017 report, comprehensive community school interventions that incorporate most or all of four features, or pillars (integrated student supports; expanded learning time and opportunities; family and community engagement; collaborative leadership and practice), are associated with a range of positive student outcomes.

''A well-implemented community school leads to improvement in student and school outcomes and contributes to meeting the educational needs of low-achieving students in high-poverty schools. Strong research reinforces the efficacy of integrated student supports, expanded learning time and opportunities, and family and community engagement as intervention strategies.''[3]

Over the last decade, the field has observed a wide range of practices coordinated and implemented in full-service community schools. In a January 2020 study of New York City community schools by the Rand Corporation, assuming strong social capital, stable leadership, and a strong instructional program, community schools have been associated with improved attendance, on-time grade progression, student achievement in math, and fewer disciplinary incidents.[4]

This year we encourage applicants to consider where possible the option to give families the choice to apply for services beyond the project's required services to meet the unique needs of students and their families. In order to offer families expanded options, applicants may need to engage in greater collaboration with partners who can meet those unique needs.

Priorities: This notice contains one absolute priority, four competitive preference priorities, and one invitational priority. In accordance with 34 CFR 75.105(b)(2)(iv), the absolute priority is from section 4625(b)(1)(A) of the ESEA. The competitive preference priorities are from ESEA sections 4625(b)(1)(B), 4625(b)(2), and 4625(b)(3), and 34 CFR 75.226(c).

Absolute Priority: For FY 2021, and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Eligible entities that will serve a minimum of two or more full-service community schools eligible for a schoolwide program (as defined in this notice) under section 1114(b) of the ESEA as part of a community- or district-wide strategy.

Competitive Preference Priorities: For FY 2021, and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional two points to an application that meets Competitive Preference Priority 1, and we award an additional point to an application that meets Competitive Preference Priority 2. We award an additional point to an application that meets Competitive Preference Priority 3, and an additional five points to an application that meets Competitive Preference Priority 4. An applicant may receive a maximum of nine competitive preference priority points. Applicants may apply under any, all, or none of the competitive preference priorities. Applicants must identify under Quality of the Project Design the priorities they are addressing in order to receive those points.

These priorities are:

Competitive Preference Priority 1—Rural Districts-Small and Rural or Rural and Low-Income. (0 or 2 points)

The Secretary gives priority to eligible entities that include an LEA that satisfies the requirements of the Small Rural School Achievement (SRSA) program (ESEA section 5211(b)(1)(A), (B), or (C)) or the Rural and Low-Income School (RLIS) program (ESEA section 5221(b)(1)(A), (B), or (C)).

Note: Applicants may determine whether a particular LEA is eligible for these programs by referring to information on the following Department website: *https://oese.ed.gov/offices/office-of-formula-grants/rural-insular-native-achievement-programs/rural-education-achievement-program/.*

Note: An LEA includes a public charter school that operates as an LEA.

Competitive Preference Priority 2—Broadly Representative Consortiums. (0 or 1 point)

The Secretary gives priority to an eligible entity that is a consortium comprised of a broad representation of stakeholders.

Competitive Preference Priority 3—History of Effectiveness. (0 or 1 point)

The Secretary gives priority to an eligible entity that is a consortium demonstrating a history of effectiveness.

Competitive Preference Priority 4—Evidence-Based Activities, Strategies, or Interventions. (0 or 5 points)

The Secretary gives priority to an application that is supported by evidence that meets the definition of promising evidence (as defined in this notice).

Invitational Priority: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1), we do not give an application that meets this invitational priority a competitive or

[1] Maier, A., Daniel, J., Oakes, J., & Lam, L. (December 2017). Community Schools as an Equitable School Improvement Strategy: A Review of the Evidence. Learning Policy Institute.

[2] Horn, M. B., Freeland, J., Butler, S. M., & Brookings Institution. (2015). Schools as Community Hubs: Integrating Support Services to Drive Educational Outcomes. A Series of Discussion Papers on Building Healthy Neighborhoods. No. 3. In Brookings Institution. Brookings Institution.

[3] Ibid.

[4] Johnston, W., Engberg, J., Opper, I., Sontag-Padilla, L., and Xenakis, L. (2020). Illustrating the Promise of Community Schools: An Assessment of the Impact of the New York City Community Schools Initiative. City of New York, *www.rand.org/pubs/research_reports/RR3245.html.*

absolute preference over other applications.

This priority is:

Empowering Families With the Delivery of On-Demand Support Services that Meet the Unique Needs of Students.

Projects that allow families to choose up to two service options that are in addition to the five required services under the FSCS program.

Definitions: The definitions of ''Community-based organization,'' ''Eligible entity,'' ''Full-service community school,'' ''Local educational agency,'' ''Pipeline services,'' and ''State educational agency'' are from sections 4622 and 8101 of the ESEA. The definitions of ''Baseline,'' ''Experimental study,'' ''Nonprofit,'' ''Performance measure,'' ''Performance target,'' ''Project,'' ''Project component,'' ''Promising evidence,'' ''Quasi-experimental design study,'' ''Relevant outcome,'' and ''What Works Clearinghouse Handbook'' are from 34 CFR 77.1. The definition of ''School eligible for a schoolwide program'' is from 34 CFR 200.25(b).

Baseline means the starting point from which performance is measured and targets are set.

Community-based organization means a public or private nonprofit (as defined in this notice) organization of demonstrated effectiveness that—

(a) Is representative of a community or significant segments of a community; and

(b) Provides educational or related services to individuals in the community.

Eligible entity means a consortium of one or more LEAs; or the Bureau of Indian Education; and one or more community-based organizations, nonprofit organizations, or other public or private entities.

Experimental study means a study that is designed to compare outcomes between two groups of individuals (such as students) that are otherwise equivalent except for their assignment to either a treatment group receiving a project component or a control group that does not. Randomized controlled trials, regression discontinuity design studies, and single-case design studies are the specific types of experimental studies that, depending on their design and implementation (*e.g.,* sample attrition in randomized controlled trials and regression discontinuity design studies), can meet What Works Clearinghouse (WWC) standards without reservations as described in the WWC Handbooks (as defined in this notice):

(a) A randomized controlled trial employs random assignment of, for example, students, teachers, classrooms, or schools to receive the project component being evaluated (the treatment group) or not to receive the project component (the control group).

(b) A regression discontinuity design study assigns the project component being evaluated using a measured variable (*e.g.,* assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes.

(c) A single-case design study uses observations of a single case (*e.g.,* a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment.

Full-service community school means a public elementary school or secondary school that—

(a) Participates in a community-based effort to coordinate and integrate educational, developmental, family, health, and other comprehensive services through community-based organizations and public and private partnerships; and

(b) Provides access to such services in school to students, families, and the community, such as access during the school year (including before- and after-school hours and weekends), as well as during the summer.

Local educational agency (LEA) means:

(a) In General. A public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) Administrative Control and Direction. The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(c) Bureau of Indian Education Schools. The term includes an elementary school or secondary school funded by the Bureau of Indian Education but only to the extent that including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the ESEA with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency (as defined in this notice) other than the Bureau of Indian Education.

(d) Educational Service Agencies. The term includes educational service agencies and consortia of those agencies.

(e) State Educational Agency. The term includes the State educational agency in a State in which the State educational agency is the sole educational agency for all public schools.

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance.

Performance target means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project.

Pipeline services means a continuum of coordinated supports, services, and opportunities for children from birth through entry into and success in postsecondary education, and career attainment. Such services shall include, at a minimum, strategies to address through services or programs (including integrated student supports) the following:

(a) High-quality early childhood education programs.

(b) High-quality school and out-of-school-time programs and strategies.

(c) Support for a child's transition to elementary school, from elementary school to middle school, from middle school to high school, and from high school into and through postsecondary education and into the workforce, including any comprehensive readiness assessment determined necessary.

(d) Family and community engagement and supports,

which may include engaging or supporting families at

school or at home.

(e) Activities that support postsecondary and workforce readiness, which may include job training, internship opportunities, and career counseling.

(f) Community-based support for students who have attended the schools

in the area served by the pipeline, or students who are members of the community, facilitating their continued connection to the community and success in postsecondary education and the workforce.

(g) Social, health, nutrition, and mental health services and supports.

(h) Juvenile crime prevention and rehabilitation programs.

Project means the activity described in an application.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Promising evidence means that there is evidence of the effectiveness of a key project component in improving a relevant outcome, based on a relevant finding from one of the following:

(a) A practice guide prepared by WWC reporting a ''strong evidence base'' or ''moderate evidence base'' for the corresponding practice guide recommendation;

(b) An intervention report prepared by the WWC reporting a ''positive effect'' or ''potentially positive effect'' on a relevant outcome with no reporting of a ''negative effect'' or ''potentially negative effect'' on a relevant outcome; or

(c) A single study assessed by the Department, as appropriate, that—

(i) Is an experimental study, a quasi-experimental design study, or a well-designed and well-implemented correlational study with statistical controls for selection bias (*e.g.,* a study using regression methods to account for differences between a treatment group and a comparison group); and

(ii) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome.

Quasi-experimental design study means a study using a design that attempts to approximate an experimental study by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation (*e.g.,* establishment of baseline equivalence of the groups being compared), can meet WWC standards with reservations, but cannot meet WWC standards without reservations, as described in the WWC Handbooks.

Relevant outcome means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

School eligible for a schoolwide program means any school eligible under 34 CFR 200.25(b) to operate a schoolwide program.

State educational agency (SEA) means the agency primarily responsible for the State supervision of public elementary schools and secondary schools.

What Works Clearinghouse Handbooks (WWC Handbooks) means the standards and procedures set forth in the WWC Standards Handbook, Versions 4.0 or 4.1, and WWC Procedures Handbook, Versions 4.0 or 4.1, or in the WWC Procedures and Standards Handbook, Version 3.0 or Version 2.1 (all incorporated by reference, see § 77.2). Study findings eligible for review under WWC standards can meet WWC standards without reservations, meet WWC standards with reservations, or not meet WWC standards. WWC practice guides and intervention reports include findings from systematic reviews of evidence as described in the WWC Handbooks documentation.

Application Requirements: The following requirements are from section 4625(a) of the ESEA. In order to receive funding, an applicant must include the following in its application:

(a) A description of the eligible entity.

(b) A memorandum of understanding among all partner entities in the eligible entity that will assist the eligible entity to coordinate and provide pipeline services and that describes the roles the partner entities will assume.

(c) A description of the capacity of the eligible entity to coordinate and provide pipeline services at two or more full-service community schools.

(d) A comprehensive plan that includes descriptions of the following:

(1) The student, family, and school community to be served, including demographic information.

(2) A needs assessment that identifies the academic, physical, nonacademic, health, mental health, and other needs of students, families, and community residents.

(3) Annual measurable performance objectives and outcomes, including an increase in the number and percentage of families and students targeted for services each year of the program, in order to ensure that children are—

(i) Prepared for kindergarten;

(ii) Achieving academically; and

(iii) Safe, healthy, and supported by engaged parents.

(4) Pipeline services, including existing and additional pipeline services, to be coordinated and provided by the eligible entity and its partner entities, including an explanation of—

(i) Why such services have been selected;

(ii) How such services will improve student academic achievement; and

(iii) How such services will address the annual measurable performance objectives and outcomes described above under (d)(3).

(5) Plans to ensure that each full-service community school site has a full-time coordinator of pipeline services at such school, including a description of the applicable funding sources, plans for professional development for the personnel managing, coordinating, or delivering pipeline services, and plans for joint utilization and management of school facilities.

(6) Plans for annual evaluation based upon attainment of the performance objectives and outcomes described above under (d)(3).

(7) Plans for sustaining the programs and services described in the application after the grant period.

(e) An assurance that the eligible entity and its partner entities will focus services on schools eligible for a schoolwide program under section 1114(b) of the ESEA.

Applications that do not address the application requirements are not eligible for funding and will not be reviewed.

Program Authority: as amended sections 4621–4623 and 4625 of the Elementary and Secondary Education Act (ESEA) of 1965 (20 U.S.C. 7275).

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws. Projects serving children with disabilities must be operated consistent with the requirements of the Individuals with Disabilities Education Act.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) 34 CFR 200.25.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $13,700,000.

Estimated Range of Awards: $275,000–$500,000 for each 12-month budget period; $1,375,000–$2,500,000 for the entire project period.

Estimated Average Size of Awards: $450,000 for each 12-month period.

Maximum Award: We will not make an award exceeding $2,500,000 for the entire project period.

Minimum Award: The Secretary is prohibited by section 4625(d) of the ESEA from making a grant under the FSCS program in an amount that is less than $75,000 for each year of the grant. Therefore, we will reject any application that proposes an amount that is less than $75,000 for any budget period.

Estimated Number of Awards: 30.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* A consortium of—

(a)(i) One or more LEAs; or

(ii) The Bureau of Indian Education; and

(b) One or more community-based organizations, nonprofit organizations, or other public or private entities.

A consortium must comply with the provisions governing group applications in 34 CFR 75.127 through 75.129.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* To be eligible for an award, an applicant shall provide matching funds through non-Federal contributions, either in cash or in-kind donations. The applicant must propose the amount of cash or in-kind resources to be contributed for each year of the grant.

The Bureau of Indian Education may meet the matching requirement using funds from other Federal sources.

The Secretary does not, as a general matter, anticipate waiving the matching requirement in the future. Furthermore, given the importance of matching funds to the long-term success of the project, eligible entities must identify appropriate matching funds in the proposed budget.

b. *Supplement not Supplant:* This program is subject to supplement-not-supplant funding requirements. Grantees must use FSCS grant funds to supplement, and not supplant, any other Federal, State, and local funds that would otherwise have been available to carry out activities authorized under section 4625 of the ESEA.

c. *Indirect Cost Rate Information:* This program uses a restricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

d. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Planning:* Interagency collaborative efforts are highly complex undertakings that require extensive planning and communication among partners and key stakeholders. Partnerships should be based on identified needs and organized around a set of mutually defined results and outcomes. Under section 4625(c) of the ESEA, applicants under this program may not use more than 10 percent of the total amount of grant funds for planning purposes during the first year of the grant. Funding received by grantees during the remainder of the project period must be devoted to program implementation.

5. *Use of Funds:* Under section 4625(e) of the ESEA, grantees must use FSCS grant funds to: (1) Coordinate not less than three existing pipeline services, as of the date their grants are awarded, and provide not less than two additional pipeline services, at two or more public elementary schools or secondary schools; (2) to the extent practicable, integrate multiple pipeline services into a comprehensive and coordinated continuum to achieve the annual measurable performance objectives and outcomes under section 4625(a)(4)(C) of the ESEA to meet the holistic needs of children; and (3) if applicable, coordinate and integrate services provided by community-based organizations and government agencies with services provided by specialized instructional support personnel.

6. *Evaluation:* Under section 4625(g) of the ESEA, grantees must conduct an annual evaluation of their project's progress in meeting the purpose of the FSCS program set out in section 4621(2) of the ESEA and use those evaluations to refine and improve activities carried out under the grant and the annual measurable performance objectives and outcomes in section 4625(a)(4)(C) of the ESEA. Grantees must make the results of their annual evaluation publicly available, including by providing public notice of the availability of such results.

Note: Nothing in section 4625 of the ESEA shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded school or LEA employees under Federal, State, or local laws (including applicable regulations or court orders) under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employees and their employers.

IV. Application and Submission Information

1. *Application Submission Instructions:* For information on how to submit an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contains requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the FSCS program, your application may include business information that you consider proprietary. In 34 CFR 5.11, we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 150 pages and (2) use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Notice of Intent to Apply:* The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department of the applicant's intent to submit an application for funding by sending a short email message indicating the applicant's intent to submit an application for funding. The email need not include information regarding the content of the proposed application, only the applicant's intent to submit it. This email notification should be sent to *FSCS@ed.gov* with ''INTENT TO APPLY'' in the subject line by February 1, 2021. Applicants that do not notify us of their intent to apply may still apply for funding.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210. The maximum score for all of the selection criteria is 100 points. The maximum score for each criterion is included in parentheses following the title of the specific selection criterion. Each criterion also includes the factors that reviewers will consider in determining the extent to which an applicant meets the criterion.

Points awarded under these selection criteria are in addition to any points an applicant earns under the competitive preference priorities in this notice. The maximum score that an application may receive under the competitive preference priorities and the selection criteria is 109 points.

The selection criteria are as follows:

(a) *Quality of the Project Design* (up to 25 points).

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers—

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(b) *Quality of the Project Services* (up to 25 points).

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of project services, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following—

(1) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(2) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(c) *Adequacy of Resources* (up to 15 points).

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors—

(1) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(2) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(d) *Quality of the Management Plan* (up to 20 points).

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors—

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(e) *Quality of the Project Evaluation* (up to 15 points).

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors—

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(3) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of

funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department of Education will review and consider applications for funding pursuant to this notice inviting applications in accordance with the following:

- Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);
- Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);
- Promoting the freedom of speech and religious liberty in alignment with Promoting Free Speech and Religious Liberty (E.O. 13798) and Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);
- Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and
- Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* We have established one performance measure for the FSCS program: The percentage and number of individuals targeted for services and who receive services during each year of the project period.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement

requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Frank T. Brogan,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2021–00725 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Graduate Assistance in Areas of National Need

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for the Graduate Assistance in Areas of National Need (GAANN) Program, Assistance Listing Number 84.200A. This notice relates to the approved information collection under OMB control number 1840–0604.

DATES: *Applications Available:* January 15, 2021.

Deadline for Transmittal of Applications: March 1, 2021.

Deadline for Intergovernmental Review: April 30, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR–2019–02–13/pdf/2019–02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Rebecca Ell, U.S. Department of Education, 400 Maryland Avenue SW, Room 2B–214, Washington, DC 20202. Telephone: (202) 453–6348. Email: *OPE_GAANN_Program@ed.gov*; or ReShone Moore, U.S. Department of Education, 400 Maryland Avenue SW, Room 2B–214, Washington, DC 20202–4260. Telephone (202) 453–7624. Email: *reshone.moore@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The GAANN Program provides grants to academic departments and programs of institutions of higher education (IHEs) to support graduate fellowships for students with excellent academic records who demonstrate financial need and plan to pursue the highest degree available in their course of study at the institution.

Priorities: This notice contains one absolute priority and one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute priority is from the regulations for this program (34 CFR 648.33(a) and Appendix to part 648—Academic Areas). Please note that the codes next to selected academic areas under the absolute priority are from the Appendix to part 648—Academic Areas of the program regulations and can be found in the application booklet as well as on *www.ecfr.gov/cgi-bin/text-idx?SID=f8ad0cf4f75cd9841b2bc1adb98c5739&mc=true&node=pt34.3.648&rgn=div5.* The competitive preference priority is from the notice of final administrative priorities for discretionary grant programs published in the **Federal Register** on March 9, 2020 (85 FR 13640) (Administrative Priorities).

Absolute Priority: For FY 2021 and any subsequent year for which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

The absolute priority is:

Graduate Assistance in Areas of National Need.

A project must provide fellowships in one or more of the following areas of national need, in an interdisciplinary program of study involving at least two of these areas, or for a multidisciplinary project. A multidisciplinary project is one that requests fellowships for more than a single academic department in one or more of the following areas, and in which each department's program of study is independent.

A. For the following academic areas, the project must provide fellowships for programs that lead either to a Professional Science Master's (PSM) degree, master's degree or a doctoral degree, whichever is the highest degree awarded in the area of need at the institution.

1. Computer and Information Sciences. A degree or a degree with specialization in one or more of the following areas:

- Cybersecurity (the interdiscipline of ''11.01 Computer and Information Sciences, General'' and ''11.05 Computer Systems Analysis'').
- Secure computer programming (the interdiscipline of ''11.01 Computer and Information Sciences, General'' and ''11.02 Computer Programming'').
- Artificial Intelligence (the interdiscipline of ''11.02 Computer Programming,'' ''11.04 Information Sciences and Systems,'' and ''14.09 Computer Engineering'').

2. 14. Engineering.

14.01 Engineering, General
14.02 Aerospace, Aeronautical, and Astronautical Engineering
14.03 Agricultural Engineering
14.04 Architectural Engineering
14.05 Bioengineering and Biomedical Engineering
14.06 Ceramic Sciences and Engineering
14.07 Chemical Engineering
14.08 Civil Engineering
14.09 Computer Engineering
14.10 Electrical, Electronic, and Communications Engineering

14.11 Engineering Mechanics
14.12 Engineering Physics
14.13 Engineering Science
14.14 Environmental/Environmental Health Engineering
14.15 Geological Engineering
14.16 Geophysical Engineering
14.17 Industrial/Manufacturing Engineering
14.18 Materials Engineering
14.19 Mechanical Engineering
14.20 Metallurgical Engineering
14.21 Mining and Mineral Engineering
14.22 Naval Architecture and Marine Engineering
14.23 Nuclear Engineering
14.24 Ocean Engineering
14.25 Petroleum Engineering
14.27 Systems Engineering
14.28 Textile Sciences and Engineering
14.29 Engineering Design
14.30 Engineering/Industrial Management
14.31 Materials Science
14.32 Polymer/Plastics Engineering

B. For the following academic areas, the project must provide fellowships in programs that lead either to a PSM degree, master's degree, or a doctoral degree, whichever is the highest degree awarded in the area of need at the institution. Students pursuing a degree in one of these areas are planning a career in either teaching or research.

- 26. Biological Sciences/Life Sciences.

26.01 Biology, General
26.02 Biochemistry and Biophysics
26.03 Botany
26.04 Cell and Molecular Biology
26.05 Microbiology/Bacteriology
26.06 Miscellaneous Biological Specializations
26.07 Zoology

- 42. Psychology.

42.01 Psychology
42.02 Clinical Psychology
42.03 Cognitive Psychology and Psycholinguistics
42.04 Community Psychology
42.06 Counseling Psychology
42.07 Developmental and Child Psychology
42.08 Experimental Psychology
42.09 Industrial and Organizational Psychology
42.11 Physiological Psychology/Psychobiology
42.16 Social Psychology
42.17 School Psychology

- 51.16 Nursing. Applications from nursing programs must focus on the preparation of nursing scholars for educational leadership roles. Graduates will become teachers preparing students for careers in nursing and will disseminate to the public new knowledge gained from disciplined inquiry related to nursing and nursing education.

Note: Not for clinical degrees.

Competitive Preference Priority: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award an additional one point to an application that meets this priority.

This priority is:

Applications from New Potential Grantees (1 point).

Under this priority, an applicant must demonstrate that the applicant does not, as of the deadline date for submission of applications, have an active grant, including through membership in a group application submitted in accordance with 34 CFR 75.127–75.129, under the program from which it seeks funds.

Note: For the purpose of this priority, a grant or contract is active until the end of the grant's or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

Program Authority: 20 U.S.C. 1135–1135e.

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 648. (e) The Administrative Priorities.

Note: The open licensing requirement in 2 CFR 3474.20 does not apply to this program.

II. Award Information

Type of Award: Discretionary grants, including funds redistributed as graduate fellowships to individual fellows.

Estimated Available Funds: $20,425,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Estimated Range of Awards: $101,460–$405,840.

Estimated Average Size of Awards: $275,000.

Estimated Number of Awards: 72.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Stipend Level: For the 2021–22 academic year, the institution must pay the fellow a stipend at a level of support equal to that provided by the National Science Foundation Graduate Research Fellowship Program, except that this amount must be adjusted as necessary so as not to exceed the fellow's demonstrated level of financial need as stated under part F of title IV of the Higher Education Act of 1965, as amended.

Institutional Payment: For the 2021–22 academic year, the estimated institutional payment is $16,730 per fellow. This amount was determined by adjusting the previous academic year's institutional payment of $16,370 per fellow by the U.S. Department of Labor's Consumer Price Index for the 2020 calendar year.

III. Eligibility Information

1. *Eligible Applicants:* (a) Any academic department of an IHE that provides a course of study that—

(i) Leads to a graduate degree in an area of national need; and

(ii) Has been in existence for at least four years at the time of an application for a grant under this competition; or

(b) An academic department of an IHE that—

(i) Satisfies the requirements of paragraph (a) of this section; and

(ii) Submits a joint application with one or more eligible non-degree-granting institutions that have formal arrangements for the support of doctoral dissertation research with one or more degree-granting institutions.

Note: Students are not eligible to apply for grants under this program.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing

body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* An institution must provide, from non-Federal funds, an institutional matching contribution equal to at least 25 percent of the grant amount received. (See 34 CFR 648.7.)

b. *Supplement-Not-Supplant:* This competition involves supplement-not-supplant funding requirements. (See 34 CFR 648.20(b)(5).)

c. *Indirect Cost Rate Information:* We specify unallowable costs under IV. Application and Submission Information.

d. *Administrative Cost Limitation:* We specify unallowable costs under IV. Application and Submission Information.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Other:* For requirements relating to selecting fellows, see 34 CFR 648.40.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019–02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

3. *Funding Restrictions:* We specify unallowable costs in 34 CFR 648.64. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* Applications that do not follow the page limit and formatting recommendations will not be penalized. The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend the following page limits and standards:

- A project narrative in a single discipline or for an interdisciplinary course of study should be limited to no more than 40 pages.
- A project narrative for a multidisciplinary project should be limited to no more than 40 pages for each academic department.
- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins.
- Double-space all text in the application project narrative, and single-space titles, headings, footnotes, quotations, references, and captions.
- Use a 12-point font.
- Use an easily readable font such as Times New Roman, Courier, Courier New, or Arial.
- Limit appendices to the following: Two-page version of a curriculum vitae, per faculty member; a course listing; letters of commitment showing institutional support; a bibliography; and one additional optional appendix relevant to the support of the proposals, recommended not to exceed five pages.

The recommended page limit does not include the Application for Federal Assistance (SF 424) and the Department of Education Supplemental Information for the SF 424 Form; the one-page abstract; the GAANN Statutory Assurances Form; the GAANN Budget Spreadsheet(s) Form; the Appendices; the Assurances and Certifications; or an optional two-page table of contents.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 648.31 and are as follows:

(a) *Meeting the purposes of the program* (7 points). The Secretary reviews each application to determine how well the project will meet the purposes of the program, including the extent to which—

(1) The applicant's general and specific objectives for the project are realistic and measurable;

(2) The applicant's objectives for the project seek to sustain and enhance the capacity for teaching and research at the institution and at State, regional, or national levels;

(3) The applicant's objectives seek to institute policies and procedures to ensure the enrollment of talented graduate students from traditionally underrepresented backgrounds; and

(4) The applicant's objectives seek to institute policies and procedures to ensure that it will award fellowships to individuals who satisfy the requirements of 34 CFR 648.40.

(b) *Extent of need for the project* (5 points). The Secretary considers the extent to which a grant under the program is needed by the academic department by considering—

(1) How the applicant identified the problems that form the specific needs of the project;

(2) The specific problems to be resolved by successful realization of the goals and objectives of the project; and

(3) How increasing the number of fellowships will meet the specific and general objectives of the project.

(c) *Quality of the graduate academic program* (20 points). The Secretary reviews each application to determine the quality of the current graduate academic program for which project funding is sought, including—

(1) The course offerings and academic requirements for the graduate program;

(2) The qualifications of the faculty, including education, research interest, publications, teaching ability, and accessibility to graduate students;

(3) The focus and capacity for research; and

(4) Any other evidence the applicant deems appropriate to demonstrate the quality of its academic program.

(d) *Quality of the supervised teaching experience* (10 points). The Secretary reviews each application to determine the quality of the teaching experience the applicant plans to provide fellows under this program, including the extent to which the project—

(1) Provides each fellow with the required supervised training in instruction;

(2) Provides adequate instruction on effective teaching techniques;

(3) Provides extensive supervision of each fellow's teaching performance; and

(4) Provides adequate and appropriate evaluation of the fellow's teaching performance.

(e) *Recruitment plan* (5 points). The Secretary reviews each application to determine the quality of the applicant's recruitment plan, including—

(1) How the applicant plans to identify, recruit, and retain students from traditionally underrepresented backgrounds in the academic program for which fellowships are sought;

(2) How the applicant plans to identify eligible students for fellowships;

(3) The past success of the academic department in enrolling talented graduate students from traditionally underrepresented backgrounds; and

(4) The past success of the academic department in enrolling talented graduate students for its academic program.

(f) *Project administration* (8 points). The Secretary reviews the quality of the proposed project administration, including—

(1) How the applicant will select fellows, including how the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, religion, gender, age, or disabling condition;

(2) How the applicant proposes to monitor whether a fellow is making satisfactory progress toward the degree for which the fellowship has been awarded;

(3) How the applicant proposes to identify and meet the academic needs of fellows;

(4) How the applicant proposes to maintain enrollment of graduate students from traditionally underrepresented backgrounds; and

(5) The extent to which the policies and procedures the applicant proposes to institute for administering the project are likely to ensure efficient and effective project implementation, including assistance to and oversight of the project director.

(g) *Institutional commitment* (15 points). The Secretary reviews each application for evidence that—

(1) The applicant will provide, from any funds available to it, sufficient funds to support the financial needs of the fellows if the funds made available under the program are insufficient;

(2) The institution's social and academic environment is supportive of the academic success of students from traditionally underrepresented backgrounds on the applicant's campus;

(3) Students receiving fellowships under this program will receive stipend support for the time necessary to complete their courses of study, but in no case longer than five years; and

(4) The applicant demonstrates a financial commitment, including the nature and amount of the institutional matching contribution, and other institutional commitments that are likely to ensure the continuation of project activities for a significant period of time following the period in which the project receives Federal financial assistance.

(h) *Quality of key personnel* (5 points). The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(1) The qualifications of the project director;

(2) The qualifications of other key personnel to be used in the project;

(3) The time commitment of key personnel, including the project director, to the project; and

(4) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected without regard to race, color, national origin, religion, gender, age, or disabling condition, except pursuant to a lawful affirmative action plan.

(i) *Budget* (5 points). The Secretary reviews each application to determine the extent to which—

(1) The applicant shows a clear understanding of the acceptable uses of program funds; and

(2) The costs of the project are reasonable in relation to the objectives of the project.

(j) *Evaluation plan* (15 points). The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Relate to the specific goals and measurable objectives of the project;

(2) Assess the effect of the project on the students receiving fellowships under this program, including the effect on persons of different racial and ethnic backgrounds, genders, and ages, and on persons with disabilities who are served by the project;

(3) List both process and product evaluation questions for each project activity and outcome, including those of the management plan;

(4) Describe both the process and product evaluation measures for each project activity and outcome;

(5) Describe the data collection procedures, instruments, and schedules for effective data collection;

(6) Describe how the applicant will analyze and report the data so that it can make adjustments and improvements on a regular basis; and

(7) Include a time-line chart that relates key evaluation processes and benchmarks to other project component processes and benchmarks.

(k) *Adequacy of resources* (5 points). The Secretary reviews each application to determine the adequacy of the resources that the applicant makes available to graduate students receiving fellowships under this program, including facilities, equipment, and supplies.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For this competition, a panel of non-Federal reviewers will review each application in accordance with the selection criteria in 34 CFR 648.31 and the competitive preference priority, if that applies. The individual scores of the reviewers will be added and the sum divided by the number of reviewers to determine the peer review score received in the review process.

Additional factors we consider in selecting an application for an award are in 34 CFR 648.32.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative

agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Promoting the freedom of speech and religious liberty in alignment with *Promoting Free Speech and Religious Liberty* (E.O. 13798) and *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);

(d) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(e) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Grantees will be required to submit a supplement to the Final Performance Report two years after the expiration of their GAANN grant. The purpose of this supplement is to identify and report the educational outcome of each GAANN fellow.

4. *Performance Measures:* Under the Government Performance and Results Act of 1993, the following measures will be used by the Department in assessing the performance of the GAANN Program and for Department reporting under 34 CFR 75.110:

(1) The percentage of GAANN fellows completing the terminal degree in the designated areas of national need.

(2) The median time to completion of master's and doctoral degrees for GAANN fellows.

(3) The percentage of GAANN fellows who have placements in faculty or professional positions in the area of their studies within one year of completing the degree.

If funded, you will be required to collect and report data in your project's annual performance report (34 CFR 75.590) on those measures and steps taken toward improving performance toward those outcomes. Consequently, applicants are advised to include these outcome measures in conceptualizing the design, implementation, and evaluation of their proposed projects. These outcome measures should be included in the project evaluation plan, in addition to measures of your progress toward the goals and objectives specific to your project.

All grantees will be expected to submit an annual performance report documenting their success in addressing these performance measures.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

your search to documents published by the Department.

Christopher J. McCaghren,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 2021–00766 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice Inviting Applications for Funds Under the Higher Education Emergency Relief Fund (HEERF), Section 314(a)(1); Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary is announcing the availability of new HEERF grant funding under section 314(a)(1) of the CRRSAA and inviting applications from public and nonprofit institutions that did not previously receive funding under section 18004(a)(1) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). This notice relates to the approved information collections under OMB control numbers 1801–0005 and 1840–0842.

DATES:

Applications Available: January 15, 2021.

Deadline for Transmittal of Applications: Applications will be accepted on a rolling basis until April 15, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Karen Epps, U.S. Department of Education, 400 Maryland Avenue SW, Room 250–64, Washington, DC 20202. Telephone: The Department of Education HEERF Call Center at (202) 377–3711. Email: *HEERF@ed.gov.* Please also visit our HEERF website at: *https://www2.ed.gov/about/offices/list/ope/crrsaa.html.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

Background: On December 27, 2020, the President signed into law the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260). This law makes available approximately $22.7 billion for institutions of higher education under the Higher Education Emergency Relief Fund (HEERF), with funding appropriated for the existing (a)(1), (a)(2) and (a)(3) programs previously authorized under the CARES Act, as well as funding for a new (a)(4) program authorized under the CRRSAA.

With this notice, the Secretary is announcing the availability of HEERF grant funds under the CRRSAA section 314(a)(1) programs (CFDAs 84.425E and 84.425F). These programs, with some changes, are a continuation of the CARES Act section 18004(a)(1) program which the Department implemented as two funding streams: the Student Aid Portion (CFDA 84.425E) for financial grants to students, and the Institutional Portion (CFDA 84.425F) for institutional uses of funds related to the coronavirus.

Eligible institutions are institutions of higher education, as defined in sections 101 and 102(c) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1001, 1002(c). Allocations for these programs will be calculated according to the formula in section 314(a)(1) of the CRRSAA. Under CRRSAA section 314(c), grant awards under these programs may be used to (1) defray expenses associated with coronavirus (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, and payroll); (2) carry out student support activities authorized by the HEA that address needs related to coronavirus; or (3) provide financial aid grants to students (including students exclusively enrolled in distance education), which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care. In making financial aid grants to students, an institution of higher education must prioritize grants to students with exceptional need, such as students who receive Pell Grants.

Given section 314(d)(8) of the CRRSAA not requiring institutions of higher education that previously received grants under section 18004(a)(1) of the CARES Act to submit new or revised applications to receive this funding, the Department will be automatically awarding supplemental funds to eligible institutions that previously received a section 18004(a)(1) Student Aid Portion or Institutional Portion award under the CARES Act. No action is required by eligible institutions to receive these supplemental awards. The Project Director identified on the most current Grant Award Notification (GAN) will automatically receive an email indicating a supplement award has been made to your institution. Please note that drawing down any amount of these supplemented funds constitutes an institution's acceptance of the new terms and conditions under the CRRSAA and a new Supplemental Agreement, which are included as attachments to this notice for reference.

Not every institution that received grants under CARES Act section 18004(a)(1) will receive a supplement. First, the CRRSAA prohibits proprietary institutions from receiving supplemental funding under section 314(a)(1) and creates a new program for these institutions under section 314(a)(4). More information, including instructions on how to apply for (a)(4) funding, is provided in a separate notice.

Second, institutions that have not yet complied with the reporting requirements of the CARES Act may receive delayed supplemental (a)(1) awards and/or may receive awards with a restriction on the ability to drawdown those awarded funds (stop payment status) until the institution has satisfied its CARES Act HEERF reporting obligations.

Institutions that did not receive a CARES Act section 18004(a)(1) award but are on the Department's published section 314(a)(1) allocation table for CRRSAA may apply for and receive section 314(a)(1) Student Aid Portion (CFDA 84.425E) and Institutional Portion (CFDA 84.425F) grant awards. Pursuant to CRRSAA section 314(f), an institution must apply for funds within 90 days of the publication of this notice.

Finally, for an institution that paid or will be required to pay the endowment excise tax in tax year 2019 (''endowment tax institutions''), the institution's CRRSAA section 314(a)(1) allocation will be reduced by 50% under section 314(d)(6) of the CRRSAA. Endowment tax institutions must only use their allocations for financial aid grants to students under section 314(c)(3) or for sanitation, personal protective equipment, or other expenses associated with the general health and safety of the campus environment related to the coronavirus emergency. A limited exception to this requirement is provided for any endowment tax

institution that participates in the work colleges program authorized under section 448 of the Higher Education Act of 1965, as amended. Endowment tax institutions must complete and submit a form disclosing this tax status available on the Department's HEERF website. Endowment excise tax institutions may also seek a waiver of these limitations.

Program Authority: Section 314 of Coronavirus Response and Relief Supplemental Appropriations Act, 2021.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: Approximately $20,500,000,000 will be used to make awards under this program. This amount includes new funds allocated under the CRRSAA, and both unspent CARES Act funds under CARES Act section 18004(a)(1) and unspent Project SERV funds that were reallocated per CRRSAA section 314(d)(4).

Grant Period: Institutions must expend funds received under this program within 12 months of obligation of the funds by the Department.

III. Eligibility Information

1. *Eligible Applicants:* Public and Private Nonprofit IHEs, as defined in section 101 and section 102(c) of the HEA.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* Subgrantees are not allowed under this program.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to submit their applications using *Grants.gov*. The *Grants.gov* Funding Opportunity Numbers are ED–GRANTS–041020–003 for the Student Aid Portion and ED–GRANTS–042120–004 for the Institutional Portion. Applications must be submitted by XXX Date [90 days after publication]. To register to use *Grants.gov*, please visit their ''How to Apply for Grants'' web page (*https://www.grants.gov/applicants/apply-for-grants.html*), or call their Applicant Support helpdesk at 1–800–518–4726.

Each completed application for a Student Aid Portion or Institutional Portion grant must consist of:

- A complete SF–424;
- A Certification and Agreement (Student Aid Portion Certification and Agreement (Gold C&A), or the Institutional Portion Certification and Agreement (Blue C&A), as appropriate); and
- The Required Notification of Endowment Excise Tax Paid (if applicable).

Note: The applicant must submit the corresponding Certificate and Agreement for the funds requested. No institution will receive an Institutional Portion grant if they do not also apply for their Student Aid portion. Each Certificate and Agreement must be completed and include the correct OPE ID and DUNS number of the institution for which you are requesting funds. Each grantee will receive the amount calculated for them and listed in Department's published section 314(a)(1) allocation table.

2. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make timely awards.

3. *Funding Restrictions:* Specified in each program's Certification and Agreement or Supplemental Agreement.

4. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* In general, to do business with the Department of Education, you must—

(a) Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

(b) Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

(c) Provide your DUNS number and TIN on your SAM application; and

(d) Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following website: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. Given the national emergency related to COVID–19, the Department may accept an application without an active SAM registration and may allow registered SAM users whose registrations expire before May 16, 2020, an additional 60 days to update their registration, consistent with the Office of Management and Budget Memo M–20–17.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

V. Award Administration Information

1. *Award Notices:* If you receive a grant award under this program, we will send you a Grant Award Notification (GAN), or we may send you an email containing a link to access an electronic version of your GAN.

2. *Reporting:* Reporting requirements are specified in each program's Certification and Agreement or Supplemental Agreement.

VI. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Christopher J. McCaghren,

Acting Assistant Secretary for Postsecondary Education.

Attachment 1: Example Supplemental Agreement for Supplemental Grant Funds for Students

Coronavirus Response and Relief Supplemental Appropriations Act, 2021

Supplemental Agreement (CFDA 84.425E) ((a)(1) Student Aid Portion)

Supplemental Grant Funds for STUDENTS

The terms, conditions, and requirements governing your institution's (Recipient's) use of these supplemental grant funds awarded pursuant to section 314(a)(1) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260) (supplemental award or grant) by the U.S. Department of Education (Department) are governed by section 314 of the CRRSAA and the following terms and conditions of this Supplemental Agreement.

BY DRAWING DOWN THESE GRANT FUNDS, YOU AGREE TO BE BOUND BY THE CONDITIONS SET FORTH ON THE BEHALF OF THE INSTITUTION YOU REPRESENT, AND YOU WARRANT THAT YOU HAVE THE AUTHORITY TO BIND THE INSTITUTION TO THE FOLLOWING CONDITIONS:

Use of Supplemental Grant Funds:

1. Section 314(d)(5) of the CRRSAA requires Recipient, an institution of higher education as defined in section 101 or 102(c) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1001 or 1002(c), to provide at least the same amount of funding in financial aid grants to students as was required to be provided under sections 18004(a)(1) and (c) of division B of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136). The amount of funds made available by this supplemental award under CFDA 84.425E represents the minimum amount that Recipient must use for financial aid grants to students.

2. Under section 314(c)(3) of the CRRSAA, Recipient must make financial aid grants directly to students (including students exclusively enrolled in distance education), which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care) or child care.

3. Recipient acknowledges that it retains discretion to determine the amount and availability of each individual financial aid grant consistent with all applicable laws, including non-discrimination laws. Recipient further acknowledges that under section 314(c)(3), it must prioritize grants to students with exceptional need, such as students who receive Pell Grants. However, students do not need to be Pell recipients or students who are eligible for Pell grants.

4. Recipient acknowledges that it may not condition the receipt of such a financial aid grant on continued or future enrollment with the Recipient. Recipient also acknowledges that it may not require a student to consent to the application of the financial aid grant to the student's outstanding account balance with Recipient as a condition of receipt of or eligibility for the financial aid grant.

5. In consideration for this award, Recipient agrees that Recipient holds these grant funds in trust for students and acts in the nature of a fiduciary for students.

6. Recipient acknowledges that the Secretary recommends (a) the maximum Federal Pell Grant for the applicable award year as an appropriate maximum amount for a student's financial aid grant in most cases, and (b) that the Recipient should consider each student's particular socioeconomic circumstances in the administration of these grants.

7. The Secretary strongly encourages Recipient's financial aid administrator to exercise the use of professional judgment available under HEA section 479A, 20 U.S.C. 1087tt, to make adjustments on a case-by-case basis to exclude individual financial aid grants from the calculation of a student's expected family contribution. The Secretary does not consider these individual financial aid grants to constitute Federal financial aid under Title IV of the HEA.

8. Recipient must notify the Department within 30 days if Recipient is required or becomes aware that it will be required to remit payment to the Internal Revenue Service for the excise tax paid on investment income of private colleges and universities under section 4968 of the Internal Revenue Code of 1986 for tax year 2019 via the form provided attached to this GAN, pursuant to section 314(d)(6) of the CRRSAA. Recipient acknowledges that if it was required to remit payment to the Internal Revenue Service for this excise tax paid, and if it is not an institution that has been designated as an eligible work college under HEA section 448, 20 U.S.C. 1087–58:

a. Recipient must not draw down more than 50% of its total allocation received under CRRSAA section 314(a)(1) (combined Student Aid Portion and Institutional Portion grants under CFDAs 84.425E and 84.425F), unless a waiver of this condition has requested by Recipient and until approved by the Secretary under CRRSAA section 314(d)(6)(B).

b. Recipient must use its remaining available funds only for financial aid grants to students consistent with CRRSAA section 314(c)(3), or for sanitation, personal protective equipment, or other expenses associated with the general health and safety of the campus environment related to the qualifying emergency, unless a waiver of this condition has been requested by Recipient and until approved by the Secretary under CRRSAA section 314(d)(6)(B), and subject to other applicable requirements in section 314.

Grant Administration:

9. Recipient acknowledges that consistent with 2 CFR 200.305, it must minimize the time between drawing down funds from G5 and paying incurred obligations (liquidation). Recipient further acknowledges that if it draws down funds and does not pay the incurred obligations (liquidates) within 15 calendar days it may be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's Office of the Inspector General (OIG). Recipient further acknowledges that returning funds pursuant to mistakes in drawing down excessive grant funds in advance of need may also be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's OIG. Finally, Recipient acknowledges that it must maintain drawn down grant funds in an interest-bearing account, and any interest earned on all Federal grant funds above $500 (all Federal grants together) during an institution's fiscal year must be returned (remitted) to the Federal government via a process described here: *https://www2.ed.gov/documents/funding-101/g5-returning-interest.pdf.*

10. Recipient may not charge any indirect or administrative costs to funds made available under this supplemental award because the allocation in this grant award represents the minimum amount of funds that must be distributed to students.

11. Recipient acknowledges that any obligation under this grant (pre-award costs pursuant to 2 CFR 200.458) must have been incurred on or after December 27, 2020, the date of the enactment of the CRRSAA.

12. Recipient must promptly and to the greatest extent practicable distribute all grant funds from this award in the form of financial aid grants to students within the one-year period of performance (2 CFR 200.77) specified in Box 6 of this Grant Award Notification (GAN).

13. Recipient must, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus pursuant to section 315 of the CRRSAA.

14. Recipient acknowledges that its failure to draw down any amount of its supplemental grant funds within 90 days of the date of this supplemental award will constitute nonacceptance of the terms, conditions, and requirements of this Supplemental Agreement and of these supplemental grant funds. In such event, the Department, in its sole discretion, may choose to deobligate these supplemental grant funds or take other appropriate administrative action, up to and including

terminating the grant award pursuant to 2 CFR 200.340.

Reporting and Accountability:

15. Recipient must promptly and timely report to the Department on the use of funds no later than 6 months after the date of this supplemental award in a manner to be specified by the Secretary pursuant to section 314(e) of the CRRSAA. Recipient must also promptly and timely provide a detailed accounting of the use of funds provided by this supplemental award in such manner and with such subsequent frequency as the Secretary may require. Recipient will comply with any other applicable reporting requirements including those in Section 15011(b)(2) of Division B of the CARES Act. Recipient acknowledges the Department may require additional or more frequent reporting to be specified by the Secretary.

16. Recipient must comply with all requirements of the Single Audit Act Amendments of 1996, 31 U.S.C. 7501, *et seq.* (Single Audit Act) and all applicable auditing standards. Considering that the HEERF grant program is a new program not previously audited or subjected to Department oversight, and the inherent risk that comes with a new program, the Department strongly suggests that the HEERF grant program be audited as a major program in the first fiscal year(s) that the institution received a HEERF grant.

17. Recipient acknowledges it is under a continuing affirmative duty to inform the Department if Recipient is to close or terminate operations as an institution or merge with another institution. In such cases, Recipient must promptly notify in writing the assigned education program officer contact in Box 3 of the GAN. Additionally, Recipient must promptly notify the assigned education program officer if the Recipient's Authorized Representative changes.

18. Recipient must cooperate with any examination of records with respect to the advanced funds by making records and authorized individuals available when requested, whether by (i) the Department and/or its OIG; or (ii) any other Federal agency, commission, or department in the lawful exercise of its jurisdiction and authority. Recipient must retain all financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award for a period of three years from the date of submission of the final expenditure report pursuant to 2 CFR 200.334.

19. Recipient acknowledges that failure to comply with this Supplemental Agreement, its terms and conditions, and/or all relevant provisions and requirements of the CRRSAA or any other applicable law may result in Recipient's liability under the False Claims Act, 31 U.S.C. 3729, *et seq.;* OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; 18 U.S.C. 1001, as appropriate; and all of the laws and regulations referenced in Attachment A, which is incorporated by reference herein.

Applicable Law:

20. Recipient must comply with all applicable assurances in OMB Standard Forms (SF) SF–424B and SF–424D (Assurances for Non-Construction and Assurances for Construction Programs), including the assurances relating to the legal authority to apply for assistance; access to records; conflict of interest; nondiscrimination; Hatch Act provisions; labor standards; Single Audit Act; and the general agreement to comply with all applicable Federal laws, executive orders, and regulations.

21. Recipient certifies that with respect to the certification regarding lobbying in Department Form 80–0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or supplementing of Federal grants under this program; Recipient must complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' when required (34 CFR part 82, Appendix B).

22. Recipient must comply with the provisions of all applicable acts, regulations and assurances; the following provisions of *Education Department General Administrative Regulations* (EDGAR) 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99; the *OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)* in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Attachment 2: Example Supplemental Agreement for Supplemental Grant Funds for Institutions

Coronavirus Response and Relief Supplemental Appropriations Act, 2021

Supplemental Agreement (CFDA 84.425F) ((a)(1) Institutional Portion)

Supplemental Grant Funds for Institutions

The terms, conditions, and requirements governing your institution's (Recipient's) use of these grant funds awarded pursuant to section 314(a)(1) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260) (award or grant) by the U.S. Department of Education (Department) are governed by section 314 of the CRRSAA and the following terms and conditions of this Certification and Agreement (C&A):

BY DRAWING DOWN THESE GRANT FUNDS, YOU AGREE TO BE BOUND BY THE CONDITIONS SET FORTH ON THE BEHALF OF THE INSTITUTION YOU REPRESENT, AND YOU WARRANT THAT YOU HAVE THE AUTHORITY TO BIND THE INSTITUTION TO THE FOLLOWING CONDITIONS:

Use of Supplemental Grant Funds:

1. Under section 314(c) of the CRRSAA, Recipient may use these supplemental grant funds for Recipient's Institutional Costs to defray expenses associated with coronavirus (including lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty and staff trainings, and payroll); carry out student support activities authorized by the Higher Education Act of 1965, as amended (HEA) that address needs related to coronavirus; and make additional financial grants to students, which may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care.

2. Recipient acknowledges that no supplemental grant funds may be used to fund contractors for the provision of pre-enrollment recruitment activities; marketing or recruitment; endowments; capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship; senior administrator or executive salaries, benefits, bonuses, contracts, incentives; stock buybacks, shareholder dividends, capital distributions, and stock options; or any other cash or other benefit for a senior administrator or executive.

3. Recipient may, but is not required to, use funds designated for Recipient's Institutional Costs to provide additional financial aid grants to students. If Recipient chooses to use these grant funds designated for Recipient's Institutional Costs to provide additional financial aid grants to students, then those funds are subject to the requirements in the Public and Nonprofit Institution Grant Funds for Students Supplemental Agreement.

4. The Secretary urges Recipient to devote the maximum amount of funds possible to financial aid grants to students, including some or all of the funds allocated for Recipient's Institutional Costs. The Secretary urges Recipient to take strong measures to ensure that financial aid grants to students are made to the maximum extent possible.

5. Recipient must notify the Department within 30 days if Recipient is required or becomes aware that it will be required to remit payment to the Internal Revenue Service for the excise tax paid on investment income of private colleges and universities under section 4968 of the Internal Revenue Code of 1986 for tax year 2019 via the form provided as an attachment to this GAN, pursuant to section 314(d)(6) of the CRRSAA. Recipient acknowledges that if it was required to remit payment to the Internal Revenue Service for this excise tax paid, and if it is not an institution that has been designated as an eligible work college under HEA section 448, 20 U.S.C. 1087–58:

a. Recipient must not draw down more than 50% of its total allocation received under CRRSAA section 314(a)(1) (combined Student Aid Portion and Institutional Portion grants under CFDAs 84.425E and 84.425F), unless and a waiver of this condition has requested by Recipient and until approved by the Secretary under CRRSAA section 314(d)(6)(B).

b. Recipient must use its remaining available funds only for financial aid grants to students consistent with CRRSAA section 314(c)(3), or for sanitation, personal protective equipment, or other expenses

associated with the general health and safety of the campus environment related to the qualifying emergency, unless a waiver of this condition has been requested by Recipient and until approved by the Secretary under CRRSAA section 314(d)(6)(B), and subject to other applicable requirements in section 314.

Grant Administration:

6. Recipient acknowledges that consistent with 2 CFR 200.305, it must minimize the time between drawing down funds from G5 and paying incurred obligations (liquidation). Recipient further acknowledges that if it draws down funds and does not pay the incurred obligations (liquidates) within 3 calendar days it may be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's Office of the Inspector General (OIG). Recipient further acknowledges that returning funds pursuant to mistakes in drawing down excessive grant funds in advance of need may also be subject to heightened scrutiny by the Department, Recipient's auditors, and/or the Department's OIG. Finally, Recipient acknowledges that it must maintain drawn down grant funds in an interest-bearing account, and any interest earned on all Federal grant funds above $500 (all Federal grants together) during an institution's fiscal year must be returned (remitted) to the Federal government via a process described here: *https://www2.ed.gov/documents/funding-101/g5-returning-interest.pdf*.

7. Recipient may charge indirect costs to supplemental funds made available under this award consistent with its negotiated indirect cost rate agreement. If Recipient does not have a current negotiated indirect cost rate with its cognizant agency for indirect costs, it may appropriately charge the *de minimis* rate of ten percent of Modified Total Direct Costs (MTDC). Recipient may also charge reasonable direct administrative costs to the supplemental funds made available under this award.

8. Recipient acknowledges that any obligation under this grant (pre-award costs pursuant to 2 CFR 200.458) must have been incurred on or after December 27, 2020, the date of the enactment of the CRRSAA.

9. Recipient must promptly and to the greatest extent practicable expend all grant funds from this award within the one-year period of performance (2 CFR 200.77) specified in Box 6 of this Grant Award Notification (GAN).

10. Recipient must, to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus pursuant to section 315 of the CRRSAA.

11. Recipient acknowledges that its failure to draw down any amount of its supplemental grant funds within 90 days of the date of this supplemental award will constitute nonacceptance of the terms, conditions, and requirements of this Supplemental Agreement and of these supplemental grant funds. In such event, the Department, in its sole discretion, may choose to deobligate these supplemental grant funds or take other appropriate administrative action, up to and including terminating the grant award pursuant to 2 CFR 200.340.

Reporting and Accountability:

12. Recipient must promptly and timely report to the Department on the use of funds no later than 6 months after the date of this supplemental award in a manner to be specified by the Secretary pursuant to section 314(e) of the CRRSAA. Recipient must also promptly and timely provide a detailed accounting of the use of funds provided by this supplemental award in such manner and with such subsequent frequency as the Secretary may require. Recipient will comply with any other applicable reporting requirements including those in Section 15011(b)(2) of Division B of the CARES Act. Recipient acknowledges the Department may require additional or more frequent reporting to be specified by the Secretary.

13. Recipient must comply with all requirements of the Single Audit Act Amendments of 1996, 31 U.S.C. 7501, *et seq.* (Single Audit Act) and all applicable auditing standards. Considering that the HEERF grant program is a new program not previously audited or subjected to Department oversight, and the inherent risk that comes with a new program, the Department strongly suggests that the HEERF grant program be audited as a major program in the first fiscal year(s) that the institution received a HEERF grant.

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16. Recipient acknowledges that failure to comply with this Supplemental Agreement, its terms and conditions, and/or all relevant provisions and requirements of the CRRSAA or any other applicable law may result in Recipient's liability under the False Claims Act, 31 U.S.C. 3729, *et seq.;* OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; 18 U.S.C. 1001, as appropriate; and all of the laws and regulations referenced in Attachment A, which is incorporated by reference herein.

Applicable Law:

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18. Recipient certifies that with respect to the certification regarding lobbying in Department Form 80–0013, no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making or supplementing of Federal grants under this program; Recipient must complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' when required (34 CFR part 82, Appendix B).

19. Recipient must comply with the provisions of all applicable acts, regulations and assurances; the following provisions of *Education Department General Administrative Regulations* (EDGAR) 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99; the *OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)* in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

[FR Doc. 2021–00935 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Authorities; Innovative Assessment Demonstration Authority

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for new authorities for fiscal year (FY) 2021 under the Innovative Assessment Demonstration Authority (IADA).

DATES:

Applications Available: January 15, 2021.

Deadline for Notice of Intent to Apply: February 16, 2021.

Deadline for Transmittal of Applications: March 16, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to the *Application and Submission Information* section of this notice.

FOR FURTHER INFORMATION CONTACT: Donald Peasley, U.S. Department of Education, 400 Maryland Avenue SW, room 3W106, Washington, DC 20202–6132. Telephone: (202) 453–7982. Email: *ESEA.Assessment@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Opportunity Description

Purpose of Program: The Secretary provides State educational agencies (SEAs), including consortia of SEAs, with the authority to establish and operate an innovative assessment system in their public schools under the IADA in section 1204 of the Elementary and Secondary Education Act of 1965, as amended (ESEA or the Act). An approved State, based on its response to this NIA, must be ready to administer and use the results from the innovative assessments in the 2021–2022 school year. During this initial demonstration period, no more than seven SEAs may participate, including those participating in consortia, which may include no more than four SEAs. Through previous competitions, the Department has awarded five States the authority. Two additional States may be approved for this authority during this competition. In FY 2020, the Department awarded grants under the Competitive Grants for State Assessments program (Assistance Listing Number 84.368A), including two grants to implement IADA for States already approved for flexibility and one grant to support preparation of an application for flexibility under IADA.

Application Requirements: An SEA or consortium of SEAs seeking IADA must submit an application to the Secretary that demonstrates how the applicant meets all application requirements under 34 CFR 200.105 and that addresses all selection criteria under 34 CFR 200.106. The following requirements are from 34 CFR 200.105.

An eligible application must include the following:

(a) *Consultation.* Evidence that the SEA or a consortium has developed an innovative assessment system in collaboration with—

(1) Experts in the planning, development, implementation, and evaluation of innovative assessment systems, which may include external partners; and

(2) Affected stakeholders in the State, or in each State in the consortium, including—

(i) Those representing the interests of children with disabilities, English learners, and other subgroups of students described in section 1111(c)(2) of the ESEA;

(ii) Teachers, principals, and other school leaders;

(iii) Local educational agencies (LEAs);

(iv) Representatives of Indian Tribes located in the State;

(v) Students and parents, including parents of children described in paragraph (a)(2)(i) of this section; and

(vi) Civil rights organizations.

(b) *Innovative assessment system.* A demonstration that the innovative assessment system does or will—

(1) Meet the requirements of section 1111(b)(2)(B) of the ESEA, except that an innovative assessment—

(i) Need not be the same assessment administered to all public elementary and secondary school students in the State during the demonstration authority period described in 34 CFR 200.104(b)(2) or extension period described in 34 CFR 200.108 and prior to statewide use consistent with 34 CFR 200.107, if the innovative assessment system will be administered initially to all students in participating schools within a participating LEA, provided that the statewide academic assessments under 34 CFR 200.2(a)(1) and section 1111(b)(2) of the ESEA are administered to all students in any non-participating LEA or any non-participating school within a participating LEA; and

(ii) Need not be administered annually in each of grades 3–8 and at least once in grades 9–12 in the case of reading/language arts and mathematics assessments, and at least once in grades 3–5, 6–9, and 10–12 in the case of science assessments, so long as the statewide academic assessments under 34 CFR 200.2(a)(1) and section 1111(b)(2) of the ESEA are administered in any required grade and subject under 34 CFR 200.5(a)(1) in which the SEA does not choose to implement an innovative assessment;

(2)(i) Align with the challenging State academic content standards under section 1111(b)(1) of the ESEA, including the depth and breadth of such standards, for the grade in which a student is enrolled; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level so long as, for purposes of meeting the requirements for reporting and school accountability under sections 1111(c) and 1111(h) of the ESEA and paragraphs (b)(3) and (b)(7)–(9) of this section, the State measures each student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled;

(3) Express student results or competencies consistent with the challenging State academic achievement standards under section 1111(b)(1) of the ESEA and identify which students are not making sufficient progress toward, and attaining, grade-level proficiency on such standards;

(4)(i) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable for all students and for each subgroup of students described in 34 CFR 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the ESEA, to the results generated by the State academic assessments described in 34 CFR 200.2(a)(1) and section 1111(b)(2) of the ESEA for such students. Consistent with the SEA's or consortium's evaluation plan under 34 CFR 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period in one of the following ways:

(A) Administer full assessments from both the innovative and statewide assessment systems to all students enrolled in participating schools, such that at least once in any grade span (*i.e.,* 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered to all such students. As part of this determination, the innovative assessment and statewide assessment need not be administered to an individual student in the same school year.

(B) Administer full assessments from both the innovative and statewide assessment systems to a demographically representative sample of all students and subgroups of students described in section 1111(c)(2) of the ESEA, from among those students enrolled in participating schools, such that at least once in any grade span (*i.e.,* 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered in the same school year to all students included in the sample.

(C) Include, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the statewide assessment system that, at a minimum,

have been previously pilot-tested or field-tested for use in the statewide assessment system.

(D) Include, as a significant portion of the statewide assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot-tested or field-tested for use in the innovative assessment system.

(E) Use an alternative method for demonstrating comparability that an SEA can demonstrate will provide for an equally rigorous and statistically valid comparison between student performance on the innovative assessment and the statewide assessment, including for each subgroup of students described in 34 CFR 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the ESEA; and

(ii) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable, for all students and for each subgroup of students described in 34 CFR 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the ESEA, among participating schools and LEAs in the IADA. Consistent with the SEA's or consortium's evaluation plan under 34 CFR 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period;

(5)(i) Provide for the participation of all students, including children with disabilities and English learners;

(ii) Be accessible to all students by incorporating the principles of universal design for learning, to the extent practicable, consistent with 34 CFR 200.2(b)(2)(ii); and

(iii) Provide appropriate accommodations consistent with 34 CFR 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the ESEA;

(6) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the ESEA, annually measure in each participating school progress on the Academic Achievement indicator under section 1111(c)(4)(B) of the ESEA of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the ESEA, who are required to take such assessments consistent with paragraph (b)(1)(ii) of this section;

(7) Generate an annual summative determination of achievement, using the annual data from the innovative assessment, for each student in a participating school in the demonstration authority that describes—

(i) The student's mastery of the challenging State academic standards under section 1111(b)(1) of the ESEA for the grade in which the student is enrolled; or

(ii) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the ESEA, the student's mastery of those standards;

(8) Provide disaggregated results by each subgroup of students described in 34 CFR 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the ESEA, including timely data for teachers, principals and other school leaders, students, and parents consistent with 34 CFR 200.8 and section 1111(b)(2)(B)(x) and (xii) and section 1111(h) of the ESEA, and provide results to parents in a manner consistent with paragraph (b)(4)(i) of this section and 34 CFR 200.2(e); and

(9) Provide an unbiased, rational, and consistent determination of progress toward the State's long-term goals for academic achievement under section 1111(c)(4)(A) of the ESEA for all students and each subgroup of students described in section 1111(c)(2) of the ESEA and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B) of the ESEA for participating schools relative to non-participating schools so that the SEA may validly and reliably aggregate data from the system for purposes of meeting requirements for—

(i) Accountability under sections 1003 and 1111(c) and (d) of the ESEA, including how the SEA will identify participating and non-participating schools in a consistent manner for comprehensive and targeted support and improvement under section 1111(c)(4)(D) of the ESEA; and

(ii) Reporting on State and LEA report cards under section 1111(h) of the ESEA.

(c) *Selection Criteria.* Information that addresses each of the selection criteria under 34 CFR 200.106.

(d) *Assurances.* Assurances that the SEA, or each SEA in a consortium, will—

(1) Continue use of the statewide academic assessments in reading/language arts, mathematics, and science required under 34 CFR 200.2(a)(1) and section 1111(b)(2) of the ESEA—

(i) In all non-participating schools; and

(ii) In all participating schools for which such assessments will be used in addition to innovative assessments for accountability purposes under section 1111(c) of the ESEA consistent with paragraph (b)(1)(ii) of this section or for evaluation purposes consistent with 34 CFR 200.106(e) during the demonstration authority period;

(2) Ensure that all students and each subgroup of students described in section 1111(c)(2) of the ESEA in participating schools are held to the same challenging State academic standards under section 1111(b)(1) of the ESEA as all other students, except that students with the most significant cognitive disabilities may be assessed with alternate assessments aligned with alternate academic achievement standards consistent with 34 CFR 200.6 and section 1111(b)(1)(E) and (b)(2)(D) of the ESEA, and receive the instructional support needed to meet such standards;

(3) Report the following annually to the Secretary, at such time and in such manner as the Secretary may reasonably require:

(i) An update on implementation of the IADA, including—

(A) The SEA's progress against its timeline under 34 CFR 200.106(c) and any outcomes or results from its evaluation and continuous improvement process under 34 CFR 200.106(e); and

(B) If the innovative assessment system is not yet implemented statewide consistent with 34 CFR 200.104(a)(2), a description of the SEA's progress in scaling up the system to additional LEAs or schools consistent with its strategies under 34 CFR 200.106(a)(3)(i), including updated assurances from participating LEAs consistent with paragraph (e)(2) of this section.

(ii) The performance of students in participating schools at the State, LEA, and school level, for all students and disaggregated for each subgroup of students described in section 1111(c)(2) of the ESEA, on the innovative assessment, including academic achievement and participation data required to be reported consistent with section 1111(h) of the ESEA, except that such data may not reveal any personally identifiable information.

(iii) If the innovative assessment system is not yet implemented statewide, school demographic information, including enrollment and student achievement information, for the subgroups of students described in section 1111(c)(2) of the ESEA, among participating schools and LEAs and for any schools or LEAs that will

participate for the first time in the following year, and a description of how the participation of any additional schools or LEAs in that year contributed to progress toward achieving high-quality and consistent implementation across demographically diverse LEAs in the State consistent with the SEA's benchmarks described in 34 CFR 200.106(a)(3)(iii).

(iv) Feedback from teachers, principals and other school leaders, and other stakeholders consulted under paragraph (a)(2) of this section, including parents and students, from participating schools and LEAs about their satisfaction with the innovative assessment system.

(4) Ensure that each participating LEA informs parents of all students in participating schools about the innovative assessment, including the grades and subjects in which the innovative assessment will be administered, and, consistent with section 1112(e)(2)(B) of the ESEA, at the beginning of each school year during which an innovative assessment will be implemented. Such information must be—

(i) In an understandable and uniform format;

(ii) To the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and

(iii) Upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act, provided in an alternative format accessible to that parent; and

(5) Coordinate with and provide information to, as applicable, the Institute of Education Sciences for purposes of the progress report described in section 1204(c) of the ESEA and ongoing dissemination of information under section 1204(m) of the ESEA.

(e) *Initial implementation in a subset of LEAs or schools.* If the innovative assessment system will initially be administered in a subset of LEAs or schools in a State—

(1) A description of each LEA, and each of its participating schools, that will initially participate, including demographic information and its most recent LEA report card under section 1111(h)(2) of the ESEA; and

(2) An assurance from each participating LEA, for each year that the LEA is participating, that the LEA will comply with all requirements of this section.

(f) *Application from a consortium of SEAs.* If an application for the IADA is submitted by a consortium of SEAs—

(1) A description of the governance structure of the consortium, including—

(i) The roles and responsibilities of each member SEA, which may include a description of affiliate members, if applicable, and must include a description of financial responsibilities of member SEAs;

(ii) How the member SEAs will manage and, at their discretion, share intellectual property developed by the consortium as a group; and

(iii) How the member SEAs will consider requests from SEAs to join or leave the consortium and ensure that changes in membership do not affect the consortium's ability to implement the IADA consistent with the requirements and selection criteria in this section and 34 CFR 200.106.

(2) While the terms of the association with affiliate members are defined by each consortium, consistent with 34 CFR 200.104(b)(1) and paragraph (f)(1)(i) of this section, for an affiliate member to become a full member of the consortium and to use the consortium's innovative assessment system under the demonstration authority, the consortium must submit a revised application to the Secretary for approval, consistent with the requirements of this section and 34 CFR 200.106 and subject to the limitation under 34 CFR 200.104(d).

Definitions: For FY 2021 and any subsequent year in which we award the IADA, the following definitions will apply. These definitions are from 34 CFR 200.104(b).

(1) *Affiliate member of a consortium* means an SEA that is formally associated with a consortium of SEAs that is implementing the IADA, but is not yet a full member of the consortium because it is not proposing to use the consortium's innovative assessment system under the demonstration authority, instead of, or in addition to, its statewide assessment under section 1111(b)(2) of the ESEA for purposes of accountability and reporting under sections 1111(c) and 1111(h) of the ESEA.

(2) *Demonstration authority period* refers to the period of time over which an SEA, or consortium of SEAs, is authorized to implement the IADA, which may not exceed five years and does not include the extension or waiver period under 34 CFR 200.108. An SEA must use its innovative assessment system in all participating schools instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the ESEA for purposes of accountability and reporting under section 1111(c) and 1111(h) of the ESEA in each year of the demonstration authority period.

(3) *Innovative assessment system* means a system of assessments, which may include any combination of general assessments or alternate assessments aligned with alternate academic achievement standards, in reading/language arts, mathematics, or science administered in at least one required grade under 34 CFR 200.5(a)(1) and section 1111(b)(2)(B)(v) of the ESEA that—

(i) Produces—

(A) An annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the ESEA; or

(B) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the ESEA and aligned with the State's academic content standards for the grade in which the student is enrolled, an annual summative determination relative to such alternate academic achievement standards for each such student; and

(ii) May, in any required grade or subject, include one or more of the following types of assessments:

(A) Cumulative year-end assessments.

(B) Competency-based assessments.

(C) Instructionally embedded assessments.

(D) Interim assessments.

(E) Performance-based assessments.

(F) Another innovative assessment design that meets the requirements under 34 CFR 200.105(b).

(4) *Participating LEA* means an LEA in the State with at least one school participating in the IADA.

(5) *Participating school* means a public school in the State in which the innovative assessment system is administered under the IADA instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the ESEA and where the results of the school's students on the innovative assessment system are used by its State and LEA for purposes of accountability and reporting under section 1111(c) and 1111(h) of the ESEA.

Program Authority: Section 1204 of the ESEA (20 U.S.C. 6364); 34 CFR 200.104 through 200.108.

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

II. Award Information

Type of Award: Innovation authority.

Estimated Available Funds: No funds are authorized to be appropriated for the IADA. However, an SEA may use funds it receives under Grants for State Assessments and Related Activities (see section 1201 of the ESEA (20 U.S.C. 6361)) to implement its innovative assessment system.

Estimated Number of Awards: Up to two States may be approved for this authority in this competition because five States have previously received the authority. For the initial demonstration period, no more than seven States, including States that are part of a consortium (which may include no more than four States), may participate.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs (as defined in section 8101(49) of the ESEA) and consortia of SEAs that include no more than four SEAs.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* An application from a consortium of SEAs must designate one SEA as the lead State for project management.

IV. Application and Submission Information

1. *Address to Request Application Package:* Donald Peasley, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W106, Washington, DC 20202–6132. Telephone: (202) 453–7982. Email: *ESEA.Assessment@ed.gov.*

To obtain a copy via the internet, use the following address: *https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/iada/.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

2. *Content and Form of Application Submission:* Requirements concerning the content and form of an application, together with the forms you must submit, are in the application package for this program, which can be found at *https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/iada/.*

3. *Notice of Intent to Apply:* We will be able to develop a more efficient process for reviewing applications if we have a better understanding of the number of applicants that intend to apply for selection under this program. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application by February 16, 2021. This notification should be brief, and identify the SEA applicant, and, if part of a consortium, the SEA that is the fiscal agent for the consortium. Submit this notification by email to *ESEA.Assessment@ed.gov* with ''Intent to Apply'' in the email subject line or by mail to Donald Peasley, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W106, Washington, DC 20202–6132. Applicants that do not provide this notification may still apply for the authority.

4. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the IADA, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended). Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information, please see 34 CFR 5.11(c).

5. *Intergovernmental Review:* This competition is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

6. *Application Submission Instructions:*

Applications under this program must be submitted electronically using the Department's application portal at *www.Max.gov.* For directions on how to access and use the application portal, please contact Donald Peasley at *ESEA.Assessment@ed.gov.* For information (including dates and times) about how to submit your application electronically, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

7. *Other Submission Requirements:*

a. *Electronic Submission of Applications.*

Applications under this program must be submitted electronically using the Department's application portal at *www.Max.gov* by 5:00:00 p.m. Eastern Time on March 16, 2021. For directions on how to access and use the application portal, please contact Donald Peasley at *ESEA.Assessment@ed.gov.*

You may access the electronic application for this program at *https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/iada/.* You must submit all documents electronically.

- You must upload any narrative sections and all other attachments to your application as files in a read-only, flattened Portable Document Format (PDF), meaning any fillable PDF documents must be saved as flattened non-fillable files. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, flattened PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will not review that material. Please note that this could result in your application not being considered because the material in question—for example, the project narrative—is critical to a meaningful review of your proposal. For that reason it is important to allow yourself adequate time to upload all material as PDF files. The Department will not convert material from other formats to PDF.
- Your application must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in a read-only, flattened PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.
- We may request that you provide us original signatures on forms at a later date.

b. *Submission of Application in Case of Technical Issues.*

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with

the Max.gov system, you may email your application to the person listed under **FOR FURTHER INFORMATION CONTACT** and provide an explanation of the technical problem you experienced. We will contact you after we determine whether your application will be accepted.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 200.106. We will award a maximum of up to 120 points to an application under the selection criteria; the total possible points for addressing each selection criterion are noted in parentheses.

(a) *Project narrative.* (Up to 40 points)

The quality of the SEA's or consortium's plan for implementing the IADA. In determining the quality of the plan, the Secretary considers—

(1) The rationale for developing or selecting the particular innovative assessment system to be implemented under the demonstration authority, including—

(i) The distinct purpose of each assessment that is part of the innovative assessment system and how the system will advance the design and delivery of large-scale, statewide academic assessments in innovative ways; and

(ii) The extent to which the innovative assessment system as a whole will promote high-quality instruction, mastery of challenging State academic standards, and improved student outcomes, including for each subgroup of students described in section 1111(c)(2) of the ESEA; (5 points if factor (3) is applicable; 10 points if factor (3) is inapplicable);

(2) The plan the SEA or consortium, in consultation with any external partners, if applicable, has to—

(i) Develop and use standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments throughout the demonstration authority period, consistent with relevant nationally recognized professional and technical standards, to ensure inter-rater reliability and comparability of innovative assessment results consistent with 34 CFR 200.105(b)(4)(ii), which may include evidence of inter-rater reliability; and

(ii) Train evaluators to use such strategies, if applicable; (25 points if factor (3) is applicable; 30 points if factor (3) is inapplicable); and

(3) If the system will initially be administered in a subset of schools or LEAs in a State—

(i) The strategies the SEA, including each SEA in a consortium, will use to scale the innovative assessment to all schools statewide, with a rationale for selecting those strategies;

(ii) The strength of the SEA's or consortium's criteria that will be used to determine LEAs and schools that will initially participate and when to approve additional LEAs and schools, if applicable, to participate during the requested demonstration authority period; and

(iii) The SEA's plan, including each SEA in a consortium, for how it will ensure that, during the demonstration authority period, the inclusion of additional LEAs and schools continues to reflect high-quality and consistent implementation across demographically diverse LEAs and schools, or contributes to progress toward achieving such implementation across demographically diverse LEAs and schools, including diversity based on enrollment of subgroups of students described in section 1111(c)(2) of the ESEA and student achievement. The plan must also include annual benchmarks toward achieving high-quality and consistent implementation across participating schools that are, as a group, demographically similar to the State as a whole during the demonstration authority period, using the demographics of initially participating schools as a baseline. (10 points, if applicable)

(b) *Prior experience, capacity, and stakeholder support.* (Up to 20 points)

(1) The extent and depth of prior experience that the SEA, including each SEA in a consortium, and its LEAs have in developing and implementing the components of the innovative assessment system. An SEA may also describe the prior experience of any external partners that will be participating in or supporting its demonstration authority in implementing those components. In evaluating the extent and depth of prior experience, the Secretary considers—

(i) The success and track record of efforts to implement innovative assessments or innovative assessment items aligned to the challenging State academic standards under section 1111(b)(1) of the ESEA in LEAs planning to participate; and

(ii) The SEA's or LEA's development or use of—

(A) Effective supports and appropriate accommodations consistent with 34 CFR 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the ESEA for administering innovative assessments to all students, including English learners and children with disabilities, which must include professional development for school staff on providing such accommodations;

(B) Effective and high-quality supports for school staff to implement innovative assessments and innovative assessment items, including professional development; and

(C) Standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments, with documented evidence of the validity, reliability, and comparability of annual summative determinations of achievement, consistent with 34 CFR 200.105(b)(4) and (7). (5 points)

(2) The extent and depth of the SEA, including each SEA in a consortium, and LEA capacity to implement the innovative assessment system considering the availability of technological infrastructure; State and local laws; dedicated and sufficient staff, expertise, and resources; and other relevant factors. An SEA or consortium may also describe how it plans to enhance its capacity by collaborating with external partners that will be participating in or supporting its demonstration authority. In evaluating the extent and depth of capacity, the Secretary considers—

(i) The SEA's analysis of how capacity influenced the success of prior efforts to develop and implement innovative assessments or innovative assessment items; and

(ii) The strategies the SEA is using, or will use, to mitigate risks, including those identified in its analysis, and support successful implementation of the innovative assessment. (5 points)

(3) The extent and depth of State and local support for the application for demonstration authority in each SEA, including each SEA in a consortium, as demonstrated by signatures from the following:

(i) Superintendents (or equivalent) of LEAs, including participating LEAs in the first year of the demonstration authority period.

(ii) Presidents of local school boards (or equivalent, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iii) Local teacher organizations (including labor organizations, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iv) Other affected stakeholders, such as parent organizations, civil rights organizations, and business organizations. (10 points)

(c) *Timeline and budget.* (Up to 15 points)

The quality of the SEA's or consortium's timeline and budget for implementing the IADA. In determining

the quality of the timeline and budget, the Secretary considers—

(1) The extent to which the timeline reasonably demonstrates that each SEA will implement the system statewide by the end of the requested demonstration authority period, including a description of—

(i) The activities to occur in each year of the requested demonstration authority period;

(ii) The parties responsible for each activity; and

(iii) If applicable, how a consortium's member SEAs will implement activities at different paces and how the consortium will implement interdependent activities, so long as each non-affiliate member SEA begins using the innovative assessment in the same school year consistent with 34 CFR part 200.104(b)(2); (5 points) and

(2) The adequacy of the project budget for the duration of the requested demonstration authority period, including Federal, State, local, and non-public sources of funds to support and sustain, as applicable, the activities in the timeline under paragraph (c)(1) of this section, including—

(i) How the budget will be sufficient to meet the expected costs at each phase of the SEA's planned expansion of its innovative assessment system; and

(ii) The degree to which funding in the project budget is contingent upon future appropriations at the State or local level or additional commitments from non-public sources of funds. (10 points)

(d) *Supports for educators, students, and parents.* (Up to 25 points)

The quality of the SEA or consortium's plan to provide supports that can be delivered consistently at scale to educators, students, and parents to enable successful implementation of the innovative assessment system and improve instruction and student outcomes. In determining the quality of supports, the Secretary considers—

(1) The extent to which the SEA or consortium has developed, provided, and will continue to provide training to LEA and school staff, including teachers, principals, and other school leaders, that will familiarize them with the innovative assessment system and develop teacher capacity to implement instruction that is informed by the innovative assessment system and its results; (5 points if factor (4) is applicable; 9 points if factor (4) is inapplicable)

(2) The strategies the SEA or consortium has developed and will use to familiarize students and parents with the innovative assessment system; (5 points if factor (4) is applicable; 8 points if factor (4) is inapplicable)

(3) The strategies the SEA will use to ensure that all students and each subgroup of students under section 1111(c)(2) of the Act in participating schools receive the support, including appropriate accommodations consistent with 34 CFR 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the ESEA, needed to meet the challenging State academic standards under section 1111(b)(1) of the ESEA; (5 points if factor (4) is applicable; 8 points if factor (4) is inapplicable) and

(4) If the system includes assessment items that are locally developed or locally scored, the strategies and safeguards (*e.g.,* test blueprints, item and task specifications, rubrics, scoring tools, documentation of quality control procedures, inter-rater reliability checks, audit plans) the SEA or consortium has developed, or plans to develop, to validly and reliably score such items, including how the strategies engage and support teachers and other staff in designing, developing, implementing, and validly and reliably scoring high-quality assessments; how the safeguards are sufficient to ensure unbiased, objective scoring of assessment items; and how the SEA will use effective professional development to aid in these efforts. (10 points if applicable)

(e) *Evaluation and continuous improvement.* (Up to 20 points)

The quality of the SEA's or consortium's plan to annually evaluate its implementation of IADA. In determining the quality of the evaluation, the Secretary considers—

(1) The strength of the proposed evaluation of the innovative assessment system included in the application, including whether the evaluation will be conducted by an independent, experienced third party, and the likelihood that the evaluation will sufficiently determine the system's validity, reliability, and comparability to the statewide assessment system consistent with the requirements of 34 CFR 200.105(b)(4) and (9); (12 points) and

(2) The SEA's or consortium's plan for continuous improvement of the innovative assessment system, including its process for—

(i) Using data, feedback, evaluation results, and other information from participating LEAs and schools to make changes to improve the quality of the innovative assessment; and

(ii) Evaluating and monitoring implementation of the innovative assessment system in participating LEAs and schools annually. (8 points)

2. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205(c) and 200.207, before approving a project under this authority, the Department may conduct a review of the risks posed by the applicant and impose specific conditions as needed.

3. *Additional Review and Selection Process Factors:*

(a) The Secretary uses a peer review process, including a review of the SEA's application to determine that it meets or will meet each of the requirements under 34 CFR 200.105 and sufficiently addresses each of the selection criteria under 34 CFR 200.106, to inform the Secretary's decision of whether to award the IADA to an SEA or consortium of SEAs. Peer review teams consist of experts and State and local practitioners who are knowledgeable about innovative assessment systems, including—

(i) Individuals with past experience developing innovative assessment and accountability systems that support all students and subgroups of students described in section 1111(c)(2) of the ESEA (*e.g.,* psychometricians, measurement experts, researchers); and

(ii) Individuals with experience implementing such innovative assessment and accountability systems (*e.g.,* State and local assessment directors, educators).

VI. Administration Information

1. *Approval Notices:* If your application is approved, we notify your U.S. Representative and U.S. Senators and send you a letter or email approving your project.

If your application is not selected, we notify you.

2. *Programmatic Requirements:* Your application must address the programmatic requirements in section 1204 of the ESEA and 34 CFR 200.104 through 200.108.

3. *Reporting:* (a) If you apply under this program, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements should your application be approved.

(b) You must submit, at the end of each year of your project period, an annual update on program activity according to the requirements of 34 CFR 200.105(d)(3).

4. *Transition to Statewide Use:* Pursuant to 34 CFR 200.107—

(a)(1) After an SEA has scaled its innovative assessment system to operate statewide in all schools and LEAs in the State, the SEA must submit evidence for peer review under section 1111(a)(4) of the ESEA and 34 CFR 200.2(d) to determine whether the system may be

used for purposes of both academic assessments and the State accountability system under sections 1111(b)(2), (c), and (d) and 1003 of the ESEA.

(2) An SEA may only use the innovative assessment system for the purposes described in paragraph (a)(1) of this section if the Secretary determines that the system is of high quality consistent with paragraph (b) of this section.

(b) Through the peer review process of State assessments and accountability systems under section 1111(a)(4) of the ESEA and 34 CFR 200.2(d), the Secretary determines that the innovative assessment system is of high quality if—

(1) An innovative assessment developed in any grade or subject under 34 CFR 200.5(a)(1) and section 1111(b)(2)(B)(v) of the ESEA—

(i) Meets all of the requirements under section 1111(b)(2) of the ESEA and 34 CFR 200.105(b) and (c);

(ii) Provides coherent and timely information about student achievement based on the challenging State academic standards under section 1111(b)(1) of the ESEA;

(iii) Includes objective measurements of academic achievement, knowledge, and skills; and

(iv) Is valid, reliable, and consistent with relevant, nationally recognized professional and technical standards;

(2) The SEA provides satisfactory evidence that it has examined the statistical relationship between student performance on the innovative assessment in each subject area and student performance on other measures of success, including the measures used for each relevant grade-span within the remaining indicators (*i.e.,* indicators besides Academic Achievement) in the statewide accountability system under section 1111(c)(4)(B)(ii)–(v) of the ESEA, and how the inclusion of the innovative assessment in its Academic Achievement indicator under section 1111(c)(4)(B)(i) of the ESEA affects the annual meaningful differentiation of schools under section 1111(c)(4)(C) of the ESEA;

(3) The SEA has solicited information, consistent with the requirements under 34 CFR 200.105(d)(3)(iv), and taken into account feedback from teachers, principals, other school leaders, parents, and other stakeholders under 34 CFR 200.105(a)(2) about their satisfaction with the innovative assessment system; and

(4) The SEA has demonstrated that the same innovative assessment system was used to measure—

(i) The achievement of all students and each subgroup of students described in section 1111(c)(2) of the ESEA, and that appropriate accommodations were provided consistent with 34 CFR 200.6(b) and (f)(1)(i) under section 1111(b)(2)(B)(vii) of the ESEA; and

(ii) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the ESEA, progress on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the ESEA of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the ESEA.

(c) With respect to the evidence submitted to the Secretary to make the determination described in paragraph (b)(2) of this section, the baseline year for any evaluation is the first year that a participating LEA in the State administered the innovative assessment system under the demonstration authority.

(d) In the case of a consortium of SEAs, evidence may be submitted for the consortium as a whole so long as the evidence demonstrates how each member SEA meets each requirement of paragraph (b) of this section applicable to an SEA.

5. *Continuation of Authority:* Pursuant to 34 CFR 200.108—

(a) The Secretary may extend an SEA's demonstration authority period for no more than two years if the SEA submits to the Secretary—

(1) Evidence that its innovative assessment system continues to meet the requirements under 34 CFR 200.105 and the SEA continues to implement the plan described in its application in response to the selection criteria in 34 CFR 200.106 in all participating schools and LEAs;

(2) A high-quality plan, including input from stakeholders under 34 CFR 200.105(a)(2), for transitioning to statewide use of the innovative assessment system by the end of the extension period; and

(3) A demonstration that the SEA and all LEAs that are not yet fully implementing the innovative assessment system have sufficient capacity to support use of the system statewide by the end of the extension period.

(b) In the case of a consortium of SEAs, the Secretary may extend the demonstration authority period for the consortium as a whole or for an individual member SEA.

6. *Withdrawal of Demonstration Authority.* (a) The Secretary may withdraw the IADA provided to an SEA, including an individual SEA member of a consortium, if at any time during the approved demonstration authority period or extension period, the Secretary requests, and the SEA does not present in a timely manner—

(1) A high-quality plan, including input from stakeholders under 34 CFR 200.105(a)(2), to transition to full statewide use of the innovative assessment system by the end of its approved demonstration authority period or extension period, as applicable; or

(2) Evidence that—

(i) The innovative assessment system meets all requirements under 34 CFR 200.105, including a demonstration that the innovative assessment system has met the requirements under 34 CFR 200.105(b);

(ii) The SEA continues to implement the plan described in its application in response to the selection criteria in 34 CFR 200.106;

(iii) The innovative assessment system includes and is used to assess all students attending participating schools in the demonstration authority, consistent with the requirements under section 1111(b)(2) of the ESEA to provide for participation in State assessments, including among each subgroup of students described in section 1111(c)(2) of the ESEA, and for appropriate accommodations consistent with 34 CFR 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the ESEA;

(iv) The innovative assessment system provides an unbiased, rational, and consistent determination of progress toward the State's long-term goals and measurements of interim progress for academic achievement under section 1111(c)(4)(A) of the ESEA for all students and subgroups of students described in section 1111(c)(2) of the ESEA and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the ESEA for participating schools relative to non-participating schools; or

(v) The innovative assessment system demonstrates comparability to the statewide assessments under section 1111(b)(2) of the ESEA in content coverage, difficulty, and quality.

(b)(1) In the case of a consortium of SEAs, the Secretary may withdraw IADA for the consortium as a whole at any time during its demonstration authority period or extension period if the Secretary requests, and no member of the consortium provides, the information under paragraph (a)(1) or (2) of this section.

(2) If IADA for one or more SEAs in a consortium is withdrawn, the consortium may continue to implement the authority if it can demonstrate, in an amended application to the Secretary that, as a group, the remaining SEAs

continue to meet all requirements and selection criteria in 34 CFR 200.105 and 200.106.

7. *Waiver authority.* (a) At the end of the extension period, an SEA that is not yet approved consistent with 34 CFR 200.107 to implement its innovative assessment system statewide may request a waiver from the Secretary consistent with section 8401 of the ESEA to delay the withdrawal of authority under paragraph (6) of this section for the purpose of providing the SEA with the time necessary to receive approval to transition to use of the innovative assessment system statewide under 34 CFR 200.107(b).

(b) The Secretary may grant an SEA a one-year waiver to continue the IADA, if the SEA submits, in its request under paragraph (7)(a) of this section, evidence satisfactory to the Secretary that it—

(1) Has met all of the requirements under paragraph (6)(a) of this section and of 34 CFR 200.105 and 200.106; and

(2) Has a high-quality plan, including input from stakeholders under 34 CFR 200.105(a)(2), for transition to statewide use of the innovative assessment system, including peer review consistent with 34 CFR 200.107, in a reasonable period of time.

(c) In the case of a consortium of SEAs, the Secretary may grant a one-year waiver consistent with paragraph (7)(a) of this section for the consortium as a whole or for individual member SEAs, as necessary.

8. *Return to the Statewide Assessment System.* If the Secretary withdraws IADA consistent with paragraph (6) of this section, or if an SEA voluntarily terminates use of its innovative assessment system prior to the end of its demonstration authority, extension, or waiver period under paragraph (7) of this section, as applicable, the SEA must—

(a) Return to using, in all LEAs and schools in the State, a statewide assessment that meets the requirements of section 1111(b)(2) of the Act; and

(b) Provide timely notice to all participating LEAs and schools of the withdrawal of authority and the SEA's plan for transition back to use of a statewide assessment.

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Frank T. Brogan,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2021–00882 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2021–SCC–0008]

Agency Information Collection Activities; Comment Request; Trends in International Mathematics and Science Study (TIMSS 2023) Field Test Sampling and Recruitment

AGENCY: Institute of Educational Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing revision of a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before March 16, 2021.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0008. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *Regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Trends in International Mathematics and Science Study (TIMSS 2023) Field Test Sampling and Recruitment.

OMB Control Number: 1850–0695.

Type of Review: Revision of a currently approved information collection.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 3,199.

Total Estimated Number of Annual Burden Hours: 1,040.

Abstract: The Trends in International Mathematics and Science Study (TIMSS), conducted by the National Center for Education Statistics (NCES), within the U.S. Department of Education (ED), is an international assessment of fourth and eighth grade students' achievement in mathematics and science. Since its inception in 1995, TIMSS has continued to assess students every 4 years (1995, 1999, 2003, 2007, 2011, 2015, and 2019), with the next TIMSS assessment, TIMSS 2023, being the eighth iteration of the study. In TIMSS 2023, approximately 65 countries or education systems will participate. The United States will participate in TIMSS 2023 to continue to monitor the progress of its students compared to that of other nations and to provide data on factors that may influence student achievement.

TIMSS is led by the International Association for the Evaluation of Educational Achievement (IEA), an international collective of research organizations and government agencies that create the frameworks used to develop the assessment, the survey instruments, and the study timeline. IEA decides and agrees upon a common set of standards, procedures, and timelines for collecting and reporting data, all of which must be followed by all participating countries. As a result, TIMSS can provide a reliable and comparable measure of student skills in participating countries. In the U.S., NCES conducts this study in collaboration with the IEA and several contractors to ensure proper implementation of the study and adoption of practices in adherence to the IEA's standards. Participation in TIMSS is consistent with NCES's mandate of acquiring and disseminating data on educational activities and student achievement in the United States compared with foreign nations [The Educational Sciences Reform Act of 2002 (ESRA 2002, 20 U.S.C. 9543)].

Because TIMSS is a collaborative effort among many parties, the United States must adhere to the international schedule set forth by the IEA, including the availability of final field test and main study plans as well as draft and final questionnaires. To meet the international data collection schedule, to align with recruitment for other NCES studies (*e.g.,* the National Assessment of Education Progress, NAEP), and for schools to put the TIMSS 2023 field test assessment on their Spring 2022 calendars, recruitment activities for the field test will begin in June of 2021. This package requests approval to conduct sampling and recruitment activities associated with the TIMSS 2023 field test, which will be conducted in March and April 2022.

Dated: January 11, 2021.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–00802 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0009]

Agency Information Collection Activities; Comment Request; CRRSAA, Recipient's Funding Certification and Agreement (Proprietary Schools)

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: The Department has requested emergency processing from OMB for this information collection request by January 12, 2021; and therefore, the regular clearance process is hereby being initiated to provide the public with the opportunity to comment under the full comment period. Interested persons are invited to submit comments on or before March 16, 2021.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0009. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Karen Epps, 202–453–6337.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: CRRSAA, Recipient's Funding Certification and Agreement (Proprietary Schools).

OMB Control Number: 1840–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 1,757.

Total Estimated Number of Annual Burden Hours: 8,787.

Abstract: Section 314(a)(4) of the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA) (Pub. L. 116–260) provides funding for proprietary schools, to be used to make financial aid grants directly to students, which may be used for any component of the student's cost of attendance or for emergency costs that arise due to the coronavirus, such

as tuition, food, housing, health care (including mental health care) or child care.

Additional Information: An emergency clearance approval for the use of the system is described below due to the following conditions: If this emergency collection is not approved, these emergency financial aid grants to students would be delayed. The pressing financial need of students due to the disruptions caused by the coronavirus would remain unmet, leaving students without the aid intended for such critical benefits as such as food, housing, course materials, technology, health care, and child-care expenses.

Dated: January 12, 2021.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2021–00889 Filed 1–14–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting Notice

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

TIME AND DATE: January 19, 2021, 10:00 a.m.

PLACE: Open to the public via audio Webcast only.[1]

STATUS: OPEN.

MATTERS TO BE CONSIDERED: Agenda.

* *Note*—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's website at *http://ferc.capitolconnection.org/* using the eLibrary link.

1074TH—MEETING—OPEN MEETING

[January 19, 2021 10:00 a.m.]

Item No.	Docket No.	Company
	ADMINISTRATIVE	
A-1	AD21-1-000	Agency Administrative Matters
A-2	AD21-2-000	Customer Matters, Reliability, Security and Market Operations
	ELECTRIC	
E-1	RM20-10-000	Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act.
E-2	Omitted	
E-3	EL21-7-000	Cricket Valley Energy Center, LLC and Empire Generating Company, LLC v. New York Independent System Operator, Inc.
E-4	RR19-7-001	North American Electric Reliability Corporation.
E-5	RM21-12-000	Revisions to Regulations on Electric Reliability Organization Performance Assessments.
E-6	RM21-11-000	Accounting and Reporting Treatment of Certain Renewable Energy Assets.
E–7	AC20–103–000	Locke Lord LLP.
E–8	ER20-3040-001; ER20-3042-000; ER20-3042-001; ER20-3043-001; ER20-3044-001; ER20-3045-001; (not consolidated).	Southwestern Electric Power Company.
E-9	Omitted	
E-10	Omitted	
E-11	Omitted	
E-12	Omitted	
E-13	Omitted	
E-14	Omitted	
E–15	AD20-9-000	Hybrid Resources.
E-16	Omitted	
E–17	EL20-30-001	Indiana Municipal Power Agency, and City of Lawrenceburg, Indiana v. PJM Interconnection, L.L.C., American Electric Power Service Corp., and Lawrenceburg Power, LLC.
	EL20-56-001	PJM Interconnection, L.L.C.
E–18	Omitted	

[1] Join FERC online to listen live at *http://ferc.capitolconnection.org/.*

1074TH—MEETING—OPEN MEETING—Continued

[January 19, 2021 10:00 a.m.]

Item No.	Docket No.	Company
E–19	EL16–49–004	Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC, and Panda Power Generation Infrastructure Fund, LLC v. PJM Interconnection, L.L.C.
	ER18–1314–007; ER18–1314–008; EL18–178–004; (Consolidated).	PJM Interconnection, L.L.C.
E–20	EL16–49–006	Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC, and Panda Power Generation Infrastructure Fund, LLC v. PJM Interconnection, L.L.C.
	EL18–178–006, ER18–1314–010	PJM Interconnection, L.L.C.
	GAS	
G-1	RP21-38-000	Northern Border Pipeline Company.
G–2	Omitted	
G–3	RP21-216-000	Driftwood Holdings LLC and Driftwood LNG LLC.
G–4	RP20-608-002	ANR Pipeline Company.
G–5	Omitted	
	HYDRO	
H-1	RM21-9-000	Financial Assurance Measures for Hydroelectric Projects.
H–2	Omitted	
H–3	P–2299–082, P–14581–002	Turlock Irrigation District and Modesto Irrigation District.
H–4	Omitted	
H–5	Omitted	
H–6	Omitted	
H–7	P–2660–030	Woodland Pulp LLC.
H–8	P–2486–088	Wisconsin Electric Power Company.
	Certificates	
C–1	RM21-10-000	Categorical Exclusions under the National Environmental Policy Act.
C–2	CP20-466-000	New Fortress Energy LLC.
C–3	CP15-17-005	Sabal Trail Transmission, LLC.
C–4	Omitted	
C–5	Omitted	
C–6	Omitted	
C–7	CP16-454-002	Rio Grande LNG, LLC.
C–8	CP16-9-011	Algonquin Gas Transmission, LLC, Maritimes & Northeast Pipeline, LLC.
C–9	CP20-48-000	Iroquois Gas Transmission System, L.P.
C–10	CP20-47-000	PennEast Pipeline Company, LLC.
C–11	CP21–12–000	Mountain Valley Pipeline, LLC.
C–12	CP20–459–000	Golden Pass LNG Terminal LLC.
C–13	CP16–10–000	Mountain Valley Pipeline, LLC.
C–14	RM20–15–001	Limiting Authorizations to Proceed with Construction Activities Pending Rehearing.
C–15	CP20–518–000	PennEast Pipeline Company, LLC.
C–16	CP17-494-003, CP17-495-003	Pacific Connector Gas Pipeline, LP, Jordan Cove Energy Project L.P.
C–17	Omitted	
C–18	CP17-40-005	Spire STL Pipeline LLC.
C–19	CP16–10–008	Mountain Valley Pipeline, LLC.

Issued: January 12, 2021.

Kimberly D. Bose,

Secretary.

The public is invited to listen to the meeting live at *http://ferc.capitolconnection.org/.* Anyone with internet access who desires to hear this event can do so by navigating to *www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its audio webcast. The Capitol Connection provides technical support for this free audio webcast. It will also offer access to this event via phone bridge for a fee. If you have any questions, visit *http://ferc.capitolconnection.org/* or contact Shirley Al-Jarani at 703–993–3104.

[FR Doc. 2021–01039 Filed 1–13–21; 11:15 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP18–13–000]

Columbia Gas Transmission, LLC; Notice of Request for Extension of Time

Take notice that on January 7, 2021, Columbia Gas Transmission, LLC (Columbia) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until January 17, 2023, to complete construction of, and place into service, Sections 1 and 2 of its Line 8000 Replacement Project (Project) located in Mineral County, West Virginia, and Allegany County, Maryland, as authorized in the January 17, 2019 Order Issuing Certificate and Granting Abandonment (Order).[1] Ordering Paragraph B(1) of the Order required Columbia to complete the construction of the Project facilities and make them available for service within two years from issuance, or by January 17, 2021.[2]

Columbia states that due to unforeseen delays in reaching an agreement from the Maryland Department of Natural Resources (MDNR) for land rights across state-owned lands, additional time is required in order to complete Sections 1 and 2 of the Project.[3]

Columbia avers that on November 18, 2020, it filed a letter explaining a phased approach to initiating construction for the remaining Project facilities and included a request to commence construction, including certain project modifications, of Section 2 excluding facilities crossing state-owned lands. Columbia asserts that Phase 2a (Section 2 excluding facilities crossing state-owned lands) would be constructed in 2021 and Phase 2b (Section 1 and facilities crossing state-owned lands in Section 2) would be constructed in 2022, subject to an agreement with the MDNR. Accordingly, Columbia now requests an additional two years, or until January 17, 2023, to complete the authorized construction of Sections 1 and 2 of its Line 8000 Replacement Project and make them available for service.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on Columbia's request for an extension of time may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the proceedings for this request, you should, on or before the comment date stated below, file a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10).[4]

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for Natural Gas Act facilities when such requests are contested before order issuance. For those extension requests that are contested,[5] the Commission will aim to issue an order acting on the request within 45 days.[6] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[7] The Commission will not consider arguments that re-litigate the issuance of the Certificate Order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.[8] At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.[9] The OEP Director, or his or her designee, will act on those extension requests that are uncontested.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning COVID–19, issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on, January 26, 2021.

Dated: January 11, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00856 Filed 1–14–21; 8:45 am]

BILLING CODE 6717–01–P

[1] *Columbia Gas Transmission, LLC,* 166 FERC 61,037 (2019).

[2] Sections 3, 4 and 5 of the Project were completed and placed into service on September 6, August 22, and August 11, 2019, respectively.

[3] Section 1 consists of Line 8000, and associated facilities, from MP 0.0 to 0.4. Section 2 consists of Line 8000, and associated facilities, from MP 0.9 to 7.3.

[4] Only motions to intervene from entities that were party to the underlying proceeding will be accepted. *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 39 (2020).

[5] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2020).

[6] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

[7] *Id.* P 40.

[8] Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

[9] *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 40 (2020)

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–848–000]

Battle Mountain SP, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Battle Mountain SP, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 1, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: January 11, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00857 Filed 1–14–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1971–079]

Idaho Power Company; Notice of Meeting

Commission staff will meet with representatives of the Burns Paiute Tribe regarding the proposed Hells Canyon Hydroelectric Project. The meeting will be held via teleconference on January 28, 2020 at 2 p.m. Eastern Standard Time (EST).

Members of the public, intervenors, and agencies in the referenced proceeding and Idaho Power Company may attend this meeting; however, participation will be limited to only tribal representatives and Commission staff. If the Burns Paiute Tribe decides to disclose information about a specific location which could create a risk or harm to an archeological site or Native American cultural resource, the public will be excused for that portion of the meeting.[1] If you plan to attend this meeting, please contact Michael Davis at (202) 502–8339 or at *michael.davis@ferc.gov* by January 25, 2020, to receive contact information.

Dated: January 11, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00859 Filed 1–14–21; 8:45 am]

BILLING CODE 6717–01–P

[1] Protection from public disclosure involving this kind of specific information is based upon 18 CFR 4.32(b)(3)(ii) (2020) of the Commission's regulations implementing the Federal Power Act.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2530–057]

Brookfield White Pine Hydro LLC; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2530–057.

c. *Date filed:* November 20, 2020.

d. *Applicant:* Brookfield White Pine Hydro LLC (White Pine Hydro).

e. *Name of Project:* Hiram Hydroelectric Project.

f. *Location:* The existing project is located on the Saco River in the towns of Hiram, Baldwin, Brownfield, and Denmark within Oxford and Cumberland Counties, Maine. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)—825(r).

h. *Applicant Contact:* Luke Anderson, Licensing Manager, Brookfield White Pine Hydro LLC, 150 Main Street, Lewiston, ME 04240; Telephone (207) 755–5600.

i. *FERC Contact:* Dianne Rodman, (202) 502–6077 or *dianne.rodman@ferc.gov.*

j. *Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose,

Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–2530–057.

Intervenors—those on the Commission's service list for this proceeding—are reminded that if they file comments with the Commission, they must also serve a copy of their filing on each person whose name appears on the official service list. Note that the list is periodically updated. The official service list can be obtained on the Commission's website (*https://www.ferc.gov*)—click on Documents and Filing and click on eService—or call the Office of the Secretary, Dockets Branch at (202) 502–8715. In addition, if any party files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on the resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on July 15, 2020, revising the regulations under 40 CFR parts 1500—1518 that federal agencies use to implement NEPA (see Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43,304). The Final Rule became effective on and applies to any NEPA process begun after September 14, 2020. An agency may also apply the regulations to ongoing activities and environmental documents begun before September 14, 2020, which includes the proposed Hiram Project. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. The existing Hiram Project consists of a 255-acre, 7.5-mile-long impoundment at normal full pond elevation 349.0 feet; a 448-foot-long dam located at the top of Great Falls fitted with an inflatable dam across the spillway crest; an intake that is integral to the dam; a 320-foot-long, 15.5-foot-diameter penstock that bifurcates to one 170-foot-long by 10-foot-wide penstock (to Unit 1), and one 80-foot-long by 15.5-foot-diameter penstock (to Unit 2); a powerhouse containing two turbine-generator units, Unit 1 rated at 2.4 megawatts (MW) and Unit 2 at 8.1 MW, for a total installed capacity of 10.5 MW; and appurtenant facilities. The project's transmission facilities include: (1) Generator leads; (2) a substation located adjacent to, and north of, the powerhouse; and (3) a transmission circuit connecting the substation to a non-project switching station. The project generates an annual average of 45,142 megawatt-hours.

White Pine Hydro proposes to continue to: Operate the project in a run-of-river mode from October 1 through November 15, with head pond drawdowns limited to 1 foot or less from the full pond elevation, or from the spillway crest when the inflatable dam is down. From November 16 through September 30, White Pine Hydro proposes to continue to cycle daily operations whereby it would turn on and off its generating units when inflow is sufficient to meet load demands, resulting in drawdown of the head pond by up to 2 feet from the full pond elevation during normal project operation, or from the spillway crest when the inflatable dam is down. During this period, White Pine Hydro would continue to provide a minimum flow of 300 cubic feet per second (cfs), of inflow, whichever is less below the powerhouse.

White Pine Hydro proposes to remove from the current project boundary 152 acres of land and 25 acres of water.

m. A copy of the application can be viewed on the Commission's website at *https://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title PROTEST, MOTION TO INTERVENE, COMMENTS, REPLY COMMENTS, RECOMMENDATIONS, PRELIMINARY TERMS AND CONDITIONS, or PRELIMINARY FISHWAY PRESCRIPTIONS; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. Procedural Schedule:

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Deadline for filing comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions.	March 2021
Deadline for Filing Reply Comments.	April 2021

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. A license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provided for in § 5.22: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification. Please note that the certification request must be sent to the certifying authority and to the Commission concurrently.

Dated: January 11, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00858 Filed 1–14–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC21–41–000.
Applicants: AES Southland Energy, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of AES Southland Energy, LLC, on behalf of its Public Utility Subsidiaries.
Filed Date: 1/8/21.
Accession Number: 20210108–5240.
Comments Due: 5 p.m. ET 1/29/21.

Docket Numbers: EC21–42–000.
Applicants: BEP SF Holdings, LLC, Horseshoe Bend Wind, LLC, North Hurlburt Wind, LLC, South Hurlburt Wind, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Horseshoe Bend Wind, LLC, et al.
Filed Date: 1/8/21.
Accession Number: 20210108–5242.
Comments Due: 5 p.m. ET 1/29/21.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–65–000.
Applicants: Trent River Solar, LLC.
Description: Self-Certification of Trent River Solar, LLC.
Filed Date: 1/8/21.
Accession Number: 20210108–5250.
Comments Due: 5 p.m. ET 1/29/21.

Docket Numbers: EG21–66–000.
Applicants: PGR Lessee P, LLC.
Description: PGR Lessee P, LLC submits a notice of self-certification of exempt wholesale generator status.
Filed Date: 1/8/21.
Accession Number: 20210108–5252.
Comments Due: 5 p.m. ET 1/29/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–399–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 1887R10 Evergy Kansas Central, Inc. NITSA NOA—Elsmore to be effective 2/1/2021.
Filed Date: 1/11/21.
Accession Number: 20210111–5083.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–417–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 2881R11 City of Chanute, KS NITSA NOA to be effective 9/1/2020.
Filed Date: 1/11/21.
Accession Number: 20210111–5078.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–425–000.
Applicants: Copper Mountain Solar 5, LLC.
Description: Report Filing: Copper Mountain Solar 5 Informational Supplement to be effective N/A.
Filed Date: 1/8/21.
Accession Number: 20210108–5171.
Comments Due: 5 p.m. ET 1/29/21.

Docket Numbers: ER21–466–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 2415R13 Kansas Municipal Energy Agency NITSA and NOA to be effective 9/1/2020.
Filed Date: 1/11/21.
Accession Number: 20210111–5070.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–853–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2021–01–11_SA 3304 Ameren-Lincoln Land Wind 1st Rev GIA (J757) to be effective 12/29/2020.
Filed Date: 1/11/21.
Accession Number: 20210111–5048.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–854–000.
Applicants: Southwestern Electric Power Company.
Description: § 205(d) Rate Filing: SWEPCO–NTEC Avinger Delivery Point Agreement to be effective 3/12/2021.
Filed Date: 1/11/21.
Accession Number: 20210111–5058.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–855–000.
Applicants: Pacific Gas and Electric Company.
Description: Tariff Cancellation: Termination of San Joaquin Cogen GSFA (SA 130) to be effective 3/13/2021.
Filed Date: 1/11/21.
Accession Number: 20210111–5068.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–856–000.
Applicants: PGR Lessee P, LLC.
Description: Baseline eTariff Filing: PGR Lessee P, LLC MBR Tariff to be effective 1/12/2021.
Filed Date: 1/11/21.
Accession Number: 20210111–5081.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–857–000.
Applicants: Trent River Solar, LLC.
Description: Baseline eTariff Filing: Trent River Solar, LLC MBR Tariff to be effective 1/12/2021.
Filed Date: 1/11/21.
Accession Number: 20210111–5082.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–858–000.
Applicants: Public Service Company of Colorado.
Description: § 205(d) Rate Filing: 2021–01–11 PSC–HLYCRS–APSISA-Eagle-608–0.1.0 to be effective 1/12/2021.
Filed Date: 1/11/21.
Accession Number: 20210111–5088.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–859–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of WMPA, SA No. 5480; Queue No. AD2–002 to be effective 12/29/2020.
Filed Date: 1/11/21.
Accession Number: 20210111–5121.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–860–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA No. 5871; Queue No. AD2–180 to be effective 12/11/2020.
Filed Date: 1/11/21.
Accession Number: 20210111–5122.
Comments Due: 5 p.m. ET 2/1/21.

Docket Numbers: ER21–861–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2021–01–11_SA 3269 OTP-Tatanka Ridge Wind 2nd Rev GIA (J493) to be effective 12/23/2020.
Filed Date: 1/11/21.
Accession Number: 20210111–5145.
Comments Due: 5 p.m. ET 2/1/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 11, 2021

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00855 Filed 1–14–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2020–0351; FRL–10018–10–OAR]

Ozone Transport Commission Recommendation that EPA Require Daily Limits for Emissions of Nitrogen Oxides From Certain Sources in Pennsylvania

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Public Hearing and Supplemental Information.

SUMMARY: The Environmental Protection Agency (EPA) is issuing this notice of public hearing and supplemental information regarding a recommendation submitted by the Ozone Transport Commission (OTC) to address ongoing ozone pollution in the northeastern United States. The OTC has recommended that EPA require Pennsylvania to revise its state implementation plan (SIP) to include additional control measures that would establish daily limits on emissions of nitrogen oxides (NO_X) from coal-fired electricity generating units (EGUs) with already-installed selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR) controls. According to the recommendation, the additional control measures are to ensure that the SCR and SNCR controls are optimized to minimize NO_X emissions each day of the ozone season (May 1 through September 30), and the measures must be as stringent as any one of several specified state rules already approved into the SIPs of Delaware, Maryland, and New Jersey. This notice discusses the relevant provisions of the Clean Air Act (CAA or the Act), summarizes the recommendation and the supporting information submitted by the OTC, and provides additional information that EPA believes may be relevant in reaching a decision on the recommendation. This notice also announces the date of a public hearing and opens a public comment period on the recommendation, the supporting information provided by the OTC, and the additional information being provided by EPA.

DATES: EPA will hold a virtual public hearing on February 2, 2021. Please refer to *https://www.epa.gov/interstate-air-pollution-transport/ozone-transport-commission-otc-section-184c-recommendation* for additional information on the public hearing, including registration procedures. Comments must be received on or before March 8, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2020–0351, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* Please note that to reduce the risk of transmitting COVID–19, written comments submitted by mail are temporarily suspended, no hand deliveries will be accepted, and EPA is temporarily suspending access to its Docket Center and Reading Room for public visitors. Additional materials related to this action, including submitted comments, can be viewed online at regulations.gov under Docket ID No. EPA–HQ–OAR–2020–0351. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Beth Murray, Clean Air Markets Division, Office of Atmospheric Programs, Office of Air and Radiation, Environmental Protection Agency, 202–343–9115, *murray.beth@epa.gov.*

SUPPLEMENTARY INFORMATION: This document concerns a recommendation submitted by the OTC to EPA under CAA section 184(c). In section I, EPA discusses the relevant statutory provisions. Section II describes the steps EPA is following to facilitate public participation in the Agency's process for reaching a decision on the recommendation. In Section III, EPA discusses the OTC recommendation, including the Delaware, Maryland, and New Jersey rules that OTC believes should become the standards for EPA's approval of a responsive SIP revision from Pennsylvania. In section III, EPA also identifies the potentially affected Pennsylvania EGUs, and summarizes the supporting information provided by the OTC. Sections IV and V provide additional information on the potentially affected EGUs' historical emissions and on regulatory context that may be relevant to EPA's decision on the recommendation.

EPA is holding a public hearing on the recommendation as required by section 184(c) and is also taking comment on the recommendation, the supporting information submitted by the OTC, and the additional information provided by EPA.

I. Statutory Provisions

A. Summary of CAA Section 184

Ground-level ozone is a secondary air pollutant created by chemical reactions between the ozone precursor pollutants NO_X and volatile organic compounds (VOC) in the presence of sunlight. Precursor pollutant emissions can be transported downwind directly or, after transformation in the atmosphere, as ozone. Studies have established that ozone formation, atmospheric residence, and transport can occur on a regional scale (*i.e.,* across hundreds of miles) over much of the eastern U.S.[1]

The Ozone Transport Region (OTR) was established by operation of law under CAA section 184 and comprises the states of Connecticut, Delaware, Maine,[2] Massachusetts, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont, the District of Columbia, and the portion of Virginia that is within the Consolidated Metropolitan Statistical Area that includes the District of Columbia.

Under CAA section 184(a), the Administrator established a commission for the OTR, the OTC, consisting of the Governor of each state or their designee, the Administrator or their designee, the Regional Administrators for the EPA regional offices affected (or the Administrator's designees), and an air pollution control official representing each state in the region, appointed by the Governor. Section 184(b) sets forth certain control measures that OTR states are required to include in their SIPs, including enhanced vehicle inspection and maintenance in certain

[1] For example, Bergin, M.S. et al. (2007). Regional air quality: Local and interstate impacts of NO_X and SO_2 emissions on ozone and fine particulate matter in the eastern United States. Environmental Sci. & Tech. 41: 4677–4689.

[2] On February 20, 2020, Maine petitioned EPA under CAA section 176A(a) for removal of certain areas of the state from the OTR. EPA has not yet acted on the petition.

metropolitan statistical areas and implementation of reasonably available control technology (RACT) for certain sources of VOC and NO_X [3] in the state.

CAA section 184(c) specifies a procedure for the OTC to develop recommendations for additional control measures to be applied within all or a part of the OTR if the OTC determines that such measures are necessary to bring any area in the OTR into attainment with national ambient air quality standards (NAAQS) for ozone by the applicable attainment deadlines. Section 184(c)(1) provides that:

> Upon petition of any states within a transport region for ozone, and based on a majority vote of the Governors on the Commission (or their designees), the Commission may, after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the Commission determines such measures are necessary to bring any area in such region into attainment by the dates provided by [subpart II of part D of CAA title I].

Section 184(c) also lays out procedures the Administrator is to follow in responding to recommendations from the OTC. After receipt of the recommendations, the Administrator is to immediately publish a **Federal Register** notice stating that the recommendations are available and is to provide an opportunity for a public hearing within 90 days. The Administrator is also to ''commence a review of the recommendations to determine whether the control measures in the recommendations are necessary to bring any area in such region into attainment by the dates provided by [subpart II] and are otherwise consistent with [the Act].'' Finally, in undertaking the review, the Administrator is to consult with members of the OTC and is to consider the data, views, and comments received pursuant to the public hearing.

CAA sections 184(c)(4) and (5) govern EPA's response to the OTC recommendations. Under section 184(c)(4), the Administrator is to determine whether to approve, disapprove, or partially approve and partially disapprove the recommendations within nine months of receipt. For any disapproval or partial disapproval, the Administrator is to specify:

> (i) Why any disapproved additional control measures included in the recommendation are not necessary to bring any area in such region into attainment by the dates provided by [subpart II] or are otherwise not consistent with the Act; and
>
> (ii) Recommendations concerning equal or more effective actions that could be taken by the commission to conform the disapproved portion of the recommendations to the requirements of [section 184].

Section 184(c)(5) provides that, upon approval or partial approval of any recommendations, the Administrator is to issue, to each state in the OTR to which an approved requirement applies, a finding under CAA section 110(k)(5) that the SIP for that state is inadequate to meet the requirements of CAA section 110(a)(2)(D), often referred to as the ''good neighbor provision.'' Section 110(a)(2)(D) provides, in pertinent part, that each state's SIP shall contain adequate provisions:

> (i) Prohibiting, consistent with the provisions of [CAA title I], any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—
>
> (I) Contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any [NAAQS].

Under section 184(c)(5), the Administrator's finding of inadequacy under section 110(a)(2)(D) is to require that each affected state revise its SIP to include the approved additional control measures within one year after the finding is issued.

B. Judicial Interpretation of CAA Section 184(c)

EPA has taken action under CAA section 184(c) once before. On February 10, 1994, the OTC submitted a recommendation under the section that EPA require all states in the OTR to adopt a Low Emission Vehicle (LEV) program equivalent to the LEV program already adopted by California. After proposing to approve the recommendation and soliciting public comment, EPA published a final action approving the OTC's recommendation and issuing a SIP call that required each OTR state either to adopt the LEV program or to adopt other measures of the state's choosing that would achieve a level of NO_X emission reductions identified by EPA. 60 FR 4712 (Jan. 25, 1995). In the final action, EPA took the position that authority to promulgate these requirements was provided independently by both CAA section 184(c) and CAA section 110. *Id.* at 4716–18.

On review, the U.S. Court of the Appeals for the District of Columbia Circuit (D.C. Circuit) vacated EPA's action. *Virginia* v. *EPA,* 108 F.3d 1397 (D.C. Cir. 1997). Although the court's decision ultimately rested on other grounds, the court interpreted certain aspects of CAA section 184(c), in part by contrasting it with CAA section 110. The court first determined that, as a practical matter, the SIP call mandated adoption of the LEV program because the purported alternative allowing states to adopt other control measures was so much less attractive that it was, in the court's view, ''no alternative at all.'' 108 F.3d at 1404. The court then explained that because section 110 does not authorize EPA to condition approval of a state's SIP on the adoption of specific control measures chosen by EPA, section 110(k)(5) alone could not provide authority for a SIP call requiring adoption of the LEV program. *Id.* at 1410. The court then considered whether section 184(c), in contrast to section 110, would allow EPA to condition approval of a state's SIP upon the adoption of specific control measures and concluded that the language of section 184(c) ''answers with an emphatic yes.'' *Id.* However, because the court also found that other CAA provisions—specifically, CAA sections 177 and 202—barred EPA from requiring states to adopt the LEV program at that time, the court vacated the SIP call without regard to whether issuance of the SIP call otherwise would have been within EPA's authority under section 184(c). *Id.* at 1411–13.[4]

C. Options for Action on a CAA Section 184(c) Recommendation

After the OTC submits a recommendation to EPA, under CAA section 184(c)(4) the Administrator may approve, disapprove, or partially approve and partially disapprove the recommendation. The section's requirement that, in conjunction with a disapproval or partial disapproval, EPA must identify ''equal or more effective actions that could be taken by the commission to conform the disapproved recommendation to [CAA section 184]'' suggests that EPA does not have authority to simply adopt such conforming modifications on its own initiative as part of an action otherwise approving the recommendation. We interpret these provisions as limiting the Agency's ability to modify or supplement an OTC recommendation, except insofar as EPA may partially approve and partially disapprove the recommendation. Consistent with the court's discussion in *Virginia,* this

[3] CAA section 184(b) requires RACT for sources of VOC in OTR states and CAA section 182(f)(1) extends the requirement for RACT to major sources of NO_X.

[4] Because its decision rested on other grounds, the court found it unnecessary to resolve other claims challenging EPA's authority under CAA section 184(c), including claims—contested by EPA—that the section is unconstitutional because of the role assigned to the OTC. 108 F.3d at 1410.

statutory interpretation recognizes that, under CAA section 110, EPA generally does not have authority to require states to include particular control measures in their SIPs, and that section 184(c) provides a limited exception to this general principle only with respect to control measures that have been specifically recommended to EPA by the OTC in accordance with statutory procedures.

EPA requests comment on this interpretation of its options for action on the OTC's recommendation.

EPA also requests comment on the standard that should be applied in acting on the OTC's recommendation. CAA sections 184(c)(2)(B) and (c)(4)(i) provide that EPA is to determine whether the OTC's recommended additional control measures are ''necessary to bring any area in [the OTR] into attainment by the [areas' attainment dates].'' However, CAA section 184(c)(5) states that where the EPA approves or partially approves the OTC's recommendation, the Administrator is to issue a finding under CAA section 110(k)(5) that the state at issue (here, Pennsylvania) has an implementation plan inadequate to meet the requirements of CAA section 110(a)(2)(D). In effect, this would be a determination that the plan does not contain adequate provisions prohibiting emissions in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to a NAAQS. EPA invites comment on how it should interpret these provisions in order to ensure consistent treatment throughout the section 184(c) process.

II. Public Notice and Participation Under CAA Section 184(c)

As noted in section I.A of this document, CAA section 184(c)(1) requires the OTC to provide notice and an opportunity for public comment on any recommendations for additional control measures to be applied within all or part of the OTR. After the OTC transmits such recommendations to EPA, EPA is to publish a notice stating that the recommendations are available, hold a public hearing, consult with members of the OTC, conduct a review of the OTC recommendation, and issue an approval, disapproval, or partial approval and partial disapproval of the recommendation within nine months of receiving the recommendation. CAA section 184(c)(1)–(4). The CAA requires that EPA publish its determination in the **Federal Register**.

The provision also requires that EPA ''shall take into account the data, views, and comments received'' pursuant to its notification of the available recommendation and the public hearing. EPA is in this notice providing information the Agency has developed and that it is considering in light of the OTC's recommendation, and we are providing an opportunity for the public to submit comments on the OTC's recommendation and this information by March 8, 2021. This opportunity to comment is in addition to the statutorily mandated public hearing.[5]

Specifically, EPA seeks public comments on the OTC's recommendation; the information the OTC submitted to EPA in support of its recommendation, consisting of certain technical analyses and a summary of OTC's response to the comments submitted to the OTC; and the information EPA is providing in this document and in other materials referenced in this document and included in the docket established for this action.

As discussed elsewhere in this document, EPA is considering several issues in determining whether to approve or disapprove the OTC recommendation and invites comments on all these issues. In addition to providing the opportunity to file written comments and present oral views at the February 2, 2021 hearing, EPA intends to consult with the affected states as required by section 184(c)(3) prior to making a final decision on the recommendation. If EPA approves or partially approves the OTC's recommendation, per CAA section 184(c)(5), the Agency shall issue a finding under CAA section 110(k)(5), also known as a SIP call, that the implementation plan for such state is inadequate to meet the requirements of CAA section 110(a)(2)(D).

III. Discussion of the OTC's Recommendation

A. The OTC's Section 184(c) Recommendation for NO_X Limits on Certain Pennsylvania EGUs

In 2015, EPA revised the NAAQS for ozone to 70 parts per billion (ppb). 80 FR 65292 (October 28, 2015). In 2018, EPA designated certain areas as nonattainment with respect to this NAAQS and identified each area's classification according to the severity of its air quality problems. 83 FR 25776 (June 4, 2018). Five areas within the OTR were designated as nonattainment: Baltimore, MD; Greater Connecticut, CT; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; Washington, DC-MD-VA; and New York-Northern New Jersey-Long Island, NY-NJ-CT. *Id.* The first four of these areas were classified as Marginal and the New York area was classified as Moderate. *Id.* The attainment deadlines for the Marginal and Moderate areas are three and six years after the effective date of their nonattainment designations, or August 3, 2021 and August 3, 2024, respectively. 83 FR 10376 (March 9, 2018).

On May 30, 2019, Maryland petitioned the OTC to adopt a recommendation calling for additional control measures to be applied within part of the OTR. In response to Maryland's petition, the OTC commenced a notice-and-comment process that culminated in a June 3, 2020 vote by a majority of OTR states to submit a recommendation to EPA under CAA section 184(c).[6] EPA received the recommendation on June 8, 2020 and published a notice in the **Federal Register** of the availability of the recommendation on July 13, 2020 (85 FR 41974). The recommendation itself is published as an appendix to this document, and the recommendation as well as the supporting materials submitted to EPA by the OTC are available in the docket.

The OTC has recommended that EPA require Pennsylvania to revise its SIP to establish daily NO_X emissions limits for coal-fired EGUs with existing SCR or SNCR controls to ensure optimization of the controls to minimize NO_X emissions each day of the ozone season. The recommendation calls for the new Pennsylvania requirements to be as stringent as the requirements in any one of certain existing rules adopted by Delaware, Maryland, and New Jersey that were incorporated by reference into the recommendation. Each of the referenced rules was intended to establish some form of daily NO_X control requirements for the respective state's coal-fired EGUs. The recommendation requests that EPA require Pennsylvania to implement the requested control measures as

[5] We note that in EPA's only prior action on a section 184(c) recommendation in 1994–1995, the Agency elected to employ CAA section 307(d) rulemaking procedures in acting on the OTC's recommendation, but stated that it was not legally obligated to do so. *See* 80 FR 21270, 21274 (Apr. 26, 1994).

[6] The supporting materials submitted by the OTC include documentation that notice-and-comment procedures were followed. *See* Part 3 of Attachment 2, ''Policy and Technical Rationale Supporting OTC's Recommendation for Additional Control Measures Under CAA Section 184(c),'' and Attachment 3, ''Response to Comments Received on OTC 184(c) Recommendation,'' available in the docket.

expeditiously as practicable.[7] The OTC recommendation did not address sources other than coal-fired EGUs in Pennsylvania.

The OTC highlighted four main reasons for making the recommendation. First, several areas in the OTR are not expected to attain the 2015 ozone NAAQS by 2021, the statutory deadline for areas classified as Marginal. If the areas do not attain by the deadline, they will be reclassified (*i.e.,* ''bumped up'') and subject to more stringent requirements. Additionally, there are still some areas that have not attained the 2008 ozone NAAQS. The OTC's second line of reasoning points to research showing that large regional NO_X reductions lower peak ozone across the eastern U.S. and that additional NO_X reductions are needed for attainment of the 2008 and 2015 ozone NAAQS. Third, the OTC references EPA information identifying emissions from Pennsylvania as contributing to downwind nonattainment and includes estimates developed by Maryland of additional NO_X reductions from Pennsylvania EGUs that could be achieved through daily NO_X limits. Finally, the OTC states that it decided to use the CAA section 184(c) process after a collaborative process resulted in some states adopting daily NO_X limits, while Pennsylvania, with the largest NO_X emissions from coal-fired EGUs of any state in the OTR, has not.

In the cover letter accompanying the recommendation, the OTC recognizes that Pennsylvania has a regulatory process underway to update its RACT requirements for the EGUs that are the subject of the recommendation (Pennsylvania calls the planned requirements ''RACT III''). Pennsylvania has periodically provided the OTC with information on the progress and components of the RACT III regulatory process. The OTC's letter states that the OTC will withdraw the CAA section 184(c) recommendation if Pennsylvania adopts final RACT III requirements that address the recommendation.

B. Pennsylvania Units Affected by the Recommendation

EPA has identified the operating Pennsylvania coal-fired EGUs (including units that combust coal refuse) that are believed to have already installed SCR controls (10 units) or SNCR controls (8 units) and that therefore would be affected by a full approval of the OTC's recommendation. Table III–1 lists the units and indicates for each unit the associated generator capacity, boiler type, and NO_X control type as well as NO_X mass emissions and NO_X emission rate for the 2019 ozone season. In Table III–2, EPA lists operating Pennsylvania coal-fired EGUs that are believed not to have already installed SCR or SNCR controls. The two tables exclude units that are believed to have either retired or permanently discontinued coal combustion.

EPA requests comment on whether the Pennsylvania units that would be affected by a full approval of the OTC's recommendation have been correctly identified.

TABLE III–1—PENNSYLVANIA OPERATING COAL-FIRED EGUS WITH SCR OR SNCR CONTROLS †

Unit	Generator summer capacity (MW)	Boiler type	Post-combustion NO_X controls	2019 ozone season NO_X emissions (tons)	2019 ozone season NO_X emission rate (lb/mmBtu)
Cheswick unit 1	565	Tangential	SCR	331	0.192
Colver unit AAB01	110	Fluidized bed	SNCR	309	0.157
Conemaugh unit 1	850	Tangential	SCR	1,350	0.132
Conemaugh unit 2	850	Tangential	SCR	1,719	0.149
Homer City unit 1	623	Dry bottom wall	SCR	504	0.106
Homer City unit 2	633	Dry bottom wall	SCR	465	0.107
Homer City unit 3	650	Dry bottom wall	SCR	456	0.089
Keystone unit 1	850	Tangential	SCR	1,778	0.136
Keystone unit 2	850	Tangential	SCR	1,368	0.134
Montour unit 1	752	Tangential	SCR	143	0.101
Montour unit 2	752	Tangential	SCR	120	0.106
Northampton unit NGC01	112	Fluidized bed	SNCR	12	0.075
Panther Creek unit 1	†† 83	Fluidized bed	SNCR	3	0.123
Panther Creek unit 2	†† 83	Fluidized bed	SNCR	5	0.116
Scrubgrass unit 1	†† 85	Fluidized bed	SNCR	52	0.118
Scrubgrass unit 2	†† 85	Fluidized bed	SNCR	53	0.131
Seward unit 1	†† 521	Fluidized bed	SNCR	107	0.095
Seward unit 2	†† 521	Fluidized bed	SNCR	91	0.088
Totals/Wtd. average (all units)	8,286			8,866	0.129
Totals/Wtd. average (SCR-equipped units).	7,375			8,233	0.130

† Data sources: EPA Clean Air Markets, Power Sector Emissions Data, Air Markets Program Data (AMPD) and EIA Form 860. ''Coal-fired'' EGUs include units combusting coal refuse. Several of the units report ''ammonia injection'' controls which EPA interprets as SNCR controls.

†† This generator is served by multiple boilers.

[7] The recommendation also specifically requests that EPA require Pennsylvania to establish daily NO_X limits for the 2020 and 2021 ozone seasons.

TABLE III–2—PENNSYLVANIA OPERATING COAL-FIRED EGUS WITHOUT SCR OR SNCR CONTROLS †

Unit	Generator summer capacity (MW)	Boiler type	Post-combustion NO_X controls	2019 ozone season NO_X emissions (tons)	2019 ozone season NO_X emission rate (lb/mmBtu)
Brunner Island unit 1 ††	306	Tangential	none	176	0.121
Brunner Island unit 2 ††	363	Tangential	none	115	0.103
Brunner Island unit 3 ††	742	Tangential	none	283	0.109
Ebensburg unit 031	50	Fluidized bed	none	83	0.079
Gilberton unit 031	†† 80	Fluidized bed	none	62	0.071
Gilberton unit 032	†† 80	Fluidized bed	none	62	0.072
Mt. Carmel unit SG–101	43	Fluidized bed	none	23	0.069
St. Nicholas unit 1	86	Fluidized bed	none	110	0.052
Westwood unit 031	30	Fluidized bed	none	61	0.132
Totals/Wtd. average	1,700			976	0.090

† Data sources: EPA Clean Air Markets, Power Sector Emissions Data, Air Markets Program Data (AMPD) and EIA Form 860. "Coal-fired" EGUs include units combusting coal refuse.
†† Reported data indicate that this unit combusted primarily natural gas during the 2019 ozone season.
††† This generator is served by multiple boilers.

C. Referenced State Rules for Delaware, Maryland, and New Jersey

As noted in section III.A of this document, the OTC's recommendation calls for EPA to require Pennsylvania to adopt requirements into its SIP that are at least as stringent as the requirements in referenced state rules adopted by Delaware, Maryland, or New Jersey.[8] Following approval or partial approval of the OTC's recommendation, EPA would be required to issue a SIP call, and Pennsylvania would be required to submit a responsive SIP revision within one year. In order to approve the SIP revision, if EPA were to approve the recommendation in full, EPA would then need to determine whether the requirements adopted by Pennsylvania in response to the resulting SIP call in fact are at least as stringent as the requirements previously adopted by one of the other three states. These three referenced rules are therefore important components of the OTC's recommendation, because the rules provide the only benchmark for comparison against which EPA would determine the approvability of a future submission from Pennsylvania. In this section, EPA summarizes the relevant provisions of the Delaware, Maryland, and New Jersey state rules and requests comment on how EPA would use the rules as standards for determining whether a SIP revision submitted by Pennsylvania is approvable.

1. Delaware

The Delaware rule referenced in the OTC's recommendation is 7 DE Admin. Code 1146, Electric Generating Unit (EGU) Multi-Pollutant Regulation. Section 4.3 requires each existing coal-fired and residual oil-fired EGU with a nameplate capacity rating of 25 MW or more to limit its NO_X emission rate to 0.125 lb/mmBtu on a 24-hour rolling average basis. The rule does not differentiate among EGUs based on the type of boiler or control technology and contains no exceptions based on load levels or particular operating conditions (such as start-up or shut-down). Delaware has one operating coal-fired EGU. The unit is equipped with SCR controls.

TABLE III–3—DELAWARE OPERATING COAL-FIRED EGUS †

Unit	Generator summer capacity (MW)	Boiler type	Post-combustion NO_X controls	2019 ozone season NO_X emissions (tons)	2019 ozone season NO_X emission rate (lb/mmBtu)
Indian River unit 4	410	Dry bottom turbo	SCR	48	0.082

† Data sources: EPA Clean Air Markets, Power Sector Emissions Data, Air Markets Program Data (AMPD) and EIA Form 860.

2. Maryland

The Maryland rule referenced in the OTC's recommendation is COMAR 26.11.38, Control of Nitrogen Oxide Emissions from Coal-Fired Electric Generating Units. Maryland's rule establishes requirements that vary across units as well as groups of units under common ownership, with differences that appear to reflect factors including boiler type, control technology, and other characteristics of individual units.

One of Maryland's operating coal-fired EGUs is a fluidized bed boiler equipped with SNCR controls. Section .03D(2) requires this unit to limit its NO_X emissions to 0.10 lb/mmBtu on a 24-hour block average basis without any exceptions based on load levels or operating conditions (such as start-up or shut-down). There is little overlap between the requirements established for this unit and the requirements established for other Maryland coal-fired EGUs under the referenced rule.

[8] EPA has already approved the three referenced state rules into the respective states' SIPs. *See* Delaware SIP approval (73 FR 50723, Aug. 28, 2008; 75 FR 48566, Aug. 11, 2010); Maryland SIP approval (82 FR 24546, May 30, 2017); New Jersey SIP approval (83 FR 50506, Oct. 9, 2018).

Maryland's seven other operating coal-fired EGUs are tangentially fired or dry bottom wall-fired boilers, six of which are equipped with SCR and one of which is equipped with another type of ammonia-based post-combustion NO_X control.[9] For these units, the rule establishes a multi-part set of ozone season requirements. First, section .03A(1) requires the owner of each unit to submit for approval a plan addressing how the unit's NO_X controls will be operated under various possible operating conditions. Second, section .03A(2) requires each of these EGUs ''to minimize NO_X emissions by operating and optimizing the use of all installed pollution control technology and combustion controls consistent with the technological limitations, manufacturers' specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions (as defined in 40 CFR 60.11(d)) for such equipment and the unit at all times the unit is in operation while burning any coal.'' Third, section .03B(1) limits owner-level average NO_X emission rates to 0.15 lb/mmBtu on a 30-day rolling average basis. (Depending on the owner's choice of compliance options for its units without SCR controls under section .04, the owner-level 30-day rolling average emission rate limit may be phased down to 0.09 lb/mmBtu by 2020.) Fourth, section .03C incorporates a set of unit-level and owner-level caps on ozone season NO_X mass emissions established under COMAR 26.11.27. Fifth, section .04 requires that by June 1, 2020 each coal-fired unit not already equipped with SCR controls (except the fluidized bed unit) either install SCR controls, retire, switch to natural gas combustion, or, in conjunction with the owner's other units, meet either an owner-level daily NO_X emission rate limit of 0.13 lb/mmBtu or an owner-level daily cap on NO_X mass emissions of 21 tons.[10]

Finally, in addition to the plans, operational standards and limits, and control requirements of the rules, section .05 establishes compliance demonstration requirements, including detailed daily reporting requirements that apply for days on which affected units exceed specified benchmark 24-hour block average NO_X emission rates. For the SCR-equipped units, each unit is assigned a unit-specific benchmark NO_X emission rate of 0.07 or 0.08 lb/mmBtu, one unit is also assigned a second unit-specific benchmark rate of 0.15 lb/mmBtu that applies at lower load levels, and one unit is also assigned an alternative facility-wide benchmark rate in conjunction with a co-located unit that does not have SCR controls. For the units not equipped with SCR controls (except the fluidized bed unit), each unit is assigned a unit-specific benchmark rate ranging from 0.24 to 0.34 lb/mmBtu and several units are also assigned alternative facility-wide benchmark rates. Section .05A(4) generally provides that exceedances of the benchmark NO_X emission rates are not violations of the requirement under section .03A(2) to operate and optimize installed controls as long as the owner has followed its approved plan for operating and optimizing the controls under section .03A(1).

TABLE III–4—MARYLAND OPERATING COAL-FIRED EGUS †

Unit	Generator summer capacity (MW)	Boiler type	Post-combustion NO_X controls	2019 ozone season NO_X emissions (tons)	2019 ozone season NO_X emission rate (lb/mmBtu)
Brandon Shores unit 1	635	Dry bottom wall	SCR	235	0.064
Brandon Shores unit 2	638	Dry bottom wall	SCR	299	0.065
Chalk Point unit 1 ††	333	Dry bottom wall	SCR	105	0.133
Chalk Point unit 2 ††	337	Dry bottom wall	SACR	129	0.189
Morgantown unit 1	596	Tangential	SCR	108	0.046
Morgantown unit 2	609	Tangential	SCR	122	0.039
Wagner unit 3	305	Dry bottom wall	SCR	17	0.069
Warrior Run unit 001	180	Fluidized bed	SNCR	184	0.066
Totals/Wtd. average (all units)	3,633			1,198	0.066
Totals/Wtd. average (SCR-equipped units).	3,116			885	0.060

† Data sources: EPA Clean Air Markets, Power Sector Emissions Data, Air Markets Program Data (AMPD) and EIA Form 860.
†† This unit has a proposed retirement date of June 1, 2021. *See https://www.genon.com/genon-news/genon-holdings-inc-announces-retirement-of-chalk-point-coal-units* (August 10, 2020).

3. New Jersey

The New Jersey rule referenced in the OTC's recommendation is N.J.A.C. 7:27–19.4, Control and Prohibition of Air Pollution from Oxides of Nitrogen: Boilers serving electric generating units. Under section 19.4(a), each existing coal-fired EGU is required to limit NO_X emissions during the ozone season to 1.50 lb/MWh.[11] Section 19.4(d) incorporates the provisions of N.J.A.C. 7:29–19.15(a), which generally require EGUs to demonstrate compliance with this emission rate limit on a 24-hour block average basis during the ozone season. Under section 19.4(e), emissions occurring during certain start-up and shut-down hours when a unit is not combusting coal may be excluded from the emission rate calculations. The rule does not differentiate among EGUs based on the type of boiler or control technology. New Jersey has three operating coal-fired EGUs, all of which are equipped with SCR controls.

[9] Chalk Point unit 2 is equipped with selective autocatalytic reduction (SACR) controls. SACR controls use simultaneous injections of ammonia and hydrocarbons (*e.g.,* natural gas) to create a catalytic chemical reaction that reduces NO_X without a separate catalyst. *See https://www.nsenergybusiness.com/features/featuresacr-promises-low-nox-at-low-cost/* (March 5, 2002).

[10] At the time Maryland adopted COMAR 26.11.38, section .04 applied to seven coal-fired units without SCR controls. Chalk Point unit 2 is the only one of these seven EGUs that is still operating as a coal-fired unit.

[11] For units with heat rates of 9,000, 10,000, and 11,000 Btu/kWh, an emission rate limit expressed as 1.5 lb/MWh would be equivalent to emission rate limits expressed as 0.167, 0.150, and 0.136 lb/mmBtu, respectively.

TABLE III–5—NEW JERSEY OPERATING COAL-FIRED EGUS †

Unit	Generator summer capacity (MW)	Boiler type	Post-combustion NO_X controls	2019 ozone season NO_X emissions (tons)	2019 ozone season NO_X emission rate (lb/mmBtu)
Carneys Point unit 1001	†† 244	Dry bottom wall	SCR	110	0.102
Carneys Point unit 1002	†† 244	Dry bottom wall	SCR	90	0.098
Logan unit 1001	219	Dry bottom wall	SCR	160	0.119
Totals/Wtd. average	463			360	0.108

† Data sources: EPA Clean Air Markets, Power Sector Emissions Data, Air Markets Program Data (AMPD) and EIA Form 860.
†† This generator is served by multiple boilers.

D. Use of the Delaware, Maryland, and New Jersey Rules as Standards for Evaluating a Pennsylvania SIP Submission

Under the OTC's recommendation, Pennsylvania would be required to revise its SIP to include control measures establishing daily NO_X emission limits that ensure optimization of existing SCR and SNCR controls and that are at least as stringent as the requirements for Delaware, Maryland, or New Jersey EGUs described above. The diversity of the other states' rules provides Pennsylvania with flexibility in designing its responsive SIP revision but the lack of precise specifications for the required additional control measures also raises the possibility that EPA would not have an objectively clear standard for determining whether the SIP revision would in fact comply with the OTC's recommendation.

The Delaware and New Jersey rules—and the Maryland rule as applied to one EGU—establish binding daily NO_X emission rate limits but do not appear to require operation or optimization of installed NO_X controls. Also, the stringencies of the daily NO_X emission rate limits differ across the three states, and the rules do not contain information indicating whether or how the physical or operating characteristics of each state's units might have been considered for purposes of setting the stringency of that state's emission rate limits.

In contrast, Maryland's rule—as applied to all but one of the state's coal-fired EGUs—requires daily operation and optimization of installed NO_X controls but does not establish binding daily NO_X emission rate limits, although it does establish non-binding benchmark daily NO_X emission rates. In addition, while variations in the benchmark rates across units indicate that some unit-specific characteristics were considered when setting those rates, the rule does not contain information indicating how such characteristics were considered.

EPA requests comment on whether the Delaware, Maryland, and New Jersey rules have been accurately summarized in this document. EPA also requests comment on how those rules could be used as standards for evaluating a SIP revision submitted by Pennsylvania, including but not limited to the following questions:

- If Pennsylvania establishes requirements for daily NO_X emission rate limits that are at least as stringent as those in Delaware's rule or New Jersey's rule, could the SIP revision be approved if it does not also establish requirements to operate and optimize installed NO_X controls? Alternatively, if Pennsylvania establishes requirements to operate and optimize controls comparable to Maryland's rule for the majority of its sources, could the SIP revision be approved if it does not also establish binding daily NO_X emission rate limits or benchmark daily NO_X emission rates?
- If Pennsylvania's SIP revision would have to establish binding daily NO_X emission rate limits or benchmark daily NO_X emission rates, could those limits or benchmark rates be higher than the limits or benchmark rates set by Delaware, Maryland, and New Jersey if supported by differences in the physical or operating characteristics of the coal-fired units in the respective states? Conversely, would EPA need to consider whether Pennsylvania could have set limits or benchmark rates lower than the limits or benchmark rates set by the other states based on differences in the units' physical or operating characteristics?
- Are there other ways in which EPA could consider differences in the physical or operating characteristics of Pennsylvania's coal-fired EGUs relative to the other states' EGUs when evaluating a responsive Pennsylvania SIP revision? For example, could EPA approve a SIP revision that exempts or establishes less stringent control requirements for Pennsylvania EGUs whose unit sizes (*e.g.,* MW capacity) or historical emissions fall below the ranges of unit sizes or historical emissions for the other states' units?
- Is EPA's authority under section 184(c) to modify the OTC's recommendation limited such that when evaluating Pennsylvania's responsive SIP revision, EPA may not consider unit-specific characteristics that the OTC did not identify in the recommendation as being potentially relevant?
- Is EPA's authority under section 184(c) to modify the OTC's recommendation limited such that EPA may not establish parameters for Pennsylvania regarding whether specific elements of a responsive SIP revision would (or would not) be consistent with the OTC's recommendation? As one hypothetical example, if EPA approves the OTC's recommendation, would it be permissible under CAA section 184(c) for EPA to identify a presumption that an approvable SIP would require compliance to be demonstrated on a unit-specific basis rather than through multi-unit averaging, even though the recommendation does not specifically state such a condition?

E. Materials Provided by the OTC To Support the Recommendation

In addition to the recommendation itself (including the Delaware, Maryland, and New Jersey rules discussed in section III.C of this document), the OTC provided two other attachments of materials intended to support the recommendation. In this section, EPA summarizes these supporting materials and requests comment on them.

The first supporting attachment to the OTC's recommendation is entitled ''Policy and Technical Rationale Supporting OTC's Recommendation for Additional Control Measures Under CAA Section 184(c).'' The attachment includes background information, information intended to document the OTC's compliance with CAA section 184(c)'s procedural requirements, and a statement of the policy rationale summarized in section III.A of this

document. In addition, the attachment contains materials intended to serve as technical support for the recommendation, most of which were provided as part of Maryland's 2019 petition to the OTC:

- A table showing, for a subset of ozone monitoring locations across the OTR, preliminary 2017–2019 ozone design values, certified 2018 fourth highest ozone measurements, preliminary 2019 fourth highest ozone measurements, and calculated threshold values for 2020 fourth highest measurements that would result in 2018–2020 design values of 70 ppb or 75 ppb.
- A set of tables showing, for selected dates in the 2017 and 2018 ozone seasons that correspond to ozone exceedances in Maryland, for various individual Pennsylvania coal-fired EGUs and the group of EGUs collectively, the amounts by which these units' reported NO_X emissions exceeded Maryland's estimates of the emissions that would have occurred if the units' daily emission rates had equaled 30-day rolling average emission rates or ozone-season average emission rates achieved by the same units during past ozone seasons in which those units reported their lowest average emission rates (attachment 3 to Maryland's petition).
- A set of tables and charts showing, for selected ozone monitoring locations across the OTR and for each OTR state on average, differences in modeled ozone values between a case where Pennsylvania coal-fired EGUs' emissions were projected to reflect NO_X control performance targets identified by Maryland versus a case where the units' emissions were projected to reflect Maryland's estimates of the units' allowable emissions without additional control measures (attachment 4 to Maryland's petition).
- A table showing, for individual Pennsylvania coal-fired EGUs, the 24-hour block average emission rates and 30-day rolling average emission rates that Maryland proposed as an ''Initial Straw-Man Draft'' of required control measures to be included in an OTC recommendation (attachment 5 to Maryland's petition).
- A document describing the methodology Maryland followed to develop the tables and charts provided as attachments 3 through 5 to its petition (attachment 6 to Maryland's petition).

The second supporting attachment to the OTC's recommendation is a summary of the OTC's responses to comments that it received in its proceeding to develop the recommendation. One of the responses is a separate document entitled ''2017 OTR Ozone Season Exceedances of 2017 NAAQS.'' [12] This separate document describes an analysis of pollution back-trajectories that the OTC found shows potential connections between the locations of some Pennsylvania EGUs and the locations of some ozone exceedances in the OTR during 2017.

EPA requests comment on the information provided by the OTC to support its recommendation, particularly with respect to the question of whether the information does or does not support a determination by EPA that the control measures included in the recommendation are necessary to bring areas of the OTR into attainment with the 2008 and 2015 ozone NAAQS.

IV. Historical Emissions Data for Pennsylvania Coal-Fired EGUs Potentially Affected by the Recommendation

To assist in evaluating the OTC's CAA section 184(c) recommendation, EPA has examined historical emissions data for coal-fired EGUs in Pennsylvania as well as Delaware, Maryland, and New Jersey, focusing on the units that continue to operate, as listed in Tables III–1 through III–5 above. With respect to NO_X mass emissions, the data in those tables show that the 18 listed coal-fired EGUs with SCR or SNCR controls in Pennsylvania emitted 8,866 tons of NO_X during the 2019 ozone season, compared to a total of 1,606 tons emitted by the 12 listed units in Delaware, Maryland, and New Jersey, all of which have SCR, SNCR, or comparable controls.[13]

With respect to NO_X emission rates, EPA has focused on comparing SCR-equipped units because the SCR-equipped units are generally larger than the SNCR-equipped units and have historically produced greater amounts of both electricity and NO_X emissions. Table IV–1 shows the weighted average NO_X emission rates for the 2015–2019 ozone seasons for all SCR-equipped coal-fired EGUs that continue to operate in each of the four states. The data indicate that the weighted average emission rates for the Pennsylvania SCR-equipped units were considerably higher than the weighted average rates for the other three states in 2015 and 2016, then declined sharply in 2017. In that year, a more stringent emissions budget for the units in Pennsylvania (as well as Maryland and New Jersey) was implemented under the CSAPR Update, and Pennsylvania units also became subject to more stringent RACT requirements.[14] In 2017 and 2018, the average emission rates for the Pennsylvania units were below the average rate for the New Jersey units but above the average rates for the Delaware and Maryland units. The average emission rate for the Pennsylvania units increased above the average rate for the New Jersey units in 2019 but remained well below 2015–2016 levels.

TABLE IV–1—WEIGHTED AVERAGE OZONE SEASON NO_X EMISSION RATES AT OPERATING SCR-EQUIPPED COAL-FIRED EGUS

[lb/mmBtu] †

Year	Pennsylvania units	Delaware units	Maryland units	New Jersey units
2015	0.252	0.094	0.059	0.117
2016	0.233	0.078	0.058	0.111
2017	0.099	0.084	0.057	0.112
2018	0.102	0.086	0.064	0.112
2019	0.130	0.082	0.060	0.108

† Includes only SCR-equipped units listed in Table III–1 and Tables III–3 through III–5. Each weighted average emission rate is computed as the sum of ozone season NO_X emissions for the group of units divided by the sum of ozone season heat input for the group of units. Data are from EPA Clean Air Markets, Power Sector Emissions Data, Air Markets Program Data (AMPD).

[12] Based on the document's content, it appears that the title contains a typographical error and was intended to reference the *2015* ozone NAAQS.

[13] The data in Table III–2 show that Pennsylvania coal-fired units without SCR or SNCR controls emitted an additional 976 tons of NO_X in the 2019 ozone season.

[14] The CSAPR Update and Pennsylvania RACT rules are discussed in sections V.A. and V.B. of this document.

EPA has also examined the historical emissions data for individual coal-fired units in the four states. In recent years, many coal-fired units have experienced reduced overall utilization and more frequent cycling between lower and higher levels of output. In theory, more frequent cycling can cause a unit's average emission rate to increase because SCR controls may be less effective at lower load levels with correspondingly lower operating temperatures. To account for the possible impacts of changing operating patterns on NO_X emission rates, for this unit-specific analysis EPA has grouped the hourly emission rate data for each unit according to the unit's heat input for the hour (using hourly heat input as a proxy for both hourly operating level and hourly operating temperature).[15] The unit-specific analyses for all the units are compiled into a technical support document entitled ''Analysis of Ozone Season NO_X Emissions Data for Coal-fired EGUs in Four Mid-Atlantic States'' (referred to here as the ''Emissions Data TSD'') available in the docket for this action.

For each unit, the Emissions Data TSD includes charts with data for the ozone seasons in the 2009–2019 period during which the unit achieved its lowest and third-lowest average NO_X emission rates.[16] In addition, data are also shown for the 2019 ozone season if that was not the year of the lowest or third-lowest average NO_X emission rate. To indicate how operating patterns may have changed over time, an initial chart for each unit shows, for the set of selected ozone seasons, the number of hours during each of the ozone seasons in which the unit operated at each of the operating levels described above. Additional individual charts for each of the selected ozone seasons then display the unit's emission rate data and mass emissions data at each of the operating levels. The mass emissions data are displayed as bar charts, with each bar indicating the total NO_X emitted during the selected ozone season in hours when the unit operated at that operating level. The hourly emission rate data values for each operating level are displayed by means of a ''box plot'' or ''box-and-whisker plot.'' Each ''box'' represents the middle half of all the hourly data values—that is, the hourly data values that fall in the ''interquartile range'' between the 25th percentile and 75th percentile hourly data values. The horizontal line in the box represents the median hourly data value. Vertical lines, or ''whiskers,'' extend to the highest and lowest hourly data values that fall above or below the top or bottom edges of the box within a distance of up to 1.5 times the interquartile range. Any outlying hourly data values that fall above or below the top or bottom edges of the box by a distance of more than 1.5 times the interquartile range are shown as individual dots. Thus, a lower median data value and lower overall placement of the box on the chart indicate generally lower hourly emission rates, while shorter vertical distances between the top and bottom edges of the box and between the top and bottom ends of the whiskers, as well as fewer outliers, indicate lower variability (or greater consistency) of a unit's hourly emission rates at a given operating level. In this way, each box plot provides visual representations of both the magnitude and variability of a unit's hourly NO_X emission rates at a given operating level in a single chart. For comparison purposes, each box plot also includes a horizontal dashed line showing the 0.12 lb/mmBtu emission rate limit that Pennsylvania's SCR-equipped units are required to meet—under certain operating conditions, on a 30-day rolling average basis—by the state's current RACT rules.[17]

As examples of the more comprehensive analysis included in the Emissions Data TSD, the figures below show results for three SCR-equipped units: Keystone unit 1 and Conemaugh unit 2, the two Pennsylvania units with the highest overall NO_X mass emissions in the 2019 ozone season, and Brandon Shores unit 2, a Maryland unit that produced the largest amount of NO_X emissions during the 2019 ozone season of any coal-fired EGU in Delaware, Maryland, or New Jersey.[18]

Figures IV–1 and IV–2 show data for Brandon Shores unit 2 for 2017 (third-lowest average rate for 2009–2019) and 2019 (lowest average rate). Although the chart of operating hours indicates that in 2019 the unit spent more hours at operating levels 4–5 and fewer hours at operating levels 6–9 than in 2017, the distributions of the hourly emission rate data for 2017 and 2019 are still quite similar. In both years, hourly emission rate data for operating levels 4–10 are quite consistent, with half of the hourly data captured in thin boxes at emission rates below 0.10 lb/mmBtu. The hourly emission rate data for operating levels 1–3, generally representing start-up or shut-down conditions as indicated by the small numbers of operating hours, are less consistent and higher (at operating levels 2–3), indicating that the unit's SCR controls may not have operated until the unit reached operating level 4. The main difference between the emission rate data in the 2017 and 2019 box plots is a decrease in the number of outlier hours at operating level 6. Relative to 2017, mass emissions in 2019 increased slightly at operating levels 4–5 and decreased by larger amounts at operating levels 6–9, with both the increases and decreases driven primarily by changes in the numbers of hours spent at the respective operating levels.

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[15] EPA grouped the hourly data for each unit into ten evenly spaced ''bins'' based on the relationship of the unit's heat input in that hour to the unit's maximum hourly heat input capacity. Thus, bin 1 includes hours when the unit combusted between 0% and 10% of its maximum hourly heat input capacity and bin 10 includes hours when the unit combusted between 90% and 100% of its maximum hourly heat input capacity.

[16] Data for the ozone season with each unit's third-lowest emission rate during the 2009–2019 period are included for comparability with the data sets EPA has used to identify emission reduction opportunities in the CSAPR Update and the proposed Revised CSAPR Update. Data for the ozone season with each unit's lowest emission rate during the same period are also included for greater comparability with the data provided by the OTC to support its CAA section 184(c) recommendation. EPA notes that for some units the OTC has provided data for ozone seasons before 2009.

[17] Pennsylvania's current RACT rules are summarized in section V.B. of this document.

[18] The Keystone, Conemaugh, and Brandon Shores plants each have two coal-fired EGUs, and in each case EPA's data analysis for the plant's other unit resulted in charts similar to the charts for the plant's unit shown here. The charts for all the units are included in the Emissions Data TSD available in the docket.

Figure IV-1: Distribution of Ozone Season Operating Hours for Brandon Shores unit 2

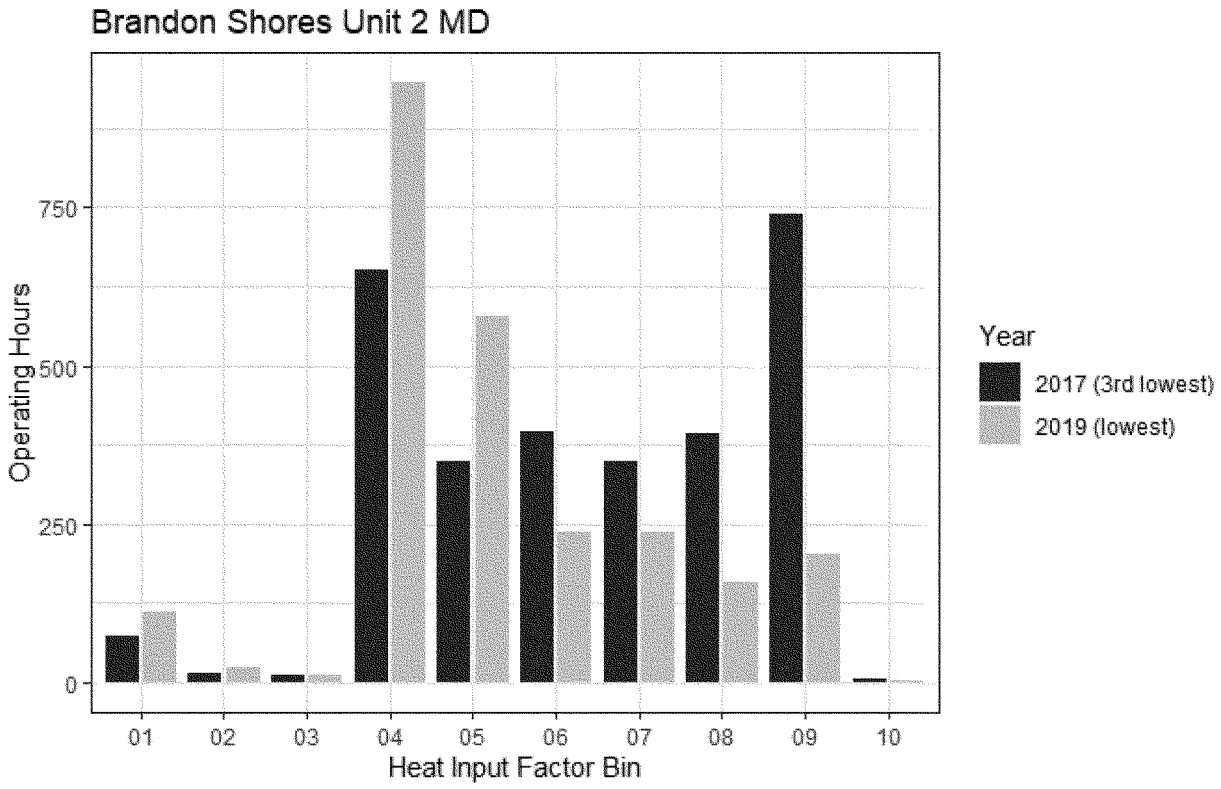
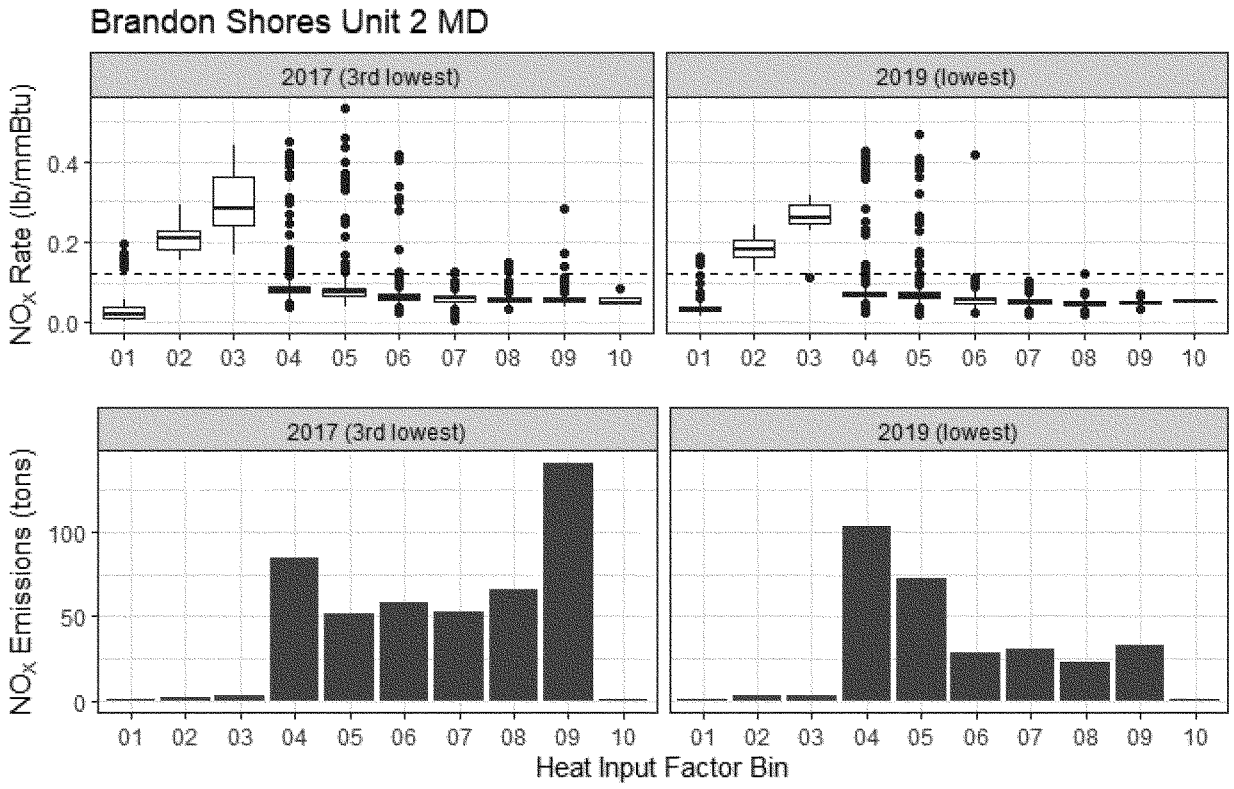


Figure IV-2: Distribution of Hourly Ozone Season NO_X Emission Rates and NO_X Mass Emissions for Brandon Shores unit 2



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Figures IV–3 and IV–4 show data for Keystone unit 1 for 2010 (lowest average rate for 2009–2019), 2017 (third-lowest average rate), and 2019. The data for 2010 show that almost all hours were spent at operating levels 6–8, and that hourly emission rates at load levels 6–9 were very consistent, with half of the hourly data captured in thin boxes at emission rates below 0.10 lb/mmBtu. In 2017, there was a shift of hours from operating level 8 to operating level 7, emission rates continued to show consistency with thin boxes at operating levels 7–9 but showed much greater variability at operating level 6, and the level of the boxes was higher than in 2010. In 2019, hours were spread more broadly, down to operating level 4 and a few hours at operating level 10, and emission rates showed less consistency at operating level 7 than in either 2010 or 2017.[19] Relative to 2010 and 2017, the changes to mass emissions in 2019 include, first, an increase in emissions at operating level 8 that appears to be driven primarily by generally higher hourly emission rates at this operating level, and second, an increase in emissions at operating level 5 that appears to be driven primarily by an increase in hours spent at this operating level.

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[19] EPA notes that additional analysis showed that the outlier values in the Keystone unit 1 hourly emission rate data at operating level 8 were spread across the ozone season and were not concentrated in a manner that would suggest controls were being intentionally idled on particular days. *See* Emissions Data TSD at Section 3.2.

Figure IV-3: Distribution of Ozone Season Operating Hours for Keystone unit 1

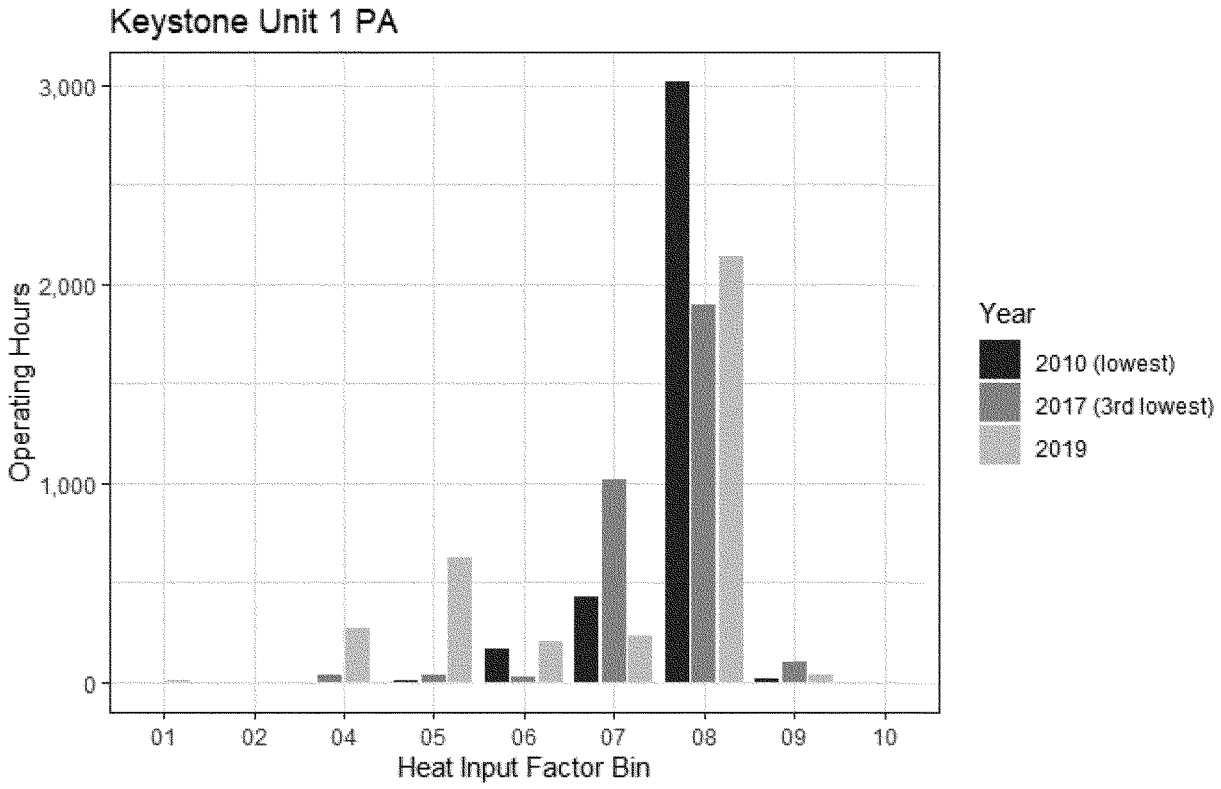
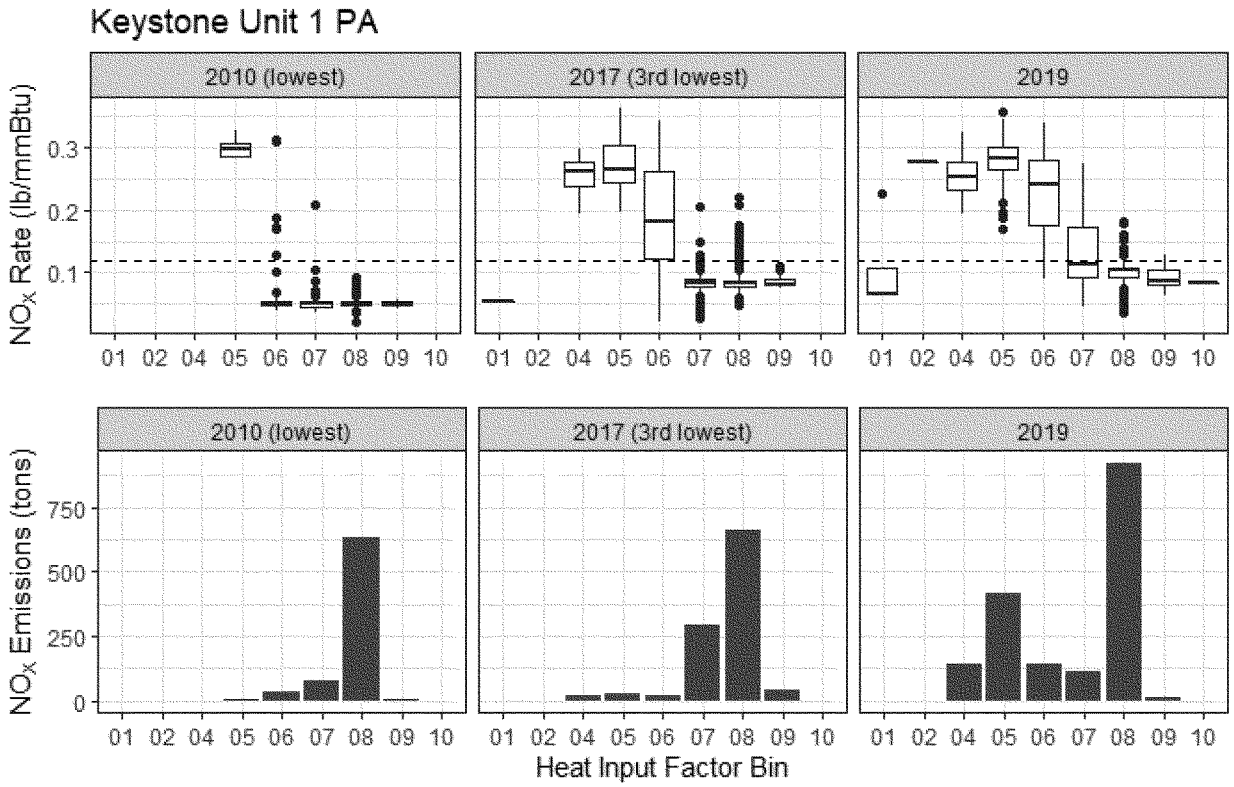


Figure IV-4: Distribution of Hourly Ozone Season NO_X Emission Rates and NO_X Mass Emissions for Keystone unit 1



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Figures IV–5 and IV–6 show data for Conemaugh unit 2 for 2016 (third-lowest average rate for 2009–2019), 2018 (lowest average rate), and 2019. The data for 2016 show that hours were spread across operating levels 4–9, and only operating levels 8–9 showed somewhat thin boxes indicating relatively consistent hourly emission rates. In 2018, hours were spread across operating levels 5–9, with a heavy concentration at operating level 9, and the unit's emission rate data showed consistently thin boxes across all of those load levels at emission rates below 0.10 lb/mmBtu, although with outliers at most operating levels. In 2019, hours were again spread across operating levels 5–9, with an increase at operating level 5, and consistent emission rates with a thin box were achieved only at operating level 9, with a relatively high frequency of outlier values.[20] Relative to 2016 and 2018, the changes to mass emissions in 2019 include, first, increases in emissions at operating level 6–8 that appear to be driven primarily by generally higher hourly emission rates at these operating levels, and second, a large increase in emissions at operating level 5 that appears to be driven primarily by generally higher hourly emission rates at this operating level but also to some extent by an increase in hours spent at this operating level.

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[20] EPA notes that additional analysis showed that the outlier values in the Conemaugh unit 2 hourly emission rate data at operating level 9 were spread across the ozone season and were not concentrated in a manner that would suggest controls were being intentionally idled on particular days. *See* Emissions Data TSD at Section 3.2.

Figure IV-5: Distribution of Ozone Season Operating Hours for Conemaugh unit 2

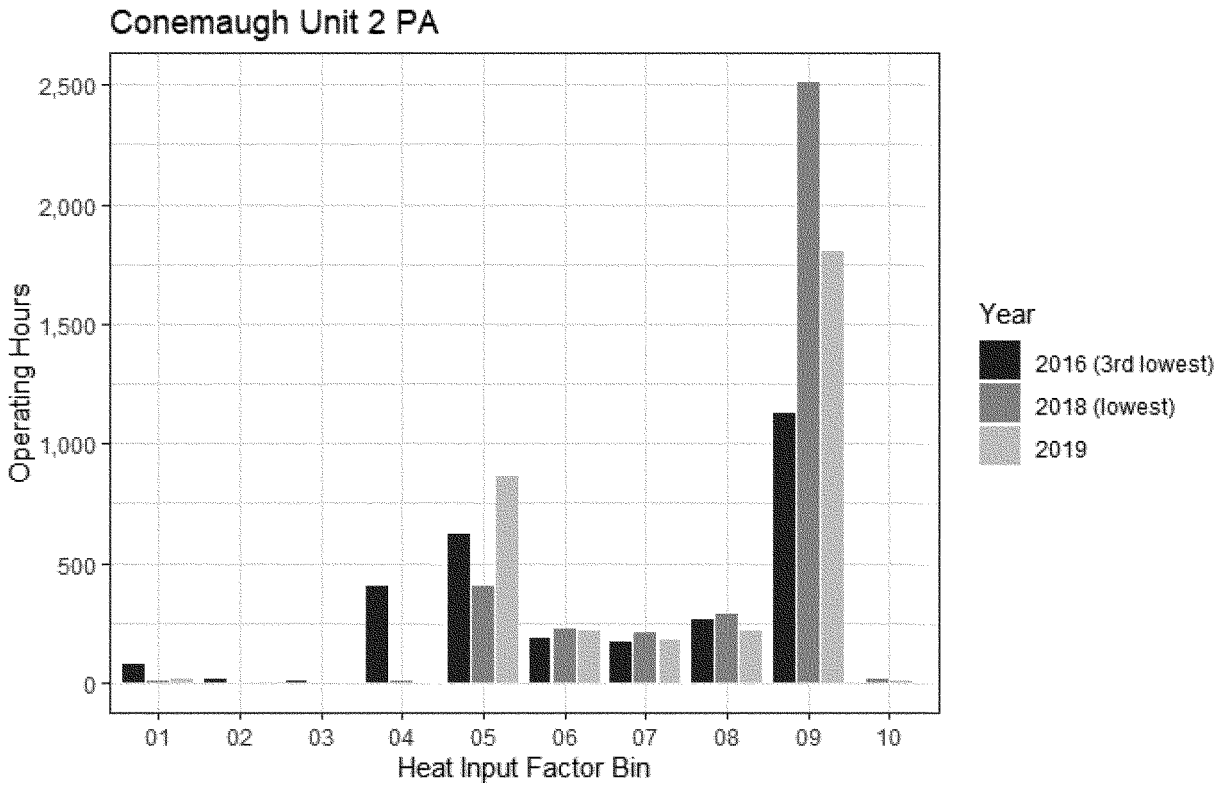
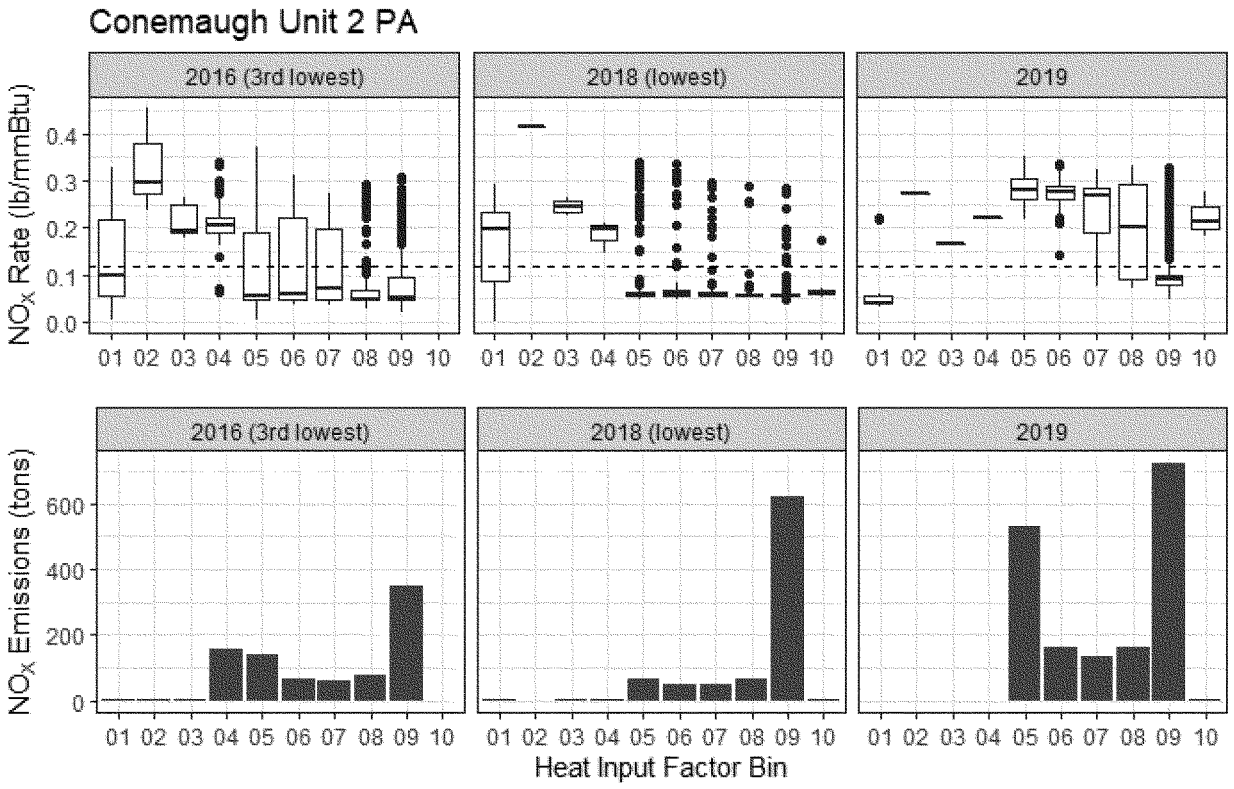


Figure IV-6: Distribution of Hourly Ozone Season NO_X Emission Rates and NO_X Mass Emissions for Conemaugh unit 2



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EPA requests comment on the analysis of emissions and operating data contained in the Emissions Data TSD and summarized in this section, including but not limited to the following questions:

- To what extent do the data support a conclusion that that coal-fired EGUs in Pennsylvania equipped with SCR or SNCR controls could further optimize operation of those controls to reduce NO_X emissions during the ozone season, notwithstanding changes in the units' operating patterns in recent years?
- To what extent do the data support a conclusion that any particular type of control measure—*i.e.,* a requirement to operate and optimize controls, a daily NO_X emission rate limit, or some combination of the two—would be more or less effective at reducing ozone season NO_X emissions from the Pennsylvania units?

V. Current Regulatory Context

The OTC's CAA section 184(c) recommendation is made in the context of ongoing activities addressing other CAA provisions. At least two such activities appear to have the potential to cause reductions in emissions from the Pennsylvania EGUs potentially affected by the OTC's recommendation by the point in time at which emissions reductions could be anticipated in response to an approval or partial approval of the OTC's recommendation, and the resulting SIP call and implementation. The first is EPA's Revised CSAPR Update rulemaking to address the interstate pollution transport obligations of states including Pennsylvania with respect to the 2008 ozone NAAQS, 85 FR 68964 (October 30, 2020). The second is Pennsylvania's proceedings to revise NO_X RACT requirements applicable to the state's coal-fired EGUs. In this section, EPA discusses these activities and requests comment on the relevance of these or other activities to EPA's decision on whether to approve, disapprove, or partially approve and partially disapprove the OTC's recommendation.

A. Revised CSAPR Update

Starting more than two decades ago, EPA has issued multiple rules requiring reductions in NO_X emissions to address the interstate transport of NO_X as an ozone precursor, including the NO_X SIP Call, 63 FR 57356 (October 27, 1998); the Clean Air Interstate Rule (CAIR), 70 FR 25162 (May 12, 2005); the Cross-State Air Pollution Rule (CSAPR), 76 FR 48208 (August 8, 2011); and the CSAPR Update, 81 FR 74504 (October 26, 2016).[21] These actions were all taken under the authority of CAA section 110(a)(2)(D)(i)(I), often referred to as the ''good neighbor provision.'' The rules were implemented through enforceable emission limits (emission budgets) that were designed to incentivize emission reductions while providing sources with flexibility as to the specific control strategies employed. Depending on the rule, the budgets were set at stringencies reflecting control measures that include new combustion or post-combustion controls, operation of existing post-combustion controls, and shifting of generation to lower emitting units.

The CSAPR Update addressed ozone transport under the 2008 ozone NAAQS by establishing more stringent statewide

[21] EPA's CSAPR Close-Out, 83 FR 65878 (Dec. 21, 2018), determined that no further NO_X reductions were required in upwind states to address downwind nonattainment and maintenance problems for the 2008 ozone NAAQS based on EPA's assessment of the analytical year 2023.

budgets for ozone season NO_X emissions from EGUs in 22 states starting in 2017. The covered states include Pennsylvania, Maryland, and New Jersey. In *Wisconsin* v. *EPA,* 938 F.3d 303 (D.C. Cir 2019), the D.C. Circuit court upheld the CSAPR Update in most respects but remanded the rule to EPA for failing to fully address good neighbor obligations of the affected states with respect to the 2008 ozone NAAQS by the applicable attainment dates.[22] On October 30, 2020, EPA published a proposal for a Revised CSAPR Update in response to the court's remand that, based on new analysis, would establish reduced NO_X ozone season emission budgets for 12 states including Pennsylvania. 85 FR 68964. Under EPA's proposal, if finalized, this rule would fully resolve the outstanding good neighbor obligations for Pennsylvania and the other eleven states for the 2008 ozone NAAQS. The rule does not, however, address the 2015 ozone NAAQS. As under the CSAPR Update, the proposed budgets are based on emission reductions achievable through full operation of existing SCR controls, upgrade of combustion controls where possible, and limited generation shifting.

To develop the proposed emission budgets for the Revised CSAPR Update, EPA identified SCR-equipped units in the relevant upwind states whose 2019 emission rate data suggested they were not optimizing their SCR controls to achieve an average emission rate of 0.08 lb/mmBtu or less during the ozone season.[23] EPA then projected the emission reductions that would be achieved if each of these units reduced its average emission rate to 0.08 lb/mmBtu, while units already achieving lower emission rates continued to do so. This methodology resulted in projected emission reductions from Pennsylvania units (implemented through an ozone season cap) of over 3,100 tons through SCR optimization alone. The proposed 2021 budget for Pennsylvania is 33% lower than the state's 2019 ozone season emission levels. EPA has a court-ordered deadline to take final action on the Revised CSAPR Update by March 15, 2021.[24]

In focusing on emission reductions achievable through optimization of existing SCR controls, the Revised CSAPR Update bases its emission budgets for Pennsylvania to a considerable extent on the same units from which emission reductions are sought under the OTC's section 184(c) recommendation. The two regulatory initiatives would employ different compliance mechanisms, with the OTC's recommendation centered on unit-specific daily limits while the Revised CSAPR Update would employ a flexible trading program implemented through regionwide emission caps, and state emission budgets and assurance levels. The Revised CSAPR Update's budgets would reflect a much more stringent target emission rate of 0.08 lb/mmBtu (on an ozone season average basis) than the 0.125 lb/mmBtu and 1.5 lb/MWh rates (on a daily basis) in the Delaware and New Jersey rules.[25] EPA also notes that under the procedural requirements of section 184(c), it is likely that any emission reductions resulting from approval of the OTC's recommendation could not be anticipated until the 2022 ozone season, given that EPA's deadline for acting on the recommendation falls in March 2021 and would be followed by a SIP call process. In contrast, EPA has proposed to implement the Revised CSAPR Update starting in the 2021 ozone season.

In light of the substantial overlap in the Pennsylvania sources that would be affected by the Revised CSAPR Update and by the OTC's section 184(c) recommendation, and recognizing the differences in the proposed structure, stringency, and implementation timing of the two initiatives, EPA requests comment on whether and how the potential finalization and implementation of the Revised CSAPR Update bears on the question of whether the additional control measures sought in the OTC's section 184(c) recommendation are necessary to achieve attainment of the 2008 or 2015 ozone NAAQS in the OTR.

B. Pending Revisions to Pennsylvania NO_X RACT Requirements

Under CAA sections 184(b) and 182(f)(1), all states in the OTR must implement NO_X RACT on a statewide basis for sources meeting certain criteria, generally including coal-fired EGUs. In addition, each OTR state generally must update its RACT determinations for each revised ozone NAAQS. *See* 40 CFR 51.1116 and 51.1316. Pennsylvania most recently updated its NO_X RACT requirements for coal-fired EGUs in 2016 to address the 2008 ozone NAAQS (Pennsylvania calls these requirements ''RACT II''). The requirements, which first became effective in January 2017, are codified at 25 Pa. Code §§ 129.96–129.100: Additional RACT Requirements for Major Sources of NO_X and VOC. Section 129.97 sets ''presumptive'' RACT requirements for certain categories of sources, including coal-fired combustion units with SCR controls (129.97(g)(1)(viii)) and coal-fired combustion units with SNCR controls (129.97(g)(1)(ix)). Section 129.97(g)(1)(viii) requires that existing SCR-equipped coal-fired EGUs not exceed a NO_X emission rate limit of 0.12 lb/mmBtu when operating with an SCR inlet temperature greater than or equal to 600 degrees Fahrenheit. Section 129.97(g)(1)(ix) requires that coal-fired combustion units with SNCR controls must operate their SNCR controls when operating with a temperature in the reagent injection area greater than or equal to 1,600 degrees Fahrenheit but does not set a NO_X limit. Section 129.97(g)(1)(vi) establishes additional NO_X emission rate limits that apply to coal-fired combustion units with rated heat input capacities greater than 250 million Btu per hour but operating at lower temperatures without regard to their installed control equipment: 0.16 lb/mmBtu for fluidized bed units, 0.35 lb/mmBtu for tangentially fired units, and 0.40 lb/mmBtu for all other types of units. Under section 129.100(a)(1), compliance with all of these limits must be demonstrated on a 30-day rolling average basis. Section 129.98 allows the emission rate limits to be met through averaging with other units subject to Pennsylvania's RACT requirements (including non-coal-fired units) under the control of the same owner or operator. EPA conditionally approved Pennsylvania's rules as satisfying NO_X RACT requirements in a revision to Pennsylvania's SIP, but the limits in section 129.97(g)(1)(viii) and (ix) were fully approved. 84 FR 20274 (May 8, 2019). However, the U.S. Court of Appeals for the Third Circuit

[22] The D.C. Circuit vacated the CSAPR Close-Out determination in *New York* v. *EPA,* 781 Fed. App'x 4 (D.C. Cir. 2019), for the same flaw it found in the CSAPR Update in *Wisconsin.*

[23] For both the CSAPR Update and the proposed Revised CSAPR Update, EPA based its assessment of the emission reductions achievable through operation and optimization of SCR controls on the average of the third-lowest ozone season average emission rates achieved by SCR-equipped units nationwide. For the CSAPR Update, EPA considered data for the period from 2009 through 2015 and the resulting average emission rate was 0.10 lb/mmBtu. For the proposed revised CSAPR Update, EPA considered data for the period from 2009 through 2019 and the resulting average emission rate was 0.08 lb/mmBtu. *See* 85 FR at 68990–91.

[24] *See New Jersey* v. *EPA,* No. 1:20–cv–01425 (S.D.N.Y. July 28, 2020).

[25] As previously noted, for a typical range of heat rates for coal-fired units of 9,000 to 11,000 Btu/kWh, an emission rate limit of 1.5 lb/MWh would be equivalent to emission rate limits in a range of 0.136 to 0.167 lb/mmBtu.

subsequently vacated and remanded the portion of EPA's approval concerning the 0.12 lb/mmBtu limit for coal-fired EGUs with SCR controls, and the 600 degree temperature exemption for that limit, both of which are found in section 129.97(g)(1)(viii). The court held that the approval of this specific provision was not supported by adequate facts or reasoning in the record. *Sierra Club* v. *EPA,* 972 F.3d 290, 299–307 (3d Cir. 2020).[26] EPA has not yet proposed any action in response to the remand, nor has Pennsylvania proposed or adopted updates to its RACT II rules.

In 2019, Pennsylvania started the process of updating its RACT requirements for the 2015 ozone NAAQS (referred to as ''RACT III'') by discussing potential concepts for a rule at its Air Quality Technical Advisory Committee meetings. For EGUs, the draft rule would require SCR-equipped and SNCR-equipped units to optimize the use of their controls consistent with technological limitations, manufacturer specifications, good engineering and maintenance practices, and good air pollution control practices. The rule would continue to differentiate the applicable emission rate limits based on specified temperature thresholds and generally would not change the levels of the emission rate limits for SCR-equipped coal-fired EGUs established in the RACT II rule, but would require compliance to be demonstrated on a daily average basis instead of a 30-day rolling average basis. In addition, a new emission rate limit of 0.10 lb/mmBtu on a 30-day rolling average basis would be established for SCR-equipped coal-fired units when operating with an SCR inlet temperature greater than or equal to 600 degrees Fahrenheit. Compliance generally could still be demonstrated by averaging across units under the control of the same owner or operator. The new rules would generally be implemented by January 1, 2023.[27] The OTC recognizes Pennsylvania's efforts to update its RACT requirements and has indicated its intention to withdraw the CAA section 184(c) recommendation if Pennsylvania adopts a rule addressing the recommendation. EPA notes that the draft RACT III rule described above was prepared before the court remand of EPA's approval of the state's RACT II rule.

EPA requests comment on whether and how Pennsylvania's RACT III rulemaking, as well as the remand of EPA's approval of Pennsylvania's RACT II SIP submittal, may bear on EPA's decision to approve, disapprove, or partially approve and partially disapprove the OTC's section 184(c) recommendation, including but not limited to the following questions:

- If EPA approved the OTC's section 184(c) recommendation and, in response to the resulting SIP call, Pennsylvania submitted a rule along the lines of the draft RACT III rule discussed above, could EPA approve the draft rule as meeting the OTC's recommendation? That is, could EPA determine that the draft rule is as stringent as the Delaware, Maryland, or New Jersey rules included in the OTC's recommendation? If the rule would not be approvable, how would Pennsylvania need to modify the draft rule to make it meet the OTC's recommendation?

- Is it appropriate for EPA to evaluate the necessity of additional measures for bringing areas in the OTR into attainment prior to the establishment of OTR RACT for VOC and NO_X under CAA section 184(b) (and, for NO_X, the extension provision of CAA section 182(f)(1))? Given that section 184(c) and section 184(b) establish independent requirements, is it appropriate for EPA to conclude that a specific set of recommended additional measures may be necessary under section 184(c) and mandate their implementation without having first given Pennsylvania an opportunity to adopt a potentially different set of measures as RACT for purposes of the 2015 ozone NAAQS that could render some or all of the recommended additional measures unnecessary as related to that NAAQS?

C. Other Pending Regulatory Activities

In addition to the proposed Revised CSAPR Update and Pennsylvania's efforts to update RACT requirements, it is possible that activities being undertaken to meet other CAA requirements could result in requirements for coal-fired EGUs in Pennsylvania to reduce NO_X emissions. For example, promulgation of the 2015 ozone NAAQS triggered a requirement, which has not yet been met, for Pennsylvania to revise its SIP to address the state's obligations under the good neighbor provision for this NAAQS.[28] Also, on March 12, 2018, New York submitted a petition to EPA under CAA section 126(b) seeking a finding that approximately 350 sources in nine states, including all of the Pennsylvania EGU facilities potentially affected under the OTC's section 184(c) recommendation, emit or would emit NO_X in violation of the good neighbor provision with respect to the 2008 and 2015 ozone NAAQS. Although EPA denied that petition, 84 FR 56058 (Oct. 18, 2019), the D.C. Circuit subsequently vacated the denial and remanded for EPA to promulgate a revised response, *New York* v. *EPA,* 964 F.3d 1214, 1226 (D.C. Cir. 2020).

EPA requests comment on whether and how regulatory activities besides the proposed Revised CSAPR Update and Pennsylvania's efforts to update RACT requirements, including but not limited to activities addressing the requirements noted above, may bear on EPA's decision to approve, disapprove, or partially approve and partially disapprove the OTC's section 184(c) recommendation.

Dated: December 15, 2020.

Anne L. Austin,

Principal Deputy Assistant Administrator.

Appendix: OTC Recommendation

OTC Recommendation for Establishing Daily Limits for Coal-Fired EGUs in Pennsylvania To Ensure That Existing Control Technologies are Optimized To Minimize Nitrogen Oxide Emissions Each Day of the Summer Ozone Season

The Ozone Transport Commission (OTC) recommends that the U.S. EPA require Pennsylvania to revise the Pennsylvania State Implementation Plan to include additional control measures which would establish daily nitrogen oxides (NO_X) emission limits for all coal-fired EGUs with already installed Selective Catalytic Reduction (SCR) or Selective Non Catalytic Reduction (SNCR) control technology to ensure that these technologies are optimized to minimize NO_X emissions each day of the ozone season.

These requirements must be as stringent as any one of the rules attached. These rules all establish daily limits designed to optimize the use of SCR and SNCR control technologies to minimize NO_X emissions each day of the ozone season. Daily NO_X limits for coal-fired EGUs have been adopted by Delaware, New Jersey and Maryland, three of the states adjacent to and directly downwind of Pennsylvania. Pennsylvania contributes significantly to four downwind nonattainment areas in the OTC including Washington DC, Baltimore, Philadelphia, and

[26] The Court also found that the recordkeeping and reporting requirement in section 129.100(d)(1) was inadequate to ensure that the 0.12 lb/mmBtu limit was being met because it did not specifically require that the inlet temperature to the SCR be recorded and reported. *Sierra Club* v. *EPA,* 972 F.3d 290, 307–309 (3d Cir. 2020).

[27] *See* Pennsylvania Department of Environmental Protection, ''Draft Proposed RACT III Rulemaking'' (Feb. 13, 2020) at 15–21, available in the docket for this action and at *http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/Air%20Quality%20Technical%20Advisory%20Committee/2020/2-13-20/RACT%20III%20Requirements%20AQTAC%20Presentation%202-13-2020.pdf.*

[28] On December 5, 2019, EPA published findings that Pennsylvania and several other states had failed to submit SIP revisions to address their good neighbor obligations with respect to the 2015 ozone NAAQS. 84 FR 66612.

New York City. During the summer of 2018, NO_X emissions from coal-fired EGUs in Pennsylvania equipped with SCR and SNCR were more than four times greater than the NO_X emissions from coal-fired EGUs in Delaware, New Jersey and Maryland combined.

Pennsylvania has not yet adopted daily NO_X limits for coal-fired EGUs. Therefore, the OTC is recommending that EPA require Pennsylvania to adopt and implement daily NO_X limits as expeditiously as practicable. It is our hope that the three options embodied in the Delaware, New Jersey and Maryland regulations will provide Pennsylvania with the flexibility to implement daily NO_X limits in a time frame to help downwind OTC states attain the 2015 ozone standard by the dates required in the Clean Air Act.

Because this recommendation does not involve the purchase or installation of new control technologies, the OTC urges EPA to require that Pennsylvania implement these requirements in time to reduce ozone levels during the summers of 2020 and 2021. All of the marginal nonattainment areas in the Ozone Transport Region (OTR) are on a path to not attain the 2015 ozone standard by 2021, the mandated attainment date for marginal nonattainment areas, if additional NO_X reductions are not achieved.

Attachments [not shown]:

1. Delaware Administrative Code, Title 7 Natural Resources & Environmental Control, 1100 Air Quality Management Section, 1146 ''Electric Generating Unit (EGU) Multi-Pollutant Regulation'' (pages 1–9).
2. New Jersey State Department of Environmental Protection, New Jersey Administrative Code, Title 7, Chapter 27, Subchapter 19, ''Control and Prohibition of Air Pollution from Oxides of Nitrogen'' (pages 1 & 27–29).
3. Maryland—Code of Maryland Regulations (COMAR), Title 26 Department of the Environment, Subtitle 11 Air Quality, Chapter 38, ''Control of NO_X Emissions from Coal-Fired Electric Generating Units'' (pages 1–6).

[FR Doc. 2021–00864 Filed 1–14–21; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OEI–2011–0096; FRL–10018–48–OMS]

Proposed Information Collection Request; Comment Request; Cross-Media Electronic Reporting Rule (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an Information Collection Request (ICR), ''Cross-Media Electronic Reporting Rule'' (EPA ICR No. 2002.08, OMB Control No. 2025–0003) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through August 31, 2021. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before March 16, 2021.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OEI–2011–0096, online using *www.regulations.gov* (our preferred method), by email to *oei.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Shirley Miller or Dipti Singh, Information Exchange Services Division, Office of Information Management, Office of Mission Support (2823T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–2908 or 202–566–0739 respectively; email address: *miller.shirley@epa.gov* or *singh.dipti@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The scope of this ICR is the electronic reporting components of the Cross-Media Electronic Reporting Rule (CROMERR), which is designed to: (i) allow EPA to comply with the Government Paperwork Elimination Act of 1998; (ii) provide a uniform, technology-neutral framework for electronic reporting across all EPA programs; (iii) allow EPA programs to offer electronic reporting as they become ready for CROMERR; and (iv) provide states with a streamlined process—together with a uniform set of standards—for approval of their electronic reporting provisions for all their EPA-authorized programs. Responses to the collection of information are voluntary. In order to accommodate CBI, the information collected must be in accordance with the confidentiality regulations set forth in 40 CFR part 2, subpart B. Additionally, EPA will ensure that the information collection procedures comply with the Privacy Act of 1974 and the OMB Circular 108.

Form Numbers: None.

Respondents/affected entities: Entities that report electronically to EPA and state or local government authorized programs; and state and local government authorized programs implementing electronic reporting.

Respondent's obligation to respond: Voluntary, required to obtain or retain a benefit (CROMERR was established to ensure compliance with the Government Paperwork Elimination Act (GPEA)).

Estimated number of respondents: About 119,800 (total).

Frequency of response: On occasion.

Total estimated burden: About 77,000 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: about $3,979,500 (per year), includes $586,300 annualized capital or operation & maintenance costs.

Changes in Estimates: The annual respondent burden estimate in the currently approved CROMERR ICR (EPA ICR Number 2002.07) is 86,554 hours. The annual respondent burden estimate for this ICR (EPA ICR Number 2002.08) is anticipated to be about 77,000 hours. This represents a decrease of 9,554 hours in the total estimated respondent burden compared with the ICR currently approved by OMB.

The decrease in respondent burden can be attributed primarily to three reasons. First, even though the annual number of registrants with EPA's electronic document receiving system (*i.e.,* the Central Data Exchange (CDX)) has increased over the past three years, the actual number of registrants under the e-Manifest system was lower than projected in the currently approved ICR. As a result, there is a net decrease in the number of registrants. Second, over the past three years, the Agency made improvements to CDX to enhance efficiencies in end-user registration, integration, and Help Desk support. These improvements resulted in reduced burden to respondents. Third, as a result of technological improvements, the Agency now is able to obtain real world data via google analytics on the frequency and amount of time a respondent spends accessing CDX web pages and features. Based on this information, EPA has revised the burden estimates associated with some of the CDX registration and identity proofing activities. The Agency believes that these revised burden estimates more accurately reflect the resources spent by respondents conducting electronic reporting activities under CROMERR, and for states gaining approval of their electronic reporting provisions for all their EPA-authorized programs. The overall change in respondent burden is considered an ''adjustment,'' because it results from changes in the respondent universe and hourly burden estimates used in the development of the ICR.

Dated: January 6, 2021.

Jennifer Campbell,

Director, Office of Information Management, Office of Mission Support.

[FR Doc. 2021–00899 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9054–8]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed January 4, 2021 10 a.m. EST Through January 11, 2021 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20210001, Draft, USMC, USAF, AZ, LEGISLATIVE—Reauthorization of the Barry M. Goldwater Range Land Withdrawal and Proposed Gila Bend Addition Land Withdrawal, Comment Period Ends: 03/01/2021, Contact: Jon Haliscak 210–395–0615.

EIS No. 20210002, Draft, BOEM, AK, Cook Inlet Planning Area Oil and Gas Lease Sale 258, Comment Period Ends: 03/01/2021, Contact: Amee Howard 907–334–5200.

EIS No. 20210003, Draft, BLM, CA, Desert Plan Amendment Draft Land Use Plan Amendment and Draft Environmental Impact Statement, Comment Period Ends: 04/15/2021, Contact: Jeremiah Karuzas 916–978–4644.

EIS No. 20210004, Draft, BLM, NV, Relief Canyon Mine Expansion Project, Comment Period Ends: 03/01/2021, Contact: Jeanette Black 775–623–1500.

EIS No. 20210005, Final, USFS, AZ, Resolution Copper Project and Land Exchange, Review Period Ends: 03/01/2021, Contact: Mary Rasmussen 602–225–5200.

Amended Notice

EIS No. 20200236, Final Supplement, USACE, AL, Allatoona Lake Water Supply Storage Reallocation Study and Updates to Weiss and Logan Martin Reservoirs Project Water Control Manuals, Alabama and Georgia (or Allatoona-Coosa Reallocation Study), Review Period Ends: 01/25/2021, Contact: Mr. Mike Malsom 251–690–2023. Revision to FR Notice Published 12/11/2020; Extending the Review Period from 01/11/2021 to 01/25/2021.

Dated: January 11, 2021.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2021–00843 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2020–0585; FRL–10018–47]

Glyphosate Registration Review; Draft Endangered Species Act Biological Evaluations; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: EPA issued a notice in the **Federal Register** of November 27, 2020, opening a 60-day comment period on the draft nationwide biological evaluations for the registration review of the pesticide glyphosate relative to the potential effects on threatened and endangered species and their designated critical habitats. This document extends the comment period for 45 days, from January 26, 2021 to March 12, 2021.

DATES: Comments, identified by docket identification (ID) number EPA–HQ–OPP–2020–0585 must be received on or before March 12, 2021.

ADDRESSES: Follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of November 27, 2020 (85 FR 76071) (FRL–10017–03).

FOR FURTHER INFORMATION CONTACT: Tracy Perry, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 308–0128; email address: *perry.tracy@epa.gov.*

SUPPLEMENTARY INFORMATION: This document extends the public comment period established in the **Federal Register** document of November 27, 2020 (85 FR 76071) (FRL–10017–03), which opened a 60-day public comment period for the draft nationwide biological evaluations for the registration review of the pesticide glyphosate relative to the potential effects on threatened and endangered species and their designated critical habitats. As noted in that document, the schedule for conducting the atrazine and simazine BEs was negotiated as part of a partial settlement agreement pursuant to a joint stipulation filed on October 18, 2019 and entered by the

court on October 22, 2019, in Center for Biological Diversity *et al.* v. EPA *et al.* (N.D. Ca) (3:11–cv–00293). EPA stated in that settlement that it would also include the herbicides propazine and glyphosate in this group of effects determinations. The Agency has completed a comprehensive, nationwide draft BE for the use of glyphosate relative to the potential effects on listed species and their designated critical habitats.

After considering a number of requests to extend the comment period received from various stakeholders, EPA is extending the comment period for the following reasons: (1) The length, complexity, and highly technical nature of the draft biological evaluations; (2) the need for some stakeholders to engage experts familiar with the subject matter to assist them with providing comments; (3) the large number of stakeholders potentially impacted by the draft biological evaluations; (4) the importance of soliciting feedback from stakeholders who may be affected; and (5) the stakeholders' need for additional time to review and develop constructive comments for this BE document. This document extends the comment period for 45 days, from January 26, 2021 to March 12, 2021.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of November 27, 2020. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 16, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2021–00862 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10018–01–OMS]

Senior Executive Service Performance Review Board; Membership

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Notice is hereby given of the membership of the U.S. Environmental Protection Agency (EPA) Performance Review Board for 2020.

FOR FURTHER INFORMATION CONTACT: Lizabeth Engebretson, Deputy Director, Policy, Planning & Training Division, 3601M, Office of Human Resources, Office of Mission Support, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; (202) 564–0804.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. This board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointment authority relative to the performance of the senior executive.

Members of the 2020 EPA Performance Review Board are:

Barry Breen, Principal Deputy Assistant Administrator, Office of Land and Emergency Management

Richard Buhl, Director, Mission Support Division, Region 8

Katrina Cherry, Director, Office of Management and International Services, Office of International and Tribal Affairs

Kerry Drake, Mission Support Division Director, Region 9

Lizabeth Engebretson, (Ex-Officio) Deputy Director, Policy, Planning and Training Division, Office of Human Resources, Office of Mission Support

Diana Esher, Deputy Regional Administrator, Region 3

Jeaneanne Gettle, Director, Science and Ecosystems Support Division, Region 4

Arron Helm, Director, Office of Administration and Resources Management—Research Triangle Park, Office of Mission Support

Vanessa ''Kay'' Holt, Deputy Director for Management, Center for Public Health & Environmental Assessment, Office of Research and Development

Juan Hunt, Director, Office of Civil Rights, Office of the Administrator

Samantha Jones, Associate Director for Risk Assessment, Center for Public Health and Environmental Assessment, Office of Research and Development

Mara J. Kamen, (Ex-Officio) Director, Office of Human Resources, Office of Mission Support

Albert McGartland, Director, National Center for Environmental Economics, Office of the Administrator

Jennifer McLain, Director, Office of Ground Water and Drinking Water, Office of Water

Tanya Mottley, Director, National Program Chemicals Division, Office of Chemical Safety and Pollution Prevention

Mary Ross, Director, Office of Science Advisor, Policy & Engagement, Office of Research and Development

Kenneth Schefski, Regional Counsel—Region 8, Office of Enforcement and Compliance Assurance

Carolyn Snyder, Director, Climate Protection Partnerships Division, Office of Air and Radiation

Gautam Srinivasan, Associate General Counsel, Air and Radiation Law Office, Office of General Counsel

Todd Stedeford, Senior Science Advisor, Office of Pollution Prevention and Toxics, Office of Chemical Safety and Pollution Prevention

Carol Terris, Associate Chief Financial Officer, Office of the Chief Financial Officer

Donna Vizian,

Principal Deputy Assistant Administrator, Office of Mission Support.

[FR Doc. 2021–00900 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–OW–2013–0610; FRL–10017–57–OW]

Proposed Information Collection Request; Comment Request; Clean Water Act 404 State-Assumed Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Clean Water Act Section 404 State-Assumed Programs'' (EPA ICR No. 0220.14, OMB Control No. 2040–0168) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through July 31, 2021. An Agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be received on or before March 16, 2021.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2013–0610, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our

preferred method). Follow the online instruction for submitting comments.

• *Email: ow-docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2013–0610 in the subject line of the message.

• *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Water Docket, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

• *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Dolores Wesson, Oceans, Communities, and Wetlands Division, Environmental Protection Agency, 1200 Pennsylvania Ave. NW (4504T), Washington, DC 20460; telephone number: 202–566–2755; email address: *wesson.dolores@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: Section 404(g) of the Federal Water Pollution Control Act (FWPCA), or the Clean Water Act (CWA) as it is commonly called,[1] authorizes States and Tribes to assume the section 404 permit program for discharges of dredged or fill material into certain waters of the United States. This ICR covers the collection of information EPA needs to perform its program approval and oversight responsibilities and the State or Tribe needs to implement its program.

Request to assume CWA section 404 permit program. States and Tribes must demonstrate that they meet the statutory and regulatory requirements at 40 CFR part 233 for an approvable program. Specified information and documents must be submitted by the State or Tribe to EPA to request assumption and must be sufficient to enable EPA to undertake a thorough analysis of the State or tribal program. The information contained in the assumption request submission is provided to the other involved federal agencies (*e.g.,* U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and National Marine Fisheries Service) and to the general public for review and comment.

Permit application information. States and Tribes with assumed programs must be able to issue permits that assure compliance with all applicable statutory and regulatory requirements, including the CWA section 404(b)(1) Guidelines. Sufficient information must be provided in the application so that States or Tribes and federal agencies reviewing the permit are able to evaluate, avoid, minimize, and compensate for any anticipated impacts resulting from the proposed project. EPA's assumption regulations at 40 CFR 233.30 establish required and recommended elements that should be included in the State or Tribe's permit application, so that sufficient information is available to make a thorough analysis of anticipated impacts. These minimum information requirements generally reflect the information that must be submitted when applying for a section 404 permit from the U.S. Army Corps of Engineers. (CWA section 404(h); CWA section 404(j); 40 CFR 230.10, 233.20, 233.21, 233.34, and 233.50; 33 CFR 325)).

Annual report and program information. EPA has an oversight role for assumed section 404 permitting programs to ensure that State or tribal programs are in compliance with applicable requirements and that State or tribal permit decisions adequately consider, avoid, minimize, and compensate for anticipated impacts. States and tribes must evaluate their programs annually and submit the results in a report to EPA. EPA's assumption regulations at 40 CFR 233.52 establish minimum requirements for the annual report.

The information included in the State or Tribe's assumption request and the information included in a permit application is made available for public review and comment. The information included in the annual report to EPA is made available to the public. EPA does not make any assurances of confidentiality for this information.

Form numbers: None.

[1] The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, EPA will generally refer to the FWPCA in this document as the CWA or the Act.

Respondents/affected entities: Entities potentially affected by this action are those States requesting assumption of the CWA section 404 permit program; States with approved assumed programs; and permit applicants for assumed State programs. No Tribes are expected to assume at this time.

Respondent's obligation to respond: Required to obtain or retain a benefit (40 CFR 233).

Estimated number of respondents: Two States to request program assumption; 9,022 permit applicants (2,255.5 applications per State); and four States with assumed programs (the two current programs and potentially two that may be approved under this ICR) which will submit an annual report.

Frequency of response: States will respond one time to request assumption; if the program is approved, they will respond annually for the annual report; permit applicants will respond one time when requesting a permit.

Total estimated burden: The public reporting and recordkeeping burden for this collection of information is estimated to be 165,755.4 hours per year (1,012 hours to request program assumption times two States (2,024 hours) over a three-year period (675 hours); 2,255.5 permit applications reviewed by four States times 12.7 hours per application (114,579.40 hours); 4,511 permit applications in the two State-assumed programs times 11 hours per permit application (49,621); and 110 hours to prepare an annual report times four State assumed programs (440 hours)). The burden to EPA for related activities is 8,455 hours per year (442 hours to review assumption requests times two States (884 hours) over a three-year period (295); 100 permit applications times 80 hours per application review (8,000 hours); and 40 hours to review an annual report times four State assumed programs (160 hours). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: Costs to States for assumed section 404 permit programs will vary widely by State and permit; however, the total estimated costs for four programs is $5,641,625.21 and costs to permittees in State-assumed programs is $1,266,824.13. There are $0 capital or operation and maintenance costs. The cost to EPA for related activities is $502,251.20 in labor costs (per year), includes $0 annualized capital or operation and maintenance costs.

Changes in estimates: There is an increase of 45,250.4 hours in the total estimated respondent burden compared with the ICR currently approved by OMB (128,960 hours in the current ICR). There are several reasons for this increase: (1) A small increase in the estimate of hours required to assume a program based on information provided by Michigan and New Jersey, the two States that are currently approved by EPA to administer a State dredged and fill program; (2) recent changes to policy in 2020 addressing endangered species and historic preservation requiring additional burden for States and federal agencies; (3) this estimate for the first time includes and reports burden to State-assumed programs of permit review and burden to permittees (prior ICRs did not calculate this burden due to lack of data); and (4) adjustments reflecting a small increase in the estimate of hours reported for review of permits by Michigan and New Jersey, as well as a small increase in the time reported to complete the annual report by Michigan. The estimate for number of permits per state has been reduced based on data provided by New Jersey and Michigan (down to 2,255.5 per state from the prior estimate of 2,975).

John Goodin,

Director, Office of Wetlands, Oceans and Watersheds, Office of Water.

[FR Doc. 2021–00904 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2020–0005; FRL–10018–41–OW]

Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides; Reissuance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of draft permit and request for public comment.

SUMMARY: All ten Environmental Protection Agency (EPA) Regions are proposing for public comment the draft 2021 National Pollutant Discharge Elimination System (NPDES) pesticide general permit (PGP)—the draft 2021 PGP. The draft 2021 PGP covers point source discharges from the application of pesticides to waters of the United States. Once finalized, the draft 2021 PGP will replace the existing permit, the 2016 PGP, which was issued for a five-year term in the **Federal Register** on October 31, 2016, and expires October 31, 2021, at midnight. The draft 2021 PGP has the same conditions and requirements as the 2016 PGP and would authorize certain point source discharges from the application of pesticides to waters of the United States in accordance with the terms and conditions described therein. EPA proposes to issue this permit for five (5) years in all areas of the country where EPA is the NPDES permitting authority. EPA solicits public comment on all aspects of the draft 2021 PGP. This **Federal Register** document describes the draft 2021 PGP in general and seeks comment as described in Section III.C, of this document. The Fact Sheet accompanying the permit contains supporting documentation. EPA encourages the public to read the Fact Sheet to understand the draft 2021 PGP better.

DATES: Comments on the draft 2021 PGP must be received on or before March 16, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2020–0005, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. EPA–HQ–OW–2020–0005. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, EPA Docket Center and Reading Room are closed to the public with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: EPA Regional Office listed in Section I.D. of this document, or you can send an email to *pgp@epa.gov.* You may also contact Chelsea Durant, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: 202–564–2290 or email: *durant.chelsea@epa.gov.* Electronic versions of the draft 2021 PGP and Fact Sheet are also available on

EPA's NPDES website at *https://www.epa.gov/npdes/pesticide-permitting.*

SUPPLEMENTARY INFORMATION: This section is organized as follows:

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C. Summary of the Permit and Changes From the 2016 PGP
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I. General Information

A. Does this action apply to me?

You may be affected by this action if you apply pesticides under the use patterns in Section III.B of this document that result in a discharge to waters of the United States in one of the geographic areas identified in Section III.A of this document. Potentially affected entities, as categorized in the North American Industry Classification System (NAICS), may include, but are not limited to:

TABLE 1—ENTITIES POTENTIALLY REGULATED BY THE DRAFT 2021 PGP

Category	NAICS	Examples of potentially affected entities
Agricultural entities—General agricultural interests, farmers/producers, forestry, and irrigation.	111 Crop Production	Producers of crops mainly for food and fiber, including farms, orchards, groves, greenhouses, and nurseries that have irrigation ditches requiring pest control.
	113110 Timber Tract Operations.	The operation of timber tracts for the purpose of selling standing timber.
	113210 Forest Nurseries Gathering of Forest Products.	Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles.
	221310 Water Supply for Irrigation.	Operating irrigation systems.
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants).	325320 Pesticide and Other Agricultural Chemical Manufacturing..	Formulation and preparation of agricultural pest control chemicals.
Public health parties (includes mosquito or other vector control districts and commercial applicators that service these).	923120 Administration of Public Health Programs.	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities.
Resource management parties (includes State departments of fish and wildlife, State departments of pesticide regulation, State environmental agencies, and universities).	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs; the administration and regulation of water and air pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
Utility parties (includes utilities)	221 Utilities	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes.

B. Public Participation

1. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2020–0005, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to monitor information carefully and continuously from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

2. Will public hearings be held on this action?

EPA has not scheduled any public hearings to receive public comment concerning the draft 2021 PGP. However, interested persons may request a public hearing concerning the draft 2021 PGP pursuant to 40 CFR 124.12. Requests for a public hearing must be sent or delivered in writing to the same email address (*PGP@epa.gov*) as provided above for public comments prior to the close of the comment period. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. Pursuant to 40 CFR 124.12, EPA shall hold a public hearing if it finds, on the basis of requests, a significant degree of public interest in a public hearing on the draft 2021 PGP. If EPA decides to hold a public hearing, a public notice of the date, time, and place of the hearing will be made at least 30 days prior to the hearing. Any person may provide written or oral statements and data pertaining to the draft 2021 PGP at any such public hearing.

To facilitate robust opportunities for public participation in the permitting process during any interruptions caused by COVID–19, EPA intends to utilize and encourages the use of electronic and telephonic means of communication to the maximum extent possible under the law. EPA will issue public notices and solicit comments on permit actions via on-line tools and/or email. If public hearings are requested, EPA will seek to conduct those hearings utilizing remote capabilities via telephone and the internet.

C. Finalizing the Draft 2021 PGP

EPA intends to issue a final 2021 PGP on or prior to October 31, 2021 (the expiration date of the 2016 PGP). The final 2021 PGP will be issued after all public comments received during the public comment period have been considered and any appropriate changes are made to the draft 2021 PGP. EPA will include its response to significant comments received in the docket as part of the final permit decision. Once the final 2021 PGP becomes effective, eligible Operators may seek authorization under the new PGP as outlined in the permit. To ensure uninterrupted permit coverage from the 2016 PGP to the 2021 PGP, Operators who are required to submit a Notice of Intent (NOI) must submit their NOI for coverage under the new permit prior to discharge as outlined in the permit (no later than 10 or 30 days before discharge). See Part 1.2.4 of the draft 2021 PGP.

D. Who are the EPA regional contacts for this draft permit?

For EPA Region 1, contact George Papadopoulos at tel.: (617) 918–1579; or email at *papadopoulos.george@epa.gov.*

For EPA Region 2, contact Stephen Venezia at tel.: (212) 637–3856; or email at *venezia.stephen@epa.gov.*

For Puerto Rico, contact Sergio Bosques at tel.: (787) 977–5838 or *bosques.sergio@epa.gov.*

For EPA Region 3, contact Carissa Moncavage at tel.: (215) 814–5798; or email at *moncavage.carissa@epa.gov.*

For EPA Region 4, contact Sam Sampath at tel.: (404) 562–9229; or email at *sampath.sam@epa.gov.*

For EPA Region 5, contact John Colletti at tel.: (312) 886–6106; or email at *colletti.john@epa.gov.*

For EPA Region 6, contact William F. Cooper at tel.: (214) 665–6443 or email at *cooper.williamf@epa.gov.*

For EPA Region 7, contact Alex Owutaka at tel.: (913) 551–7584 or email at: *owutaka.alex@epa.gov.*

For EPA Region 8, contact Amy Clark at tel.: (303) 312–7014 or email at: *clark.amy@epa.gov.*

For EPA Region 9, contact Pascal Mues at tel.: (415) 972–3768 or email at: *mues.pascal@epa.gov.*

For EPA Region 10, contact Bilin Basu at tel.: (206) 553–0029 or email at: *basu.bilin@epa.gov.*

II. Background

Section 301(a) of the Clean Water Act (CWA) provides that ''the discharge of any pollutant by any person shall be unlawful'' unless the discharge is in compliance with certain other Sections of the Act. 33 U.S.C. 1311(a). The CWA defines ''discharge of a pollutant'' as ''(A) any addition of any pollutant to navigable waters from any point source and (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.'' 33 U.S.C. 1362(12). A ''point source'' is any ''discernible, confined and discrete conveyance'' but does not include ''agricultural stormwater discharges and return flows from irrigated agriculture.'' 33 U.S.C. 1362(14).

The term ''pollutant'' includes among other things ''garbage . . . chemical wastes, biological materials . . . and industrial, municipal, and agricultural waste discharged into water.'' 33 U.S.C. 1362(6).

A person may discharge a pollutant without violating the Section 301 prohibition by obtaining authorization to discharge (referred to herein as ''coverage'') under a Section 402 NPDES permit (33 U.S.C. 1342). Under Section 402(a), EPA may ''issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding Section 1311(a)'' upon certain conditions required by the Act.

EPA issued the first Pesticide General Permit (''2011 PGP'') on October 31, 2011, in response to the United States Sixth Circuit Court of Appeals ruling vacating EPA's 2006 Final Rule on Aquatic Pesticides. *National Cotton Council of America.* v. *EPA,* 553 F.3d 927 (6th Cir. 2009). EPA developed the PGP to control point source discharges of biological pesticides and chemical pesticides that leave a residue into waters of the United States. The PGP provides coverage for certain point source discharges of pollutants to waters of the United States in areas where EPA is the NPDES permitting authority. In 2016, EPA issued the second PGP (''2016 PGP''). The 2016 PGP will expire at midnight on October 31, 2021.

III. Scope and Applicability

A. Geographic Coverage

EPA provides permit coverage for classes of point source discharges of pollutants that occur in areas where EPA is the NPDES permitting authority. The geographic coverage of the draft 2021 PGP is listed in Appendix C of the draft permit.

B. Categories of Pesticide Use-Patterns Covered

The draft 2021 PGP has the same requirements and conditions as EPA's 2016 PGP and regulates the same discharges of pollutants to waters of the United States from the application of (1)

biological pesticides, and (2) chemical pesticides that leave a residue. The draft 2021 PGP applies to the following same pesticide use patterns:

• *Mosquito and Other Flying Insect Pest Control*—to control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include mosquitoes and black flies.

• *Weed and Algae Pest Control*—to control weeds, algae, and pathogens that are pests in water and at water's edge, including ditches and/or canals.

• *Animal Pest Control*—to control animal pests in water and at water's edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens.

• *Forest Canopy Pest Control*—application of a pesticide to a forest canopy to control the population of a pest species (*e.g.,* insect or pathogen) where, to target the pests effectively, a portion of the pesticide unavoidably will be applied over and deposited to water.

The scope of activities encompassed by these pesticide use patterns is described in greater detail in Part III.1.1 of the Fact Sheet for the draft 2021 PGP.

C. Summary of the Permit and Changes From the 2016 PGP

Once issued, the final 2021 PGP will replace the 2016 PGP, which was issued for a five-year term in the **Federal Register** on October 31, 2016 (81 FR 75816), and expires October 31, 2021, at midnight. The draft 2021 PGP is similar to the 2016 PGP, and is structured in the same nine parts: (1) Coverage under This Permit, (2) Technology-Based Effluent Limitations, (3) Water Quality-Based Effluent Limitations, (4) Monitoring, (5) Pesticide Discharge Management Plan, (6) Corrective Action, (7) Recordkeeping and Annual Reporting, (8) EPA Contact Information and Mailing Addresses, and (9) Permit Conditions Applicable to Specific States (including Territories) and Indian Country. Additionally, as with the 2016 PGP, the draft 2021 PGP includes nine appendices with additional conditions and guidance for permittees: (A) Definitions, Abbreviations, and Acronyms, (B) Standard Permit Conditions, (C) Areas Covered, (D) Notice of Intent (NOI) form, (E) Notice of Termination (NOT) form, (F) Pesticide Discharge Evaluation Worksheet (PDEW), (G) Annual Reporting Template, (H) Adverse Incident Report Template, and (I) Endangered Species Procedures.

The following is a summary of the draft 2021 PGP's proposed requirements:

• The PGP defines ''Operator'' (*i.e.,* the entity required to obtain NPDES permit coverage for discharges) to include any (a) *Applicator* who performs the application of pesticides or has day-to-day control of the application of pesticides that results in a discharge to waters of the United States, or (b) *Decision-maker* who controls any decision to apply pesticides that results in a discharge to waters of the United States. There may be instances when a single entity acts as both an Applicator and a Decision-maker.

• All Applicators are required to minimize pesticide discharges by using only the amount of pesticide and frequency of pesticide application necessary to control the target pest, maintain pesticide application equipment in proper operating condition, control discharges as necessary to meet applicable water quality standards, and monitor for and report any adverse incidents.

• All Decision-makers are required, to the extent not determined by the Applicator, to minimize pesticide discharges by using only the amount of pesticide and frequency of pesticide application necessary to control the target pest. All Decision-makers are also required to control discharges as necessary to meet applicable water quality standards and monitor for and report any adverse incidents.

• Certain Decision-makers [*i.e.,* any agency for which pest management for land resource stewardship is an integral part of the organization's operations, entities with a specific responsibility to control pests (*e.g.,* mosquito and weed control districts), local governments or other entities that apply pesticides in excess of specified annual treatment area thresholds, and entities that discharge pesticides to Tier 3 waters (Outstanding National Resource Waters, 40 CFR 131.12(a)(3)) or to waters of the United States containing National Marine Fisheries Service (NMFS) Listed Resources of Concern] are required also to submit an NOI to obtain authorization to discharge and to implement pest management options to reduce the discharge of pesticides to waters of the United States. Within this group, certain large Decision-makers (any (1) public entity that serves a population greater than 10,000 or (2) private enterprise that exceeds the Small Business Administration size standard as identified in 13 CFR 121.201) must also develop a Pesticide Discharge Management Plan (PDMP), submit annual reports, and maintain detailed records. Certain small Decision-makers (any (1) public entity that serves a population of 10,000 or less or (2) private enterprise that does not exceed the Small Business Administration size standard as identified in 13 CFR 121.201) are required to complete a pesticide discharge evaluation worksheet for each pesticide application (in lieu of the more comprehensive PDMP), an annual report, and detailed recordkeeping.

• Deadlines for submittal of a Notice of Intent to be covered, if required, are provided in Part 1.2.3, Table 1–2, of the draft 2021 PGP.

EPA encourages the public to review and comment on all aspects and provisions in the draft 2021 PGP. The draft 2021 PGP is similar to the 2016 PGP but includes minor changes which are listed below. See the Fact Sheet accompanying the draft 2021 PGP for further discussion.

(1) Removes the out of date NOI provision that provided automatic coverage for all Operators until January 12, 2017.

(2) Replaces the requirement to use EPA's eNOI system with EPA's NPDES eReporting Tool (NeT) when preparing and submitting NOIs, NOTs, and annual reports.

(3) Updates Appendix A, Definitions, Abbreviations, and Acronyms to include the terms ''Pesticide discharges to waters of the United States from pesticide application'' and ''pesticide residue,'' as defined in 40 CFR 122.2.

(4) Modifies Appendix B, Standard Permit Conditions, to ensure consistency with 40 CFR 122.41.

(5) Updates Appendix C, Areas Covered, to add Indian Country within Virginia and Indian Country within Indiana, and to remove the State of Idaho.

IV. Cost Impacts of the Draft 2021 PGP

Based on the cost analyses performed for the 2011 PGP and 2016 PGP, EPA expects the costs that covered entities, including small businesses, will bear to comply with this permit will be minimal. Since the draft 2021 PGP is similar to the 2016 PGP, EPA projects that the draft 2021 PGP will have no incremental cost impacts on regulated entities. Copies of EPA's cost impact analyses for the 2011 PGP and 2016 PGP are available in the docket for this permit. See the Fact Sheet accompanying this draft permit for further discussion.

V. Executive Orders 12866 and 13563

The draft 2021 PGP is not a significant regulatory action and was therefore not

submitted to the Office of Management and Budget (OMB) for review.

VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in E.O. 13175. It will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. EPA directly implements the NPDES Program, including the 2021 PGP when it is finalized, in Indian Country; therefore, in compliance with EPA Policy on Consultation and Coordination with Indian Tribes, EPA consulted with tribal officials early in the process to permit tribes to have meaningful and timely input into the renewal of the PGP. To gain an understanding of, and where necessary, to address tribal implications of the draft 2021 PGP, EPA conducted the following activities:

- May 8, 2020—EPA emailed notification letters to tribal leaders initiating consultation and coordination on the renewal of the PGP. The initiation letter was also posted on EPA's Tribal Consultation Opportunities Tracking System (TCOTS) at *https://tcots.epa.gov/.*
- June 9, 2020—EPA held an informational webinar open to all tribal representatives and reserved the last part of the webinar for official consultation comments. Fourteen tribal representatives participated in the webinar. No official comments were received during the webinar. The presentation was posted on the tribal portal website at *http://tcots.epa.gov.*

EPA received no comments from tribes and tribal organizations during the formal consultation period. Records of the tribal informational webinar and a consultation summary are included in the docket for this proposed action (Docket ID No. EPA–HQ–OW–2020–0005).

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: December 14, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

Dated: December 14, 2020.

Javier Laureano,

Director, Water Division, EPA Region 2.

Dated: December 14, 2020.

Carmen R. Guerrero-Pérez,

Director, Caribbean Environmental Protection Division, EPA Region 2 Caribbean Office.

Dated: December 14, 2020.

Catherine A. Libertz,

Director, Water Division, EPA Region 3.

Dated: December 14, 2020.

Jeaneanne M. Gettle,

Director, Water Division, EPA Region 4.

Dated: December 14, 2020.

Tera L. Fong,

Director, Water Division, EPA Region 5.

Dated: December 14, 2020.

Charles W. Maguire,

Director, Water Division, EPA Region 6.

Dated: December 14, 2020.

Jeffery Robichaud,

Director, Water Division, EPA Region 7.

Dated: December 14, 2020.

Judy Bloom,

Manager, Clean Water Branch, EPA Region 8.

Dated: December 14, 2020.

Tomás Torres,

Director, Water Division, EPA Region 9.

Dated: December 14, 2020.

Daniel D. Opalski,

Director, Water Division, EPA Region 10.

[FR Doc. 2021–00834 Filed 1–14–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[FRS 17384]

Notice of Comment Period

AGENCY: Federal Communications Commission.

ACTION: Notice of Comment Period.

SUMMARY: On December 21, 2020, the FCC released a Public Notice (PN), Public Safety and Homeland Security Bureau Seeks Comment on a National 911 Call Center Contact Information Database, PS Dockets Nos. 13–75, 11–60. The PN announced that the Bureau will seek comments on a letter, filed on December 7, 2020 by the Alliance for Telecommunications Industry Solutions' (ATIS) Network Reliability Steering Committee. This letter addresses third-party efforts to develop a national Public Safety Answering Point (PSAP) contact information database. ATIS supports the development of this database, but believes that providers need a liability safe harbor for potentially inaccurate database information. ATIS further believes participation in this database should be voluntary.

DATES: Comments are due on or before 30 days from the date of publication in the **Federal Register**.

ADDRESSES: You may submit comments, identified by PS Dockets Nos. 13–75, 11–60, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the Federal Communications Commission's ECFS website: *http://apps.fcc.gov/ecfs/.* Follow the instructions for submitting comments.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail 70570 and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format),

send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 1–888–835–5322 (tty).

FOR FURTHER INFORMATION CONTACT: Jennifer Holtz, Deputy Division Chief, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–2336, *Jennifer.Holtz@fcc.gov;* or Kathleen Hom, Attorney Advisor, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–2049, *Kathleen.Hom@fcc.gov.* Direct press inquiries to Rochelle Cohen, (202) 418–1162, *Rochelle.Cohen@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Public Notice, DA–20–1519, released December 21, 2020. The full text of this document is available for public inspection and can be downloaded at or by using the search function for PS Dockets Nos. 13–75, 11–60 on the Commission's ECFS web page at *www.fcc.gov/ecfs.*

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–00854 Filed 1–14–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[GN Docket No. 17–208; FRS 17381]

Meeting of the Federal Advisory Committee on Diversity and Digital Empowerment

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces the February 11, 2021, meeting of the Federal Communications Commission's (Commission) Advisory Committee on Diversity and Digital Empowerment (ACDDE).

DATES: Thursday, February 11, 2021, from 10:00 a.m. to 4:00 p.m.

ADDRESSES: The ACDDE meeting will be available to the public for viewing via the internet at *http://www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Jamila Bess Johnson, Designated Federal Officer (DFO) of the ACDDE, (202) 418–2608, *Jamila-Bess.Johnson@fcc.gov;* Julie Saulnier, Deputy DFO of the ACDDE, (202) 418–1598, *Julie.Saulnier@fcc.gov;* or Jamile Kadre, Deputy DFO of the ACDDE, (202) 418–2245, *Jamile.Kadre@fcc.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Agenda: The agenda for the meeting will include a report from each of the ACDDE working groups. The *Access to Capital Working Group* will report on its ongoing examination of ways to improve access to capital to encourage management and ownership of broadcast properties by a diverse range of voices, including minorities and women. The *Digital Empowerment and Inclusion Working Group* will discuss its work assessing access, adoption, and use of broadband and new technologies by under-resourced communities. The *Diversity in the Tech Sector Working Group* will report on its progress in examining issues pertaining to hiring, promotion, and retention of women and minorities in tech industries. This agenda may be modified at the discretion of the ACDDE Chair and the DFO.

The Committee's mission is to provide recommendations to the Commission on how to empower disadvantaged communities and accelerate the entry of small businesses, including those owned by women and minorities, into the media, digital news and information, and audio and video programming industries, including as owners, suppliers, and employees.

The ACDDE meeting is accessible to the public on the internet via live feed from the FCC's web page at *www.fcc.gov/live.* Members of the public may submit any questions during the meeting to *livequestions@fcc.gov.*

Members of the public may submit comments to the ACDDE using the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the ACDDE should be filed in GN Docket No. 17–208.

Open captioning will be provided for this event. Other reasonable accommodations for persons with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way for the Commission to contact the requester if more information is needed to fulfill the request. Please allow at least five days' notice; last minute requests will be accepted but may not be possible to accommodate.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2021–00919 Filed 1–14–21; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0047; Docket No. 2021–0053; Sequence No. 1]

Information Collection; Place of Performance

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a renewal and extension concerning place of performance. DoD, GSA, and NASA invite comments on: Whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through May 31, 2021. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by March 16, 2021.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA

Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite OMB Control No. 9000–0047, Place of Performance. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mahruba Uddowla, Procurement Analyst, at telephone 703–605–2868, or *mahruba.uddowla@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. *OMB control number, Title, and any Associated Form(s):* 9000–0047, Place of Performance.

B. *Need and Uses:* This clearance covers the information that bidders or offerors must submit to comply with the following Federal Acquisition Regulation (FAR) requirements:

• 52.214–14, Place of Performance-Sealed Bidding. This FAR provision is prescribed for invitation for bids (*i.e.* FAR part 14 procurements) where the Government did not specify the place of performance.

• 52.215–6, Place of Performance. This FAR provision is prescribed for solicitations, when contracting by negotiation (*i.e.* FAR part 15 procurements), where the Government did not specify the place of performance.

Both provisions ask for identical information from bidders or offerors: Whether or not they intend to use one or more plants or facilities located at a different address from the address of the bidder or offeror as indicated in their bid or offer. If the response indicates the intention to use plants or facilities located at a different location than the bidder's or offeror's address, the provisions require that bidders or offerors provide the address(es) of the other place(s) of performance, along with name and address of the owner and operator of such plant or facility (if other than the bidder or offeror).

The contracting officer uses the place of performance and the owner of the plant or facility to—

(a) Determine prospective contractor responsibility;

(b) Determine price reasonableness;

(c) Conduct plant or source inspections; and

(d) Determine whether the prospective contractor is a manufacturer or a regular dealer.

C. *Annual Burden:*

Respondents/Recordkeepers: 14,188.

Total Annual Responses: 1,996,197.

Total Burden Hours: 90,827.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.*

Please cite OMB Control No. 9000–0047, Place of Performance.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2021–00861 Filed 1–14–21; 8:45 am]

BILLING CODE 6820–EP–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0293;Docket No. 2021–0001; Sequence No. 1]

Information Collection; Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements

AGENCY: Office of Technology Strategy/Office of Government-Wide Policy, General Services Administration (GSA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of the currently approved information collection requirement concerning the reporting and use of information concerning integrity and performance of recipients of grants and cooperative agreements.

DATES: Submit comments on or before March 16, 2021.

ADDRESSES: Submit comments identified by Information Collection 3090–0293; Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements to h*ttp://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number 3090–0293. Select the link ''Comment Now'' that corresponds with ''Information Collection 3090–0293, Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection 3090–0293, Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements'' on your attached document. If your comment cannot be submitted using *regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite Information Collection 3090–0293, Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements, in all correspondence related to this collection. Comments received generally will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three business days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Nancy Goode, Integrated Award Environment, GSA, 703–605–2175, or via email at *nancy.goode@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

This information collection requirement, OMB Control No. 3090–0293, currently titled ''Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements'' is necessary in order to comply with section 872 of the Duncan Hunter National Defense Authorization Act of 2009, Public Law 110–417, as amended by Public Law 111–212, hereafter referred to as ''the Act.'' The Duncan Hunter National Defense Authorization Act of 2009 (Pub. L. 110–417) was enacted on October 14, 2008. Section 872 of this Act required the development and maintenance of an information system that contains specific information on the integrity and performance of covered Federal agency contractors and grantees.

The Federal Awardee Performance and Integrity Information System (FAPIIS) was developed to address these requirements. FAPIIS provides users access to integrity and performance information from the FAPIIS reporting module in the Contractor Performance Assessment Reporting System (CPARS), proceedings information from the Entity Management section of the System for Award Management (SAM) database, and suspension/debarment information

from the Performance Information section of SAM.

As stated in 2 CFR 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, the Federal awarding agency is required to review information available through any OMB-designated repositories of government-wide eligibility qualification or financial integrity information, as appropriate.

The Federal awarding agency is required to review the non-public segment of the OMB-designated integrity and performance system accessible through SAM (currently the FAPIIS), prior to making a Federal award where the Federal share is expected to exceed the simplified acquisition threshold (currently $250,000), defined in 41 U.S.C. 134, over the period of performance.

For non-federal entities (NFEs), if the total value of the NFEs currently active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds $10,000,000 for any period of time during the period of performance of the Federal award, then the NFE must disclose semiannually, and maintain the currency of information reported to the SAM that is made available in the designated integrity and performance system (currently the FAPIIS) about civil, criminal, or administrative proceedings, as described in the award terms and conditions, for the most recent five year period.

B. Annual Reporting Burden

Proceedings Screening Question #1

Respondents: 13,683.
Respnoses per Respondent: 1.
Total annual responses: 13,683.
Hours per response: .1.
Total response burden hours: 1,368.

Proceedings Screening Question #2

Respondents: 1,663.
Responsed per Respondent: 1.
Total annual responses: 1,663.
Hours per response: .1.
Total response burden hours: 166.

Proceedings Details

Respondents: 24.
Responses per respondent: 2.
Total annual responses: 48.
Hours per response: .5.
Total response burden hours: 24.

C. Public Comments

Public comments are particularly invited on: Whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. Please cite OMB Control No. 3090–0293, Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements, in all correspondence.

Beth Anne Killoran,

Deputy Chief Information Officer.

[FR Doc. 2021–00867 Filed 1–14–21; 8:45 am]

BILLING CODE 6820–WY–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Interventional Treatments for Acute and Chronic Pain: Systematic Review

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for Supplemental Evidence and Data Submissions

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Interventional Treatments for Acute and Chronic Pain: Systematic Review,* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: *Submission Deadline* on or before February 16, 2021.

ADDRESSES:

Email submissions: epc@ahrq.hhs.gov
Print submissions:
Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality. ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.
Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality. ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Jenae Benns, Telephone: 301–427–1496 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *Interventional Treatments for Acute and Chronic Pain: Systematic Review.* AHRQ is conducting this systematic review pursuant to Section 902 of the Public Health Service Act, 42 U.S.C. 299a.

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *Interventional Treatments for Acute and Chronic Pain,* including those that describe adverse events. The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/interventional-treatments-pain/protocol.*

This is to notify the public that the EPC Program would find the following information on *Interventional Treatments for Acute and Chronic Pain* helpful:

■ A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*

■ *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.

■ *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion

criteria, and primary and secondary outcomes.

■ Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

Key Questions (KQs)

KQ1: What are the effectiveness and harms of selected interventional procedures (vertebral augmentation procedures, piriformis injection, sphenopalatine block, occipital nerve stimulation, cooled or pulsed radiofrequency ablation, intradiscal and facet joint platelet rich plasma, intradiscal methylene blue, intradiscal ozone, and peripheral nerve stimulation) versus placebo, a sham procedure, or no interventional procedure for Medicare beneficiaries with pain?

a. How do the effectiveness and harms vary according to demographic (age, sex, race/ethnicity), clinical (type of pain, severity of pain, prior treatments, medical and psychiatric co-morbidities), and technical factors (variations in techniques, intensity, frequency, dose, and number of treatments)?

PICOTS (Populations, Interventions, Comparators, Outcomes, Timing, Settings)

PICOTS	Inclusion	Exclusion
Population	Adults with pain of any duration (pain conditions for each interventional procedure specified below); will highlight studies of populations applicable to Medicare, defined as persons enrolled in Medicare, age >55 years, or persons with disability (including end-stage renal disease [ESRD]), if available. Population subgroups of interest include those based on demographics (age, sex, race/ethnicity) and clinical factors (type of pain, severity of pain, prior treatments, medical and psychiatric co-morbidities, including presence of disability [including ESRD], prior substance use disorder, and psychological co-morbidities).	• Patients undergoing end-of-life care, terminally ill (e.g., hospice) patients; those under supervised palliative care; those with pain due to metastatic or advanced cancer. • Children.
Intervention	(1) Vertebral augmentation procedures (vertebroplasty and kyphoplasty) for pain due to vertebral compression fracture. (2) Piriformis injection (local anesthetic, corticosteroid, and/or botulinum toxin) for piriformis syndrome. (3) Sphenopalatine block for trigeminal neuralgia or headache. (4) Occipital stimulation for headache (5) Cooled radiofrequency denervation for degenerative back or hip pain and pulsed radiofrequency denervation for degenerative back pain. (6) Intradiscal and facet joint platelet rich plasma for presumed discogenic back pain. (7) Intradiscal stem cells for presumed discogenic back pain. (8) Intradiscal methylene blue for presumed discogenic back pain. (9) Intradiscal ozone for radicular low back pain or non-radicular, presumed discogenic back pain. (10) Peripheral nerve stimulation for ulnar, median, or radial neuropathy. Technical factors of interest as potential modifiers of treatment effect include variations in techniques, intensity, frequency, dose, or number of treatments.	• Minimally invasive surgical procedures • Orthopedic intra-articular and soft tissue injections • Local soft tissue injections • Other interventional procedures and conditions not listed as included
Comparator	Placebo, sham interventional procedure, or no interventional procedure. For cooled and pulsed radiofrequency denervation: standard (thermal, continuous) radiofrequency denervation.	Active treatments, other than standard radiofrequency denervation as a comparison for cooled radiofrequency denervation.
Outcome	• *Primary:* Pain, function • *Secondary:* HRQOL, emotional function (e.g., depression, anxiety), opioid use, surgery rates. • Global improvement • Harms (e.g., bleeding, infection, other complications), adverse events, unintended consequences.	*Patient-oriented outcomes:* • Non-validated instruments for outcomes (e.g., pain, function, HRQOL, depression, etc.). • Intermediate outcomes (e.g., range of motion, physical strength, etc.).

PICOTS	Inclusion	Exclusion
Timing	Duration of followup: ≥1 month; categorized as short term (1 to <6 months), intermediate term (≥6 to <12 months) and long term (≥12 months) following intervention.	<1 month.
Setting	Any	None.
Study design, publication type.	Randomized clinical trials and cohort studies if RCTs are not available.. Large (n > 500) case series for serious, rare harms	• Case reports. • Case series (other than large case series for serious, rare harms). • Case-control studies, cross-sectional studies. • Conference proceedings, editorials, letters, white papers, citations that have not been peer-reviewed.

Marquita Cullom,

Associate Director.

[FR Doc. 2021–00800 Filed 1–14–21; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meetings

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of five AHRQ Subcommittee meetings.

SUMMARY: The subcommittees listed below are part of AHRQ's Health Services Research Initial Review Group Committee. Grant applications are to be reviewed and discussed at these meetings. Each subcommittee meeting will be closed to the public.

DATES: See below for dates of meetings:

1. *Healthcare Safety and Quality Improvement Research (HSQR)*
   Date: February 3–4, 2021
2. *Healthcare Effectiveness and Outcomes Research (HEOR)*
   Date: February 10–11, 2021
3. *Health System and Value Research (HSVR)*
   Date: February 11–12, 2021
4. *Health Care Research and Training (HCRT)*
   Date: February 25–26, 2021 & March 1–2, 2021
5. *Healthcare Information Technology Research (HITR)*
   Date: February 25–26, 2021

ADDRESSES: Agency for Healthcare Research and Quality (Virtual Review), 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: (to obtain a roster of members, agenda or minutes of the non-confidential portions of the meetings.)

Jenny Griffith, Committee Management Officer, Office of Extramural Research Education and Priority Populations, Agency for Healthcare Research and Quality (AHRQ), 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 427–1557.

SUPPLEMENTARY INFORMATION: In accordance with section 10 (a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), AHRQ announces meetings of the above-listed scientific peer review groups, which are subcommittees of AHRQ's Health Services Research Initial Review Group Committee. The subcommittee meetings will be closed to the public in accordance with the provisions set forth in 5 U.S.C. App. 2 section 10(d), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(6). The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Agenda items for these meetings are subject to change as priorities dictate.

Dated: January 12, 2021.

Marquita Cullom,

Associate Director.

[FR Doc. 2021–00894 Filed 1–14–21; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2021–0003]

Notice of Availability of a Draft Policy Statement for the Biosafety of Large Animal Study-Related Activities With Brucella abortus and Brucella suis Using Outdoor Containment Spaces

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of availability and request for comment.

SUMMARY: The Centers for Disease Control and Prevention (CDC) in the Department of Health and Human Services (HHS) is opening a public docket to obtain comment on a draft *Brucella* policy statement. This draft policy statement, when finalized, will aid individuals and entities in the development of biosafety plans for outdoor large animal studies involving swine, elk, bison, and cattle to further brucellosis research in a manner that complies with the HHS and U.S. Department of Agriculture (USDA) select agent regulations. In a companion document published in this issue of the **Federal Register**, USDA has proposed the same policy for comment.

DATES: Submit written or electronic comments by March 16, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2021–0003 by either of the methods listed below. Do not submit comments by email. CDC does not accept acomments by email.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H21–7, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket No. CDC–2021–0003 for this rulemaking. All relevant comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket Access: For access to the docket to read background documents or comments received, or to download an electronic version of the draft policy statement, go to *http://www.regulations.gov.* Please be aware that comments and other submissions from members of the public are made available for public viewing without changes.

FOR FURTHER INFORMATION CONTACT: Samuel S. Edwin Ph.D., Director, Division of Select Agents and Toxins, Centers for Disease Control and

Prevention, 1600 Clifton Road NE, Mailstop H21–7, Atlanta, Georgia 30329. Telephone: (404) 718–2000.

SUPPLEMENTARY INFORMATION:

A. Legal Authority

HHS/CDC is promulgating this policy under the authority of sections 201–204 and 221 of Title II of Public Law 107–188, 116 Stat 637 (42 U.S.C. 262a).

B. Background

Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Bioterrorism Response Act) (42 U.S.C. 262a(a)(1)), the HHS Secretary regulates a list of biological agents and toxins that have the potential to pose a severe threat to public health and safety. The biological agents and toxins listed in 42 CFR 73.3 (HHS select agents and toxins) have the potential to pose a severe threat to human health and safety and are regulated only by HHS/CDC. The biological agents listed in § 73.4 (overlap select agents and toxins) have not only the potential to pose a severe threat to human health and safety; but have been determined by the USDA, pursuant to USDA's authority under the Agriculture Bioterrorism Protection Act of 2002 (7 U.S.C. 8401), to have the potential to pose a severe threat to animals and animal products. Accordingly, these biological agents are jointly regulated by HHS/CDC and USDA as ''overlap'' select agents. The Bioterrorism Response Act defines the term ''overlap agent or toxin'' to mean a biological agent or toxin that is listed pursuant to 42 U.S.C. 262a and is listed pursuant to 7 U.S.C. 8401. See 7 U.S.C. 8411.

Brucellosis, also known as contagious abortion or Bang's disease, is a contagious, costly disease that has significant animal health, public health, and international trade consequences. While most often found in ruminant animals (*e.g.,* cattle, bison, cervids and swine), brucellosis can affect other animals and is transmissible to humans. Brucellosis is caused by a group of bacteria known scientifically as the genus *Brucella.* Two species of *Brucella* found in the United States: *B. abortus,* principally affecting cattle, bison, and cervids, and *B. suis,* principally affecting swine and reindeer, but also cattle and bison.

Brucellosis can be costly to agriculture production. In 1952, prior to established efforts to eradicate the disease, agriculture production losses due to brucellosis exceeded $400 million. A cautionary indicator of the need for greater understanding of the disease is the expanding range of endemic *B. abortus* in the Greater Yellowstone Area and *B. suis* in feral swine populations throughout various areas of the United States. This disease expansion emphasizes the critical need for improved diagnostics, along with vaccine development for both *Brucella* species, which could be furthered by outdoor research studies.

Both *B. abortus* and *B. suis* are currently listed as overlap select agents in select agent regulations (42 CFR 73.4 and 9 CFR 121.4). Accordingly, any outdoor research studies must comport with the select agent and toxin regulations. Therefore, HHS/CDC and USDA are issuing a FSAP draft policy statement on biosafety for large animal outdoor containment studies with *B. abortus* and *B. suis* to aid individuals and entities in the development of biosafety plans for such studies that meet the requirements of the select agent regulations. We are making this policy document available to the public at the Supporting & Related Materials tab of the docket and at *https://www.selectagents.gov/regulations/policy/animalstudy.htm* for review and comment.

Copies of the policy document are also available for public inspection at USDA, room 1620, South Building, 14th Street and Independence Avenue SW, Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Sandra Cashman,

Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2021–00877 Filed 1–14–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2021–0002]

Advisory Committee on Immunization Practices (ACIP)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC), announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. Time will be available for public comment. The meeting will be webcast live via the World Wide Web.

DATES: The meeting will be held on January 27, 2021 from 10:00 a.m. to 5:00 p.m., EST (times subject to change, see the ACIP website for any updates: *http://www.cdc.gov/vaccines/acip/index.html*).

Written comments must be received on or before January 27, 2021.

ADDRESSES: For more information on ACIP please visit the ACIP website: *http://www.cdc.gov/vaccines/acip/index.html.*

You may submit comments, identified by Docket No. CDC–2021–0002 by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Docket No. CDC–2021–0002, c/o Attn: January 27, 2021 ACIP Meeting, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H24–8, Atlanta, GA 30329–4027.

Instructions: All submissions received must include the Agency name and Docket Number. All relevant comments received in conformance with the *https://www.regulations.gov* suitability policy will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

Written public comments submitted 24 hours prior to the ACIP meeting will be provided to ACIP members before the meeting.

FOR FURTHER INFORMATION CONTACT: Stephanie Thomas, ACIP Committee Management Specialist, Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases, 1600 Clifton Road NE, MS–H24–8, Atlanta, GA 30329–4027; Telephone: 404–639–8367; Email: *ACIP@cdc.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 41 CFR 102–3.150(b), less than 15 calendar days' notice is being given for this meeting due to the exceptional circumstances of the COVID–19 pandemic and rapidly evolving COVID–19 vaccine development and regulatory processes. The Secretary of Health and Human Services has determined that COVID–19 is a Public Health Emergency.

Purpose: The committee is charged with advising the Director, CDC, on the

use of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under provisions of the Affordable Care Act, section 2713 of the Public Health Service Act, immunization recommendations of the ACIP that have been approved by the Director of the Centers for Disease Control and Prevention and appear on CDC immunization schedules must be covered by applicable health plans.

Matters to be Considered: The agenda will include discussions on COVID–19 vaccines. No recommendation vote is scheduled for COVID–19 vaccines. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda visit *https://www.cdc.gov/vaccines/acip/meetings/meetings-info.html.*

Meeting Information: The meeting will be webcast live via the World Wide Web; for more information on ACIP please visit the ACIP website: *http://www.cdc.gov/vaccines/acip/index.html.*

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials are part of the public record and are subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket. CDC does not accept comment by email.

Written Public Comment: Written comments must be received on or before January 27, 2021. Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the January 27, 2021 ACIP meeting must submit a request at *http://www.cdc.gov/vaccines/acip/meetings/* no later than 11:59 p.m., EST, January 25, 2021 according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by January 26, 2021. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to 3 minutes, and each speaker may only speak once per meeting.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021–00870 Filed 1–12–21; 4:15 pm]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2306]

TG United Inc., et al.; Withdrawal of Approval of 27 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 27 abbreviated new drug applications (ANDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of February 16, 2021.

FOR FURTHER INFORMATION CONTACT: Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1676, Silver Spring, MD 20993–0002, 240–402–6980, *Martha.Nguyen@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process described in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
ANDA 040083	Phentermine Hydrochloride (HCl) Capsules, 30 milligrams (mg)	TG United Inc., 16275 Aviation Loop Dr., Brooksville, FL 34604.
ANDA 040451	Cyanocobalamin Injection, 1 mg/milliliters (mL)	Mylan Institutional LLC, 4901 Hiawatha Dr., Rockford, IL 61103.
ANDA 040518	Bethanechol Chloride Tablets, 50 mg	Morton Grove Pharmaceuticals Inc./Wockhardt USA LLC, 6451 W. Main St., Morton Grove, IL 60053.
ANDA 040532	Bethanechol Chloride Tablets, 5 mg	Do.

Application No.	Drug	Applicant
ANDA 060347	Tetracycline HCl Capsules, 250 mg	Pharmacia & Upjohn Co., a subsidiary of Pfizer Inc., 235 East 42nd St., New York, NY 10017.
ANDA 060478	Neomycin Sulfate Ophthalmic Ointment	Pfizer Inc., 235 East 42nd St., New York, NY 10017.
ANDA 065266	Clarithromycin Tablets, 250 mg and 500 mg	Morton Grove Pharmaceuticals Inc./Wockhardt USA LLC.
ANDA 065281	Doxycycline Hyclate Delayed Release Capsules, Equivalent to (EQ) 75 mg base; EQ 100 mg base.	Bausch Health US, LLC, 400 Somerset Corporate Blvd., Bridgewater, NJ 08807.
ANDA 075208	Ranitidine HCl Tablets, EQ 150 mg base; EQ 300 mg base	Morton Grove Pharmaceuticals Inc./Wockhardt USA LLC.
ANDA 075822	Loratadine Orally Disintegrating Tablets, 10 mg	GlaxoSmithKline Consumer Healthcare Holdings (US) LLC, 184 Liberty Corner Rd., Suite 200, Warren, NJ 07059.
ANDA 076760	Ranitidine HCl Tablets, EQ 75 mg base	Morton Grove Pharmaceuticals Inc./Wockhardt USA LLC.
ANDA 076849	Vinorelbine Tartrate Injection, EQ 10 mg base/mL	Fresenius Kabi USA, LLC, Three Corporate Dr., Lake Zurich, IL 60047.
ANDA 077432	Carboplatin Injection, 50 mg/5 mL(10 mg/mL), 150 mg/15 mL (10 mg/mL), and 450 mg/45 mL (10 mg/mL).	Do.
ANDA 078500	Amlodipine Besylate Tablets, EQ 2.5 mg base; EQ 5 mg base; EQ 10 mg base.	Morton Grove Pharmaceuticals Inc./Wockhardt USA LLC.
ANDA 084041	Chlordiazepoxide HCl Capsules, 10 mg	Upsher-Smith Laboratories, LLC, 6701 Evenstad Dr., Maple Grove, MN 55369.
ANDA 084678	Chlordiazepoxide HCl Capsules, 5 mg	Do.
ANDA 084679	Chlordiazepoxide HCl Capsules, 25 mg	Do.
ANDA 088508	Homatropine Methylbromide; Hydrocodone Bitartrate Tablets, 1.5 mg; 5 mg.	King Pharmaceuticals Research and Development, LLC, 4000 Centregreen Way, Suite 300, Cary, NC 27513.
ANDA 089953	Thioridazine HCl Tablets, 10 mg, 25 mg, 50 mg, and 100 mg	Sun Pharmaceutical Industries, Inc., 2 Independence Way, Princeton, NJ 08540.
ANDA 090094	Didanosine Delayed Release Capsules, 125 mg, 200 mg, 250 mg, and 400 mg.	Aurobindo Pharma USA, Inc., 279 Princeton-Hightstown Rd., East Windsor, NJ 08520.
ANDA 090394	Iopamidol Injection, 61% and 76%	Sanochemia Corporation USA, 9201 University City Blvd., c/o Countervail Corp., Charlotte, NC 08876.
ANDA 091302	Fludrocortisone Acetate Tablets, 0.1 mg	Hikma Pharmaceuticals USA Inc., 1809 Wilson Rd., Columbus, OH 43228.
ANDA 203959	Temozolomide Capsules, 5 mg, 20 mg, 100 mg, 140 mg, and 250 mg.	Watson Laboratories, Inc. (an indirect, wholly owned subsidiary of Teva Pharmaceuticals USA, Inc.), 425 Privet Rd., Horsham, PA 19044.
ANDA 204243	Indomethacin Extended Release Capsules, 75 mg	Aurobindo Pharma USA, Inc.
ANDA 206061	Pravastatin Sodium Tablets, 20 mg, 40 mg, and 80 mg	Hisun Pharmaceuticals USA, Inc., 200 Crossing Blvd., 2nd Floor, Bridgewater, NJ 08807.
ANDA 206857	Tiagabine HCl Tablets, 2 mg, 4 mg, 12 mg, and 16 mg	Wilshire Pharmaceuticals, Inc., 6 Concourse Pkwy., Suite 1800, Atlanta, GA 30328.
ANDA 209076	Ibuprofen Tablets, 200 mg	Ultra Tab Laboratories, Inc., 50 Toc Dr., Highland, NY 12528.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of February 16, 2021. Approval of each entire application is withdrawn, including any strengths and dosage forms inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on February 16, 2021 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: January 11, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00833 Filed 1–14–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

FDA Drug Review Timeline Transparency; Statement of Policy

The Department and its component agencies exist to serve the American people. Consistent with and in follow up to the Department's previous transparency efforts,[1] and given the significant impact FDA's approval of drugs has on Americans, the Secretary believes the public would benefit from information regarding the timeline for FDA's review of drug product applications as provided in this document.

In 1962, Congress amended the Food, Drug, and Cosmetic Act (FD&C Act) to authorize the Food and Drug Administration (FDA) to review and approve ''new drugs'' for safety and efficacy.[2] When Congress made this historic change to our nation's drug laws, it provided a timeframe for FDA's review. In section 104 of the Drug Amendments of 1962, codified at section 505(c) of the FD&C Act, 21 U.S.C. 355(c), Congress required that, for New Drug Applications (NDAs), ''[w]ithin one hundred eighty days after the filing of an application . . . , the Secretary shall either approve the application . . . or give the applicant notice of an opportunity for a hearing before the Secretary.'' As the Senate Judiciary Committee explained at the time, ''this provision strikes a balance between the need for governmental control to assure that new drugs are not placed on the market until they have passed the relevant tests and the need to insure that governmental control does not become so rigid that the flow of new drugs to the market, and the incentive to undergo the expense involved in preparing them for the market, become stifled.'' [3]

At the time, the 180-day timeframe for review of ''new drugs'' was uncontroversial. At a 1963 public hearing, the Acting Director for FDA's Division of New Drugs stated that ''[a]pplications for drugs of questionable safety or effectiveness will continue to take more of every body's time.'' [4] However, the Director ''pledge[d] action greatly short of the 180-day limit on all applications and supplements that present good scientific evidence of the safety and effectiveness of the drugs and that are properly informative to the physician or patient.'' [5]

When Congress made additional amendments to the FD&C Act in 1984, it borrowed from and applied the existing 180-day review framework to the review of Abbreviated New Drug Applications (ANDAs), the approval mechanism for generic drugs.[6] Under section 505(j)(5)(A) of the FD&C Act, 21 U.S.C. 355(j)(5)(A), the Secretary ''shall approve or disapprove the [ANDA] application'' ''[w]ithin one hundred and eighty days of the initial receipt of an application.'' FDA promulgated regulations implementing the 180-day statutory provisions for review of NDAs and ANDAs. *See* 21 CFR 314.100, 314.101. While the Prescription Drug User Fee Act (PDUFA) and Generic Drug User Fee Act (GDUFA) in their iterative forms have provided FDA with additional resources to carry out its statutory mission, Congress did not do away with the 180-day provisions in section 505 of the FD&C Act, 21 U.S.C. 355, in those laws.

Though the agency has made strides over the years to expedite review in the face of limited resources, the total time elapsed between FDA's filing of an NDA or receipt of an ANDA to ultimate approval or disapproval of the application often exceeds 180 days. Even so, reporting on drug approvals, such as GAO's March 2020 report,[7] focused primarily on agency compliance with PDUFA dates. The GAO report did not mention the 180-day benchmark or discuss the agency's approval timeframe in view of that requirement.

Given this gap in reporting, the Department reviewed FDA's New Drug Therapy Approvals from 2019 [8] in view of the 180-day timeframe. The Department's review considered 48 products listed by the agency as approved in 2019.[9] The table below presents, among other things, the date of submission, date of approval, total days from submission to approval, and total days in excess of 180 days of submission for these drugs.

Drug brand name	Summary of FDA-approved use on approval date	Submission date	Approval date	Days submission to approval	Days in excess of 180 days
Accrufer	Iron deficiency anemia	9/27/2018	7/25/2019	301	121
Adakveo	Reduce vasoocclusive crises in sickle cell disease.	5/16/2019	11/15/2019	183	3
Aklief	Acne vulgaris	10/4/2018	10/4/2019	365	185
Balversa	Locally advanced or metastatic bladder cancer	9/18/2018	4/12/2019	206	26
Beovu	Wet age-related macular degeneration	2/7/2019	10/7/2019	242	62
Brukinsa	Mantle cell lymphoma	6/27/2019	11/14/2019	140	N/A
Cablivi	Acquired thrombotic thrombocytopenic purpura	6/6/2018	2/6/2019	245	65
Caplyta	Schizophrenia	9/27/2018	12/20/2019	449	269
Dayvigo	Insomnia	12/27/2018	12/20/2019	358	178
Egaten	Fascioliasis	6/14/2018	2/13/2019	244	64
Enhertu	Metastatic breast cancer	8/29/2019	12/20/2019	113	N/A
Evenity	Osteoporosis	7/9/2018	4/9/2019	274	94
ExEm Foam	Diagnostic agent for fallopian tube assessment	10/9/2018	11/7/2019	394	214
Fetroja	Complicated urinary tract infection	12/14/2018	11/14/2019	335	155
fluorodopa F 18	Diagnostic agent for Parkinsonian syndromes	4/10/2019	10/10/2019	183	3

[1] E.g., 85 FR 75893 (Nov. 27, 2020).

[2] Drug Amendments of 1962, Pub. L. 87–781, 76 Stat. 780 (Oct. 10, 1962).

[3] 1962 U.S.C.C.A.N. 2884, 2891.

[4] Proceedings, FDA Conference on the Kefauver-Harris Drug Amendments and Proposed Regulations, at 7 (Feb. 15, 1963).

[5] *Id.* at 6.

[6] Drug Price Competition and Patent Term Restoration Act of 1984, Public Law 98–417, 98 Stat. 1585, 1588 (Sept. 24, 1984).

[7] GAO, *FDA Drug Approval, Application Review Times Largely Reflect Agency Goals* (Mar. 2020), *https://www.gao.gov/assets/710/705193.pdf.*

[8] FDA, *New Drug Therapy Approvals 2019, https://www.fda.gov/drugs/new-drugs-fda-cders-new-molecular-entities-and-new-therapeutic-biological-products/new-drug-therapy-approvals-2019.*

[9] In its review, the Department obtained the ''submission date'' (or, if available, ''filing date'') of the 48 drugs by searching documents available to the public on FDA's Drugs@FDA website.

Drug brand name	Summary of FDA-approved use on approval date	Submission date	Approval date	Days submission to approval	Days in excess of 180 days
Ga 68 DOTATOC	Diagnostic agent for neuroendocrine tumors	5/23/2018	8/21/2019	455	275
Givlaari	Acute hepatic porphyria	6/4/2019	11/20/2019	169	N/A
Ibsrela	Irritable bowel syndrome with constipation	9/12/2018	9/12/2019	365	185
Inrebic	Certain types of myelofibrosis	1/4/2019	8/16/2019	224	44
Jeuveau	Improve appearance of glabellar lines (lines between eyebrows).	5/15/2017	2/1/2019	627	447
Mayzent	Relapsing forms of multiple sclerosis	6/28/2018	3/26/2019	271	91
Nourianz	Parkinson's disease ''off'' episodes	7/27/2019	8/27/2019	31	N/A
Nubeqa	Non-metastatic prostate cancer	2/26/2019	7/30/2019	154	N/A
Oxbryta	Sickle cell disease	6/26/2019	11/25/2019	152	N/A
Padcev	Refractory bladder cancer	7/15/2019	12/18/2019	146	N/A
Piqray	Advanced or metastatic breast cancer	12/18/2018	5/24/2019	157	N/A
Polivy	Relapsed or refractory diffuse large B-cell lymphoma.	12/19/2018	6/10/2019	173	N/A
pretomanid	Treatment-resistant forms of tuberculosis	12/14/2018	8/14/2019	243	63
Reblozyl	Anemia associated with beta thalassemia	4/4/2019	11/8/2019	218	38
Recarbrio	Complicated urinary tract infections and complicated intra-abdominal infections	11/16/2018	7/16/2019	242	62
Reyvow	Migraine with or without aura	10/11/2018	10/11/2019	365	185
Rinvoq	Moderately to severely active rheumatoid arthritis.	12/18/2018	8/16/2019	241	61
Rozlytrek	Metastatic non-small cell lung cancer and locally advanced or metastatic solid tumors with a specific genetic defect.	12/18/2018	8/15/2019	240	60
Scenesse	Increase pain-free light exposure in patients with erythropoietic protoporphyria.	11/8/2018	10/8/2019	334	154
Skyrizi	Moderate-to-severe plaque psoriasis	4/3/2018	4/23/2019	385	205
Sunosi	Excessive daytime sleepiness in patients with narcolepsy or obstructive sleep apnea.	12/20/2017	3/20/2019	455	275
TissueBlue	Dye used in eye surgery	4/29/2019	12/20/2019	235	55
Trikafta	Cystic Fibrosis	7/19/2019	10/21/2019	94	N/A
Turalio	Symptomatic tenosynovial giant cell tumor	12/3/2018	8/2/2019	242	62
Ubrelvy	Migraine	12/26/2018	12/23/2019	362	182
Vyleesi	Hypoactive sexual desire disorder in premenopausal women.	3/23/2018	6/21/2019	455	275
Vyndaqel	Cardiomyopathy caused by transthyretin-mediated amyloidosis.	11/2/2018	5/3/2019	182	2
Vyondys 53	Duchenne muscular dystrophy	12/19/2018	12/12/2019	358	178
Wakix	Excessive daytime sleepiness in patients with narcolepsy.	12/14/2018	8/14/2019	243	63
Xcopri	Partial-onset seizures	11/21/2018	11/21/2019	365	185
Xenleta	Community-acquired bacterial pneumonia	12/19/2018	8/19/2019	243	63
Xpovio	Relapsed or refractory multiple myeloma	8/6/2018	7/3/2019	331	151
Zulresso	Postpartum depression	4/9/2018	3/19/2019	344	164

The Department found that 38 of the 48 drugs (79.1%) were approved more than 180 days after submission of an application. The average time from submission to approval for the 48 drugs in the table above was 273.8 days. It should be noted that in many instances the failure to meet the 180-day statutory benchmark may have been justified and in such cases, was frequently the result of questions by the agency and responses by the applicant.

Because FDA's approval of drugs affects the health and financial well-being of all Americans, the Department believes the public is entitled to information like the data provided in the table above regarding the amount of the time required for FDA review and approval of new and generic drugs. To that end, effective upon publication of this Notice, for all NDA and ANDA approvals, FDA must take the following action.

FDA shall publish annually on its website, for each approved NDA and ANDA approved after the date of this publication, (a) the date on which FDA ''filed,'' in the case of an NDA, or ''received,'' in the case of an ANDA, such application; (b) the date on which FDA approved the NDA or ANDA; (c) the total days elapsed between the dates in (a) and (b); and (d) the total days in excess of 180-days the date of (c). For example, if an NDA was ''filed'' on January 25, 2021 and approved on December 27, 2021, then the total days elapsed for review would be 336 days, and the days in excess of 180 days would be 156 days.

Members of the public can use this information to further study the health and economic impacts of FDA review timelines. This reporting is also consistent with FDA's mission to ''promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner.'' 21 U.S.C. 393(b)(1). In addition to educating the public, the Department believes this information will inform Congress as to whether to provide FDA with additional resources to carry out the agency's review obligations within the timeframe prescribed by Congress.

Dated: January 8, 2021.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–00786 Filed 1–14–21; 8:45 am]

BILLING CODE 4150–26–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0255]

Patient-Focused Drug Development for Vitiligo; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: In the **Federal Register** notice published on March 19, 2020, the Food and Drug Administration (FDA, Agency, or we) announced the cancellation of the public meeting entitled ''Patient-Focused Drug Development for Vitiligo'' originally scheduled to occur on March 30, 2020, as announced in the **Federal Register** on February 12, 2020. FDA is announcing a new date for the meeting, to occur in a virtual format. The purpose of the public meeting is to allow FDA to obtain patient perspectives on the impact of vitiligo on daily life, patient views on treatment approaches, and decision factors considered when selecting a treatment.

DATES: The public meeting will be held on March 8, 2021, from 10 a.m. to 2:30 p.m. Eastern Time. Submit either electronic or written comments on this public meeting by May 10, 2021. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: Please note that due to the impact of the COVID–19 pandemic, all meeting participants will be joining this public meeting via an online conferencing platform.

You may submit comments as follows. The docket number to submit comments is FDA–2020–N–0255. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before May 10, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 10, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–0255 for ''Patient-Focused Drug Development for Vitiligo; Public Meeting; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Shannon Cole, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave, Bldg. 51, Rm. 6306, Silver Spring, MD 20993–0002, 301–796–9208, *PatientFocused@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On March 19, 2020, FDA announced in the **Federal Register** (85 FR 15789) the cancellation of the meeting entitled ''Patient-Focused Drug Development for Vitiligo,'' originally scheduled to occur on March 30, 2020, as announced in the **Federal Register** on February 12, 2020 (85 FR 8004). The meeting has been rescheduled in a virtual format.

This meeting will provide FDA with the opportunity to obtain patient and patient representative input on the aspects of vitiligo, including how it affects daily life, what matters most to patients, and on current approaches to treating vitiligo. Vitiligo is an autoimmune disease that causes the loss of skin color. The loss of color can affect skin, hair, and other areas of the body. The area affected by color loss can range in individual patients from small discrete areas to near total involvement. Although there is no cure or FDA-approved treatment for repigmentation, there are available therapies, such as prescription medications or non-drug therapies, which may be used to manage

aspects of vitiligo. FDA is interested in patients' (including adult and pediatric patients) perspectives on: (1) The impact of their vitiligo; (2) treatment approaches; and (3) decision factors considered when selecting a treatment.

The questions that will be asked of patients and patient representatives at the meeting are listed in the following section and organized by topic. For each topic, a brief initial patient panel discussion will begin the dialogue. This discussion will be followed by a facilitated discussion inviting comments from other patients and patient representatives. In addition to input generated through this public meeting, FDA is interested in receiving patient and patient representative input addressing these questions through written comments, which can be submitted to the public docket (see **ADDRESSES**). When submitting comments, if you are commenting on behalf of a patient, please indicate that you are doing so and answer the following questions as much as possible from the patient's perspective.

FDA will post the agenda and other meeting materials approximately 5 days before the meeting at: *https://www.fda.gov/drugs/news-events-human-drugs/public-meeting-patient-focused-drug-development-vitiligo-03082021-03082021.*

II. Topics for Discussion at the Public Meeting

Topic 1: Health Effects and Daily Impacts That Matter Most to Patients

1. Which aspects of vitiligo have the most significant impact on your life? (Examples may include depigmentation, itching, sensitivity to sunlight, etc.)

2. Are there specific activities that are important to you but that you cannot do at all or as fully as you would like because of your vitiligo? (Examples of activities may include participating in social events, playing sports, being outside in the sunlight, etc.)

a. How does your vitiligo and its impacts affect your daily life on the best days? On the worst days?

3. How has your vitiligo changed over time?

a. How has your vitiligo changed from childhood to adulthood (such as vitiligo severity, disease acceptance)?

b. Would you define your vitiligo today as being well-managed?

4. What worries you most about your vitiligo?

a. Is there a particular body area affected by vitiligo (such as face, hands, limbs) that is of most concern to you?

Topic 2: Patients' Perspectives on Current Approaches to Treatment

1. What are you currently doing to help treat your vitiligo? (Examples may include prescription medicines, over-the-counter products, and other therapies, including non-drug therapies such as diet modification.)

a. How has your treatment regimen changed over time, and why?

2. How well does your current treatment regimen treat the most significant aspects of your vitiligo? For example, how well do your treatments improve your ability to do specific activities?

3. What are the most significant downsides to your current treatments, and how do they affect your daily life? (Examples of downsides may include bothersome side effects, depigmentation of affected area is more noticeable, hospital treatments, etc.)

4. Assuming there is no complete cure for your vitiligo, what specific things would you look for in an ideal treatment for your vitiligo?

a. Is there a particular body area affected by vitiligo (such as face, hands, limbs) that you would prioritize for treatment?

5. What factors do you consider when making decisions about selecting a course of treatment?

III. Participating in the Public Meeting

Registration: Persons interested in attending this public meeting via webcast must register online at *https://vitiligopfdd.eventbrite.com.* Persons without access to the internet can call 301–796–9208 to register. Contact information provided during registration will remain confidential and will only be used to send meeting updates to participants.

Registration for this virtual event is free, although there may be limited space for attendance based on bandwidth availability. Webcast information will be provided upon completion of registration. Closed captioning will be provided. Please check the meeting website for the latest information: *https://www.fda.gov/drugs/news-events-human-drugs/public-meeting-patient-focused-drug-development-vitiligo-03082021-03082021.*

If you need special accommodations due to a disability, please contact Shannon Cole (see **FOR FURTHER INFORMATION CONTACT**) no later than March 1, 2021.

Streaming Webcast of the Public Meeting: This public meeting will be streamed via webcast only. The recording and presentation slides, along with a meeting transcript and summary report, will also be made publicly available after the meeting. To register for the webcast, please visit *https://vitiligopfdd.eventbrite.com.* The webcast can also be accessed via: *https://fda.yorkcast.com/webcast/Play/46a8899c50914665b27d134db530bd421d.* Simply click on the link and hit the ''play'' button and it will start. The webcast link will be activated 30 minutes prior to the start of the meeting.

FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the meeting website at *https://www.fda.gov/drugs/news-events-human-drugs/public-meeting-patient-focused-drug-development-vitiligo-03082021-03082021.*

Dated: January 11, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00832 Filed 1–14–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–4337]

Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the following virtual public meeting entitled ''Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards.'' The purpose of the virtual public meeting and the request for comments is to fulfill FDA's commitment to seek stakeholder input related to data standards and the electronic submission system's past performance, future targets, emerging industry needs, and technology initiatives. FDA will use the information from the public meeting as

well as from comments submitted to the docket to provide input into data standards initiatives, the FDA Information Technology (IT) Strategic Plan, and electronic submissions gateway target timeframes.

DATES: The public meeting will be held on April 7, 2021, from 9 a.m. to 1 p.m. Eastern Time and will take place virtually, held by webcast only. Submit either electronic or written comments on this public meeting by March 7, 2021. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: Registration to attend the meeting and other information can be found at *https://www.fda.gov/industry/prescription-drug-user-fee-amendments/pdufa-vi-information-technology-goals-and-progress.*

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before March 7, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 7, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand Delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–N–4337 for ''Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure laws. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

FOR FURTHER INFORMATION CONTACT: Bryan Spells, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1117, Silver Spring, MD 20993–0002, 240–402–6511, *bryan.spells@fda.hhs.gov,* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911, *stephen.ripley@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is committed to achieve the long-term goal of improving the predictability and consistency of the electronic submission process and enhancing transparency and accountability of FDA information technology-related activities. In the document containing the performance goals and procedures for the Prescription Drug User Fee Act (PDUFA) reauthorization for fiscal years 2018 through 2022 (the PDUFA VI commitment letter), FDA agreed to hold annual public meetings to seek stakeholder input related to electronic submissions and data standards to inform the FDA IT Strategic Plan and published targets. The PDUFA VI commitment letter outlines FDA's performance goals and procedures under the PDUFA program for the years 2018 through 2022. The PDUFA VI commitment letter can be found at *https://www.fda.gov/media/99140/download.*

FDA will consider all comments made at this meeting or received through the docket (see **ADDRESSES**).

II. Participating at the Public Meeting

Registration: To register to attend ''Prescription Drug User Fee Act of 2017; Electronic Submissions and Data Standards,'' please visit the following website to register: *https://www.eventbrite.com/e/pdufa-vi-2021-public-meeting-on-electronic-submissions-and-data-standards-tickets-126816546705.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone. A draft agenda will be posted approximately 1 month prior to the meeting.

Opportunity for Public Comment: Those who register online by March 7,

2021, will receive a notification about an opportunity to participate in the public comment session of the meeting. If you wish to speak during the public comment session, follow the instructions in the notification and identify which topic(s) you wish to address. We will do our best to accommodate requests to make public comments. Individuals and organizations with common interests are urged to consolidate or coordinate their comments and request time jointly. All requests to make a public comment during the meeting must be received by March 7, 2021, 11:59 p.m. Eastern Time. We will determine the amount of time allotted to each commenter, the approximate time each comment is to begin, and will select and notify participants by March 21, 2021. No commercial or promotional material will be permitted to be presented at the public meeting.

Streaming Webcast of the Public Meeting: This public meeting will also be held via Adobe Connect webcast: *https://collaboration.fda.gov/pdufavify21/.*

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the internet at *https://www.fda.gov/forindustry/userfees/prescriptiondruguserfee/ucm446608.htm.*

Dated: January 11, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00831 Filed 1–14–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

RIN 0991–ZA52

Making Permanent Regulatory Flexibilities Provided During the COVID–19 Public Health Emergency by Exempting Certain Medical Devices From Premarket Notification Requirements; Request for Information, Research, Analysis, and Public Comment on Opportunities for Further Science and Evidence-Based Reform of Section 510(k) Program

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

ACTION: Notice; request for information.

SUMMARY: To provide Americans with expanded access to certain medical devices to respond to the COVID–19 Public Health Emergency, FDA issued guidance documents providing numerous regulatory flexibilities, including a temporary waiver of premarket notification requirements under section 510(k) of the Food, Drug, and Cosmetic Act. For seven class I devices for which 510(k) premarket review as temporarily waived during the PHE, the Department of Health and Human Services is permanently exempting those seven (7) class I devices from the 510(k) requirement and is also proposing to exempt an additional 83 class II devices and 1 unclassified device class from the 510(k) requirement, for which premarket review had also been waived during the PHE. The Department is soliciting the public's views on whether premarket review should be permanently waived for some or all of these 83 devices and views on ways to improve the 510(k) premarket notification program.

DATES: Part III.A of this Notice shall be effective immediately on publication in the **Federal Register**. To be considered, responses and comments related to Part III.B of this Notice must be received electronically, within sixty days of publication in the **Federal Register** as provided below. The Department will consider information submitted by the public in response to Part IV of this Notice on a rolling basis, and until further notice.

ADDRESSES: You may submit comments through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted to *http://regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Comments must be identified by 0991–ZA52. Because of staff and resource limitations, all comments must be submitted electronically to *www.regulations.gov.* Follow the ''Submit a comment'' instructions.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to comments received.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make. HHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.* Follow the search instructions on that website to view the public comments.

FOR FURTHER INFORMATION CONTACT: Dan Barry, 200 Independence Ave. SW, Washington, DC 20201; or by email at *daniel.barry@hhs.gov;* or by telephone at 1–877–696–6775.

SUPPLEMENTARY INFORMATION: The Administration is committed to creating a data-based regulatory process that appropriately balances benefits and costs. Consistent with the President's executive order on COVID–19 regulatory flexibilities, and Congress' direction in the 21st Century Cures Act, the Department is issuing this Notice to permanently exempt or proposing to permanently exempt certain class I and class II medical devices from the premarket notification requirement in section 510(k) of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360(k). Under this notice, the Department is immediately making permanent the exemption of 7 class I device classes from the section 510(k) requirement and proposes to exempt an additional 84 class II and unclassified device classes from the same requirement on a permanent basis. These 91 devices were all subject a 510(k) waiving during the PHE.

I. Background

A. Statutory Framework

Under the Food, Drug, and Cosmetic Act (FD&C Act), medical devices are placed ''in three categories based on the risk that they pose to the public.'' [1] Class I devices, products ''that present no unreasonable risk of illness or injury,'' [2] are subject to general controls. FD&C Act 513(a)(1)(A), 21 U.S.C.

[1] *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 476 (1996).

[2] *Id.* at 476–77.

360c(a)(1)(A). Class II devices are ''potentially more harmful'' than class I devices, and ''must comply with federal performance regulations known as 'special controls.'''[3] Class III devices carry the highest risk, in that they are for ''use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present[ ] a potential unreasonable risk of illness or injury.'' FD&C Act 513(a)(1)(C)(ii)(I)–(II), 21 U.S.C. 360c(a)(1)(C)(ii)(I)–(II).

Medical devices are generally subject to FDA premarket review in one of two forms. The first is premarket approval (PMA) review under section 515 of the FD&C Act, 21 U.S.C. 360e. This form of ''rigorous'' review, analogous to FDA review of a New Drug Application for a ''new drug,'' requires manufacturers to ''submit detailed information regarding the safety and efficacy of their devices, which the FDA then reviews.''[4] During the mid-1990s, FDA reported spending ''an average of 1,200 hours on each [PMA] submission,''[5] though the time for review has likely increased since *Lohr* was decided.

The second form of premarket review is the premarket notification process, which is commonly referred to as the 510(k) process after section 510(k) of the FD&C Act, 21 U.S.C. 360(k). Generally, under the 510(k) process, a device that is ''substantially equivalent'' to another legally marketed predicate device is ''cleared'' (as opposed to ''approved'')[6] by FDA for legal marketing in the United States. *See* FD&C Act 510(k), 513(i), 21 U.S.C. 360(k), 360c(i). FDA regulations specify the required contents of 510(k) notifications, including labeling, intended use, and clinical and performance data requirements. 21 CFR 807.92. FDA previously reported requiring ''an average of only 20 hours'' to complete a 510(k) review,[7] which would be around 60 times less than the time required for PMA review.

Obtaining either a PMA approval or a 510(k) clearance to legally market a medical device is expensive and time-consuming. According to a 2010 survey of medical device companies, ''the average total cost from concept to approval [of a PMA device] was approximately $94 million, with $75 million spent on stages linked to the FDA.''[8] For PMAs, survey respondents reported ''that it actually took them an average of 54 months to work with the FDA from first communication to approval.''[9]

While 510(k) devices trod a swifter, less expensive path to market than PMA devices do, the same survey found that ''the average total cost for participants to bring a low-to-moderate-risk 510(k) product from concept to clearance was approximately $31 million, with $24 million spent on FDA dependent and/or related activities.''[10] Respondents also reported ''an average of 10 months from first filing to clearance'' for a 510(k) device.[11] The survey authors acknowledged that respondents ''were most likely those companies working on innovative, new medical technologies that required clinical data to get through the FDA rather those seeking relatively simple extensions to low-risk, ubiquitous product lines already in existence.''[12] Nevertheless, the survey found the average total cost connected to the ''Process of Obtaining [a] 510(k) [clearance]'' to be more than $4 million per product.[13] Even if these estimates overstate costs by a factor of ten, a firm could still spend $2.4 million ''on FDA dependent and/or related activities,'' to include an estimated $400,000 on the 510(k) clearance process itself. Similarly, even if the survey respondents overstated delays, and the actual time were much closer to FDA's goal date of 90 days for review, it is undisputed that the 510(k) clearance process delays a device's introduction to the market.

A 2014 report on antibacterial products produced for the Assistant Secretary for Planning and Evaluation (ASPE) contains similar findings. The report noted that, to conduct a pivotal clinical study to support a 510(k) submission for a MRSA point-of-care diagnostic, a manufacturer could expect to spend ''from a low of $250,000 to as high as $4.0 million.''[14] The report estimated the cost to prepare and submit a 510(k) application ''at $100,000'' while acknowledging the amount ''could be highly variable depending on device characteristics.''[15]

These costs are barriers to new market entrants. To the extent imposing the section 510(k) premarket notification on a device does not create corresponding safety and efficacy benefits for Americans, those barriers are unjustified. Such barriers warrant scrutiny, particularly when market incumbents have an interest in retaining them. As FDA acknowledged in a 1975 proposed rule in the analogous context of drug approvals, ''the manufacturer who holds the 'pioneer' NDA for a drug may well have an economic interest in retaining the new drug status of that drug'' because ''[a]s long as either a full or an abbreviated NDA is required, entry into the market place, and thus increased competition is impeded.''[16] FDA noted its belief ''that it was not the intention of Congress that section 505 of the [FD&C Act] would be used as an economic trade barrier.''[17]

[3] *Lohr,* 518 U.S. at 477; *see also* FD&C Act 513(a)(1)(B), 21 U.S.C. 360c(a)(1)(B).

[4] *Lohr,* 518 U.S. at 477.

[5] *Id.*

[6] *See* 21 CFR 807.97 (providing that ''determination by the Commissioner that the device intended for introduction into commercial distribution is substantially equivalent'' to a predicate device ''does not in any way denote official approval of the device'').

[7] *Id.*

[8] Josh Makower, Aabed Meer & Lyn Denend, *FDA Impact on U.S. Medical Technology Innovation: A Survey of Over 200 Medical Device Companies,* at 7 (Nov. 2010), *https://www.medtecheurope.org/wp-content/uploads/2015/07/01112010_FDA-impact-on-US-medical-technology-innovation_Backgrounder.pdf.* During a 2011 hearing before a House subcommittee, the Director for the Center for Devices and Radiological Health (CDRH) raised concerns regarding the methodology used in this study. *FDA Medical Device Approval: Is There a Better Way?, Hearing Before the H. Subcomm. on Health Care, District of Columbia, Census and the National Archives,* 112th Cong. 29 (2011) (hereinafter the ''2011 Hearing''). The CDRH Director's criticisms largely focused on the report's comparison of FDA's regulation of medical devices to the European Union's regulatory system. The CDRH Director otherwise acknowledged that FDA does not ''do cost analyses for what the manufacturers are doing'' and that the agency ''would not know of the total cost to a particular company.'' *Id.* at 32. Here, the Department is citing this study for 510(k) cost and time estimates, not for purposes of comparing the U.S. and E.U. medical device regulatory systems.

[9] *Id.* at 22.

[10] *Id.* at 7.

[11] *Id.* at 22.

[12] *Id.* at 29, fig. 10.

[13] *Id.*

[14] Aylin Sertkaya et al., *Analytical Framework for Examining the Value of Antibacterial Products,* at 5–3 (Apr. 15, 2014).

[15] *Id.* at 5–4.

[16] 40 FR 26142, 26148 (June 20, 1975).

[17] *Id.*

Congress has taken action to ensure that the section 510(k) premarket notification process does not create undue economic barriers for new medical devices. Under the FD&C Act, the Secretary is authorized to exempt class I and II medical devices from the 510(k) requirement if the Secretary finds those devices ''no longer require[ ] a report under section [510](k) to provide reasonable assurance of safety and effectiveness.'' FD&C Act 510(*l*)(2), 510(m)(1)(A)(i), 21 U.S.C. 360(*l*)(2), 360(m)(1)(A)(i). Congress did this in part to ''allow the Secretary to expend limited premarket review resources on potentially risky and technologically advanced devices'' so that ''the public continues to be adequately protected and will still benefit from the earlier availability of new products.'' [18] In section 3054 of the 21st Century Cures Act, Public Law 114–255, 130 Stat. 1033, 1126–27 (Dec. 13, 2016), Congress imposed additional requirements on the Secretary to take action to affirmatively review class I and II devices to determine whether they are exempt from the 510(k) requirement. This Notice is responsive to these previous mandates.

B. Waiver of Premarket Notification Requirement During COVID–19 PHE

Beginning in March 2020, in response to the COVID–19 Public Health Emergency (PHE), FDA issued a series of guidance documents designed to provide the private sector with regulatory flexibility to meet the sudden, increased need for personal protective equipment, disinfectant products, and other devices to combat the pandemic. The table below presents the various guidance documents issued in April 2020 to assist in the response to the PHE.

TABLE 1—LIST OF FDA MEDICAL DEVICE ENFORCEMENT POLICIES RESPONSIVE TO PHE

Title of guidance	Date
Enforcement Policy for Clinical Electronic Thermometers During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Imaging Systems During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Face Masks and Respirators During the Coronavirus Disease (COVID–19) Public Health Emergency (Revised).	May 2020.
Enforcement Policy for Gowns, Other Apparel, and Gloves During the Coronavirus Disease (COVID–19) Public Health Emergency.	March 2020.
Enforcement Policy for Sterilizers, Disinfectant Devices, and Air Purifiers During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	March 2020.
Enforcement Policy for Digital Health Devices For Treating Psychiatric Disorders During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Extracorporeal Membrane Oxygenation and Cardiopulmonary Bypass Devices During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Infusion Pumps and Accessories During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Non-Invasive Fetal and Maternal Monitoring Devices Used to Support Patient Monitoring During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring During the Coronavirus Disease-2019 (COVID–19) Public Health Emergency (Revised).	March 2020 (original). June 2020 (revised). October 2020 (revised).
Enforcement Policy for Remote Digital Pathology Devices During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Remote Ophthalmic Assessment and Monitoring Devices During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	April 2020.
Enforcement Policy for Ventilators and Accessories and Other Respiratory Devices During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency.	March 2020.

As FDA explained in its clinical thermometer guidance, FDA provided these flexibilities to ''ensure the availability of equipment that might offer some benefit to health care providers and the general public during the public health emergency.'' [19] To that end, among other things, FDA announced that the agency ''does not intend to object to the distribution and use of clinical thermometers that are not currently 510(k) cleared.'' [20] Some of the flexibilities, such as those extended to remote patient monitoring, have helped facilitate telemedicine during the PHE. FDA extended similar flexibility to additional devices in other guidance documents shown in Table 1.

II. HHS' Review of 510(k) Premarket Notification Flexibilities

On May 19, 2020, the President issued Executive Order No. 13924, instructing ''[t]he heads of all agencies'' to ''review any regulatory standards that they have temporarily rescinded, suspended, modified, or waived during the public health emergency,'' in order to ''determine which, if any, would promote economic recovery if made permanent.'' [21] Further, Congress already instructed the Secretary to consider whether to exempt class I and II devices from the section 510(k) requirement ''at least once every 5 years.'' FDCA 510(*l*)(2), 510(m)(1)(A), 21 U.S.C. 360(*l*)(2), 360(m)(1)(A).

Consistent with the President's executive order, and Congress' direction in the 21st Century Cures Act, the Department conducted a data-driven review to determine whether temporary waiver of the section 510(k) premarket notification requirement for some devices during the PHE should be made permanent. The flexibilities given by FDA during the PHE presented the Department with a unique opportunity to analyze the adverse event records of

[18] H.R. Conf. Rep. 105–399, at 96 (1997).

[19] FDA, Enforcement Policy for Clinical Electronic Thermometers During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency, at 3 (Apr. 2020), *https://www.fda.gov/media/136698/download.*

[20] *Id.*

[21] 85 FR 31353, 31356 (May 22, 2020).

devices in periods of time with and without the premarket notification requirement. In view of this, the overarching question for HHS was whether premarket notification provided corresponding safety and efficacy benefits. Below the Department describes the methodology for its review and the results of the same.

A. Methodology

HHS first reviewed the thirteen FDA guidance documents listed in Table 1 to determine which device types are subject to those enforcement policies. The Department identified 221 unique device types. HHS analyzed those device types using FDA's Product Code Database [22] to determine how many of those devices require premarket review. Of those 221 device types, the Department determined that 5 require a PMA, 29 are exempt from the 510(k) requirement, 3 are marketed subject to FDA's enforcement discretion, and 184 require 510(k) clearance prior to marketing. Of the 184 devices types that would require 510(k) clearance without the guidance documents list in Table 1, 10 are class I devices, 173 are class II devices, and 1 is unclassified. These 184 devices are referred to collectively in this Notice as the ''Review Devices.''

FDA maintains a publicly available adverse event reporting database called the Manufacturer and User Facility Device Experience database or MAUDE. MAUDE ''houses [medical device reports or] MDRs submitted to the FDA by mandatory reports (manufacturers, importers and device user facilities) and voluntary reporters such as health care professionals, patients and consumers.'' [23] Like any ''passive surveillance system,'' MAUDE has ''limitations, including the potential submission of incomplete, inaccurate, untimely, or biased data,'' which means ''incidence or prevalence of an event cannot be determined from this reporting system alone due to under-reporting of events, inaccuracies in reports, lack of verification that the device caused the reported event, and lack of information about frequency of device use.'' [24] Even with the system's limitations, MAUDE is an important source of data. FDA has previously used data from MAUDE to inform the agency's decision making.[25] Products liability plaintiffs also make use of the database.[26] As the CDRH Director previously explained to Congress, systems like MAUDE set the United States apart from jurisdictions like the European Union that ''do not have publicly available centralized data base[s] for that kind of information.'' [27]

In this review, the Department performed searches of the Review Devices in FDA's online searchable MAUDE database. Updated on a monthly basis, the online ''searchable database data contains the last 10 year's data'' of reports ''on medical devices which may have malfunctioned or caused a death or serious injury.'' [28] HHS entered the three-letter product code for each Review Device into the online MAUDE database. HHS then collected data on the number of reports for each Review Device from November 1, 2010 to November 30, 2020, tabulating the reports from November 1, 2010 to the beginning of the PHE, and for the time period subsequent the beginning of the PHE to November 30, 2020.

B. Results

Of the 184 Review Devices, HHS found there were 120 or more MAUDE reports for 74 devices and less than 100 MAUDE reports for the 110 other devices during the last ten years. This means roughly 60% of the Review Devices have less than 100 MAUDE reports over the last ten years. Of those 110 devices, 35 devices had no MAUDE reports from November 1, 2010 to November 30, 2020. Those 35 devices are shown in Table 2 below.

TABLE 2—REVIEW DEVICES WITH ZERO ADVERSE EVENT REPORTS IN MAUDE FOR THE TIME PERIOD NOVEMBER 1, 2010 TO NOVEMBER 30, 2020

Device description	Device class	Product code	Section in 21 CFR
Powder-Free Polychloroprene Patient Examination Glove	I	OPC	880.6250
Ventilator, Continuous, Minimal Ventilatory Support, Home Use	II	NQY	868.5895
Airway Monitoring System	II	OQU	868.5730
Impedance Measuring Device Utilizing Oscillation Techniques	II	PNV	868.1840
Gauge, Pressure, Coronary, Cardiopulmonary Bypass	II	DXS	870.4310
Valve, Pressure Relief, Cardiopulmonary Bypass	II	MNJ	870.4400
Oximeter, Tissue Saturation, Reprocessed	II	NMD	870.2700
Multivariate Vital Signs Index	II	PLB	870.2300
Electrocardiograph Software For Over-The-Counter Use	II	QDA	870.2345
Sterilizer, Dry Heat	II	KMH	880.6870
Check Valve, Retrograde Flow (In-Line)	II	MJF	880.5440
Intravascular Administration Set, Automated Air Removal System	II	OKL	880.5445
Neuraxial Administration Set—Intrathecal Delivery	II	PYR	880.5440
High Level Disinfection Reprocessing Instrument For Ultrasonic Transducers, Liquid	II	PSW	892.1570
Pediatric/Child Facemask	II	OXZ	878.4040
Normalizing Quantitative Electroencephalograph Software	II	OLU	882.1400
Computerized Cognitive Assessment Aid	II	PKQ	882.1470
Physiological Signal Based Seizure Monitoring System	II	POS	882.1580
Computerized Behavioral Therapy Device For Psychiatric Disorders	II	PWE	882.5801
Monitor, Phonocardiographic, Fetal	II	HFP	884.2640
Monitor, Cardiac, Fetal	II	KXN	884.2600
Digital Pathology Display	II	PZZ	864.3700
Digital Pathology Image Viewing And Management Software	II	QKQ	864.3700

[22] FDA, *Product Classification Database, https://www.fda.gov/medical-devices/classify-your-medical-device/product-code-classification-database.*

[23] FDA, *MAUDE—Manufacturer and User Facility Device Experience, https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfmaude/search.cfm.*

[24] *Id.*

[25] *E.g.,* 85 FR 70003, 70006 (Dec. 20, 2019).

[26] *See* Patrick J. McGrather, *The FDA's MAUDE: Useful Insights for Medical Devices* (Oct. 31, 2017), *https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2017/manufacture-and-user-facility-device-experience/.*

[27] 2011 Hearing at 30.

[28] FDA, *Manufacturer and User Facility Device Experience Database—(MAUDE), https://www.fda.gov/medical-devices/mandatory-reporting-requirements-manufacturers-importers-and-device-user-facilities/manufacturer-and-user-facility-device-experience-database-maude.*

TABLE 2—REVIEW DEVICES WITH ZERO ADVERSE EVENT REPORTS IN MAUDE FOR THE TIME PERIOD NOVEMBER 1, 2010 TO NOVEMBER 30, 2020—Continued

Device description	Device class	Product code	Section in 21 CFR
System, Imaging, Holography, Acoustic	II	NCS	892.1550
Lung Computed Tomography System, Computer-Aided Detection	II	OEB	892.2050
Chest X-Ray Computer Aided Detection	II	OMJ	892.2050
Computer-Assisted Diagnostic Software For Lesions Suspicious For Cancer	II	POK	892.2060
Radiological Computer-Assisted Triage And Notification Software	II	QAS	892.2080
Radiological Computer Assisted Detection/Diagnosis Software For Fracture	II	QBS	892.2090
Radiological Computer Assisted Detection/Diagnosis Software For Lesions Suspicious For Cancer.	II	QDQ	892.2090
Radiological Computer-Assisted Prioritization Software For Lesions	II	QFM	892.2080
X-Ray Angiographic Imaging Based Coronary Vascular Simulation Software Device	II	QHA	892.1600
Automated Radiological Image Processing Software	II	QIH	892.2050
Image Acquisition And/Or Optimization Guided By Artificial Intelligence	II	QJU	892.2100
Apparatus, Vestibular Analysis	Unclassified	LXV	N/A

Another 43 devices had no reports in MAUDE following declaration of the PHE, and the waiver of the 510(k) premarket notification requirement, with anywhere from 1 to 86 reports in MAUDE prior to the PHE for those same devices. For the ten-year period spanning November 1, 2010 to November 30, 2020, there were a total of 637 reports in MAUDE associated with theses 43 devices listed in Table 3.1. This equates to about 1.5 MAUDE reports per year per device. Table 3.1 below shows each device with the corresponding number of adverse events before and after the PHE.

TABLE 3.1—REVIEW DEVICES WITH ZERO ADVERSE EVENTS POST-PHE AND 86 OR FEWER ADVERSE EVENTS PRE-PHE IN MAUDE

Device description	Device class	Product code	Section in 21 CFR	MAUDE events November 1, 2010 to PHE	MAUDE events Post-PHE to November 30, 2020
Patient Examination Glove, Specialty	I	LZC	880.6250	46	0
Radiation Attenuating Medical Glove	I	OPH	880.6250	1	0
Powder-Free Non-Natural Rubber Latex Surgeon's Gloves	I	OPA	878.4460	1	0
Powder-Free Guayle Rubber Examination Glove	I	OIG	880.6250	2	0
Latex Patient Examination Glove	I	LYY	880.6250	48	0
Meter, Peak Flow, Spirometry	II	BZH	868.1860	27	0
Monitor, Apnea, Facility Use	II	FLS	868.2377	86	0
Monitor, Apnea, Home Use	II	NPF	868.2377	41	0
Oximeter, Reprocessed	II	NLF	870.2700	65	0
Stethoscope, Electronic	II	DQD	870.1875	2	0
Defoamer, Cardiopulmonary Bypass	II	DTP	870.4230	4	0
Filter, Blood, Cardiotomy Suction Line, Cardiopulmonary Bypass	II	JOD	870.4270	2	0
Detector, Bubble, Cardiopulmonary Bypass	II	KRL	870.4205	44	0
Cpb Check Valve, Retrograde Flow, In-Line	II	MJJ	870.4400	12	0
Sterilizer, Ethylene-Oxide Gas	II	FLF	880.6860	29	0
Cabinet, Ethylene-Oxide Gas Aerator	II	FLI	880.6100	2	0
Purifier, Air, Ultraviolet, Medical	II	FRA	880.6500	1	0
Cleaner, Air, Medical Recirculating	II	FRF	880.5045	7	0
Controller, Infusion, Intravascular, Electronic	II	LDR	880.5725	27	0
Cleaners, Medical Devices	II	MDZ	880.6992	5	0
Percutaneous, Implanted, Long-Term Intravascular Catheter Accessory For Catheter Position.	II	OMF	880.5970	9	0
N95 Respirator With Antimicrobial/Antiviral Agent For Use By The General Public In Public Health Medical Emergencies.	II	ORW	880.6260	1	0
Two Or More Sterilant Sterilizer	II	PJJ	880.6860	6	0
High Level Disinfection Reprocessing Instrument For Ultrasonic Transducers, Mist.	II	OUJ	892.1570	3	0
Gown, Patient	II	FYB	878.4040	1	0
Surgical Mask With Antimicrobial/Antiviral Agent	II	OUK	878.4040	1	0
Cerebral Oximeter	II	QEM	870.2700	2	0
Device, Sleep Assessment	II	LEL	882.5050	4	0
Standard Polysomnograph With Electroencephalograph	II	OLV	882.1400	9	0
Source Localization Software For Electroencephalograph Or Magnetoencephalograph.	II	OLX	882.1400	2	0
Automatic Event Detection Software For Polysomnograph With Electroencephalograph.	II	OLZ	882.1400	1	0
Amplitude-Integrated Electroencephalograph	II	OMA	882.1400	1	0

TABLE 3.1—REVIEW DEVICES WITH ZERO ADVERSE EVENTS POST-PHE AND 86 OR FEWER ADVERSE EVENTS PRE-PHE IN MAUDE—Continued

Device description	Device class	Product code	Section in 21 CFR	MAUDE events November 1, 2010 to PHE	MAUDE events Post-PHE to November 30, 2020
Automatic Event Detection Software For Full-Montage Electroencephalograph.	II	OMB	882.1400	4	0
Burst Suppression Detection Software For Electroencephalograph	II	ORT	882.1400	1	0
Monitor, Heart Rate, Fetal, Ultrasonic	II	HEL	884.2660	12	0
Transducer, Ultrasonic, Obstetric	II	HGL	884.2960	6	0
Uterine Electromyographic Monitor	II	OSP	884.2720	3	0
Tonometer, Ac-Powered	II	HKX	886.1930	1	0
Tonometer, Manual	II	HKY	886.1930	8	0
Automated Digital Image Manual Interpretation Microscope	II	OEO	864.1860	1	0
System, X-Ray, Tomographic	II	IZF	892.1740	35	0
Analyzer, Medical Image	II	MYN	892.2070	1	0
C-Arm Fluoroscopic X-Ray System	II	RCC	892.1650	73	0

The Department further analyzed the details of the MAUDE reports listed in Table 3.1. For the 5 class I glove devices listed, there were 98 reports. As shown in Table 3.2 below, after review of the detailed narratives for those 98 reports, they can be broken down into eight categories.

TABLE 3.2—MAUDE REPORT BREAKDOWN FOR 5 CLASS I DEVICES IN TABLE 3.1

Device description (Product Code)	MAUDE report category							
	Rip/tear/hole	Discolor/debris	Allergy/skin issue	Not device related	Improper use	Mislabeled	Odor	Total
Patient Examination Glove, Specialty (LZC)	22	19	4	1	0	0	0	46
Radiation Attenuating Medical Glove (OPH)	0	0	0	0	1	0	0	1
Powder-Free Non-Natural Rubber Latex Surgeon's Gloves (OPA)	0	0	1	0	0	0	0	1
Powder-Free Guayle Rubber Examination Glove (OIG)	0	0	2	0	0	0	0	2
Latex Patient Examination Glove (LYY)	6	7	29	4	0	1	1	48
Total	28	26	36	5	1	1	1	98

More than half of the reports (55%) related to material flaws such as tears, discoloration, or foreign debris in the gloves. For the 36 allergic reaction reports, there was only one report connected with a hospital visit for which the patient was ultimately monitored and discharged. There are 5 MAUDE events from which the report narrative does not provide a basis to infer that the device itself caused the harm.[29] None of the 98 reports involved a death.

The 38 class II devices listed in Table 3.1 were connected to another 539 MAUDE reports. Of those reports, 322 (59.7%) involved device malfunctions, 71 (13.2%) involved injuries, 22 (4.1%) involved deaths, and 124 (23%) have the event type listed as ''other'' or ''NA.'' Table 3.3 below provides the breakdown of the 539 MAUDE reports by device type.

TABLE 3.3—MAUDE REPORT BREAKDOWN FOR 38 CLASS II DEVICES IN TABLE 3.1

Device description	Product code	MAUDE report category					
		Malfunction	Injury	Death	Other	NA	Total
Meter, Peak Flow, Spirometry	BZH	26	1	0	0	0	27
Monitor, Apnea, Facility Use	FLS	52	9	16	9	0	86
Monitor, Apnea, Home Use	NPF	34	5	2	0	0	41
Oximeter, Reprocessed	NLF	49	14	0	0	2	65
Stethoscope, Electronic	DQD	1	0	0	1	0	2
Defoamer, Cardiopulmonary Bypass	DTP	3	1	0	0	0	4
Filter, Blood, Cardiotomy Suction Line, Cardiopulmonary Bypass	JOD	1	0	0	1	0	2

[29] For example, there was one MAUDE incident where a user reported suffering a third-degree burn after ''pouring boiling nitric acid into a beaker and without warning a chemical reaction occurred causing acid to spill onto the wrist.'' Nothing in the report indicates the gloves themselves caused the burn or otherwise exacerbated the burn.

TABLE 3.3—MAUDE REPORT BREAKDOWN FOR 38 CLASS II DEVICES IN TABLE 3.1—Continued

Device description	Product code	MAUDE report category					
		Malfunction	Injury	Death	Other	NA	Total
Detector, Bubble, Cardiopulmonary Bypass	KRL	33	0	0	1	10	44
Cpb Check Valve, Retrograde Flow, In-Line	MJJ	11	1	0	0	0	12
Sterilizer, Ethylene-Oxide Gas	FLF	7	9	0	1	12	29
Cabinet, Ethylene-Oxide Gas Aerator	FLI	0	2	0	0	0	2
Purifier, Air, Ultraviolet, Medical	FRA	1	0	0	0	0	1
Cleaner, Air, Medical Recirculating	FRF	6	0	0	0	1	7
Controller, Infusion, Intravascular, Electronic	LDR	27	0	0	0	0	27
Cleaners, Medical Devices	MDZ	4	0	0	1	0	5
Percutaneous, Implanted, Long-Term Intravascular Catheter Accessory For Catheter Position.	OMF	3	2	0	4	0	9
N95 Respirator With Antimicrobial/Antiviral Agent For Use By The General Public In Public Health Medical Emergencies.	ORW	1	0	0	0	0	1
Two Or More Sterilant Sterilizer	PJJ	0	6	0	0	0	6
High Level Disinfection Reprocessing Instrument For Ultrasonic Transducers, Mist.	OUJ	1	1	0	1	0	3
Gown, Patient	FYB	0	0	1	0	0	1
Surgical Mask With Antimicrobial/Antiviral Agent	OUK	0	1	0	0	0	1
Cerebral Oximeter	QEM	1	1	0	0	0	2
Device, Sleep Assessment	LEL	4	0	0	0	0	4
Standard Polysomnograph With Electroencephalograph	OLV	7	2	0	0	0	9
Source Localization Software For Electroencephalograph Or Magnetoencephalograph.	OLX	1	1	0	0	0	2
Automatic Event Detection Software For Polysomnograph With Electroencephalograph.	OLZ	0	1	0	0	0	1
Amplitude-Integrated Electroencephalograph	OMA	1	0	0	0	0	1
Automatic Event Detection Software For Full-Montage Electroencephalograph.	OMB	1	0	0	1	2	4
Burst Suppression Detection Software For Electroencephalograph.	ORT	1	0	0	0	0	1
Monitor, Heart Rate, Fetal, Ultrasonic	HEL	9	2	1	0	0	12
Transducer, Ultrasonic, Obstetric	HGL	0	6	0	0	0	6
Uterine Electromyographic Monitor	OSP	1	1	1	0	0	3
Tonometer, Ac-Powered	HKX	0	0	0	0	1	1
Tonometer, Manual	HKY	3	4	0	1	0	8
Automated Digital Image Manual Interpretation Microscope	OEO	1	0	0	0	0	1
System, X-Ray, Tomographic	IZF	31	1	1	1	1	35
Analyzer, Medical Image	MYN	1	0	0	0	0	1
C-Arm Fluoroscopic X-Ray System	RCC	0	0	0	1	72	73
Total		322	71	22	23	101	539

An additional 32 devices had from 1 to 32 reports in MAUDE after the PHE began and anywhere from 1 to 78 reports in MAUDE from November 1, 2010 to the start of the PHE. These devices are shown in Table 4.1 below.

TABLE 4.1—REVIEW DEVICES WITH MAUDE REPORTS BEFORE AND AFTER PHE

Device description	Device class	Product code	Section in 21 CFR	MAUDE events November 1, 2010 to PHE	MAUDE events Post-PHE to November 30, 2020
Vinyl Patient Examination Glove	I	LYZ	880.6250	40	1
Mechanical Ventilator	II	ONZ	868.5895	2	1
Cannula, Arterial, Cardiopulmonary Bypass (Cpb), Embolism Protection.	II	NCP	870.4210	6	1
Dual Lumen Ecmo Cannula	II	PZS	870.4100	2	4
Respirator, N95, For Use By The General Public In Public Health Medical Emergencies.	II	NZJ	880.6260	1	1
Sterilizer Automated Loading System	II	PEC	880.6880	8	1
Infusion Safety Management Software	II	PHC	880.5725	6	1
Gown, Isolation, Surgical	II	FYC	878.4040	12	1
Non-Normalizing Quantitative Electroencephalograph Software	II	OLT	882.1400	12	1
Monitor, Ultrasonic, Fetal	II	KNG	884.2660	16	2
Whole Slide Imaging System	II	PSY	864.3700	2	1
Oxygenator, Long Term Support Greater Than 6 Hours	II	BZG	868.1840	10	1
Transmitters And Receivers, Electrocardiograph, Telephone	II	BZQ	868.2375	38	8

TABLE 4.1—REVIEW DEVICES WITH MAUDE REPORTS BEFORE AND AFTER PHE—Continued

Device description	Device class	Product code	Section in 21 CFR	MAUDE events November 1, 2010 to PHE	MAUDE events Post-PHE to November 30, 2020
Extracorporeal System For Long-Term Respiratory/Cardiopulmonary Failure.	II	NFB	868.5905	24	1
Catheter, Percutaneous, Intraspinal, Short Term	II	NHJ	868.5905	18	2
Implanted Subcutaneous Securement Catheter	II	NHK	868.5905	78	1
Subcutaneous Implanted Apheresis Port	II	QAV	868.5454	0	1
Non-Coring (Huber) Needle	II	BYS	870.4100	0	1
Administrations Sets With Neuraxial Connectors	II	DXH	870.2920	18	5
Port & Catheter, Implanted, Subcutaneous, Intraventricular	II	QJZ	870.4100	0	12
Hood, Surgical	II	MAJ	868.5120	17	1
N95 Respirator With Antimicrobial/Antiviral Agent	II	OKC	880.5970	16	1
Reduced- Montage Standard Electroencephalograph	II	PTD	880.5965	40	32
Monitor, Uterine Contraction, External (For Use In Clinic)	II	PTI	880.5570	36	10
Coil, Magnetic Resonance, Specialty	II	PWH	880.5440	0	5
Solid State Fluoroscopic X-Ray Imager	II	LKG	882.5550	20	1
Oxygenator, Long Term Support Greater Than 6 Hours	II	FXY	878.4040	20	1
Transmitters And Receivers, Electrocardiograph, Telephone	II	ONT	878.4040	0	1
Extracorporeal System For Long-Term Respiratory/Cardiopulmonary Failure.	II	OMC	882.1400	0	1
Catheter, Percutaneous, Intraspinal, Short Term	II	HFM	884.2720	13	1
Implanted Subcutaneous Securement Catheter	II	MOS	892.1000	72	1
Subcutaneous Implanted Apheresis Port	II	QHY	892.1650	0	1

Table 4.2 presents the devices in Table 4.1 broken down by type of MAUDE. Of the 630 MAUDE reports analyzed, the majority (383 or 60.7%) involved product malfunctions with a limited number connected to death (24 or 3.8%).

TABLE 4.2—REVIEW DEVICES IN TABLE 4.1 BY MAUDE REPORT

Device descriptions	Device class	Product code	MAUDE Reports					
			Malfunction	Death	Injury	Other	NA	Total
Vinyl Patient Examination Glove	I	LYZ	20	0	19	1	1	41
Mechanical Ventilator	II	ONZ	1	1	1	0	0	3
Cannula, Arterial, Cardiopulmonary Bypass (Cpb), Embolism Protection.	II	NCP	2	0	5	0	0	7
Dual Lumen Ecmo Cannula	II	PZS	1	1	4	0	0	6
Respirator, N95, For Use By The General Public In Public Health Medical Emergencies.	II	NZJ	1	0	1	0	0	2
Sterilizer Automated Loading System	II	PEC	7	0	2	0	0	9
Infusion Safety Management Software	II	PHC	7	0	0	0	0	7
Gown, Isolation, Surgical	II	FYC	12	0	1	0	0	13
Non-Normalizing Quantitative Electroencephalograph Software.	II	OLT	11	2	0	0	0	13
Monitor, Ultrasonic, Fetal	II	KNG	2	1	15	0	0	18
Whole Slide Imaging System	II	PSY	2	0	1	0	0	3
Oxygenator, Long Term Support Greater Than 6 Hours.	II	BZG	7	0	2	1	1	11
Transmitters And Receivers, Electrocardiograph, Telephone.	II	BZQ	38	5	3	0	0	46
Extracorporeal System For Long-Term Respiratory/ Cardiopulmonary Failure.	II	NFB	11	4	9	1	0	25
Catheter, Percutaneous, Intraspinal, Short Term	II	NHJ	10	1	9	0	0	20
Implanted Subcutaneous Securement Catheter	II	NHK	68	4	6	0	1	79
Subcutaneous Implanted Apheresis Port	II	QAV	1	0	0	0	0	1
Non-Coring (Huber) Needle	II	BYS	1	0	0	0	0	1
Administrations Sets With Neuraxial Connectors	II	DXH	9	1	9	0	4	23
Port & Catheter, Implanted, Subcutaneous, Intraventricular.	II	QJZ	9	1	2	0	0	12
Hood, Surgical	II	MAJ	12	0	6	0	0	18
N95 Respirator With Antimicrobial/Antiviral Agent	II	OKC	12	0	3	1	1	17
Reduced- Montage Standard Electroencephalograph.	II	PTD	52	1	19	0	0	72
Monitor, Uterine Contraction, External (For Use In Clinic).	II	PTI	22	0	24	0	0	46
Coil, Magnetic Resonance, Specialty	II	PWH	5	0	0	0	0	5

TABLE 4.2—REVIEW DEVICES IN TABLE 4.1 BY MAUDE REPORT—Continued

Device descriptions	Device class	Product code	MAUDE Reports					
			Malfunction	Death	Injury	Other	NA	Total
Solid State Fluoroscopic X-Ray Imager	II	LKG	16	1	4	0	0	21
Oxygenator, Long Term Support Greater Than 6 Hours.	II	FXY	19	0	2	0	0	21
Transmitters And Receivers, Electrocardiograph, Telephone.	II	ONT	0	0	1	0	0	1
Extracorporeal System For Long-Term Respiratory/Cardiopulmonary Failure.	II	OMC	1	0	0	0	0	1
Catheter, Percutaneous, Intraspinal, Short Term	II	HFM	10	1	3	0	0	14
Implanted Subcutaneous Securement Catheter	II	MOS	13	0	52	7	1	73
Subcutaneous Implanted Apheresis Port	II	QHY	1	0	0	0	0	1
		Total	383	24	203	11	9	630

III. Exemption from 510(k) Premarket Notification Requirement

A. Class I Devices

Section 510(*l*)(2)(A)–(B) of the FD&C Act, 21 U.S.C. 360(*l*)(2)(A)–(B), provides that ''the Secretary shall identify through publication in the **Federal Register**, any type of class I device that the Secretary determines no longer requires a report under subsection (k) to provide reasonable assurance of safety and effectiveness'' and that ''[u]pon such publication—each type of class I device so identified shall be exempt from the requirement for a report under subsection (k); and the classification regulation applicable to each such type of device shall be deemed amended to incorporate such exemption.''

In view of the complete lack of or de minimis number of adverse events in MAUDE following FDA's waiver of the premarket notification requirement for the class I devices listed in Tables 2, 3.1, and 4.1, the Department has concluded that the premarket notification requirement is no longer required to provide reasonable assurance of the safety and efficacy of those devices. As such, as of this Notice, the 7 class I devices listed in Table 5 below shall be exempt from the 510(k) premarket notification requirement.

TABLE 5—CLASS I DEVICES IMMEDIATELY EXEMPT FROM 510(k) NOTIFICATION REQUIREMENT

Device description	Device class	Product code	Section in 21 CFR
Powder-Free Polychloroprene Patient Examination Glove	I	OPC	880.6250
Patient Examination Glove, Specialty	I	LZC	880.6250
Radiation Attenuating Medical Glove	I	OPH	880.6250
Powder-Free Non-Natural Rubber Latex Surgeon''s Gloves	I	OPA	878.4460
Powder-Free Guayle Rubber Examination Glove	I	OIG	880.6250
Latex Patient Examination Glove	I	LYY	880.6250
Vinyl Patient Examination Glove	I	LYZ	880.6250

B. Class II Devices

Section 510(m)(2) of the FD&C Act, 21 U.S.C. 360(m)(2), provides that, after a 60-calendar-day-notice comment period, ''the Secretary may exempt a class II device from the requirement to submit a report under subsection (k) . . . if the Secretary determines that such report is not necessary to assure the safety and effectiveness of the device.'' Within 120 days of publication, ''the Secretary shall publish an order in the **Federal Register** that sets forth the final determination of the Secretary regarding the exemption of the device that was the subject of the notice.'' Given the lack of any adverse event reports in MAUDE for class II and the unclassified medical devices listed in Table 2, and the lack of non-death-related adverse event reports for class II devices in Tables 3.3 and 4.2, the Department has determined that 510(k) premarket notification for the 84 class II devices and the unclassified device listed in Table 6 below is no longer necessary to assure the safety and effectiveness of those devices.

TABLE 6—CLASS II DEVICES AND UNCLASSIFIED DEVICES PROPOSED EXEMPT FROM 510(k) REQUIREMENT

Device description	Device class	Product code	Section in 21 CFR
Ventilator, Continuous, Minimal Ventilatory Support, Home Use	II	NQY	868.5895
Airway Monitoring System	II	OQU	868.5730
Impedance Measuring Device Utilizing Oscillation Techniques	II	PNV	868.1840
Gauge, Pressure, Coronary, Cardiopulmonary Bypass	II	DXS	870.4310
Valve, Pressure Relief, Cardiopulmonary Bypass	II	MNJ	870.4400
Oximeter, Tissue Saturation, Reprocessed	II	NMD	870.2700
Multivariate Vital Signs Index	II	PLB	870.2300
Electrocardiograph Software For Over-The-Counter Use	II	QDA	870.2345
Sterilizer, Dry Heat	II	KMH	880.6870
Check Valve, Retrograde Flow (In-Line)	II	MJF	880.5440

TABLE 6—CLASS II DEVICES AND UNCLASSIFIED DEVICES PROPOSED EXEMPT FROM 510(k) REQUIREMENT—Continued

Device description	Device class	Product code	Section in 21 CFR
Intravascular Administration Set, Automated Air Removal System	II	OKL	880.5445
Neuraxial Administration Set—Intrathecal Delivery	II	PYR	880.5440
High Level Disinfection Reprocessing Instrument For Ultrasonic Transducers, Liquid	II	PSW	892.1570
Pediatric/Child Facemask	II	OXZ	878.4040
Normalizing Quantitative Electroencephalograph Software	II	OLU	882.1400
Computerized Cognitive Assessment Aid	II	PKQ	882.1470
Physiological Signal Based Seizure Monitoring System	II	POS	882.1580
Computerized Behavioral Therapy Device For Psychiatric Disorders	II	PWE	882.5801
Monitor, Phonocardiographic, Fetal	II	HFP	884.2640
Monitor, Cardiac, Fetal	II	KXN	884.2600
Digital Pathology Display	II	PZZ	864.3700
Digital Pathology Image Viewing And Management Software	II	QKQ	864.3700
System, Imaging, Holography, Acoustic	II	NCS	892.1550
Lung Computed Tomography System, Computer-Aided Detection	II	OEB	892.2050
Chest X-Ray Computer Aided Detection	II	OMJ	892.2050
Computer-Assisted Diagnostic Software For Lesions Suspicious For Cancer	II	POK	892.2060
Radiological Computer-Assisted Triage And Notification Software	II	QAS	892.2080
Radiological Computer Assisted Detection/Diagnosis Software For Fracture	II	QBS	892.2090
Radiological Computer Assisted Detection/Diagnosis Software For Lesions Suspicious For Cancer	II	QDQ	892.2090
Radiological Computer-Assisted Prioritization Software For Lesions	II	QFM	892.2080
X-Ray Angiographic Imaging Based Coronary Vascular Simulation Software Device	II	QHA	892.1600
Automated Radiological Image Processing Software	II	QIH	892.2050
Image Acquisition And/Or Optimization Guided By Artificial Intelligence	II	QJU	892.2100
Apparatus, Vestibular Analysis	Unclassified.	LXV	N/A
Meter, Peak Flow, Spirometry	II	BZH	868.1860
Oximeter, Reprocessed	II	NLF	870.2700
Stethoscope, Electronic	II	DQD	870.1875
Defoamer, Cardiopulmonary Bypass	II	DTP	870.4230
Filter, Blood, Cardiotomy Suction Line, Cardiopulmonary Bypass	II	JOD	870.4270
Detector, Bubble, Cardiopulmonary Bypass	II	KRL	870.4205
Cpb Check Valve, Retrograde Flow, In-Line	II	MJJ	870.4400
Sterilizer, Ethylene-Oxide Gas	II	FLF	880.6860
Cabinet, Ethylene-Oxide Gas Aerator	II	FLI	880.6100
Purifier, Air, Ultraviolet, Medical	II	FRA	880.6500
Cleaner, Air, Medical Recirculating	II	FRF	880.5045
Controller, Infusion, Intravascular, Electronic	II	LDR	880.5725
Cleaners, Medical Devices	II	MDZ	880.6992
Percutaneous, Implanted, Long-Term Intravascular Catheter Accessory For Catheter Position	II	OMF	880.5970
N95 Respirator With Antimicrobial/Antiviral Agent For Use By The General Public In Public Health Medical Emergencies.	II	ORW	880.6260
Two Or More Sterilant Sterilizer	II	PJJ	880.6860
High Level Disinfection Reprocessing Instrument For Ultrasonic Transducers, Mist	II	OUJ	892.1570
Surgical Mask With Antimicrobial/Antiviral Agent	II	OUK	878.4040
Cerebral Oximeter	II	QEM	870.2700
Device, Sleep Assessment	II	LEL	882.5050
Standard Polysomnograph With Electroencephalograph	II	OLV	882.1400
Source Localization Software For Electroencephalograph Or Magnetoencephalograph	II	OLX	882.1400
Automatic Event Detection Software For Polysomnograph With Electroencephalograph	II	OLZ	882.1400
Amplitude-Integrated Electroencephalograph	II	OMA	882.1400
Automatic Event Detection Software For Full-Montage Electroencephalograph	II	OMB	882.1400
Burst Suppression Detection Software For Electroencephalograph	II	ORT	882.1400
Transducer, Ultrasonic, Obstetric	II	HGL	884.2960
Tonometer, Ac-Powered	II	HKX	886.1930
Tonometer, Manual	II	HKY	886.1930
Automated Digital Image Manual Interpretation Microscope	II	OEO	864.1860
Analyzer, Medical Image	II	MYN	892.2070
C-Arm Fluoroscopic X-Ray System	II	RCC	892.1650
Cannula, Arterial, Cardiopulmonary Bypass (Cpb), Embolism Protection	II	NCP	870.4210
Respirator, N95, For Use By The General Public In Public Health Medical Emergencies	II	NZJ	880.6260
Sterilizer Automated Loading System	II	PEC	880.6880
Infusion Safety Management Software	II	PHC	880.5725
Gown, Isolation, Surgical	II	FYC	878.4040
Whole Slide Imaging System	II	PSY	864.3700
Oxygenator, Long Term Support Greater Than 6 Hours	II	BZG	868.1840
Subcutaneous Implanted Apheresis Port	II	QAV	868.5454
Non-Coring (Huber) Needle	II	BYS	870.4100
Hood, Surgical	II	MAJ	868.5120
N95 Respirator With Antimicrobial/Antiviral Agent	II	OKC	880.5970
Monitor, Uterine Contraction, External (For Use In Clinic)	II	PTI	880.5570
Coil, Magnetic Resonance, Specialty	II	PWH	880.5440

TABLE 6—CLASS II DEVICES AND UNCLASSIFIED DEVICES PROPOSED EXEMPT FROM 510(k) REQUIREMENT—Continued

Device description	Device class	Product code	Section in 21 CFR
Oxygenator, Long Term Support Greater Than 6 Hours	II	FXY	878.4040
Transmitters And Receivers, Electrocardiograph, Telephone	II	ONT	878.4040
Extracorporeal System For Long-Term Respiratory/Cardiopulmonary Failure	II	OMC	882.1400
Implanted Subcutaneous Securement Catheter	II	MOS	892.1000
Subcutaneous Implanted Apheresis Port	II	QHY	892.1650

C. Impact of Exemptions on Patient Access to Medical Devices

With this Notice, the Department is immediately exempting 7 devices from the premarket notification requirement, and proposes to exempt an additional 84 devices from the requirement after public comment is closed. As noted above in Part I.A, estimates on the cost of preparing a 510(k) submission range from $100,000 to $4 million. The exemptions provided for and proposed under this Notice for these 91 device classes could eliminate anywhere from $9.1 to $364 million in startup costs if there were one new entrant into each device market. Savings could further accrue based on each new market entrant. Instead of being costs passed along to patients and taxpayers, these savings could be invested in other areas such as research and development and manufacturing.

At the same time, should these waivers go into effect as proposed, patients stand to gain more immediate access to new products that would otherwise be required to obtain a 510(k) clearance prior to marketing.

The exemptions provided for in this Notice also conserve FDA's scarce review resources. The COVID–19 PHE stretched FDA's review capacity. Under this Notice, FDA's review resources can be redeployed to review other innovative technology, to include devices designed to mitigate the impact of COVID–19.

IV. Request for Information, Data, and Further Study

HHS' review in this Notice warrants expansion and further study. FDA's medical device Product Code database contains 6,651 unique codes (to include those discussed in this Notice). Of those unique codes, 157 are for class I devices that require 510(k) clearance, and 2,662 are for class II devices that require 510(k) clearance. Applying the $100,000 to $4 million in estimated costs for 510(k) preparation and submission to these 2,819 devices yields approximately $281.9 million to $11.276 billion in startup costs, assuming one new market entrant in each of the 2,819 device classes. Further, again assuming a 90-day review period and one new device entrant in each of the 2,819 device classes that require 510(k) notification, FDA's current approach creates 253,710 review days or 695.1 review years between Americans and new devices. The question of whether the 510(k) notice is justified in view of safety and efficacy concerns merits comprehensive analysis for the benefit of Americans. The Department seeks public comment, research, and analysis on whether other devices should be exempt from the premarket notification requirement.

At a more detailed level, the Department observed internal inconsistencies in FDA's regulation of some device classes that merit discussion. Manual stethoscopes are exempt from the premarket notification requirement. 21 CFR 870.1875(a)(2). Electronic stethoscopes are also exempt, but only if the device ''is a lung sound monitor.'' 21 CFR 870.1875(b)(2). Similarly, FDA exempts ''clinical mercury thermometer . . . device[s] used to measure oral, rectal, or axillary (armpit) body temperature using the thermal expansion of mercury'' from the 510(k) premarket notification requirement. 21 CFR 880.2920. By contrast, clinical electronic thermometers which never enter into any body orifice require 510(k) premarket notification. 21 CFR 880.2910. These apparent inconsistencies merit scientific scrutiny. To that end, the Department seeks public comment as to whether other inconsistencies in the medical device regulatory framework exist.

Dated: January 8, 2021.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–00787 Filed 1–14–21; 8:45 am]

BILLING CODE 4150–26–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1657]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Survey of Drug Product Manufacturing, Processing, and Packing Facilities

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by February 16, 2021.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comment'' or by using the search function. The title of this information collection is ''Survey of Drug Product Manufacturing, Processing, and Packing Facilities.'' Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Survey of Drug Product Manufacturing, Processing, and Packing Facilities—21 CFR parts 210 and 211

OMB Control Number 0910–NEW

FDA has the responsibility to regulate the safety, as well as the efficacy and quality, of drugs in the United States. Under the Food and Drug Administration Safety and Innovation Act, enacted in 2012, the term current good manufacturing practice (CGMP) includes the implementation of oversight and controls over the manufacturing, processing, and packing of drugs to ensure quality, including managing the risk of, and establishing the safety of, raw materials used in the manufacture of drugs. The safety and availability of drugs can be affected by raw material suppliers, the material supply chain, and the facility's controls over raw material quality. Risk management enables manufacturers to make proper choices and ensure the continued suitability of these materials and supply chains. The Agency needs to better understand how manufacturers, processors, and packers of drug products approach managing risks related to components, containers, and closures as well as the supply and distribution chains between the producers of raw materials and drug product manufacturers, processors, and packers. Such information will allow FDA to examine the potential economic impact of changes to regulations that govern the manufacturing, processing, and packing of drugs.

In the **Federal Register** of September 18, 2020 (85 FR 58370), FDA published a 60-day notice requesting public comment on the proposed collection of information. Although one comment was received, it was not responsive to the four collection of information topics solicited and therefore will not be discussed in this document.

This is a one-time information collection, the primary purpose of which is to collect industry-wide data on how facilities that manufacture, process, and pack drug products for use in humans and/or animals ensure the quality of their operations, including their current risk management approaches and practices for ensuring the quality and suitability of the drug components, containers, and closures that they use. FDA intends to use this information to inform its economic analyses of potential updates to CGMPs for human and animal drug product manufacturing, processing, and packing facilities under 21 CFR parts 210 and 211. Survey respondents will be contacted by email or, if necessary, by regular mail. Respondents will be able to take the survey online or, if requested, they can return a hard copy by mail. FDA estimates the maximum burden of this collection of information as follows:

TABLE 1.—ESTIMATED BURDEN HOURS FOR ONE-TIME DATA COLLECTION[1]

Type of respondent/facility	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Group 1: Facilities in United States engaged in drug manufacturing (in addition to other possible activities).	394	1	394	1.1	433
Group 2: Facilities in United States *not* engaged in manufacturing but engaged in other forms of drug processing or packing (e.g., labeling, repacking, etc.).	333	1	333	0.75 (45 minutes)	250
Group 3: Facilities outside United States engaged in drug manufacturing (in addition to other possible activities).	407	1	407	2.20	895
Group 4: Facilities outside United States *not* engaged in manufacturing but engaged in other forms of drug processing or packing (e.g., labeling, repacking, etc.).	261	1	261	1.5	392
Total	1,395		1,395		1,970

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Burden hours are based on pretests of the survey and interviews with industry representatives and reflect the time required by each type of respondent to read the survey invitation and instructions and complete the survey questions. The total estimated one-time burden hours are 1,970.

Dated: January 11, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00838 Filed 1–14–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Faculty Loan Repayment Program; OMB No. 0915–0150—Revision

AGENCY: Health Resources and Services Administration, (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30 day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than February 16, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Lisa

Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Faculty Loan Repayment Program

OMB No.: 0915–0150—Revision.

Abstract: HRSA's Bureau of Health Workforce administers the Faculty Loan Repayment Program (FLRP). FLRP provides degree-trained health professionals from disadvantaged backgrounds based on environmental and/or economic factors the opportunity to enter into a contract with the HHS in exchange for the repayment of qualifying educational loans for a minimum of 2 years of service as a full-time or part-time faculty member at eligible health professions schools.

A 60-day notice published in the **Federal Register** on October 6, 2020, vol. 85, No. 194; pp. 63120–21. There were no public comments.

Need and Proposed Use of the Information: The information collected will be used to evaluate applicants' eligibility to participate in FLRP and to monitor FLRP related activities. The FLRP intends to include a Disadvantaged Background (DB) form in the FLRP application. FLRP applicants are required to provide certification from a health professions school previously attended that identifies the individual as coming from an economically or environmentally disadvantaged background. In the past, applicants provided this information in varying formats. The DB form is not requesting new information from FLRP applicants. The form will allow an easier method for applicants to compete and convey their DB status and will standardize the collection of information. The information collected will be used to evaluate applicants' rank and tier in the FLRP award process.

Likely Respondents: FLRP applicants and institutions providing employment to the applicants.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

Total Estimated Annualized burden hours:

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Eligible Applications	186	1	186	1	186
Institution/Loan Repayment Employment Form	*186	1	186	1	186
Authorization to Release Information Form	186	1	186	.25	46.5
Disadvantaged Background Form	186	1	186	.20	37.2
Total	744		744		455.70

*Respondent for this form is the institution for the applicant.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–00808 Filed 1–14–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0263]

Agency Information Collection Request. 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before March 16, 2021.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0263–60D, and project title for reference, to Sherrette Funn, the Reports Clearance Officer, *Sherrette.funn@hhs.gov,* or call 202–795–7714.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Incident Report Form—the Protection of Human Subjects: Assurance Identification/IRB Certification/Declaration of Exemption Form.

Type of Collection: OMB No. 0990–0263 Office of the Assistant Secretary for Health, Office for Human Research Protections.

Abstract: The Office of the Assistant Secretary for Health, Office for Human Research Protections is requesting is requesting a three-year extension of the Protection of Human Subjects: Assurance Identification/IRB Certification/Declaration of Exemption Form, OMB No. 0990–0263.

This form will facilitate prompt reporting of specific human subject

protection incidents to OHRP by organizations and institutions conducting or reviewing human subjects research, and will provide a simplified standardized format for the reports. The information collected on the form is to provide a simplified procedure for institutions engaged in research conducted or supported by the Department of Health and Human Services (HHS) to satisfy the requirements of HHS regulations for the protection of human subjects at 45 CFR 46.103 for assurance identification and IRB certification and declare exemption status.

Likely Respondents: Institutions engaged in research involving human subjects where the research is supported by HHS. Institutional use of the form is also relied upon by other federal departments and agencies that have codified or follow the Federal Policy for the Protection of Human Subjects (Common Rule), which is codified for HHS at 45 CFR part 46, subpart A.

ANNUALIZED BURDEN HOUR TABLE

Form name	Number of respondents	Number of responses per respondent	Hours per response	Response burden hours
Protection of Human Subjects: Assurance Identification/IRB Certification/ Declaration of Exemption	14,000	2	0.5	14,000

Dated: January 12, 2021.

Sherrette A. Funn,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2021–00934 Filed 1–14–21; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; Promoting Research on Music and Health: Phased Innovation Award for Music. Interventions (R61/R33 Clinical Trial Optional)

Date: March 12, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Complementary and Integrative Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Martina Schmidt, Ph.D.. Chief Office of Scientific Review, National Center for Complementary & Integrative Health, NIH, 6707 Democracy Blvd., Suite 401, Bethesda, MD 20892, 301–594–3456, *schmidma@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: January 12, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00923 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel BRAIN Initiative: Data Archives, Integration, and Standards.

Date: February 11, 2021.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Mental Health, 6001 Executive Blvd. Neuroscience Center, Room 6150, Bethesda, MD 20892, 301–435–1260, *jasenka.borzan@nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel Preventive Interventions in Primary Care Settings.

Date: February 12, 2021.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Marcy Ellen Burstein, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6143, MSC 9606, Bethesda, MD 20892–9606, 301–443–9699, *bursteinme@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: January 11, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00783 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the

provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group Reproduction, Andrology, and Gynecology Subcommittee.

Date: February 18, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development, 6710B Rockledge Drive, Rockledge Drive, Bethesda, MD 20817 (Video-Assisted Meeting).

Contact Person: Derek J. McLean, Ph.D., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver, National Institute of Child Health and Human Development, NIH 6710B, Rockledge Drive, Rm. 2125B, Bethesda, MD 20892–7002, (301) 443–5082, *derek.mclean@nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Initial Review Group Pediatrics Subcommittee.

Date: March 11, 2021.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development, 6710B Rockledge Drive, Bethesda, MD 20817 (Video-Assisted Meeting).

Contact Person: Joanna Kubler-Kielb, Ph.D., Scientific Review Officer, Scientific Review Branch (SRB), DER Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS 6710B, Rockledge Drive, Rm 2125C, Bethesda, MD 20817, 301–435–6916, *kielbj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: January 12, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00915 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–9: SBIR Contract Review Meeting.

Date: February 19, 2021.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850, 240–276–7975, *chufanee@mail.nih.gov.*

Name of Committee: National Cancer Institute, Special Emphasis Panel; TEP–2: SBIR Contract Review Meeting.

Date: March 4–5, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Ombretta Salvucci, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH 9609, Medical Center Drive, Room 7W264, Rockville, Maryland 20850, 240–276–7286, *salvucco@mail.nih.gov.*

Name of Committee: National Cancer Institute, Special Emphasis Panel; SEP–6: NCI Clinical and Translational R21 and Omnibus R03 Review.

Date: March 10, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH 9609, Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240–276–5122, *hasan.siddiqui@nih.gov.*

Name of Committee: National Cancer Institute, Special Emphasis Panel; SEP–9: Research Answers to NCI Provocative Questions.

Date: March 10, 2021.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove. 9609 Medical Center Drive, Room 7W116, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Klaus B. Piontek, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W116, Rockville, Maryland 20850, 240–276–5413, *klaus.piontek@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–5: Research Answers to NCI Provocative Questions.

Date: March 11, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Anita T. Tandle, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH 9609, Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–276–5085, *tandlea@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; R13 Conference Grant Review.

Date: March 11, 2021.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W552, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeanette Irene Marketon, Ph.D., Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W552, Rockville, Maryland 20850, 240–276–6780, *jeanette.marketon@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–6: SBIR Contract Review Meeting.

Date: March 11, 2021.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shakeel Ahmad, Ph.D., Chief, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850, 240–276–6442, *ahmads@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–1:

Research Answers to NCI Provocative Questions.

Date: March 17, 2021.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: John Paul Cairns, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850, 240–276–5415, *paul.cairns@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Investigation of the Transmission of Kaposi Sarcoma-Associated Herpesvirus.

Date: March 17, 2021.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Mukesh Kumar, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850, 240–276–6611, *mukesh.kumar3@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–3: NCI Clinical and Translational R21 and Omnibus R03.

Date: March 31, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review, Branch Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–6371, *decluej@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Preclinical Pharmacokinetic and Pharmacological Studies TEP.

Date: April 1, 2021.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shakeel Ahmad, Ph.D., Chief Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850, 240–276–6442 *ahmads@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Preclinical Toxicological Studies TEP.

Date: April 2, 2021.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850, 240–276–5856, *nadeem.khan@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 12, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00917 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Regulation, Learning and Ethology Study Section.

Date: February 11–12, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sara Louise Hargrave, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3170, Bethesda, MD 20892, (301) 443–7193, *hargravesl@mail.nih.gov.*

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Molecular Oncogenesis Study Section.

Date: February 17–18, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nywana Sizemore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, (301) 435–1718, *sizemoren@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Pathophysiology of Obesity and Metabolic Disease Study Section.

Date: February 17–18, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Raul Rojas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6185, Bethesda, MD 20892, (301) 451–6319, *rojasr@mail.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Pathobiology of Kidney Disease Study Section.

Date: February 17–18, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Atul Sahai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, (301) 435–1198, *sahaia@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Instrumentation and Systems Development Study Section.

Date: February 17–18, 2021.

Time: 9:30 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kee Forbes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7806, Bethesda, MD 20892, (301) 272–4865, *pyonkh2@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering

Integrated Review Group; Surgery, Anesthesiology and Trauma Study Section.

Date: February 17–18, 2021.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Weihua Luo, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, (301) 435–1170, *luow@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Biology Development and Disease Study Section.

Date: February 17–19, 2021.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Aruna K Behera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, (301) 435–6809, *beheraak@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Kidney, Nutrition, Obesity and Diabetes Study Section.

Date: February 17–18, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Steven Michael Frenk, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, (301) 480–8665, *frenksm@mail.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function D Study Section.

Date: February 17–18, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ian Frederick Thorpe, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–8662, *ian.thorpe@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 12, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00916 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Eye Council.

The meeting will be open to the public as indicated below. The February 12, 2021 National Advisory Eye Council Meeting will be held via a ZOOM Webinar. Instructions for accessing the meeting can be found at *https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec/national-advisory-eye-council-naec-meeting-agenda* .

Attendees and interested parties can submit questions and comments through written Q&A during the meeting, and for 15 days after the meeting, to *aes@nei.nih.gov*. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The Zoom Webinar will have sign language interpretation and closed captions. The open session (event) will be videocast by NIH with sign language interpretation and closed captioning. The link to the videocast is: https://videocast.nih.gov/watch=41219 .

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Eye Council National Institutes of Health.

Date: February 12, 2021.

Time: 10:00 a.m. to 11:30 a.m.

Agenda: Following opening remarks by the Director, NEI, there will be presentations by the staff of the Institute and discussions concerning Institute programs.

Place: National Eye Institute, National Institutes of Health 6700 Rockledge Drive, Suite 3400, Bethesda, MD 20892 (Virtual Meeting).

Date: February 12, 2021.

Closed: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Eye Institute, National Institutes of Health, 6700 Rockledge Drive, Suite 3400, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kathleen C. Anderson, Ph.D., Director, Division of Extramural Activities, National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3440, Bethesda, MD 20892, 301–451–2020, *kanders1@nei.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice within 15 days after the meeting. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.nei.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: January 11, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00784 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development

Special Emphasis Panel. Member Conflict SEP.

Date: February 26, 2021.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development, 6710B Rockledge Drive, Bethesda, MD 20892 (Video-Assisted Meeting).

Contact Person: Helen Huang, Ph.D. Scientific Review Officer Scientific Review Branch Eunice, Kennedy Shriver National Institute of Child Health and Human Development, NIH Bethesda, MD 20817 301–435–8207 *helen.huang@nih.gov*

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; Maternal and Pediatric Precision in Therapeutics Hub (P50)

Date: March 9–10, 2021.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development, 6710B Rockledge Drive, Bethesda, MD 20817 (Video-Assisted Meeting)

Contact Person: Christiane M. Robbins, Scientific Review Officer Scientific Review Branch, (SRB), DER Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS 6710B Rockledge Drive, Rm 2121A Bethesda, MD 20817 301–451–4989 *crobbins@mail.nih.gov*.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Maternal and Pediatric Precision in Therapeutics Hub (P30)

Date: March 11, 2021.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development, 6710B Rockledge Drive, Bethesda, MD 20817 (Video-Assisted Meeting)

Contact Person: Christiane M. Robbins Scientific Review Officer Scientific Review Branch (SRB), DER Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS 6710B Rockledge Drive, Rm 2121A Bethesda, MD 20817 301–451–4989 *crobbins@mail.nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: January 12, 2021.

Ronald J. Livingston, Jr.,

Program Analyst,Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00924 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Review of Dietary Biomarker Development Centers (U2C).

Date: February 17–18, 2021.

Time: 9:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Video Meeting).

Contact Person: Lan Tian, Ph.D., Scientific Review Officer, National Institute of Diabetes and Digestive and Kidney Diseases, National Institutes of Health, 6707 Democracy Boulevard, Room 7349, Bethesda, MD 20892–5452, (301) 496–7050, email: *tianl@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 12, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00920 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Council on Alcohol Abuse and Alcoholism, February 4, 2021, 11:00 a.m. to February 4, 2021, 5:00 p.m., National Institutes of Health, National Institute on Drug Abuse, 6700B Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on December 21, 2020, 85 FR 83101.

This notice is being amended to change the end time of the closed session as well as the start time and end time of the open session of the meeting. The closed session will now be held from 11:00 a.m. to 12:00 p.m. and the open session will now be held from 12:00 p.m. to 5:30 p.m. The meeting is partially closed to the public.

Dated: January 12, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00921 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development.

FOR FURTHER INFORMATION CONTACT: Licensing information may be obtained by communicating with Vidita Choudhry, Ph.D., Office of Technology Transfer and Development, National Heart, Lung, and Blood Institute, 31 Center Drive Room 4A29, MSC2479, Bethesda, MD 20892–2479; telephone: 301–594–4095; email: *vidita.choudhry@nih.gov.* A signed Confidential Disclosure Agreement may be required to receive any unpublished information.

SUPPLEMENTARY INFORMATION: Technology description follows.

High-Throughput COVID–19 Diagnostic Test That Detects Both Viral and Host Nucleic Acid

The virus that causes COVID–19 is designated severe acute respiratory syndrome coronavirus 2 (SARS-CoV–2). The rapid worldwide spread and impact of COVID–19 has created a need for accurate, reliable, and readily accessible testing on a massive scale. The subject invention describes development of a

massively paralleled multiplexed screening method using next generation sequencing (NGS). This method uses sample-specific barcoded indexes that detect both SARS–COV–2 virus and the host's transcriptional response to infection simultaneously. By matching existing laboratory protocols for PCR-based sample processing, this assay is easily incorporated into existing CLIA-certified facilities. This testing approach provides the capability for testing tens of thousands of patient samples in a large bolus, allowing accurate and fast-turnaround SARS-CoV–2 testing capacity at population scale, and permits massive scale monitoring of at-risk individuals with minimal processing delay.

Potential Commercial Applications: Diagnostic test for detecting infectious organisms, including SARS-CoV–2.

Competitive Advantages

- Reduction in reagents needed to perform a test, reducing test cost and bottleneck of critical reagents used during nucleic acid amplification.
- Simultaneously detect the pathogen and a host's transcriptional response to infection by the pathogen.
- Gene expression information from the donor can be used to predict disease severity.

Development Stage:

- Early stage.
- Data from tests of human samples available.

Inventors: Ozwaldo Alonso Lozoya (NIEHS), and Brian Papas (NIEHS).

Intellectual Property: HHS Reference No. E–241–2020–0; U.S Provisional Patent Application 63/116,031 filed November 19, 2020.

Licensing Contact: Vidita Choudhry, Ph.D.; 301–594–4095; *vidita.choudhry@nih.gov.* This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404.

Dated: January 8, 2021.

Bruce D. Goldstein,

Director, National Heart, Lung, and Blood Institute, Office of Technology Transfer and Development.

[FR Doc. 2021–00825 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; Maternal and Pediatric HIV/AIDS Research.

Date: March 12, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development, 6710B Rockledge Drive, Bethesda, MD 20817 (Video-Assisted Meeting).

Contact Person: Luis E. Dettin, Ph.D., M.S., M.A., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Rm. 2131B, Bethesda, MD 20892, (301) 827–8231, *luis_dettin@nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; Centers to Advance Research in Endometriosis (CARE) (P01 Clinical Trial Not Allowed).

Date: March 16–17, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6710B Rockledge Drive, Rockledge Drive, Bethesda, MD 20817 (Video-Assisted Meeting).

Contact Person: Derek J. McLean, Ph.D., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Rm. 2125B, Bethesda, MD 20892–7002, *Derek.McLean@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: January 12, 2021.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00918 Filed 1–14–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0016]

Meeting To Implement Pandemic Response Voluntary Agreement Under the Defense Production Act

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Announcement of meetings.

SUMMARY: The Federal Emergency Management Agency (FEMA) held a series of meetings to implement the Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic.

DATES: The first meeting took place on Wednesday, January 6, 2021, from 2 to 4 p.m. Eastern Time (ET). The second meeting took place on Thursday, January 7, 2021, from 2 to 4 p.m. ET. The third meeting took place on Friday, January 8, 2021, from 2 to 3:30 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Robert Glenn, Office of Business, Industry, Infrastructure Integration, via email at *OB3I@fema.dhs.gov* or via phone at (202) 212–1666.

SUPPLEMENTARY INFORMATION: Notice of these meetings is provided as required by section 708(h)(8) of the Defense Production Act (DPA), 50 U.S.C. 4558(h)(8), and consistent with 44 CFR part 332.

The DPA authorizes the making of ''voluntary agreements and plans of action'' with, among others, representatives of industry and business to help provide for the national defense.[1] The President's authority to facilitate voluntary agreements was delegated to the Secretary of Homeland Security with respect to responding to the spread of COVID–19 within the United States in Executive Order 13911.[2] The Secretary of Homeland Security has further delegated this authority to the FEMA Administrator.[3]

On August 17, 2020, after the appropriate consultations with the Attorney General and the Chairman of the Federal Trade Commission, FEMA completed and published in the **Federal Register** a ''Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to

[1] 50 U.S.C. 4558(c)(1).

[2] 85 FR 18403 (Apr. 1, 2020).

[3] DHS Delegation 09052, Rev. 00.1 (Apr. 1, 2020); DHS Delegation Number 09052 Rev. 00 (Jan. 3, 2017).

Respond to a Pandemic'' (Voluntary Agreement).[4] Unless terminated prior to that date, the Voluntary Agreement is effective until August 17, 2025, and may be extended subject to additional approval by the Attorney General after consultation with the Chairman of the Federal Trade Commission. The Agreement may be used to prepare for or respond to any pandemic, including COVID–19, during that time.

On December 7, 2020, the first plan of action under the Voluntary Agreement—the Plan of Action to Establish a National Strategy for the Manufacture, Allocation, and Distribution of Personal Protective Equipment (PPE) to Respond to COVID–19 (Plan of Action)—was finalized.[5] The Plan of Action established several sub-committees under the Voluntary Agreement, focusing on different aspects of the Plan of Action.

The meetings were chaired by the FEMA Administrator or his delegate, and attended by the Attorney General or his delegate and the Chairman of the Federal Trade Commission or his delegate. In implementing the Voluntary Agreement, FEMA adheres to all procedural requirements of 50 U.S.C. 4558 and 44 CFR part 332.

Meeting Objectives: The objectives of the meetings were to:

(1) Establish priorities for COVID–19 PPE under the Voluntary Agreement;

(2) Identify tasks that should be completed under specific sub-committees; and

(3) Identify information gaps and areas that merit sharing (from both FEMA to private sector and vice versa).

Meetings Closed to the Public: By default, the DPA requires meetings held to implement a voluntary agreement or plan of action be open to the public.[6] However, attendance may be limited if the Sponsor[7] of the voluntary agreement finds that the matter to be discussed at a meeting falls within the purview of matters described in 5 U.S.C. 552b(c). The Sponsor of the Voluntary Agreement, the FEMA Administrator, found that these meetings to implement the Voluntary Agreement involved matters which fell within the purview of matters described in 5 U.S.C. 552b(c) and were therefore closed to the public.[8]

Specifically, the meetings to implement the Voluntary Agreement could have required participants to disclose trade secrets or commercial or financial information that is privileged or confidential. Disclosure of such information is a basis for closing meetings pursuant to 5 U.S.C. 552b(c)(4). In addition, the success of the Voluntary Agreement depends wholly on the willing and enthusiastic participation of private sector participants. Failure to close these meetings could have had a strong chilling effect on participation by the private sector and caused a substantial risk that sensitive information would be prematurely released to the public, resulting in participants withdrawing their support from the Voluntary Agreement and thus significantly frustrating the implementation of the Voluntary Agreement. Frustration of an agency's objective due to premature disclosure of information allows for the closure of a meeting to pursuant to 5 U.S.C. 552b(c)(9)(B).

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2021–00893 Filed 1–14–21; 8:45 am]

BILLING CODE 9111–19–P

[4] 85 FR 50035 (Aug. 17, 2020). The Attorney General, in consultation with the Chairman of the Federal Trade Commission, made the required finding that the purpose of the voluntary agreement may not reasonably be achieved through an agreement having less anticompetitive effects or without any voluntary agreement and published the finding in the **Federal Register** on the same day. 85 FR 50049 (Aug. 17, 2020).

[5] *See* 85 FR 78869 (Dec. 7, 2020). *See also* 85 FR 79020 (Dec. 8, 2020).

[6] *See* 50 U.S.C. 4558(h)(7).

[7] ''[T]he individual designated by the President in subsection (c)(2) [of section 708 of the DPA] to administer the voluntary agreement, or plan of action.'' 50 U.S.C. 4558(h)(7).

[8] Under 50 U.S.C. 4558(h)(8), the Sponsor generally must publish in the **Federal Register** prior notice of any meeting held to carry out a voluntary agreement or plan of action. However, when the Sponsor finds that the matters to be discussed at such meeting fall within the purview of matters described in 5 U.S.C. 552b(c), notice of the meeting may instead be published in the **Federal Register** within ten days of the date of the meeting. *See* 50 U.S.C. 4558(h)(8).

DEPARTMENT OF HOMELAND SECURITY

[Docket Number DHS–2021–0004]

Agency Information Collection Activities: COVID–19 Contact Tracing, COVID–19 Contact Tracing Scripts, COVID–19 Contact Tracing Form

AGENCY: Department of Homeland Security (DHS).

ACTION: 60-day notice and request for comments; extension without change of a currently approved collection, 1601–0027.

SUMMARY: The Department of Homeland Security, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted until March 16, 2021. This process is conducted in accordance with 5 CFR 1320.1

ADDRESSES: You may submit comments, identified by docket number Docket # DHS–1601–0027, at:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # DHS–1601–0027. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

COVID–19 Contact Tracing information is necessary to support the President's National Guidelines for all phases of *Opening Up America Again.* The Office of Management and Budget (OMB) M–20–23Memorandum for Heads of Executive Department requires employers to develop and implement policies and procedures for workforce contact tracing following an employee's COVID–19 positive test. The M–20–23 Memorandum requires symptomatic Federal employees and contractors to follow their Agency's process if they are symptomatic or test positive for COVID–19. It specifies that the agency processes should protect the anonymity and privacy of Federal employees and contractors, to the extent possible, while disclosing only the information necessary for agencies to take appropriate actions of notifying potentially affected employees and cleaning the facility. Additionally, per the Centers for Disease Control and Prevention guidance entitled *Get and Keep America Open,* COVID–19 Contact Tracing is essential to reduce the spread of COVID–19. Furthermore, in response to the Coronavirus Pandemic, public health leaders are calling for communities around the country to ramp up capacity and implement a massive contact tracing effort to control spread of the Coronavirus. The response and recovery from the effect of COVID–19 will continue to present Federal agencies with unprecedented challenges, as well as opportunities for improvement, that require new processes and practices such as COVID–19 Contact Tracing to keep the workforce and the public safe. As DHS plans to reconstitute the workforce, it is

essential to have an internal DHS Contact Tracing Program that protects the workforce and our families by preventing further spread of COVID–19.

Note: In the following responses the term employee is used to include federal employee, contractor, detailee, volunteer, and intern.

Authority

DHS is authorized to collect the information pursuant to Section 319 of the Public Health Service (PHS) Act (42 U.S.C. 274d); DHS Chief Medical Officer's authorities pursuant to 6 U.S.C. 350 and 6 U.S.C. 597; 6 U.S.C. 464; 21 U.S.C. 360bbb-3; 40 U.S.C. 1315; 42 U.S.C. 97; American with Disabilities Act, including 42 U.S.C. 12112(d)(3), 29 CFR 1630.2(r), 1630.14(b), (c) Workforce safety federal requirements, including the Occupational Safety and Health Act of 1970, Executive Order 12196, 5 U.S.C. 7902; 29 U.S.C. Chapter 15 (*e.g.,* 29 U.S.C. 668), 29 CFR part 1904, 29 CFR 1910.1020, and 29 CFR 1960.66.

This is a new collection for the agency. The contract tracing process is triggered when an employee voluntarily self-reports to their supervisor that they are COVID–19 positive. The supervisor will provide the employee's name and contact information to a DHS Supervisory Contact Tracer. The Supervisory Contact tracer will assign a Contact Tracer to contact and interview the COVID–19 positive employee and obtain a list of employees the COVID–19 positive employee was in close contact with, as well as locations in the DHS worksite that the COVID–19 positive employee visited for 15 minutes or more. The Contact Tracer will call the exposed employees to inform them that were exposed by a DHS COVID–19 positive employee so they can take appropriate precautions in minimizing exposure to other DHS personnel and speak with their supervisor to discuss their work status. The contact tracer will not disclose the name or any other personally identifiable information regarding the COVID–19 positive employee to the exposed employees. The contact tracer will inform the exposed employee to notify their supervisor, contracting company (contractors only), medical provider, and local public health authorities to get instructions. The purpose of contact tracing is to control the spread of COVID–19 in the workforce.

The following information will be collected from the respondent:

—Name (first and last)
—COVID–19 lab test result
—Component Name
—Office address
—Personal phone number (Mobile or Home)
—Work phone number
—Work email address
—Where is your primary site of work (*e.g.,* department, floor, field desk location)
—Supervisor Name (First and Last)
—Supervisor's Phone Number
—Supervisor's Email
—All activities, floors visited in the DHS work site, meeting attended (including lunches, etc.) that the COVID–19 positive employee participated in starting 48 hours before their first COVID–19 symptoms began
—Last date worked in a DHS worksite
—Names (first and last) of federal employees, contractors, detailees, interns, volunteers who the COVID–19 positive employee was in close contact with, along with the close contacts' work email addresses, work phone numbers, and the last dates of contact.

The collection of information will be automated using Service Now, the existing DHS Information Technology Help desk ticketing platform. Service Now will be modified to be used as the COVID–19 reporting tool. The COVID–19 positive employee will voluntarily inform their supervisor that they are COVID–19 positive. The COVID–19 positive employee or their supervisor will create a new ticket in the COVID–19 reporting tool and include locations in the office that they were in for 15 minutes or more (to initiate facility cleaning) and names of employees they were in close contact with for 15 minutes or more (to identify exposed individuals to notify). The COVID–19 reporting tool will create a ticket and route this to the employee's supervisor and the supervisory contract tracer. The supervisory contact tracer will assign the case (ticket) to the contact tracer. The contact tracer will call the COVID–19 positive employee to verify information submitted by the employee. The Contact Tracer will call the exposed employees to inform them that were exposed to a DHS COVID–19 positive employee so they can take appropriate precautions in minimizing exposure to other DHS personnel and speak with their supervisor to discuss their work status as detailed in response #2.

The basis of the decision for adopting Service Now as a contact tracing reporting/collection tool are: Service now is an existing operating system with an approved Authority to Operate and is in accordance with DHS IT policies, procedures, and controls. Using information technology helps to streamline the process, adds uniformity, and reduces the burden on the contact tracer. The system includes an active directory for all DHS personnel, and contains the data collection, routing, reporting, and tracking capability required to automate contact tracing reporting, case (ticket) assignment and disposition.

This information collection request will not impact small businesses or other small entities.

In response to the Coronavirus Pandemic, public health leaders are calling for communities around the country to ramp up capacity and implement a massive contact tracing effort to control spread of the Coronavirus. The response and recovery from the effect of COVID–19 will continue to present Federal agencies with unprecedented challenges, as well as opportunities for improvement, that require new processes and practices such as COVID–19 Contact Tracing to keep the workforce and the public safe. As DHS plans to reconstitute the workforce, it is essential to have an internal DHS Contact Tracing Program that protects the workforce and our families. It is also essential to comply with requirements in the President's National Guidelines for all phases of *Opening Up America Again,* the Office of Management and Budget (OMB) M–20–23 Memorandum for Heads of Executive Department, the Centers for Disease Control and Prevention guidance entitled *Get and Keep America Open,* and for DHS to fulfill its overall mission. If DHS does not establish an internal COVID–19 Contact Tracing program capable of quickly identifying, isolating, tracking, and being aware of potential office outbreaks and workforce exposures, COVID–19 can unknowingly spread throughout the DHS workspace and negatively impact mission readiness and National Security.

As required by the COVID–19 Contact Tracing Script, the Contact Tracer is required to read the following statement at the beginning of the call with each respondent:

''*Before we begin, I would like to provide you with the following privacy notice: DHS is requesting information as part of this call for the purpose of maintaining and ensuring a healthy workforce and a safe DHS workspace. Further, this information will help the Department in slowing down the spread of COVID–19 by notifying those individuals who may have been exposed to the disease so that they can take appropriate precautions in minimizing exposure to other DHS personnel and DHS-affiliated personnel. As such, DHS may use the information*

I collect from you to provide notifications to other potentially exposed personnel. No personally identifiable information will be shared on you to those personnel in an identifiable format. However, information contained from this call may be shared with my supervisory contact tracer to ensure data is appropriately collected. In addition, if you report symptoms of COVID–19, this information may be shared with your supervisor so that he or she may work with you on your work status. Further, no personally identifiable information collected from this call will be shared outside of DHS. This collection is voluntary. However, your participation is requested because contact tracing is a key strategy for preventing further spread of COVID–19.''

The following Privacy Notice is Imprinted on the COVID–19 Contact Tracing Script and Form

WARNING: This document is FOR OFFICIAL USE ONLY (FOUO). It contains information that may be exempt from public release under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C 552a). It is to be controlled, stored, handled, transmitted, distributed, and disposed of in accordance with DHS policy relating to FOUO information and is not to be released to the public or other personnel who do not have a valid ''need-to-know'' without prior approval of an authorized DHS official.

The Following Privacy Act Statement Is for the Service Now COVID–19 Contact Tracing Reporting Tool

Contact Tracing Privacy Act Statement

Pursuant to 5 U.S.C. 552a(e)(3), this Privacy Act Statement serves to inform you of why DHS is requesting the information that will be collected by this information system.

Authority

DHS is authorized to collect the information pursuant to Section 319 of the Public Health Service (PHS) Act (42 U.S.C. 274d); DHS Chief Medical Officer's authorities pursuant to 6 U.S.C. 350 and 6 U.S.C. 597; 6 U.S.C. 464; 21 U.S.C. 360bbb-3; 40 U.S.C. 1315; 42 U.S.C. 97; American with Disabilities Act, including 42 U.S.C. 12112(d)(3)(B), 29 CFR 602.14, 1630.2(r), 1630.14(b)(1), (c)(1), (d)(4); Medical Examinations for Fitness for Duty Requirements, including 5 CFR part 339; Genetic Information Nondiscrimination Act (GINA), including 42 U.S.C. Chapter 21f, 29 CFR part 1635; Workforce safety federal requirements, including the Occupational Safety and Health Act of 1970, Executive Order 12196, 5 U.S.C. 7902; 29 U.S.C. Chapter 15 (*e.g.,* 29 U.S.C. 668), 29 CFR part 1904, 29 CFR 1910.1020, and 29 CFR 1960.66.

Purpose

DHS will be collecting the information for the purpose of maintaining and ensuring a healthy workforce and a safe DHS workspace. This information will help the Department to prevent the spread of infectious disease by notifying those individuals who may have been exposed so they can take appropriate precautions in minimizing exposure to other DHS personnel and DHS-affiliated personnel.

Routine Uses

The information will not be shared externally or with any third parties. It will only be used by the DHS Component or Office who employs the individual about whom the information will be collected. Further, no personally identifiable information will be shared with anyone other than the individual's supervisor and the assigned contact tracer. A complete list of routine uses for the information this system will collect can be found in the system of records notice associated with the system ''Office of Personnel Management/GOVT—10—Employee Medical File System Records.'' The Department's full list of system of records notices can be found on the Department's website at *http://www.dhs.gov/system-records-notices-sorns.*

Consequences of Failure To Provide Information

Providing information via this system is completely voluntary and no adverse action will be taken against individuals who refuse to participate. However, participation is requested because contact tracing is a key strategy in preventing further spread of infectious disease among the DHS workforce.

The Contact Tracer is required to sign a DHS non-Disclosure Agreement and take the following DHS Training—Privacy and Protecting Personal Information, IT Security Awareness and Rules of Behavior, Cybersecurity Awareness and one of the following Contact Tracer Trainings offered by the Michigan Department of Public Health Michigan Department of Public Health *https://www.train.org/wv/course/1091008/.* Additional contact tracing will be available from the Association of State and Territorial Health Officials *https://learn.astho.org/p/ContactTracer* and Johns Hopkins University *https://www.coursera.org/learn/covid-19-contact-tracing?action=enroll&edocomorp=covid-19-contact-tracing.*

The Supervisory Contact Tracer is required to review a minimum of 10% of interview calls with Contact Tracers to ensure comprehensive and high-quality interviews and compliance with privacy and confidentiality.

Explain the reasons for any program changes or adjustments reporting in Items 13 or 14 of the OMB Form 83–I.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Department of Homeland Security (DHS).

Title: COVID–19 CONTACT TRACING.

OMB Number: 1601–0027.

Frequency: Annually.

Affected Public: Affected Public.

Number of Respondents: 500.

Estimated Time Per Respondent: 1.

Total Burden Hours: 167.

Robert Dorr,

Acting Executive Director, Business Management Directorate.

[FR Doc. 2021–00927 Filed 1–14–21; 8:45 am]

BILLING CODE 9112–FL–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0052]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Naturalization

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until March 16, 2021.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0052 in the body of the letter, the agency name and Docket ID USCIS–2008–0025. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2008–0025. USCIS is limiting communications for this Notice as a result of USCIS' COVID–19 response actions.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2008–0025 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Naturalization.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* N–400; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–400, Application for Naturalization, allows USCIS to fulfill its mission of fairly adjudicating naturalization applications and only naturalizing statutorily eligible individuals. Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the INA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–400 is 393,671 and the estimated hour burden per response is 13 hours. The estimated total number of respondents for the information collection N–400 (e-filing) is 393,671 and the estimated hour burden per response is 12 hours. The estimated total number of respondents for the information collection N–400 is 7836,663 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 10,758,661 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is 364,933,017.

Dated: January 11, 2021.

Samantha L Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–00771 Filed 1–14–21; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6182–C–03]

Allocations, Common Application, Waivers, and Alternative Requirements for Disaster Community Development Block Grant Disaster Recovery Grantees; Second Allocation; Correction

AGENCY: Office of General Counsel, HUD.

ACTION: Notice, correction.

SUMMARY: On January 6, 2021, HUD published a notice in the **Federal Register** entitled, ''Allocations, Common Application, Waivers, and Alternative Requirements for Disaster Community Development Block Grant Disaster Recovery Grantees; Second Allocation.'' The notice incorrectly

stated that under a separate **Federal Register** notice, HUD will allocate $185,730,000 for mitigation activities. The correct amount is $186,781,000. Today's notice corrects the notice published on January 6, 2021.

DATES: Effective: *January 15, 2021.*

FOR FURTHER INFORMATION CONTACT: With respect to this technical correction, contact Aaron Santa Anna, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW, Room 10238, Washington, DC 20410; telephone number 202–708–1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION: On January 6, 2021 (86 FR 569) (FR Doc. 2020–29262), HUD issued a public notice allocating a total of $85,291,000 in Community Development Block Grant disaster recovery (CDBG–DR) funds appropriated by the Additional Supplemental Appropriations for Disaster Relief Act, 2019 (the Act), for the purpose of assisting in long-term recovery from major disasters that occurred in 2018 and 2019.

The January 6, 2021 notice stated that under a separate notice HUD will allocate additional funds available under the Act for mitigation activities in the most impacted and distressed areas resulting from a major disaster that occurred in 2018. The January 6, 2021 notice incorrectly listed the additional mitigation funds as $185,730,000 and the correct amount is $186,781,000.

Correction

In the **Federal Register** of January 6, 2021, in FR Doc. 2020–29262, on page 569, in the second column, first paragraph of the Summary section, replace $185,730,000 with $186,781,000 to read, ''Accordingly, under a separate notice, HUD will allocate the remaining $186,781,000 of funds available under the Act for mitigation activities in the most impacted and distressed areas resulting from a major disaster that occurred in 2018.''.

Aaron Santa Anna,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2021–00745 Filed 1–14–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR 7034–N–01]

30-Day Notice of Proposed Information Collection: Moving to Work (MTW) Form 50900: Elements for the Annual Moving to Work Plan and Annual Moving to Work Report PMB OMB Control No.: 2577–0216

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* February 16, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start* Printed Page 15501PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 4, 2020 at 85 FR 55312.

A. Overview of Information Collection

Title of Information Collection: Moving to Work (MTW) Demonstration.

OMB Approval Number: 2577–0216.

Type of Request: Revision of currently approved collection.

Form Number(s): HUD 50900.

Description of the need for the information and proposed use: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Department of Housing and Urban Development (HUD) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. All public housing authorities (PHA) are required to submit a five (5) year plan and annual plans as stated in Section 5A of the 1937 Act, as amended; however, the 39 legacy MTW PHAs with a Standard MTW Agreement must submit an Annual MTW Plan and Annual MTW Report (Form 50900) in lieu of the standard PHA plan documents.

The MTW Demonstration was authorized under Section 204 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Pub. L. 104–134, 110 Stat 1321), dated April 26, 1996. The original MTW Demonstration statute permitted up to 30 PHAs to participate in the demonstration program. Nineteen PHAs were selected for participation in the MTW demonstration in response to a HUD Notice, published in the **Federal Register** on December 18, 1996, and five of the 30 slots were filled through the Jobs-Plus Community Response Initiative.

Additional MTW 'slots' have been added by Congress over time through appropriations statutes. Two PHAs were specifically named and authorized to join the demonstration in 1999 under the VA, HUD, and Independent Agencies Appropriations Act of 1999 (Pub. L. 105–276, 112 Stat. 2461), dated October 21, 1998. A Public and Indian Housing Notice (PIH Notice 2000–52) issued December 13, 2000 allowed up to an additional 6 PHAs to participate in the MTW demonstration. The Consolidated Appropriations Act, 2008 (Pub. L. 110–161, 121 Stat. 1844) added four named PHAs to the Moving to Work demonstration program.

Subsequent appropriations acts for 2009, 2010, and 2011 authorized a total of 12 additional MTW slots. As part of HUD's 2009 budget appropriation (Section 236, title II, division I of the Omnibus Appropriations Act, 2009, enacted March 11, 2009), Congress directed HUD to add three agencies to the MTW program. As part of HUD's 2010 budget appropriation (Section 232, title II, division A of the Consolidated Appropriations Act, 2010, enacted December 16, 2009), Congress authorized HUD to add three agencies to the MTW demonstration. In 2011, Congress again authorized HUD to add

three MTW PHAs pursuant to the 2010 Congressional requirements.

A Standard MTW Agreement (Standard Agreement) was developed in 2007 and was transmitted to the MTW PHAs, in January 2008. As additional MTW PHAs were selected, they too were provided with the Standard Agreement. As established by the Consolidated Appropriations Act, 2016, all 39 legacy MTW PHAs continue to operate under the Standard Agreement, which was extended to 2028.

MTW agencies have the flexibility to apply fungibility across three core funding programs' funding streams—public housing Operating Funds, public housing Capital Funds, and HCV assistance (to include both HAP and Administrative Fees)—hereinafter referred to as ''MTW Funding.'' Also, the 39 legacy MTW PHAs are required to submit an MTW Annual Plan and an MTW Annual Report in accordance with their MTW Agreement, in lieu of the regular PHA annual and 5-year plans.

Through the MTW Annual Plan and Report, each legacy MTW PHA will inform HUD, its residents and the public of the PHA's mission and strategy for serving the needs of low-income and very low-income families. The Annual MTW Plan, like the PHA Annual Plan, provides an easily identifiable source by which residents, participants in tenant-based programs, and other members of the public may locate policies, rules, and requirements concerning the PHA's operations, programs, and services. Revisions are being made to this Form 50900 to improve its usability and to address minor issues identified by HUD and the 39 legacy MTW PHAs over time, including the following:

1. Simplification of information submitted annually by the PHA.
2. Clarification and reimagining of the information to be reported, annually, that will lead to the ability to ''tell the story'' of the Moving to Work demonstration as a whole.
3. Addition of language regarding unspent Operating and Voucher Reserves to increase the transparency locally and the planned use of the funds.
4. Support and increase local communities' knowledge and understanding of the MTW Program by requiring the inclusion of the PHA's Hardship Policy as an appendix to the MTW Annual Plan.

This proposed information collection was previously published in the **Federal Register** on October 9, 2020 (FR 7028–N–06) and allowed 60-days for public comment. The purpose of this 30-day notice is to respond to public comments received during the 60-day public comment period on Form 50900 and to allow for the 30-day public comment period for same, Form 50900.

Respondents (*i.e.* affected public): The respondents to this PRA are the 39 legacy Public Housing Authorities (PHAs) that had MTW designation as of December 15, 2015.

Estimated Number of Respondents: 39.

Estimated Number of Responses: There are 78 submissions per year, reflecting the 39 PHAs. Each submission is comprised of 7 sections each requiring a response. All 7 sections are completed with the first annual submission (Plan), and 5 of the 7 sections are completed with the second annual submission (Report). This results in a total of 2 submissions per PHA, across all 39 affected PHAs or 78 total responses, that include 468 sections.

Average Hours per Response: 60 hours.

Total Estimated Burdens: $261,799.20.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

D. Overview of Significant Changes Made to the HUD–50900

The HUD–50900 has been updated to reflect the public comments received during the 60-day **Federal Register** public comment period. These updates include removing the proposed performance metrics and reinserting the previous standard metrics, requiring the inclusion of an

MTW PHAs hardship policy and the inclusion of additional financial information for programmatic reporting purposes. A copy of the revised draft HUD–50900 can be obtained per the information provided earlier in this notice under ''For further information.''

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–00801 Filed 1–14–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–03]

30-Day Notice of Proposed Information Collection: HUD Loan Sale Bidder Qualification Statement; OMB Control No.: 2502–0576

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* February 16, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start Printed Page 15501PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 17, 2020 at 85 FR 58067.

A. Overview of Information Collection

Title of Information Collection: HUD Loan Sale Bidder Qualification Statement.

OMB Approval Number: 2502–0576.

OMB Expiration Date: January 31, 2021.

Type of Request: Revision of a currently approved collection.

Form Numbers: HUD–90092; HUD–9611; and HUD–9612.

Description of the need for the information and proposed use: The Qualification Statement solicits from Prospective bidders to the HUD Loan Sales the basic qualifications required for bidding including but not limited to, Purchaser Information (Name of Purchaser, Corporate Entity, Address, Tax ID), Business Type, Net Worth, Equity Size, Prior History with HUD Loans and prior sales participation. By executing the Qualification Statement, the purchaser certifies, represents and warrants to HUD that each of the statements included are true and correct as to the purchaser and thereby qualifies them to bid.

Respondents (*i.e.* affected public): Business or other for-profit; Not-for-profit institutions.

Estimated Number of Respondents: 320.

Estimated Number of Responses: 640.

Frequency of Response: On occasion.

Average Hours per Response: 0.5 hours.

Total Estimated Burden: 160.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–00852 Filed 1–14–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900253G]

Indian Gaming; Extension of Tribal-State Class III Gaming Compact (Rosebud Sioux Tribe and the State of South Dakota)

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice announces the extension of the Class III gaming compact between the Rosebud Sioux Tribe and the State of South Dakota.

DATES: The extension takes effect on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: An extension to an existing Tribal-State Class III gaming compact does not require approval by the Secretary if the extension does not modify any other terms of the compact. 25 CFR 293.5. The Rosebud Sioux Tribe and the State of South Dakota have reached an agreement to extend the expiration date of their existing Tribal-State Class III gaming compact to April 26, 2021. This publication provides notice of the new expiration date of the compact.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2021–00778 Filed 1–14–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[212 LLUTY02000 L17110000.PN0000 LXSSJ0650000]

Notice of Public Meeting, Bears Ears National Monument Advisory Committee, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act, as amended, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Bears Ears National Monument Advisory Committee (BENM MAC) will meet as indicated below.

DATES: The BENM MAC will hold a virtual meeting on March 31, 2021, from 8 a.m. to 3 p.m. The meeting is open to the public.

ADDRESSES: The agenda and meeting access information (including how to log in and participate) will be announced on the BENM MAC web page 30 days before the meeting at *https://www.blm.gov/get-involved/rac-near-you/utah/benm-mac.*

FOR FURTHER INFORMATION CONTACT: Jake Palma, Bears Ears National Monument Manager, P.O. Box 7, Monticello, Utah 84535, via email with the subject line ''BENM MAC'' to *blm_ut_mt_mail@blm.gov,* or by calling the Monticello Field Office at 435–587–1500. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: Presidential Proclamation 9558, as modified by Presidential Proclamation 9681, established the BENM MAC to provide advice and information to the Secretary of the Interior through the Director of the BLM, and to the Secretary of Agriculture through the Chief of the U.S. Forest Service, to consider for managing the Bears Ears National Monument. The 15-member committee represents a wide range of interests including local and state government, paleontological and archaeological expertise, conservation community, livestock grazing permittees, tribal, developed and dispersed recreation, private

landowners, local business owners, and the public at large. More information can be found on the BENM MAC web page at *https://www.blm.gov/get-involved/rac-near-you/utah/benm-mac.*

Planned agenda items for the meeting include discussing and receiving input on Bears Ears National Monument management planning efforts, wood-cutting and harvesting, and other issues as appropriate.

A public comment period will be offered during the meeting. Depending on the number of people wishing to comment and the time available, the time for individual comments may be limited. Written comments may also be sent to the Monticello Field Office at the address listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. All comments received prior to the meeting will be provided to the BENM MAC.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Detailed meeting minutes for the BENM MAC meeting will be maintained in the Canyon Country District Office and will be available for public inspection and reproduction during regular business hours within 90 days following the meeting. Minutes will also be posted to the BENM MAC web page.

Authority: 43 CFR 1784.4–2.

Gregory Sheehan,

State Director.

[FR Doc. 2021–00790 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[212 LLUT912000 L13140000.PP0000]

Notice of Public Meeting, Utah Resource Advisory Council, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Utah Resource Advisory Council (RAC) will meet as indicated below.

DATES: The Utah RAC will hold an online meeting on March 2, 2021, from 8 a.m. to 4:30 p.m. The meeting is open to the public.

ADDRESSES: The agenda and meeting registration information will be posted on the Utah RAC web page 30 days before the meeting at *https://www.blm.gov/get-involved/resource-advisory-council/near-you/utah/RAC.* Written comments to address the Utah RAC may be sent to the BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101, or via email to *BLM_UT_External_Affairs@blm.gov* with the subject line ''Utah RAC Meeting.''

FOR FURTHER INFORMATION CONTACT: Lola Bird, Public Affairs Specialist, BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; phone (801) 539–4033; or email *lbird@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at (800) 877–8339 to leave a message or question for Ms. Bird. The FRS is available 24 hours a day, 7 days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: The Utah RAC provides recommendations to the Secretary of the Interior, through the BLM, on a variety of public lands issues. Agenda topics will include: BLM Utah priorities, statewide resource management planning, travel management planning overview and current status, Color Country District project planning, Dingell Act implementation, Wild Horse and Burro Program, Great American Outdoors Act update, fuels management update, Draft Business Plan for the Kanab Field Office Campground Program, and other issues as appropriate. The Utah RAC will offer a 30-minute public comment period. Depending on the number of people wishing to comment and the time available, the amount of time for individual oral comments may be limited. Written comments may also be sent to the BLM Utah State Office at the address listed in the **ADDRESSES** section of this notice. All comments received will be provided to the Utah RAC.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Detailed meeting minutes for the Utah RAC meeting will be maintained in the BLM Utah State Office and will be available for public inspection and reproduction during regular business hours within 90 days following the meeting. Minutes will also be posted to the Utah RAC web page.

(Authority: 43 CFR 1784.4–2)

Gregory Sheehan,

State Director.

[FR Doc. 2021–00791 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[212 LLUTG02000 L17110000.PN0000]

Notice of Public Meetings, San Rafael Swell Recreation Area Advisory Council, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the U.S. Department of the Interior, Bureau of Land Management's (BLM) San Rafael Swell Recreation Area Advisory Council (Council) will meet as indicated below.

DATES: The Council is scheduled to meet on February 17, 2021, from 8 a.m. to 5 p.m. The Council is also scheduled to meet on April 7, 2021, from 12 p.m. to 5:00 p.m. and on April 8, 2021, from 8:30 a.m. to 12 p.m. A virtual meeting platform and/or teleconference may substitute an in-person meeting if public health restrictions are in place.

ADDRESSES: The meetings will be held at the Emery County Courthouse, 75 East Main Street, Castle Dale, Utah 84513. Written comments to address the Council may be sent to Lance Porter, Green River District Manager, 170 South 500 West, Vernal, Utah 84078, or via email with the subject line ''San Rafael Swell Advisory Council meeting'' to *utprmail@blm.gov.*

FOR FURTHER INFORMATION CONTACT: Lance Porter, Green River District Manager, 170 South 500 West, Vernal, Utah 84078; phone (435) 781–4400; or email *l50porte@blm.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service

(FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: The John D. Dingell, Jr. Conservation, Management, and Recreation Act (Pub. L. 116–9) established the Council to provide advice and information for the BLM in planning and managing the San Rafael Swell Recreation Area. The seven-member council represents a wide range of interests including local government, recreational users, grazing allotment permittees, conservation organizations, expertise in historical uses of the recreation area, and Tribes. More information can be found at: *https://www.blm.gov/get-involved/resource-advisory-council/near-you/utah/San-Rafael-Swell-RAC.* Agenda topics for the February meeting will include an overview of Dingell Act mandates, an overview of the Price Field Office Resource Management Plan (RMP), nomination of a Council chairperson and vice-chairperson, identification of next steps, and discussion of upcoming RMP amendments. Agenda topics for the April meeting will include agency updates, RMP updates, and discussion of implementation-level plans. The final agendas and meeting information will be posted on the Council's web page 30 days before the meetings.

The meetings are open to the public; however, transportation, lodging, and meals are the responsibility of the participating individuals. A public comment period will be offered each day of the scheduled meetings. Depending on the number of people wishing to comment and the time available, the time for individual comments may be limited. People wishing to speak will be asked to sign in before the scheduled oral comment time for planning and record keeping purposes. Written comments may also be sent to the Price Field Office at the address listed in the **ADDRESSES** section of this notice. All comments received will be provided to the Council.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Detailed Council meeting minutes will be maintained in the Green River District Office and will be available for public inspection and reproduction during regular business hours within 90 days following each meeting. Minutes will also be posted to the Council web page.

Authority: 43 CFR 1784.4–2.

Gregory Sheehan,

State Director.

[FR Doc. 2021–00445 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Fish and Wildlife Service

[212L1109AF LLUTC03000 L16100000.DS0000 LXSSJ0740000; UTU–93620; 13–08807]

Notice of Availability of the Records of Decision for a Highway Right-of-Way, Amended Habitat Conservation Plan and Issuance of an Incidental Take Permit for the Mojave Desert Tortoise, and Approved Resource Management Plan Amendments, Washington County, UT

AGENCY: Bureau of Land Management, Interior; Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (Service), as joint lead agencies, announce the availability of the records of decision (ROD) for the Northern Corridor highway right-of-way (ROW), issuance of an incidental take permit (ITP), and approved amendments for the Red Cliffs National Conservation Area (NCA) and St. George Field Office Resource Management Plans (RMP).

DATES: The Secretary of the Interior signed the ROD on January 13, 2021 which constitutes the final decision of the BLM and made the approved amendments to the RMPs, effective immediately. The BLM also signed the ROW grant for the Northern Corridor highway and issued the grant to the Utah Department of Transportation (UDOT) on January 13, 2021, which is effective immediately. The Service's Regional Director for Interior Regions 5 and 7 signed a ROD for issuance of an ITP, supported by the Habitat Conservation Plan (HCP), to Washington County (County) on January 13, 2021.

ADDRESSES: The RODs are available on the BLM ePlanning project website at *https://eplanning.blm.gov/eplanning-ui/project/1502103/510.* Click the ''Documents'' link on the left side of the screen to find the electronic versions of these materials. If you would like to request to view a hard copy, please call the St. George Field Office for more information at (435) 688–3200, Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Gloria Tibbetts, BLM Color Country District Planning and Environmental Coordinator, telephone: (435) 865–3063; address: 176 East DL Sargent Dr., Cedar City, UT 84721; email: *gtibbetts@blm.gov.* For information on the Amended HCP or ITP, contact Yvette Converse, Field Supervisor, U.S. Fish and Wildlife Service, telephone: (801) 975–3330 ext. 61912; email: *utahfieldoffice_esa@fws.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for Ms. Tibbetts or Ms. Converse. The FRS is available 24 hours a day, 7 days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: On September 4, 2018, UDOT submitted an application for a ROW grant for the Northern Corridor Project north of the City of St. George, Utah, on BLM-administered and non-Federal lands within the Red Cliffs NCA and Red Cliffs Desert Reserve (Reserve). The Reserve was established for the protection of the Mojave desert tortoise under the 1995 Washington County HCP. The NCA was established through the passage of the Omnibus Public Land Management Act of 2009. The 1995 HCP expired in 2016 and was extended by the Service to allow the County to amend the HCP pursuant to Section 10(a)(1)(B) of the Endangered Species Act (ESA). The Service received an application for an ITP dated January 30, 2015. The associated amended HCP was finalized by Washington County on October 20, 2020. The amended HCP anticipates the Northern Corridor highway, as a potential changed circumstance, would be partially offset with the addition of a new sixth zone to the Reserve (Reserve Zone 6) as the primary conservation strategy. To allow for consideration of and mitigation for the Northern Corridor, the BLM considered amendments to the Red Cliffs NCA and St. George Field Office RMPs.

The BLM and the Service, as joint lead agencies, reviewed the ROW and ITP applications, and the BLM

developed the approved amendments to the RMPs in close coordination with the Service and cooperating agencies, using input from the public, stakeholder groups, State and local government entities, and American Indian tribes.

The BLM and the Service prepared an environmental impact statement (EIS) in accordance with the National Environmental Policy Act (NEPA) to analyze the environmental impacts associated with the proposed action and the alternatives. Additionally, the BLM consulted with the Service to meet the requirements in Section 7 of the ESA. A biological opinion was issued by the Service to the BLM on January 12, 2021, and determined that the ROW and approved amendments to the RMPs are not likely to jeopardize the continued existence of the Mojave desert tortoise in the Upper Virgin River Recovery Unit and range-wide and that they are not likely to destroy or adversely modify designated critical habitat for the desert tortoise. Pursuant to section 10 of the ESA, the Service issued an intra-agency biological opinion on January 12, 2021, which determined that the ITP is not likely to jeopardize the continued existence of the Mojave desert tortoise, Holmgren milkvetch, Shivwits milkvetch, dwarf bear-poppy, Siler pincushion cactus, Gierisch mallow, and Fickeisen plains cactus or result in the adverse modification of critical habitat for the Mojave desert tortoise, Holmgren milkvetch, Shivwits milkvetch, Gierisch mallow, or Fickeisen plains cactus. The agencies also consulted with the Utah State Historic Preservation Office (SHPO) and consulting parties as part of the Section 106 review process under the National Historic Preservation Act (NHPA). The BLM determined, and SHPO concurred, that the ROW will result in adverse effects to historic properties and that the amendments to the Red Cliffs NCA and St. George Field Office RMPs will result in no adverse effects to historic properties. For the ITP, the Service cannot fully determine the effects to historic properties prior to issuance of the ITP and has worked with the SHPO and other consulting parties to develop a programmatic agreement, as authorized by 36 CFR 800.14(b). The programmatic agreement defines a process to evaluate and address any adverse effects to historic properties related to actions by Washington County on a case-by-case basis throughout the term of the ITP. The final programmatic agreement for the ITP was signed on December 15, 2020.

The formal public scoping process began on December 5, 2019, with the publication of a Notice of Intent (NOI) in the **Federal Register** (84 FR 66692), which initiated a 30-day public scoping period. The Notice of Availability (NOA) for the Draft EIS and Amendments to the RMPs, Notice of ESA Section 10(a)(1)(B) permit application, and NOI announcing a concurrent public comment period for the proposed permanent closure of recreational target shooting within the proposed Reserve Zone 6 area were published on June 12, 2020 (85 FR 35950), which initiated a 90-day public comment period.

On November 13, 2020, the BLM published the NOA for the Final EIS and Proposed Amendments to the RMPs (85 FR 72683), initiating a 30-day protest period and a concurrent Governor's consistency review of up to 60 days. During the protest period for the Proposed Amendments to the RMPs, the BLM received 18 protest letters. All protests were resolved prior to the issuance of the RODs. For a full description of the issues raised during the protest period and how they were addressed, please refer to the BLM Protest Resolution Report, which is available online at *https://www.blm.gov/programs/planning-and-nepa/public-participation/protest-resolution-reports.* The Governor of Utah reviewed the Final EIS and Proposed Amendments to the RMPs and did not identify any inconsistencies with State or local plans, policies, or programs. Finally, in compliance with the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, Public Law 116–9, 16 U.S.C. 7913, and 43 CFR 8364.1, the NOA for the Draft EIS and Draft Amendments to the RMPs included an NOI announcing a concurrent 90-day public comment period regarding the proposed closure of recreational target shooting on BLM-administered lands within Reserve Zone 6. Based on issues analyzed in the EIS and feedback received during the target shooting comment period, protest period, government-to-government consultation, section 106 (NHPA) and section 7 (ESA) consultation, and Governor's consistency review, the BLM approved amendments to the St. George Field Office RMP, which includes a closure to recreational target shooting on BLM-administered lands within Reserve Zone 6.

Authority: Consistent with 40 CFR 1506.13 (2020), this notice and the EIS are issued under previous NEPA regulations: 40 CFR 1505.2; 40 CFR 1506.6; 40 CFR 1506.10; and 43 CFR 1610.2. The BLM also provides this notice under 43 CFR 8364.1 and 16 U.S.C. 7913. The Service also provides this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations for incidental take permits (50 CFR 17.22).

Gregory Sheehan,
State Director.
Noreen Walsh,
Regional Director.

[FR Doc. 2021–00652 Filed 1–14–21; 8:45 am]
BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2021–0003]

Notice of Availability of the Area Identification for the Proposed Cook Inlet Oil and Gas Lease Sale 258

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Area identification.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of the Area Identification (Area ID) for the proposed Cook Inlet Oil and Gas Lease Sale 258 (Cook Inlet Lease Sale 258) in the available northern portions of the Cook Inlet Planning Area.

FOR FURTHER INFORMATION CONTACT: Patricia LaFramboise, Supervisor of Leasing and Plans, Alaska Regional Office, 907–334–5271, *patricia.laframboise@boem.gov* or Wright Jay Frank, Chief, Leasing Policy and Management Division, 703–787–1325, *wright.frank@boem.gov.*

SUPPLEMENTARY INFORMATION: On January 17, 2017, the Secretary of the Interior approved the 2017–2022 National Outer Continental Shelf (OCS) Oil and Gas Leasing Program (2017–2022 National OCS Program), which included Cook Inlet Lease Sale 258 scheduled in 2021. Details of the 2017–2022 National OCS Program can be found at *https://www.boem.gov/National-OCS-Program/.* In accordance with 30 CFR 556.301, BOEM published a Call for Information and Nominations (Call) [1] on the area identified in the 2017–2022 National OCS Program for the proposed Cook Inlet Lease Sale 258. The Call solicited industry nominations for areas of leasing interest and sought comments and information from the public on the areas being considered. BOEM analyzed the comments received in response to the Call and identified the areas that warranted further leasing consideration and analyses of the proposed sale's potential leasing effects on the human, marine, and coastal environments. This Area ID is not a

[1] 85 FR 55859, September 10, 2020.

decision to lease and is not a prejudgment by the Department of the Interior to proceed with proposed Cook Inlet Lease Sale 258. A decision to lease must be preceded by a number of steps, including, but not limited to, completion of environmental analyses, opportunities for the State of Alaska and other interested parties to comment, and issuance of Proposed and Final Notices of Sale.

The Area ID is available for viewing and downloading on BOEM's website at *http://www.boem.gov/ak258.* It also may be obtained from the Alaska Regional Office, Bureau of Ocean Energy Management, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503–5820; telephone: 907–334–5200.

Authority: This Area ID is published pursuant to the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331–1356), and the implementing regulation at 30 CFR 556.302.

Walter D. Cruickshank,

Acting Director, Bureau of Ocean Energy Management.

[FR Doc. 2021–00777 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2020–0018]

Draft Environmental Impact Statement on the Cook Inlet Lease Sale 258

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of availability of a draft environmental impact statement.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of the Draft Environmental Impact Statement (Draft EIS) for the proposed Cook Inlet Outer Continental Shelf (OCS) Oil and Gas Lease Sale 258. This notice marks the start of the public review and comment period and serves to announce public hearings on the Draft EIS. After the public hearings and written comments on the Draft EIS have been reviewed and considered, a Final EIS will be prepared. The Draft EIS and associated information, including the Exploration, Development and Production, and Decommissioning Scenario (E&D Scenario) are available for review on the agency's website at *https://www.boem.gov/ak258.*

DATES: Comments are due by March 1, 2021.

FOR FURTHER INFORMATION CONTACT: Amee Howard, project manager, at Bureau of Ocean Energy Management, Alaska Regional Office, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503–5823, or at telephone number (907) 334–5200.

SUPPLEMENTARY INFORMATION: On January 17, 2017, the Secretary of the Interior approved the ''Proposed Final 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program'' (National Program). The National Program includes proposed Lease Sale 258.

Cook Inlet stretches from the Gulf of Alaska to Anchorage in south-central Alaska. The proposed lease sale would offer for lease all available OCS blocks in the northern portion of the Cook Inlet Planning Area. The proposed lease sale area comprises 224 OCS blocks, which covers an area of approximately 1.09 million acres.

On September 10, 2020, BOEM published in the **Federal Register** the notice of intent (NOI) to prepare an EIS in support of Lease Sale 258. Publication of the NOI opened a public comment period that extended through October 13, 2020. In September 2020, BOEM held a series of public scoping meetings for the EIS. The comments received during the public scoping period were used to inform the scope and content of this Draft EIS.

Proposed action: The proposed action addressed in the Draft EIS is to conduct an oil and gas lease sale on portions of the Cook Inlet OCS Planning Area. Proposed Lease Sale 258 would provide qualified bidders the opportunity to bid on OCS lease blocks in Cook Inlet to gain conditional rights to explore, develop, and produce oil and natural gas.

The Draft EIS analyzes the potential direct, indirect, and cumulative environmental impacts of the proposed lease sale on the physical, biological, and human environments in the Cook Inlet area. See 40 CFR 1508.8 (2019 ed.). The Draft EIS describes a hypothetical scenario of exploration, development, production, and decommissioning activities that could result from the proposed lease sale and analyzes the potential impacts of those activities on the environment. The Draft EIS also analyzes reasonable alternatives to the proposed action. In addition to the Proposed Action and the No Action Alternative, BOEM analyzed three alternatives consistent with internal agency scoping, past public input from National Programs and previous lease sales, and comments received during the scoping period following publication of the NOI in September 2020 to prepare an EIS. The three alternatives address potential impacts to the Cook Inlet Distinct Population Segment (DPS) of the beluga whale, the Southwest Alaska DPS of the northern sea otter, and the Cook Inlet drift gillnet fishery.

The proposed lease sale area defers certain areas from consideration due to potential conflicts with resources of high ecological and subsistence value. These deferred areas include: (1) The majority of the designated critical habitat for beluga whale and northern sea otter, and all of the critical habitat for Stellar seas lions and the North Pacific right whale, that are located within the Planning Area; (2) a buffer between the area considered for leasing and the Katmai National Park and Preserve, the Kodiak National Wildlife Refuge, and the Alaska Maritime National Wildlife Refuge; and (3) many of the subsistence use areas for the Native Villages of Nanwalek, Seldovia, and Port Graham identified during the Cook Inlet Lease Sale 191 process.

In this Draft EIS, BOEM has examined the potential environmental effects of activities that could result from the Lease Sale 258 proposed action along with several alternatives. The Draft EIS is based on BOEM estimates of the potential oil and gas resources in the proposed lease sale area and an associated scenario that estimates a range of potential oil and gas activities, including exploration, seismic surveying, on-lease ancillary activities, exploration and delineation drilling, development, production, and decommissioning.

Comment Submission: The public and all interested parties, including Federal, state, tribal, and local governments or agencies, are invited to submit written comments on the Draft EIS and associated information, including the E&D Scenario, through the Federal eRulemaking Portal: *http://www.regulations.gov.* In the field entitled ''Enter Keyword or ID,'' enter ''BOEM–2020–0018,'' and then click ''search.'' Follow the instructions to submit comments and view supporting and related materials available for this notice.

BOEM does not accept anonymous comments. Name and contact information are required to submit comments on the Federal eRulemaking Portal. Before including your address, phone number, email address or other personal identifying information within the body of your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask BOEM in your comment to withhold your personal identifying information

from public review, BOEM cannot guarantee that it will be able to do so.

Public Hearings: BOEM will host virtual public hearings on the Draft EIS in February 2021. Information regarding these hearings can be found at *https://www.boem.gov/ak258.* The purpose of these hearings is to receive public comments on the Draft EIS. These hearings are scheduled as follows:

- February 9, 2021; 2:00 p.m.–4:00 p.m. (Alaska Standard Time (AKST))
- February 10, 2021; 6:30 p.m.–8:30 p.m. (AKST)
- February 11, 2021; 2:00 p.m.–4:00 p.m. (AKST)

Authority: 42 U.S.C. 4231 *et seq.;* 43 CFR 46.415 (2019 ed.).

Walter D. Cruickshank,

Acting Director, Bureau of Ocean Energy Management.

[FR Doc. 2021–00781 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR85672000, 21XR0680A2, RX.31480001.0040000; OMB Control Number 1006–0028]

Agency Information Collection Activities; Recreation Survey Questions

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of information collection; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Reclamation (Reclamation), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before *March 16, 2021.*

ADDRESSES: Send written comments on this information collection request (ICR) by mail to Ronnie Baca, Bureau of Reclamation, Asset Management Division, 86–67200, P.O. Box 25007, Denver, CO 80225–0007; or by email to *rbaca@usbr.gov.* Please reference OMB Control Number 1006–0028 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Ronnie Baca by email at *rbaca@usbr.gov,* or by telephone at (303) 445–3257. Individuals who are hearing or speech impaired may call the Federal Relay Service at (800) 877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Reclamation is responsible for recreation development at all of its reservoirs. Presently, there are more than 240 designated recreation areas on our lands within the 17 Western States hosting approximately 40 million visitors annually. As a result, we must be able to respond to emerging trends, changes in the demographic profile of users, changing values, needs, wants, and desires, and conflicts between user groups. Statistically valid and up-to-date data derived from the user is essential to developing and providing recreation programs relevant to today's visitor. Reclamation is requesting re-approval for the collection of data from recreational users on Reclamation lands and waterbodies. To meet our needs for the collection of visitor use data, we will be requesting OMB to authorize a two-part request: survey questions for our regional offices to choose from, and a survey form template. This will allow for a custom designed survey instrument to fit a specific activity or recreation site. The custom designed survey would be created by extracting questions from the approved list of survey questions that are applicable to the recreation area and issue being evaluated. Only questions included in the pre-approved list of survey questions will be used.

Title of Collection: Recreation Survey Questions.

OMB Control Number: 1006–0028.

Form Number: 7–2675, Recreation Survey Questions.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Respondents to the surveys will be members of the public engaged in recreational activities on Reclamation lands and waterbodies. Visitors will primarily consist of local residents, people from large metropolitan areas in the vicinity of the lake/reservoir, and people from out of state.

Total Estimated Number of Annual Respondents: 696.

Total Estimated Number of Annual Responses: 696.

Estimated Completion Time per Response: 15 minutes per survey (an average of 20 questions will be used on each survey; each question will take approximately 45 seconds to complete on average).

Total Estimated Number of Annual Burden Hours: 140.

Respondent's Obligation: Voluntary.

Frequency of Collection: Twice annually.

Total Estimated Annual Nonhour Burden cost: None.

It is estimated that there will be a total of 140 out of 696 contacts that choose not to respond to the survey. These non-respondents account for 1 burden hour per year.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information

unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

Karen Knight,

Director, Dam Safety and Infrastructure.

[FR Doc. 2021–00806 Filed 1–14–21; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR03240000, XXXR4079G1, RX.03441994.0209100]

Central Arizona Project, Arizona; Water Allocations

AGENCY: Bureau of Reclamation and the Office of the Secretary, Interior.

ACTION: Notice of final decision to reallocate non-Indian agricultural (NIA) priority Central Arizona Project (CAP) water.

SUMMARY: The Department of the Interior (Department) hereby issues notice of its final decision to reallocate NIA priority CAP water in accordance with the Arizona Department of Water Resources' (ADWR) recommendation for reallocation. The Department will implement this decision by offering to enter into a subcontract with the entities and for the quantities of NIA priority CAP water listed in this notice, as recommended by ADWR. Any NIA priority CAP water subject to this decision which remains uncontracted after completion of the contracting process shall be available for future round(s) of ADWR recommendation and subsequent contracting.

FOR FURTHER INFORMATION CONTACT: Ms. Leslie Meyers, Bureau of Reclamation, Phoenix Area Office, 6150 West Thunderbird Road, Glendale, AZ 85306–4001; telephone 623–773–6211; facsimile 623–773–6480; email *lmeyers@usbr.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service at 1–800–877–8339 TTY/ASCII to contact the Ms. Meyers during normal business hours or to leave a message or question after hours. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

Previous Notices Related to CAP Water

Previous notices related to CAP water were published in the **Federal Register** at 37 FR 28082, December 20, 1972; 40 FR 17297, April 18, 1975; 41 FR 45883, October 18, 1976; 45 FR 52938, August 8, 1980; 45 FR 81265, December 10, 1980; 48 FR 12446, March 24, 1983; 56 FR 28404, June 20, 1991; 56 FR 29704, June 28, 1991; 57 FR 4470, February 5, 1992; 57 FR 48388, October 23, 1992; 65 FR 39177, June 23, 2000; 65 FR 43037, July 12, 2000; 67 FR 38514, June 4, 2002; 68 FR 36578, June 18, 2003; 69 FR 9378, February 27, 2004; and, 71 FR 50449, August 25, 2006. These notices and decisions were made pursuant to the authority vested in the Secretary of the Interior (Secretary) by the Reclamation Act of 1902, as amended and supplemented (32 Stat. 388, 43 U.S.C. 391), the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U.S.C. 617), the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885, 43 U.S.C. 1501), the Arizona Water Settlements Act (Settlements Act) (Pub. L. 108–451, 118 Stat. 3478), and in recognition of the Secretary's trust responsibility to Indian tribes.

Background of CAP Water Allocations

In a Record of Decision (ROD) published on March 24, 1983 (48 FR 12446), the Secretary, among other actions, superseded and replaced the 1980 ROD (45 FR 81265, December 10, 1980), reiterated the allocations to Indian tribes reflected in that 1980 ROD, allocated CAP water for non-Indian municipal and industrial (M&I) uses, and allocated the remaining amount for NIA uses. Subject to certain conditions, the CAP water for Indian uses was allocated to 12 Indian tribes for irrigation use or for maintaining tribal homelands. Also subject to certain conditions, the CAP water for M&I uses was allocated based on the State of Arizona's 1982 allocation recommendations for non-Indian entities that provided an amount of CAP water for M&I use to certain non-Indian entities, with the remaining amount of CAP water allocated for NIA use. The CAP NIA water was allocated to 23 non-Indian irrigation districts or other agricultural entities as a percentage of the NIA water supply that was available in any given year.

Two-party CAP water service contracts were executed between the United States and individual Indian tribes in 1980 pursuant to the 1980 ROD. CAP non-Indian M&I water service subcontracts and CAP NIA water service subcontracts were executed with those entities allocated CAP water and desiring to enter into subcontracts for CAP water. The CAP water service subcontracts for the non-Indian M&I water and the NIA water are three-party subcontracts among the entity, the Central Arizona Water Conservation District (CAWCD), and the Bureau of Reclamation (Reclamation). Some of the entities that were allocated NIA water and M&I priority water elected not to contract for the offered allocations. After completing the initial subcontracting process, 29.3 percent of the NIA water supply and 65,647 acre-feet per year of M&I water was not under contract.

Congress enacted the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (102 Stat. 2558) (SRPMIC Act). Pursuant to section 11(h) of the SRPMIC Act, the Secretary was required to request a reallocation recommendation from ADWR for the remaining NIA water that was not under contract. The Secretary was also required to reallocate the uncontracted CAP water for NIA use and to offer new or amendatory subcontracts for such water.

By letter dated January 7, 1991, ADWR recommended an allocation to the Secretary. The Secretary published a notice on June 20, 1991 (56 FR 28404), inviting public comments on the proposed reallocation of CAP water. After considering the public comments, the Secretary published a final decision on February 5, 1992 (57 FR 4470). That decision contemplated that new or amendatory CAP water service subcontracts would be offered soon thereafter.

CAP water service subcontracts for the reallocated water were not executed for several reasons, including but not limited to the following: (1) Some entities could not meet the financial feasibility requirements for receipt of CAP water; (2) lack of agreement on the form of the CAP water service subcontract, and (3) financial difficulties in the CAP NIA sector.

Beginning in the early 1990s, long-term utilization of the CAP water available for reallocation under the 1992 decision and of the uncontracted CAP M&I priority water was a central issue in negotiations to resolve various operational and financial disputes between Reclamation and CAWCD. After attempts at negotiations failed, water contracting issues were included in litigation and the resulting stipulated settlement between the United States and CAWCD. To implement some of the conditions contained in the stipulated settlement, new Federal legislation was required.

After the 1992 decision but before Federal legislation was enacted, the Secretary published on June 4, 2002 (67 FR 38514), a notice of proposed modification to the 1983 decision. The 1983 decision provided that the M&I allocation can be made more firm by execution of feasible non-potable effluent exchanges with Indian tribes and the M&I allocation was subject to

adoption of a pooling concept, whereby all M&I entities share in the benefits of effluent exchanges. The pooling concept provision was included in the CAP M&I water service subcontracts. The 2002 proposed modification to the 1983 decision was to delete the mandatory effluent pooling provision in M&I subcontracts with the cities of Chandler and Mesa, and from other M&I water service subcontracts upon request. That provision in the CAP M&I water service subcontracts was an impediment to effluent exchanges and effective water management in central Arizona. After review and consideration of the public comments, the final decision was published on June 18, 2003 (68 FR 36578), deleting the mandatory effluent pooling provision.

The Settlements Act was enacted on December 10, 2004, and provides, among other things, for: (1) A final allocation of CAP water, with a CAP supply permanently designated for Indian uses and a CAP supply designated for non-Indian M&I or NIA uses; (2) a reallocation by the Secretary of 65,647 acre-feet per year of currently uncontracted CAP M&I water to 20 specific M&I entities; (3) ratification of the Arizona Water Settlement Agreement (the ''Master Agreement'') among the United States, ADWR, and CAWCD, which provides a statutory-based framework to enable the CAP NIA districts to relinquish existing rights to the delivery of CAP NIA priority water under their CAP water service subcontracts, including their rights, if any, to the reallocated water; and, (4) a reallocation of the relinquished and uncontracted NIA water supply to various Arizona Indian tribes and ADWR for future M&I use.

On August 25, 2006, the Secretary published a final reallocation decision (71 FR 50449) that, among other things, reallocated the CAP NIA water and the uncontracted CAP M&I water. The August 2006 reallocation decision is summarized below:

The Secretary's decision reallocated up to 96,295 acre-feet of agricultural priority water per year to ADWR, pursuant to section 104(a)(2)(A) of the Settlements Act and subject to subparagraph 9.3 of the Master Agreement, to be held under contract in trust for further allocation pursuant to section 104(a)(2)(C) of the Settlements Act. Direct use of the agricultural priority water by ADWR is prohibited under the Master Agreement.

In accordance with section 104(a)(2)(C) of the Settlements Act, before water could be further allocated, the Director of ADWR had to submit to the Secretary a recommendation for reallocation. After receiving the recommendation, the Secretary carried out all of the necessary reviews for the proposed reallocation in accordance with applicable Federal law. If the Director's recommendation was rejected, the Secretary was mandated to request a revised recommendation from the Director of ADWR and proceed with any reviews required.

The reallocation of agricultural priority water to ADWR pursuant to section 104(a)(2)(A) and section 104(a)(2)(C) of the Settlements Act was subject to the Master Agreement, including certain rights provided by the Master Agreement to water users in Pinal County, Arizona. The agricultural priority water reallocated to the ADWR was subject to the condition that the water retain its non-Indian agricultural delivery priority.

As required in Section 104(a)(2)(C)(i)(I) of the Settlements Act and the August 25, 2006 final reallocation decision, ADWR submitted to the Secretary a recommendation for reallocation of agricultural priority water. This recommendation was transmitted by letter dated January 16, 2014, and ADWR requested the Secretary carry out all of the necessary reviews of the proposed reallocation in accordance with applicable Federal law.

Reclamation prepared an Environmental Assessment (EA) in accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, and pursuant to Section 104 of the Settlements Act. Public scoping was initiated on November 30, 2015 with a newsletter that was sent to interested parties and published on Reclamation's website. Scoping comments were accepted via facsimile, email, U.S. mail, and in-person at the scoping meetings, which were held on December 8–10, 2015 in Phoenix, Casa Grande, and Tucson, Arizona, respectively. Reclamation received two public responses during this initial scoping period, one of which resulted in Reclamation honoring a request for a comment period extension to January 18, 2016.

In June 2016, Reclamation mailed Notices of Availability of the Draft EA to Federal, state, and local agencies, Indian tribes, organizations, proposed recipients, and other interested stakeholders. A public meeting was held on June 22, 2016 in Casa Grande, Arizona, and the commenting period closed on July 22, 2016. Reclamation conducted in-person consultation with the Tohono O'odham Nation on February 17, 2017, and with the San Carlos Apache Tribe on June 16, 2017. The draft EA was revised in response to the comments received. A Notice of Availability for the Final Environmental Assessment—*Arizona Department of Water Resources Recommendation for the Reallocation of Non-Indian Agricultural Priority Central Arizona Project Water in Accordance with the Arizona Water Settlements Act of 2004* was issued on November 15, 2019 and the Final Finding of No Significant Impact—*Arizona Department of Water Resources Recommendation for the Reallocation of Non-Indian Agricultural Priority Central Arizona Project Water in Accordance with the Arizona Water Settlements Act of 2004* was signed on November 8, 2019.

Rationale for Decision

The Department's decision is to allocate CAP NIA water in accordance with ADWR's recommendation. The ADWR recommendation covered the initial phase, reallocating 46,629 acre-feet per year of NIA priority CAP water of the 96,295 acre-feet per year to be reallocated, as shown in the table in this notice. The total of 46,629 acre-feet per year of CAP NIA priority water in this phase is in two pools: (1) A municipal pool of 34,629 acre-feet for M&I water providers within the CAP service area and the Central Arizona Groundwater Replenishment District, and (2) an industrial pool of 12,000 acre-feet for industrial water users within the CAP service area. The rationale for the decision is based on the following:

(1) ADWR's extensive public outreach, in consultation with Reclamation, to interested parties regarding its recommendation.

(2) An EA evaluating impacts of the proposed reallocation, in accordance with NEPA, and the resulting Finding of No Significant Impact (FONSI).

The Final EA and FONSI can be found on Reclamation's website at: *https://www.usbr.gov/lc/phoenix/reports/reports.html.*

Comments on the Proposed Reallocation and Responses

The proposed allocation was published in the **Federal Register** on June 3, 2020 (85 FR 34232). Comments were accepted through July 6, 2020. The comments received, and responses to those comments, are summarized below.

Three comment letters were received during the **Federal Register** notice public comment period. Two letters, one from the City of Buckeye and one from Rosemont Copper Company, dated June 30, 2020 and June 24, 2020, respectively, were submitted in support of the proposed action. One letter from the San Carlos Apache Tribe dated July 6, 2020, was submitted opposing the

proposed action. The issues raised in this comment letter and Reclamation's response to those comments are summarized here:

Comment 1: The San Carlos Apache Tribe opposes the proposed reallocation of NIA Priority CAP water and respectfully requests that the Secretary decline to approve the proposed reallocation as described in Table 1 of the Final EA (p. 9 of Final EA).

Response 1: The comment is noted.

Comment 2: Reclamation has failed to fulfill its obligation to satisfy all applicable Federal Law in the Final EA. 'The Arizona Water Settlements Act (AWSA) states that, prior to making a decision to accept or reject ADWR's recommendation, the Secretary shall carry out all necessary reviews in accordance with applicable law' (p. 1 of Final EA). The Final EA does not satisfy that requirement.

The Final EA contains no legitimate material analysis of the impacts of any of the proposed reallocations. ''. . . prior to recipients taking and using the NIA Priority CAP Water reallocation, all environmental compliance, including NEPA, would have to be completed'' (p. 9 of Final EA). This quotation reflects the fact that there has been no specific environmental analysis of any of the individual recommended reallocations and that there has been no evaluation of the cumulative impact of the combined recommended reallocations. This approach ensures that there will never be an analysis of the cumulative impact of the recommended reallocations. 'The AWSA obligates the Secretary to approve or reject ADWR's recommendation for reallocation' (p. 5 of Final EA). Therefore, this is a singular decision by the Secretary, the potential impacts of which must be reviewed in a comprehensive cumulative Environmental Impact Statement.''

Response 2: The Final EA was developed in compliance with NEPA, the AWSA, and other applicable authorities.

The scope of the Final EA was to evaluate the proposed decision of the Secretary to approve or reject ADWR's recommendation for NIA Priority CAP water reallocation. The EA has identified the baseline conditions and evaluated impacts on the human environment associated with the Proposed Action to the degree they are known or reasonably foreseeable. Where potential future impacts might occur from a Proposed Recipient's future construction of infrastructure to take and use its NIA Priority CAP water allocation, but no other details are known about the associated location of, or amount of ground disturbance anticipated by, this infrastructure, environmental compliance for such activities cannot be evaluated until those details are known. Further, CAP water service subcontracts that would entitle recipients of the reallocations to actually receive delivery of water in a particular year have not yet been issued. Each CAP water service subcontract typically includes a clause that states, in part, ''notwithstanding any other provision of this subcontract, Project Water shall not be delivered to the Subcontractor unless or until the Subcontractor has obtained final environmental compliance from the United States . . .'' This is to ensure that any site-specific environmental compliance processes that may be appropriate will be completed prior to actual delivery of any of the reallocated water.

Comment 3: A decision to adopt the recommended reallocation would imprison what little unallocated CAP water remains available to the Central Arizona Project and would establish avenues of unjust enrichment for the proposed recipients of the recommended reallocations. Upon execution of the contracts, each proposed recipient would be in the position to 'bank' such water that is available to them under their reallocation, even though they may have no immediate need and/or delivery systems to accept and use the water within the proposed recipients' service or project area.

Response 3: The AWSA provides that the Director of ADWR shall submit to the Secretary a recommendation for reallocation of certain NIA Priority CAP water. The Secretary must either approve or reject the recommendation for reallocation. The AWSA does not authorize the Secretary to change certain recipients or direct alternate uses of the water. ADWR conducted a public process to evaluate and select the proposed recipients that were identified in its recommendation for reallocation. The proposed recipients identified by ADWR have indicated they will use the reallocated water in accordance with applicable laws, for direct use and/or recharge purposes. The Final EA evaluated, pursuant to NEPA, the effects on the human environment of the Secretary's decision whether to approve or reject ADWR's recommendation.

Comment 4: The Final EA fails to disclose the length of time during which the reallocations would exist. Without the time component for each and all recommended reallocations, no credible impact analysis can be developed.

Response 4: No particular length of time was specified because the reallocations would exist indefinitely. The analysis of impacts within the Final EA was framed as such. The Final EA further explains that actual delivery of the reallocated water will occur only after appropriate subcontracts have been executed.

Comment 5: The Final EA fails to address that the growing demand is unsustainable as both a physical and economic fact. The analysis fails to show how the recommended reallocation would meet or lead to the achievement of a sustainable balance between water supply and water consumption under current conditions. 'In 2014, municipal water demand was 1.4 million acre-feet annually (MAFA), which was 21 percent of Arizona's water demand' (p. 5 of Final EA). It also fails to analyze how the recommended reallocation would fuel the increased consumption of water and the exacerbation of demand. 'The projected statewide water demand will increase to between 8.1 and 8.6 MAFA by 2035, and between 8.6 and 9.1 MAFA by 2060 (Water Resources Development Commission (WRDC) (2011)' (p. 5 of Final EA). The recommended reallocation based upon such growth is unsustainable and therefore irresponsible.

Response 5: The Final EA addresses the issue of growing water demand in the State of Arizona. Additionally, the AWSA empowers the Director of ADWR to make a recommendation for reallocation of NIA Priority CAP water to the Secretary, and thus gives ADWR discretion to weigh, in the first instance, questions of sustainability and competing needs for the water. The recommendation for reallocation was based on ADWR's evaluation criteria. The Secretary must either approve or reject the recommendation.

Comment 6: The Final EA further fails to illustrate how the reduction of groundwater overdraft will occur in the face of increased water use by proposed recipients such as Resolution Copper.

Response 6: As stated on pages 9–10 of the Final EA, the Proposed Action includes reallocation of up to 2,238 acre-feet (AF) annually to Resolution Copper. On pages 12–14, the Final EA further describes why Resolution Copper is not dependent on the reallocation of NIA water for mine operations and as such the mine would still be developed in the absence of this reallocation. The Final EA evaluated the impacts of the proposed reallocation of 2,238 AF annually of NIA water to Resolution Copper to be used for groundwater recharge. An Environmental Impact Statement (EIS) addressing impacts resulting from the

proposed mining operations and associated water use is being prepared by the Tonto National Forest (TNF) for the proposed Resolution Copper Mine.

Comment 7: The Final EA fails to show how some of the recommended reallocations are hydrologically connected and therefore fails to analyze the impacts of the interconnections.

Response 7: The Final EA analyzes both the affected environment and the anticipated impacts of the proposed reallocation on water resources. For Apache Junction and Town of Queen Creek, page 50 of the Final EA explains that ''. . . based on their proposed direct use of their allocation, no adverse impacts are anticipated because there would be no change from the current uses.'' Groundwater modeling using ADWR models for the Active Management Areas (AMAs) potentially affected by Proposed Recipients intending to directly use their CAP allocation has not been performed due to the direct use of the Proposed Recipients' CAP allocation.

Page 50 of the Final EA identifies that Johnson Utilities and Resolution Copper Mining would use its CAP allocation for recharge to offset their groundwater use. Central Arizona Groundwater Replenishment District's (CAGRD) CAP allocation would be used to meet replenishment obligations incurred as a result of excess groundwater use by CAGRD members. No adverse impacts are anticipated from the use of CAP water to offset groundwater use and the use of existing infrastructure to convey the water. Groundwater modeling using ADWR models for the AMAs potentially affected by Proposed Recipients recharging their allocation has not been performed because of the small NIA allocation volumes for each subbasin affected and the net positive benefit to the AMAs from the Proposed Action.

Pages 51–52 of the Final EA state that Resolution Copper would not be ''. . . required to offset their permitted groundwater usage, [its] allocation would help in achieving or maintaining safe yield conditions in [Resolution's] respective AMA.'' Direct use of the CAP allocation by the mine, if developed, would help to alleviate groundwater decreases around the proposed wellfields.

Additionally, as Page 53 of the Final EA states, Resolution Copper Mine is not dependent on the reallocation of NIA water for mine operations. Therefore, the Proposed Action under this EA is not a connected action with the development of the mine (see Section 3.1 of the Final EA). The effect mining operations would have on the East Salt River Valley Subbasin is not currently known but would be determined as part of the TNF NEPA process for the mine. Accrual of Long-Term Storage Credits under the Proposed Action until the mine is operational or for potential future direct use of the CAP allocation once the mine is operational will only benefit the East Salt River Valley Subbasin.

Comment 8: The Final EA fails to analyze the impacts of recommended reallocation to proposed recipients on the San Carlos Apache Tribe and other Arizona tribal governments and entities that would be impacted by the development of the Resolution Copper Mine. It fails to recognize the vital and essential role that the recommended reallocation directly to Resolution Copper Mine would have on these Tribes.''

Response 8: Please see Response #6.

Pages 12–14 of the Final EA explain why the proposed Resolution Copper mine is not dependent on the reallocation of NIA water for mine operations; the two actions are separate and ''not interdependent parts of a larger action, nor do they depend on a larger action for their justification.'' An EIS is being prepared by the TNF for the Resolution Copper Mine project. The EIS will address any impacts on the human environment resulting from the proposed mining project. The Secretary's decision regarding whether to approve or reject ADWR's recommendation for reallocation of NIA Priority CAP water has no bearing on the viability of the proposed mine, and TNF's decision regarding Resolution Copper's proposed operations will be made after completion and review of its Final EIS.

Comment 9: Clearly, Reclamation has failed to comply with all the applicable laws when it has not evaluated the cumulative impact of the entire proposed reallocation, including the environmental impact of the use of CAP water at the various locations and for the various activities anticipated by the reallocation.

Response 9: Please see response #2.

The EA has evaluated indirect and cumulative impacts associated with the Proposed Action to the degree those impacts are reasonably foreseeable, and not speculative or totally unknown. Most of the locations at which reallocated water may be used in the future are geographically distant, and it is therefore speculative whether, or how, cumulative impacts may arise from the use of CAP water in these locations. Pages 12–14 of the Final EA state ''. . . water service subcontract for the Proposed Recipients contains language that requires completion of site-specific environmental clearances prior to any ground-disturbing activities related to constructing infrastructure necessary to take and use the reallocated water.''

Comment 10: The Final EA does not analyze certain impacts, relies on incomplete or misleading calculations or information, or makes improper assumptions.

Response 10: The comments appear to relate primarily to the sufficiency of the Final EA and not the proposed allocation decision itself. Reclamation considered all comments received relating to the Draft EA and made appropriate revisions before releasing the Final EA and issuing a FONSI. The Final EA and FONSI contained a thorough assessment of the potential effects of the proposed reallocation of NIA priority water on the quality of the human environment. The Final EA and FONSI fully comply with NEPA and appropriately inform the Secretary's decision whether to approve or reject ADWR's recommendation for reallocation.

Secretarial Decision

I hereby give notice of the Department's decision to allocate CAP NIA priority water in the amounts and to the entities as set forth in the table in this notice, and direct the Commissioner of Reclamation, through the Regional Director, Lower Colorado Basin Region, Boulder City, Nevada, to proceed to enter into contracts in accordance with this decision. This decision is made after consideration of the comments received after a proposed allocation was published in the **Federal Register** on June 3, 2020 (85 FR 34232). A summary of those comments, and responses to those comments are contained below.

CAP NIA priority water allocations are hereby modified in accordance with the information contained in the table below. This decision is effective as of the date of this notice. Insofar as previous allocation decisions are inconsistent with this allocation notice, the affected provisions of such decisions are hereby rescinded.

The Department is publishing this decision of the reallocation of NIA priority CAP water in accordance with the Settlements Act, 118 Stat. 3478, and the Secretary's Final Decision of CAP Water Reallocation, 71 FR 50449 (August 25, 2006). The following table lists the entities to receive NIA priority CAP water and the quantities reallocated to each.

SECRETARY'S DECISION FOR REALLOCATION OF NIA PRIORITY CAP WATER

Municipal pool		Industrial pool	
State of Arizona entity	Amount in acre-feet per year	State of Arizona entity	Amount in acre-feet per year
Carefree Water Company	112	Viewpoint RV and Golf Resort	400
Metropolitan Domestic Water Improvement District	299	New Harquahala Generating Company	400
Town of Cave Creek	386	Rosemont Copper Company	1,124
EPCOR—Sun City West	1,000	Salt River Project	2,160
Town of Queen Creek (Acquired H2O Water Company).	4,162	Resolution Copper Mining	2,238
Town of Marana	515	Freeport-McMoRan-Sierrita Inc	5,678
Apache Junction Water Utilities Community Facilities District.	817		
City of El Mirage	1,318		
Town of Gilbert	1,832		
City of Buckeye (Formerly was Town of Buckeye)	2,786		
Johnson Utilities	3,217		
Central Arizona Groundwater Replenishment District	18,185		
Total NIA Priority CAP Water Reallocated to Municipal:	34,629	Total NIA Priority CAP Water Reallocated to Industrial:	12,000
Total NIA Priority CAP Water Reallocated: 46,629 Acre-Feet Per Year			

Timothy R. Petty,

Assistant Secretary for Water and Science.

[FR Doc. 2021–01089 Filed 1–14–21; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 211S180110; S2D2S SS08011000 SX064A000 21XS501520; OMB Control Number 1029–0040]

Agency Information Collection Activities; Requirements for Permits for Special Categories of Mining

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before March 16, 2021.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to the Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C. Street NW, Room 4556–MIB, Washington, DC 20240; or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0040 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at 202–208–2716.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the OSMRE; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the OSMRE enhance the quality, utility, and clarity of the information to be collected; and (5) how might the OSMRE minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The information is being collected to meet the requirements of sections 507, 508, 510,515, 701 and 711 of Public Law 95–87, which require applicants for special types of mining activities to provide descriptions, maps, plans and data of the proposed activity. This information will be used by the regulatory authority in determining if the applicant can meet the applicable performance standards for the special type of mining activity.

Title of Collection: Requirements for Permits for Special Categories of Mining.

OMB Control Number: 1029–0040.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State governments and mine permittees.

Total Estimated Number of Annual Respondents: 75.

Total Estimated Number of Annual Responses: 100.

Estimated Completion Time per Response: Varies from 10 to 1,000 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 6,000.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Mark J. Gehlhar,

Information Collection Clearance Officer, Division of Regulatory Support.

[FR Doc. 2021–00875 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 211S180110; S2D2S SS08011000 SX064A000 21XS501520; OMB Control Number 1029–0112]

Agency Information Collection Activities; Requirements for Coal Exploration

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before March 16, 2021.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to the Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 4556–MIB, Washington, DC 20240; or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0112 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at 202–208–2716.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the OSMRE; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the OSMRE enhance the quality, utility, and clarity of the information to be collected; and (5) how might the OSMRE minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: OSMRE and State regulatory authorities use the information collected under 30 CFR part 772 to keep track of coal exploration activities, evaluate the need for an exploration permit, and ensure that exploration activities comply with the environmental protection and reclamation requirements of 30 CFR parts 772 and 815, and section 512 of SMCRA (30 U.S.C. 1262).

Title of Collection: Requirements for coal exploration.

OMB Control Number: 1029–0112.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State governments and mine permittees.

Total Estimated Number of Annual Respondents: 300.

Total Estimated Number of Annual Responses: 600.

Estimated Completion Time per Response: Varies from 30 minutes to 50 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 1,600.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $300.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Mark J. Gehlhar,

Information Collection Clearance Officer, Division of Regulatory Support.

[FR Doc. 2021–00874 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 211S180110; S2D2S SS08011000 SX064A000 21XS501520; OMB Control Number 1029–0083]

Agency Information Collection Activities; Certification of Blasters in Federal Program States and on Indian Lands

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 16, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C. Street NW, Room 4556–MIB, Washington, DC 20240; or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0083 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at (202) 208–2716. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on October 15, 2020 (85 FR 65422). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The information is being collected to ensure that the applicants for blaster certification are qualified. This information, with blasting tests, will be used to determine the eligibility of the applicant.

Title of Collection: Certification of blasters in Federal program states and on Indian lands.

OMB Control Number: 1029–0083.

Form Number: OSM–74.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Respondents: 18.

Total Estimated Number of Annual Responses: 18.

Estimated Completion Time per Response: 1 hour.

Total Estimated Number of Annual Burden Hours: 18.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $1,370.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Mark J. Gehlhar,

Information Collection Clearance Officer, Division of Regulatory Support.

[FR Doc. 2021–00873 Filed 1–14–21; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0314]

Agency Information Collection Activities: Proposed Collection; Comments Requested; Resinstatment of a Previously Approved Collection: Firearm Inquiry Statistics (FIST) Program

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until March 16, 2021. If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Connor Brooks, Statistician, Law Enforcement Statistics Unit, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531 (email: *Connor.Brooks@usdoj.gov;* phone: 202–514–8633).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Reinstatement of the Firearm Inquiry Statistics Program.

(2) *The Title of the Form/Collection:* 2019–2021 Firearm Inquiry Statistics Program.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is FIST–1. The applicable component within the Department of Justice is the Bureau of Justice Statistics, Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Through the Firearm Inquiry Statistics (FIST) Program, the Bureau of Justice Statistics (BJS) obtains information from state and local checking agencies responsible for maintaining records on the number of background checks for firearm transfers or permits that were issued, processed, tracked, or conducted during the calendar year. Specifically, state and

local checking agencies are asked to provide information on the number of applications and denials for firearm transfers received or tracked by the agency and reasons why applications were denied. BJS combines these data with the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) transaction data to produce comprehensive national statistics on firearm applications and denials resulting from the Brady Handgun Violence Prevention Act of 1993 and similar state laws governing background checks and firearm transfers. BJS also plans to collect information from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) on denials screened and referred to ATF field offices for investigation and possible prosecution. BJS publishes FIST data on the BJS website in statistical tables and uses the information to respond to inquiries from Congress, federal, state, and local government officials, researchers, students, the media, and other members of the general public interested in criminal justice statistics.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* A projected 1,091 respondents will take part in the FIST data collection with an average of 25 minutes for each to complete the FIST survey form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden hours associated with this collection is 455 hours annually.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: January 12, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–00929 Filed 1–14–21; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

[Docket No. DOL–2021–0001]

Guidance Regarding Department of Labor Grants

AGENCY: Office of the Assistant Secretary for Administration & Management, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor publishes its ''Guidance Regarding Department of Labor Grants'' detailing the general rules regarding equal protection of faith-based organizations that govern the Department's grant and financial assistance programs. This guidance is issued pursuant to Executive Order 13798, titled ''Promoting Free Speech and Religious Liberty,'' signed by the President on May 4, 2017, and the related Office of Management and Budget guidance issued on January 16, 2020. This guidance also reflects changes to the Department's regulations recently made through the inter-agency rulemaking, ''Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities,'' published on December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Carl Campbell, Office of the Senior Procurement Executive, Office of the Assistant Secretary for Administration and Management. Telephone: 1–202–693–7246. TTY/TDD callers may dial toll-free 1–800–877–8339 for further information.

SUPPLEMENTARY INFORMATION: The Department publishes this guidance to protect religious liberty in the administration of its grant and financial assistance programs, in compliance with Federal law. The guidance details the ways in which the Department's specific regulations protect the religious freedom of faith-based organizations that participate in these programs, and describes the process by which faith-based organizations can seek exemptions from religious non-discrimination requirements in their employment practices. The guidance is provided in the Appendix of this notice.

Bryan Slater,

Assistant Secretary for Administration and Management, Department of Labor.

Appendix—Guidance Regarding Department of Labor Grants [1]

I. Purpose and Background

On May 4, 2017, the President signed *Executive Order 13798,* titled ''Promoting Free Speech and Religious Liberty.'' [2] Among other things, Executive Order 13798 establishes a policy of promoting religious liberty and directed the Attorney General to provide guidance to Federal agencies on the requirements of Federal laws and policies protecting religious liberty. Accordingly, on October 6, 2017, the Attorney General issued a memorandum advising agencies on such laws and policies, including how they apply to the award of grants (Attorney General Memorandum).[3] Subsequently, the Office of Management and Budget (OMB) issued its own guidance on January 16, 2020 (OMB Memorandum), directing all grant-administering agencies ''within 120 days of the date of this Memorandum . . . [to] publish policies detailing how they will administer Federal grants in compliance with E.O. 13798, the Attorney General memorandum, and this Memorandum.'' [4]

The OMB and Attorney General Memoranda make clear that Federal law entitles religious organizations to compete on equal footing with secular organizations for Federal financial assistance.[5] In line with these principles, the Department of Labor (DOL or Department) is committed to ensuring that DOL-supported social service programs are open to all qualified organizations, regardless of the organizations' religious character. In particular, any grant rule or policy that penalizes or disqualifies a religious organization from the right to compete for a grant or contract because of that organization's religious character could violate the Free Exercise Clause of the First Amendment to the Constitution, or governing DOL regulations. A rule or policy that imposes a substantial burden on an organization's exercise of religion may also, depending on the circumstances, violate the Religious Freedom Restoration Act (RFRA).

To ensure that all organizations are treated equally in the issuance of awards and sub-awards of Department grant funds, and that Federal law's protections for religious liberty are faithfully adhered to, the Department is issuing this guidance. The sections that follow detail the general rules regarding equal protection of faith-based organizations that govern DOL grant programs, and the process by which faith-based organizations can seek exemptions from religious non-discrimination requirements in their employment practices.

II. Equal Treatment in Department of Labor Programs for Faith-Based Organizations

a. Equal Participation of Faith-Based Organizations

Faith-based organizations are eligible, on the same basis as any other organization, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization's religious character, affiliation,

[1] Other than the statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

[2] Exec. Order No. 13798, 82 FR 21,675 (May 4, 2017).

[3] Office of Att'y Gen., *Federal Law Protections for Religious Liberty,* Memorandum for All Executive Departments and Agencies (Oct. 6, 2017).

[4] Office of Mgmt. & Budget, Exec. Office of the President, M–20–09, *Guidance Regarding Federal Grants and Executive Order 13798* (Jan. 16, 2020).

[5] In addition, the Supreme Court recently reaffirmed that the Constitution guarantees the full participation of faith-based organizations in publicly funded programs. *See Espinoza* v. *Montana Dep't of Revenue,* 140 S.Ct. 2246 (2020).

or exercise. DOL, DOL social service providers, and State and local governments administering DOL support are not precluded from accommodating religion in a constitutionally permissible manner.[6]

i. Grant Applications and Awards

Faith-based organizations must be eligible to apply for or receive Federal financial assistance under and participate in any DOL social service program for which the organizations are otherwise eligible, on the same basis as any other organization. This means that an organization must not be discriminated for or against on the basis of the organization's religious character, affiliation, or exercise. At the same time, all applicable limitations on the use of Federal assistance must be met, including that direct financial support must not be used for explicitly religious activities.[7]

For example, organizations that apply for and are qualified to become or remain eligible training providers (ETPs), or other types of service providers, must not be excluded from being recognized as an available provider on account of their religious character or affiliation, and must be included on program lists provided to participants. Approvals and denials of applications to become ETPs or other providers, and removals of providers from such lists, must be documented in accordance with the procedures established under 20 CFR part 690, subpart D (*e.g.,* 20 CFR 690.480) in order to facilitate the Department's monitoring efforts related to this provision.

Decisions about awards of Federal financial assistance must be free from political interference, and the appearance of such interference. Award decisions must be made on the basis of merit, not on the basis of the religious affiliation of a recipient organization or lack thereof.[8] DOL will ensure that decisions are made fairly based on the substance of the proposals.

ii. Ongoing Operations

Faith-based organizations that receive DOL financial assistance retain their programmatic independence from Federal, State, and local governments and may continue to carry out their missions and maintain their religious character. This autonomy includes, among other things, the right to use the organizations' facilities to provide DOL-supported social services without removing or altering religious art, icons, scriptures or other religious symbols, and the right to govern themselves and to select board members and employees on the basis of their acceptance of or adherence to the religious requirements or standards of the organization. Faith-based organizations, like all organizations receiving DOL financial assistance, must not use direct DOL financial assistance to support any explicitly religious activities and must further comply with appropriate costs rules related to grants. Explicitly religious activities include, for example, worship, religious instruction, and proselytization.[9]

b. Responsibilities of DOL, DOL Social Service Providers, and State and Local Governments Administering DOL Support

DOL, DOL social service providers, and State and local governments administering DOL support must not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Program providers must not impermissibly restrict program beneficiaries' rights to exercise religious freedom. DOL, DOL social service providers, and State and local governments administering DOL support are not precluded from accommodating religion in a constitutionally permissible manner.[10]

DOL, DOL social service providers, and State and local governments administering DOL support must ensure that no direct DOL financial assistance is used for explicitly religious activities. The restriction against using financial assistance for explicitly religious activities does not apply when the assistance is indirect, meaning that the beneficiary chooses the service provider and the cost of the service is paid through a voucher, certificate, or other similar means of government-funded payment.[11]

If an organization conducts explicitly religious activities using non-DOL funds and also offers social service programs using direct DOL support, then that organization must offer the explicitly religious activities at a time or in a place that is separate from the programs receiving direct DOL support. For example, if directly-supported training activities are offered in a certain room in an organization's facility, inherently religious activities must not occur in that room at the same time as the training. Explicitly religious activities may occur in another room at the facility at the same time as directly-supported training, or in the same room if offered at a different time from the directly-supported training. The organization must also ensure that participation in any explicitly religious activities is purely voluntary, and not compulsory, for beneficiaries of these DOL-supported programs.[12]

Organizations whose programs are funded only by indirect DOL financial support need not modify their program activities to accommodate a beneficiary of DOL support who chooses to enroll in the organization's program and may require attendance at all activities that are fundamental to the program.[13]

c. Application to State and Local Funds

State or local governments that voluntarily contribute their own funds to supplement funds provided by DOL to support social service programs may either segregate the Federal funds or commingle them. All commingled funds are subject to the same requirements as those applying to the DOL assistance. Required matching funds and program income are treated in the same manner as commingled funds, whether or not such funds are actually commingled.[14]

d. Effect of DOL Support on Title VII Employment Non-Discrimination Requirements and on Other Existing Statutes

A faith-based organization does not forfeit its exemption from the Federal prohibition on employment discrimination on the basis of religion when the organization receives direct or indirect DOL support.[15] Some DOL programs, however, were established through Federal statutes containing independent statutory provisions that require that recipients refrain from discriminating in employment on the basis of religion. Further information on exemptions from non-discrimination requirements is provided in the next section of this guidance.

III. The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance

a. Background

One of the many important provisions of the Department's regulations on equal treatment of faith-based organizations provides that, absent statutory authority to the contrary, ''[a] religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives direct or indirect DOL support.'' [16] An organization qualifying for such exemption may make its employment decisions on the basis of an applicant's or employee's acceptance of or adherence to the religious requirements or standards of the organization, but not on the basis of any other protected characteristic. As noted above, however, some DOL programs were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating in employment on the basis of religion. Recipients and potential recipients of DOL support are therefore instructed to consult with DOL program officials, or the Civil Rights Center, to determine the scope of any such requirements, including in light of any additional constitutional or statutory protections for employment decisions that may apply.[17]

[6] *See* 29 CFR 2.32(a) (as amended January 19, 2021). On December 17, 2020, the Department published in the **Federal Register** amendments to its regulations at 29 CFR part 2 subpart D, 29 CFR 2.30 to 2.39, with an effective date of January 19, 2021. *See* 85 FR 82037, 82140–42 (Dec. 17, 2020). All citations to part 2 subpart D are to the newly amended version of the Code of Federal Regulations.

[7] *See* 29 CFR 2.32.

[8] *See* 29 CFR 2.39.

[9] *See* 29 CFR 2.32.

[10] *See* 29 CFR 2.33.

[11] *See* 29 CFR 2.33(b).

[12] *See id.*

[13] *See* 29 CFR 2.33(a).

[14] *See* 29 CFR 2.36.

[15] Civil Rights Act of 1964 § 702(a), 42 U.S.C. 2000e–1; *see* 29 CFR 2.37.

[16] 29 CFR 2.37.

[17] Civil Rights Center, U.S. Department of Labor, 200 Constitution Ave NW, Room N–4123, Washington, DC 20210, 202–693–6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free

Continued

Following the adoption of the Department's regulations on equal treatment of faith-based organizations, questions from the public arose regarding whether the Religious Freedom Restoration Act (RFRA) exempts recipients of Federal financial assistance from provisions of authorizing statutes and implementing regulations of programs that require all recipients of Federal financial assistance under those statutes or programs to agree not to consider religion when making employment decisions for positions connected with the Federally-financed program or activity. The Department of Labor has developed the exemption process described below to effectuate a controlling opinion and guidance of the U.S. Department of Justice concerning how RFRA applies to laws restricting recipients of Federal financial assistance from making employment decisions based on religion.[18]

b. RFRA Exemption Process

In 1993, Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith,* which held that a law that is religion-neutral and generally applicable need not be justified by a compelling governmental interest, even if such law incidentally affects religious practice.[19] By enacting RFRA, Congress sought to ensure that the government justify substantial burdens on religious exercise. Under RFRA, ''[g]overnment shall not substantially burden [an organization's] exercise of religion even if the burden results from a rule of general applicability,''[20] unless the Government ''demonstrates that application of the burden to the [organization]—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.''[21] RFRA thus mandates strict scrutiny of any federal law that substantially burdens the exercise of religion, even if the burden is incidental to the application of a religion-neutral rule. Congress expressly applied RFRA to all Federal law whether adopted before or after the enactment of RFRA; it therefore applies to all laws governing DOL programs.[22]

Under RFRA, the term ''exercise of religion'' does not require that a burdened religious practice be compelled by, or central to, an organization's system of religious belief to be protected.[23] Relatedly, RFRA does not permit the government to assess the reasonableness of a religious belief, including the adherent's assessment of the religious connection between a belief asserted and what the government forbids, requires, or prevents.[24] However, where a law enforced by DOL infringes on a religious practice that an organization itself regards as unimportant or inconsequential, no substantial burden has been imposed for purposes of RFRA.[25]

Where a law enforced by DOL prohibits religious discrimination in employment by recipients of DOL financial assistance, such prohibition will be displaced by RFRA and thus will not apply to a recipient with respect to employing individuals of a particular religious belief to perform work connected with carrying on the recipient's activities, provided that (i) such recipient can demonstrate that its religious exercise would be substantially burdened by applying the religious non-discrimination requirement to its employment practices in the program or activity at issue, and (ii) DOL is unable to demonstrate that applying the non-discrimination provision to this recipient both would further a compelling government interest and would be the least restrictive means of furthering that interest.

Under RFRA, a law substantially burdens religious exercise if it ''bans an aspect of the adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice.''[26] And in identifying a compelling government interest, ''broadly formulated interests justifying the general applicability of government mandates'' are insufficient.[27]

Once selected as a grantee, a recipient that seeks an exemption from the application of a religious non-discrimination provision must submit a certification of its eligibility for an exemption to the Assistant Secretary or relevant Agency Head charged with issuing or administering the grant or his/her designee attesting that: (1) Receiving the grant is important to the recipient; (2) employing individuals of a particular religion is important to the religious identity, autonomy, or communal religious exercise of the recipient; and (3) conditioning receipt of the grant on compliance with the non-discrimination provision substantially burdens its religious exercise. The Assistant Secretary or relevant Agency Head will approve exemptions, in consultation with the Office of the Solicitor, on a case-by-case basis, and no later than 14 calendar days from the date the certification was submitted, for recipients that make the above attestations, unless there is good reason to question the certification. If the Assistant Secretary or relevant Agency Head takes no action by the close of the 14 calendar day period, the certification will be deemed approved.

Recipients exempted from the religious non-discrimination requirements at issue will not be exempted or excused, by virtue of that particular exemption, from complying with other requirements contained in the law or regulation at issue. In addition, any exemption may be voided at any time by the Assistant Secretary or relevant Agency Head charged with issuing or administering the grant or his/her designee, in consultation with the Office of the Solicitor of the U.S. Department of Labor, upon a determination that the certification was untruthful or a material change in circumstances indicates that reassessment of the exemption is in order. Following such determination, the Assistant Secretary or relevant Agency Head, or his/her designee will notify the recipient of the invalidation, the reasons for the invalidation, and the name, title, telephone number and/or email address of the person to contact for further information.

Signed at Washington, DC, this 12th day of January, 2021.

Bryan Slater,

Assistant Secretary for Administration and Management.

[FR Doc. 2021–00853 Filed 1–14–21; 8:45 am]

BILLING CODE 4510–FN–P

Federal Information Relay Service at 1–800–877–8339.

[18] *See* Attorney General Memorandum at 5a; *Memorandum Opinion for the General Counsel, Office of Justice Programs, Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 26, 2007) *available at www.justice.gov/olc/opinions.htm.*

[19] 494 U.S. 872, 878–79 (1990).

[20] 42 U.S.C. 2000bb–1(a).

[21] *Id.* § 2000bb–1(b).

[22] *See id.* § 2000bb–3.

[23] *See* 42 U.S.C. 2000bb–2(4).

[24] *Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 724 (2014).

[25] Attorney General Memorandum at 5a.

[26] *Id.* at 5a.

[27] *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 431 (2006).

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Unemployment Insurance State Quality Service Plan Planning and Reporting Guidelines

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this ETA-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before February 16, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information,

including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The State Quality Service Plan (SQSP) represents an approach to the unemployment insurance (UI) performance management and planning process that allows for an exchange of information between the federal and state partners to enhance the ability of the program to reflect their joint commitment to performance excellence and client-centered services. As part of UI Performs, a comprehensive performance management system for the UI program, the SQSP is the principal vehicle that the state UI programs use to plan, record and manage improvement efforts. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on April 29, 2020 (85 FR 23865).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: Unemployment Insurance State Quality Service Plan Planning and Reporting Guidelines.

OMB Control Number: 1205–0132.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Number of Responses: 1,166.

Total Estimated Annual Time Burden: 3,975 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: December 29, 2020.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2021–00768 Filed 1–14–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities; Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed reinstatement of the ''Current Population Survey (CPS) Disability Supplement.'' A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before March 16, 2021.

ADDRESSES: Send comments to Erin Good, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments also may be transmitted by email to *BLS_PRA_Public@bls.gov.*

FOR FURTHER INFORMATION CONTACT: Erin Good, BLS Clearance Officer, at 202–691–7628 (this is not a toll free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The July 2021 CPS Disability Supplement will be conducted at the request of the Department of Labor's Chief Evaluation Office. The Disability Supplement will provide information on the low labor force participation rates for people with disabilities; the use of and satisfaction with programs that prepare people with disabilities for employment; the work history, barriers to employment, and workplace accommodations reported by persons with a disability; and the effect of financial assistance programs on the likelihood of working. Since the supplement was last collected in 2019, work patterns have changed, policies have changed, and assistive technologies have advanced due to the coronavirus (COVID–19) pandemic. Having updated information will be valuable in determining how employment barriers have changed for people with disabilities.

Because the Disability Supplement is part of the CPS, the same detailed demographic information collected in the CPS will be available about respondents to the supplement. Thus, comparisons will be possible across respondent characteristics, including sex, race, ethnicity, age, and educational attainment. It will also be possible to create estimates for those who are employed, unemployed, and not in the labor force. Because the CPS is a rich source of information on the employment status of the population, it will be possible to examine in detail the nature of various employment and unemployment situations.

II. Current Action

Office of Management and Budget clearance is being sought for the CPS Disability Supplement. These data are necessary to provide information about the labor market challenges facing persons with a disability and will contribute to improvements in policies and programs designed to assist these individuals.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: CPS Disability Supplement.

OMB Number: 1220–0186.

Type of Review: Reinstatement without change of a previously approved collection.

Affected Public: Individuals or households.

Total Respondents: 55,000.

Frequency: Once.

Total Responses: 106,000.

Average Time per Response: 5 minutes.

Estimated Total Burden Hours: 8,833 hours.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, on January 11, 2021.

Mark Staniorski,

Chief, Division of Management Systems.

[FR Doc. 2021–00845 Filed 1–14–21; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0083]

Applied Research Laboratories of South Florida, LLC; Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for Applied Research Laboratories of South Florida, LLC as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition for Applied Research Laboratories of South Florida LLC (ARL). ARL's expansion cover the addition of two test standards to the NRTL scope of recognition.

OSHA's recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including ARL, which details the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

ARL currently has one facility (site) recognized by OSHA for product testing and certification, with headquarters located at: Applied Research Laboratories of South Florida LLC, 5371 NW 161st Street, Miami, Florida 33014. A complete list of ARL's scope of recognition is available at *https://www.osha.gov/dts/otpca/nrtl/arl.html.*

ARL submitted an application, dated June 13, 2019 (OSHA–2007–0083–0055), to expand recognition to include two additional test standards. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application. OSHA published the preliminary notice announcing ARL's expansion application in the **Federal Register** on September 22, 2020 (85 FR 59554). The agency requested comments by October 7, 2020, but it received no comments in response to this notice. OSHA is now proceeding with this final notice to grant expansion of ARL's scope of recognition.

To obtain or review copies of all public documents pertaining to ARL's application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration at 202–693–2350. Docket No. OSHA–2007–0083 contains all materials in the record concerning ARL's recognition.

II. Final Decision and Order

OSHA staff examined ARL's expansion application, the capability to meet the requirements of the test standards, and other pertinent information. Based on a review of this evidence, OSHA finds that ARL meets the requirements of 29 CFR 1910.7 for expansion of the scope of recognition, subject to the conditions listed below. OSHA, therefore, is proceeding with this final notice to grant the expansion of ARL's scope of recognition. OSHA limits the expansion of ARL's scope of recognition to testing and certification of products for demonstration of conformance to the test standards listed below in Table 1.

TABLE 1—LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN ARL'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
ANSI/UL 399	Standard for Drinking-Water Coolers.
ANSI/UL 471	Standard for Commercial Refrigerators and Freezers.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the

workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, the designation of the standards-developing organization for the standard as opposed to the ANSI designation may be used. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, ARL must abide by the following conditions of the recognition:

1. ARL must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in the operations as a NRTL, and provide details of the change(s);

2. ARL must meet all the terms of the recognition and comply with all OSHA policies pertaining to this recognition; and

3. ARL must continue to meet the requirements for recognition, including all previously published conditions on ARL's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of ARL, subject to the conditions specified above.

III. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2)), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC, on January 11, 2021.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–00848 Filed 1–14–21; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice of Deep Space Food Challenge Phase 1

AGENCY: National Aeronautics and Space Administration (NASA).

Notice: (21–003).

ACTION: Notice of Deep Space Food Challenge Phase 1.

SUMMARY: Phase 1 of the Deep Space Food Challenge is open, and teams that wish to compete may now register. Centennial Challenges, part of the NASA Space Technology Mission Directorate's Prizes, Challenges, and Crowdsourcing Program, consist of prize competitions to stimulate innovation in technologies of interest and value to NASA and the nation. Phase 1 of the Deep Space Food Challenge is a prize competition with a total prize purse made up of $500,000 USD, (five hundred thousand United States dollars) to be awarded to competitor teams for the design of novel technologies, systems and approaches for food production for long duration space exploration missions. NASA is providing the prize purse for U.S. teams, and the Methuselah Foundation will be conducting the Challenge on behalf of NASA. NASA is considering a Phase 2 (system demonstration phase) of the competition depending on the outcome of the Phase 1 competition.

DATES: Challenge registration for Phase 1 opened January 12, 2021, and will remain open until the deadlines stated below. No further requests for registration will be accepted after the stated deadline.

Other important dates:

May 28, 2021 Phase 1 Registration Closes for U.S. & Non-Canadian International Teams

July 30, 2021 Submissions Due for all Teams

September 2021 Winner(s) Announced

ADDRESSES: Phase 1 of the Deep Space Food Challenge will be conducted virtually. The Challenge competitors will develop and submit their design proposals from their own location.

FOR FURTHER INFORMATION CONTACT: To register for or get additional information regarding the Deep Space Food Challenge, please visit: *www.deepspacefoodchallenge.org*

For general information on NASA Centennial Challenges please visit: *http://www.nasa.gov/challenges.* General questions and comments regarding the program should be addressed to Monsi Roman, Centennial Challenges Program Manager, NASA Marshall Space Flight Center Huntsville, AL 35812. Email address: *hq-stmd-centennialchallenges@mail.nasa.gov.*

For general information on the Canadian Space Agency please visit: *https://www.canada.ca/en/space-agency.html.* General questions and comments regarding the program should be addressed to *ASC.DefiAEL-DSFChallenge.CSA@canada.ca.*

SUPPLEMENTARY INFORMATION:

Summary

Food is a critical component of human space exploration missions. When humans return to the lunar surface, the early missions are expected to use prepackaged foods similar to those in use on the International Space Station (ISS) today, but extending the duration of lunar missions requires reducing resupply dependency on Earth. Thus, testing a sustainable system on the Moon that meets lunar crews' needs is a fundamental step for both lunar sustainability and will also support Mars exploration. As part of this, space agencies are focused on how to furnish crew members with a viable system that produces food for all long duration space missions. The food system will need to be an integrated solution that:

- Provides all daily nutritional needs
- Provides a variety of palatable and safe food choices
- Enables acceptable, safe, and quick preparation methods
- Limits resource requirements with no dependency on direct periodic resupply from Earth over durations increasing from months to years

In short, space agencies will need to provide their future crew members with nutritious foods they will enjoy eating within all of the constraints of current technology for life away from Earth. They must also ensure that the process to create, grow, and/or prepare the food is not time consuming and not unpleasant. Although there are many food systems on Earth that may offer benefits to space travelers, the ability of these systems to meet spaceflight demands has not yet been established.

Additionally, food insecurity is a significant chronic problem on Earth in urban, rural and harsh environments and communities. In places like the Arctic and Canada's North, the cost of providing fresh produce on the shelves can be incredibly high. This can also support greater food production in other milder environments, including major urban centers where vertical farming, urban agriculture and other novel food production techniques can play a more significant role.

Disasters can also disrupt supply chains, on which all people depend, and further aggravate food shortages. Developing compact and innovative advanced food system solutions can further enhance local production and reduce food supply chain challenges, providing new solutions for humanitarian responses to floods and droughts, and new technologies for rapid deployment following disasters.

The Deep Space Food Challenge will identify technology solutions that can:

- Help fill food gaps for a three-year round-trip mission with no resupply
- Feed a crew of four (4)
- Improve the accessibility of food on Earth, in particular, via production directly in urban centers and in remote and harsh environments
- Achieve the greatest amount of food output with minimal inputs and minimal waste
- Create a variety of palatable, nutritious, and safe foods that requires little processing time for crew members

This Challenge seeks to incentivize Teams to develop novel technologies, systems and/or approaches for food production that need not meet the full nutritional requirements of future crews, but can contribute significantly to and be integrated into a comprehensive food system.

I. Prize Amounts

Up to 20 top scoring U.S. Teams that achieve a score in five or more of the scoring categories will receive $25,000 USD each from NASA and be invited to compete in Phase 2 (should Phase 2 open for competition). Teams must meet the eligibility requirements for the NASA Prize in order to be eligible to receive a prize from NASA.

II. Eligibility To Participate and Win Prize Money

To be eligible to win a prize, competitors must register and comply with all requirements in the Official Rules. Interested Teams should refer to the official Challenge website (*www.deepspacefoodchallenge.org*) for full details on eligibility and registration.

III. Official Rules

The complete official rules for the Deep Space Food Challenge can be found at: *www.deepspacefoodchallenge.org.*

Nanette Smith,

NASA Federal Register Liaison Officer.

[FR Doc. 2021–00908 Filed 1–14–21; 8:45 am]

BILLING CODE 7510–13–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90887; File No. SR–FINRA–2021–001]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the FINRA Rule 6800 Series (Consolidated Audit Trail Compliance Rule) Relating to Allocation Reporting Requirements

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 4, 2021, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the FINRA Rule 6800 Series, FINRA's compliance rule (''Compliance Rule'') regarding the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan'')[3] to be consistent with a conditional exemption granted by the Commission from certain allocation reporting requirements set forth in Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan (''Allocation Exemption'').[4]

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the Rule 6800 Series to be consistent with the Allocation Exemption. The Commission granted the relief conditioned upon the Participants' adoption of Compliance Rules that implement the alternative approach to reporting allocations to the Central Repository described in the Allocation Exemption (referred to as the ''Allocation Alternative'').

(1) Request for Exemptive Relief

Pursuant to Section 6.4(d)(ii)(A) of the CAT NMS Plan, each Participant must, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if the order is executed, in whole or in part: (1) An Allocation Report;[5] (2) the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable; and the (3) CAT-Order-ID of any contra-side order(s). Accordingly, FINRA and the other Participants implemented Compliance Rules that require their Industry Members that are executing brokers to submit to the Central Repository, among other things, Allocation Reports and the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable.

On August 27, 2020, the Participants submitted to the Commission a request for an exemption from certain allocation reporting requirements set forth in Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan (''Exemption Request'').[6] In the Exemption Request, the Participants requested that they be permitted to implement the Allocation Alternative, which, as noted above, is an

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Unless otherwise specified, capitalized terms used in this rule filing are defined as set forth in the Compliance Rule.

[4] *See* Securities Exchange Act Release No. 90223 (October 19, 2020), 85 FR 67576 (October 23, 2020) (''Allocation Exemptive Order'').

[5] Section 1.1 of the CAT NMS Plan defines an ''Allocation Report'' as ''a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.''

[6] *See* letter from the Participants to Vanessa Countryman, Secretary, Commission, dated August 27, 2020 (the ''Exemption Request'').

alternative approach to reporting allocations to the Central Repository. Under the Allocation Alternative, any Industry Member that performs an allocation to a client account would be required under the Compliance Rule to submit an Allocation Report to the Central Repository when shares/contracts are allocated to a client account regardless of whether the Industry Member was involved in executing the underlying order(s). Under the Allocation Alternative, a ''client account'' would be any account that is not owned or controlled by the Industry Member.

In addition, under the Allocation Alternative, an ''Allocation'' would be defined as: (1) The placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account based on allocation instructions (*e.g.,* subaccount allocations, delivery versus payment (''DVP'') allocations). Pursuant to this definition and the proposed Allocation Alternative, an Industry Member that performs an Allocation to an account that is not a client account, such as proprietary accounts and events including step-outs,[7] or correspondent flips,[8] would not be required to submit an Allocation Report to the Central Repository for that allocation, but could do so on a voluntary basis. Industry Members would be allowed to report Allocations to accounts other than client accounts; in that instance, such Allocations must be marked as Allocations to accounts other than client accounts.

(a) Executing Brokers and Allocation Reports

To implement the Allocation Alternative, the Participants requested exemptive relief from Section 6.4(d)(ii)(A)(1) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members that are executing brokers, who do not perform Allocations, to record and report to the Central Repository, if the order is executed, in whole or in part, an Allocation Report. Under the Allocation Alternative, when an Industry Member other than an executing broker (*e.g.,* a prime broker or clearing broker) performs an Allocation, that Industry Member would be required to submit the Allocation Report to the Central Repository. When an executing broker performs an Allocation for an order that is executed, in whole or in part, the burden of submitting an Allocation Report to the Central Repository would remain with the executing broker under the Allocation Alternative. In certain circumstances this would result in multiple Allocation Reports—the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

The Participants stated that granting exemptive relief from submitting Allocation Reports for executing brokers who do not perform an Allocation, and requiring the Industry Member other than the executing broker that is performing the Allocation to submit such Allocation Reports, is consistent with the basic approach taken by the Commission in adopting Rule 613 under the Exchange Act. Specifically, the Participants stated that they believe that the Commission sought to require each broker-dealer and exchange that touches an order to record the required data with respect to actions it takes on the order.[9] Without the requested exemptive relief, executing brokers that do not perform Allocations would be required to submit Allocation Reports. In addition, the Participants stated that, because shares/contracts for every execution must be allocated to an account by the clearing broker in such circumstances, there would be no loss of information by shifting the reporting obligation from the executing broker to the clearing broker.

(b) Identity of Prime Broker

To implement the Allocation Alternative, the Participants also requested exemptive relief from Section 6.4(d)(ii)(A)(2) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if an order is executed, in whole or in part, the SRO-Assigned Market Participant Identifier of the prime broker, if applicable. Currently, under the CAT NMS Plan, an Industry Member is required to report the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker in connection with the execution of an order, and such information would be part of the order's lifecycle, rather than in an Allocation Report that is not linked to the order's lifecycle.[10] Under the Allocation Alternative, the identity of the prime broker would be required to be reported by the clearing broker on the Allocation Report, and, in addition, the prime broker itself would be required to report the ultimate allocation, which the Participants believe would provide more complete information.

The Participants stated that associating a prime broker with a specific execution, as is currently required by the CAT NMS Plan, does not reflect how the allocation process works in practice as allocations to a prime broker are done post-trade and are performed by the clearing broker of the executing broker. The Participants also stated that with the implementation of the Allocation Alternative, it would be duplicative for the executing broker to separately identify the prime broker for allocation purposes.

The Participants stated that if a particular customer only has one prime broker, the identity of the prime broker can be obtained from the customer and account information through the DVP accounts for that customer that contain the identity of the prime broker. The Participants further stated that Allocation Reports related to those executions would reflect that shares/contracts were allocated to the single prime broker. The Participants believe that there is no loss of information through the implementation of the Allocation Alternative compared to what is required in the CAT NMS Plan and that this approach does not decrease the regulatory utility of the CAT for single prime broker circumstances.

In cases where a customer maintains relationships with multiple prime brokers, the Participants asserted that the executing broker will not have information at the time of the trade as to which particular prime broker may be

[7] ''A step-out allows a member to allocate all or part of a client's position from a previously executed trade to the client's account at another broker-dealer. In other words, a step-out functions as a client's position transfer, rather than a trade; there is no exchange of shares and funds and no change in beneficial ownership.'' *See* Trade Reporting Frequently Asked Questions, Section 301, available at: *www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq.*

[8] Correspondent clearing flips are the movement of a position from an executing broker's account to a different account for clearance and settlement, allowing a broker-dealer to execute a trade through another broker-dealer and settle the trade in its own account. *See, e.g.,* The Depository Trust & Clearing Corporation, Correspondent Clearing, available at: *www.dtcc.com/clearing-services/equities-tradecapture/correspondent-clearing.*

[9] *See* Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45748 (August 1, 2012).

[10] The Participants did not request exemptive relief relating to the reporting of the SRO-Assigned Market Participant Identifier of clearing brokers.

allocated all or part of the execution. Under the Allocation Alternative, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts where the shares/contracts were ultimately allocated. To determine the prime broker for a customer, a regulatory user would query the customer and account database using the customer's CCID to obtain all DVP accounts for the CCID at broker-dealers. The Participants state that when a customer maintains relationships with multiple prime brokers, the customer typically has a separate DVP account with each prime broker, and the identities of those prime brokers can be obtained from the customer and account information.

(c) Additional Conditions to Exemptive Relief

In the Exemption Request, the Participants included certain additional conditions for the requested relief. Currently, the definition of Allocation Report in the CAT NMS Plan only refers to shares. To implement the Allocation Alternative, the Participants proposed to require that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Specifically, Participants would require the reporting of the following in each Allocation Report: (1) The FDID for the account receiving the allocation, including subaccounts; (2) the security that has been allocated; (3) the identifier of the firm reporting the allocation; (4) the price per share/contracts of shares/contracts allocated; (5) the side of shares/contracts allocated; (6) the number of shares/contracts allocated; and (7) the time of the allocation.

Furthermore, to implement the Allocation Alternative, the Participants proposed to require the following information on all Allocation Reports: (1) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (2) trade date; (3) settlement date; (4) IB/correspondent CRD Number (if applicable); (5) FDID of new order(s) (if available in the booking system); [11] (6) allocation instruction time (optional); (7) if the account meets the definition of institution under FINRA Rule 4512(c); [12] (8) type of allocation (allocation to a custody account, allocation to a DVP account, step out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.,* option exercises, conversions); (9) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (10) if an allocation was cancelled, a cancel flag, which indicates that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

(2) Proposed Rule Changes to Implement Exemptive Relief

On October 29, 2020, the Commission granted the exemptive relief requested in the Exemption Request. The Commission granted the relief conditioned upon the adoption of Compliance Rules that implement the reporting requirements of the Allocation Alternative. Accordingly, FINRA proposes the following changes to its Compliance Rule to implement the reporting requirements of the Allocation Alternative.

(a) Definition of Allocation

FINRA proposes to add a definition of ''Allocation'' as new paragraph (c) to Rule 6810.[13] Proposed paragraph (c) of Rule 6810 would define an ''Allocation'' to mean ''(1) the placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account based on allocation instructions (*e.g.,* subaccount allocations, delivery versus payment (''DVP'') allocations).'' The SEC stated in the Allocation Exemption that this definition of ''Allocation'' is reasonable.

(b) Definition of Allocation Report

FINRA proposes to amend the definition of ''Allocation Report'' set forth in Rule 6810(c) (to be renumbered as Rule 6810(d)) to reflect the requirements of the Allocation Exemption. Rule 6810(c) defines the term ''Allocation Report'' to mean:

> A report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided, for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.

FINRA proposes to amend this definition in two ways: (1) Applying the requirements for Allocation Reports to contracts in addition to shares; and (2) requiring the reporting of additional elements for the Allocation Report.

(i) Shares and Contracts

The requirements for Allocation Reports apply only to shares, as the definition of ''Allocation Report'' in Rule 6810(c) refers to shares, not contracts. In the Allocation Exemption, the Commission stated that applying the requirements for Allocation Reports to contracts in addition to shares is appropriate because CAT reporting requirements apply to both options and equities. Accordingly, the SEC stated that the Participants would be required to modify their Compliance Rules such that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Therefore, FINRA proposes to amend Rule 6810(c) (to be renumbered as Rule 6810(d)) to apply to contracts, as well as shares. Specifically, FINRA proposes to add references to contracts to the definition of ''Allocation Report'' to the following phrases: ''the Firm Designated ID for any account(s), including subaccount(s), to which executed shares/contracts are allocated,'' ''the price per share/contract of shares/contracts allocated,'' ''the side of shares/contracts allocated,'' and ''the number of shares/contracts allocated to each account.''

(ii) Additional Elements

The Commission also conditioned the Allocation Exemption on the Participants amending their Compliance Rules to require the ten additional elements in Allocation Reports described above. Accordingly, FINRA

[11] The Participants propose that for scenarios where the Industry Member responsible for reporting the Allocation has the FDID of the related new order(s) available, such FDID must be reported. This would include scenarios in which: (1) The FDID structure of the top account and subaccounts is known to the Industry Member responsible for reporting the Allocation(s); and (2) the FDID structure used by the IB/Correspondent when reporting new orders is known to the clearing firm reporting the related Allocations.

[12] FINRA Rule 4512(c) states the for purposes of the rule, the term ''institutional account'' means the account of: (1) A bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

[13] FINRA proposes to renumber the definitions in Rule 6810 to accommodate the addition of this new definition of ''Allocation'' and the new definition of ''Client Account'' discussed below.

proposes to require these additional elements in Allocation Reports. Specifically, FINRA proposes to amend the definition of ''Allocation Report'' in Rule 6810(c) (to be renumbered as Rule 6810(d)) to include the following elements, in addition to those elements currently required under the CAT NMS Plan:

(6) The time of the allocation; (7) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (8) trade date; (9) settlement date; (10) IB/correspondent CRD Number (if applicable); (11) FDID of new order(s) (if available in the booking system); (12) allocation instruction time (optional); (12) if account meets the definition of institution under FINRA Rule 4512(c); (13) type of allocation (allocation to a custody account, allocation to a DVP account, step-out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.,* option exercises, conversions); (14) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (15) if an allocation was cancelled, a cancel flag indicating that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

(c) Allocation Reports

(i) Executing Brokers That Do Not Perform Allocations

The Commission granted the Participants an exemption from the requirement that the Participants, through their Compliance Rule, require executing brokers that do not perform Allocations to submit Allocation Reports. The Commission stated that it understands that executing brokers that are not self-clearing do not perform allocations themselves, and such allocations are handled by prime and/or clearing brokers, and these executing brokers therefore do not possess the requisite information to provide Allocation Reports. Accordingly, FINRA proposes to eliminate Rule 6830(a)(2)(A)(i),[14] which requires an Industry Member to record and report to the Central Repository an Allocation Report if the order is executed, in whole or in part, and to replace this provision with proposed Rule 6830(a)(2)(F) as discussed below.

(ii) Industry Members That Perform Allocations

The Allocation Exemption requires the Participants to amend their Compliance Rules to require Industry Members to provide Allocation Reports to the Central Repository any time they perform Allocations to a client account, whether or not the Industry Member was the executing broker for the trades. Accordingly, the Commission conditioned the Allocation Exemption on the Participants adopting Compliance Rules that require prime and/or clearing brokers to submit Allocation Reports when such brokers perform allocations, in addition to requiring executing brokers that perform allocations to submit Allocation Reports. The Commission determined that such exemptive relief would improve efficiency and reduce the costs and burdens of reporting allocations for Industry Members because the reporting obligation would belong to the Industry Member with the requisite information, and executing brokers that do not have the information required on an Allocation Report would not have to develop the infrastructure and processes required to obtain, store and report the information. The Commission stated that this exemptive relief should not reduce the regulatory utility of the CAT because an Allocation Report would still be submitted for each executed trade allocated to a client account, which in certain circumstances could still result in multiple Allocation Reports,[15] just not necessarily by the executing broker.

In accordance with the Allocation Exemption, FINRA proposes to add proposed Rule 6830(a)(2)(F) to the Compliance Rule. Proposed Rule 6830(a)(2)(F) would require Industry Members to record and report to the Central Repository ''an Allocation Report any time the Industry Member performs an Allocation to a Client Account, whether or not the Industry Member was the executing broker for the trade.''

(iii) Client Accounts

In the Allocation Exemption, the Commission also exempted the Participants from the requirement that they amend their Compliance Rules to require Industry Members to report Allocations for accounts other than client accounts. The Commission believes that allocations to client accounts, and not allocations to proprietary accounts or events such as step-outs and correspondent flips, provide regulators the necessary information to detect abuses in the allocation process because it would provide regulators with detailed information regarding the fulfillment of orders submitted by clients, while reducing reporting burdens on broker-dealers. For example, Allocation Reports would be required for allocations to registered investment advisor and money manager accounts. The Commission further believes that the proposed approach should facilitate regulators' ability to distinguish Allocation Reports relating to allocations to client accounts from other Allocation Reports because Allocations to accounts other than client accounts would have to be identified as such. This approach could reduce the time CAT Reporters expend to comply with CAT reporting requirements and lower costs by allowing broker-dealers to use existing business practices.

To clarify that an Industry Member must report an Allocation Report solely for Allocations to a client account, proposed Rule 6830(a)(2)(F) specifically references ''Client Accounts,'' as discussed above. In addition, FINRA proposes to add a definition of ''Client Account'' as proposed Rule 6810(l). Proposed Rule 6810(l) would define a ''Client Account'' to mean ''for the purposes of an Allocation and Allocation Report, any account or subaccount that is not owned or controlled by the Industry Member.''

(d) Identity of Prime Broker

FINRA also proposes to amend Rule 6830(a)(2)(A)(ii) to eliminate the requirement for executing brokers to record and report the SRO-Assigned Market Participant Identifier of the prime broker. Rule 6830(a)(2)(A)(ii) states that each Industry Member is required to record and report to the Central Repository, if the order is executed, in whole or in part, the ''SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable.'' FINRA proposes to delete the phrase ''or prime broker'' from this provision. Accordingly, each Industry Member that is an executing broker would no longer be required to report the SRO-Assigned Market Participant Identifier of the prime broker.

As the Commission noted in the Allocation Exemption, exempting the Participants from the requirement that they, through their Compliance Rules,

[14] FINRA proposes to renumber Rule 6830(a)(2)(A)(ii) and (iii) as Rule 6830(a)(2)(A)(i) and (ii) in light of the proposed deletion of Rule 6830(a)(2)(A)(i).

[15] As noted above, under the Allocation Alternative, for certain executions, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

require executing brokers to provide the SRO-Assigned Market Participant Identifier of the prime broker is appropriate because, as stated by the Participants, allocations are done on a post-trade basis and the executing broker will not have the requisite information at the time of the trade. Because an executing broker, in certain circumstances, does not have this information at the time of the trade, this relief relieves executing brokers of the burdens and costs of developing infrastructure and processes to obtain this information in order to meet the contemporaneous reporting requirements of the CAT NMS Plan.

As the Commission noted in the Allocation Exemption, although executing brokers would no longer be required to provide the prime broker information, regulators will still be able to determine the prime broker(s) associated with orders through querying the customer and account information database. If an executing broker has only one prime broker, the identity of the prime broker can be obtained from the customer and account information associated with the executing broker. For customers with multiple prime brokers, the identity of the prime brokers can be obtained from the customer and account information which will list the prime broker, if there is one, that is associated with each account.

FINRA has filed the proposed rule change for immediate effectiveness. The proposed rule change will be operative 30 days after the date of the filing.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[16] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(9) of the Act,[17] which requires that FINRA rules not impose any burden on competition that is not necessary or appropriate.

FINRA believes that the proposed rule change is consistent with the Act because it is consistent with, and implements, the Allocation Exemption, and is designed to assist FINRA and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [18] To the extent that the proposed rule change implements the Plan, and applies specific requirements to Industry Members, FINRA believes that it furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA notes that the proposed rule change is consistent with the Allocation Exemption and is designed to assist FINRA in meeting its regulatory obligations pursuant to the Plan. FINRA also notes that the proposed rule change will apply equally to all Industry Members. FINRA anticipates no new costs to member firms reporting to the CAT as a result of this proposed rule change, because any related costs have already been built in the technical specifications previously determined and shared broadly in conformance with the CAT NMS Plan and the Allocation Exemption. In addition, FINRA and all national securities exchanges are proposing this amendment to their Compliance Rules. Therefore, this is not a competitive rule filing and does not impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b-4(f)(6) thereunder.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2021–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2021–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

[16] 15 U.S.C. 78o–3(b)(6).

[17] 15 U.S.C. 78o–3(b)(9).

[18] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696, 84697 (November 23, 2016).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2021–001, and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00821 Filed 1–14–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90901; File No. SR–CboeEDGX–2020–064]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish a Policy Relating to Billing Errors

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on December 31, 2020, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its options and equities fees schedules to adopt a provision relating to billing errors and fee disputes.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its options and equities fees schedules to adopt a provision relating to billing errors and fee disputes. Particularly, the Exchange proposes to provide that after three calendar months, all fees and rebates assessed by the Exchange would be considered final. More specifically, the Exchange would adopt language in the fees schedules that would provide that all fees and rebates assessed prior to the three full calendar months before the month in which the Exchange becomes aware of a billing error shall be considered final. Particularly, the Exchange will resolve an error by crediting or debiting Members and Non-Members based on the fees or rebates that should have been applied in the three full calendar months preceding the month in which the Exchange became aware of the error, including to all impacted transactions that occurred during those months.[5] The Exchange will apply the three month look back regardless of whether the error was discovered by the Exchange or by a Member or Non-Member that submitted a fee dispute to the Exchange. The Exchange also proposes to provide all disputes concerning fees and rebates assessed by the Exchange would have to be submitted to the Exchange in writing and accompanied by supporting documentation.

The purpose of the proposed change is to encourage Members and Non-Members to promptly review their Exchange invoices so that any disputed charges can be addressed in a timely manner. The Exchange notes that it provides Members with both daily and monthly fee reports and thus believes they should be aware of any potential billing errors within three months. Requiring that Members and Non-Members submit disputes in writing and provide supporting documentation encourages them to promptly review their invoices so that any disputed charges can be addressed in a timely manner while the information and data underlying those charges (*e.g.,* applicable fees and order information) is still easily and readily available. This practice will avoid issues that may arise when Members or Non-Members do not dispute an invoice in a timely manner and will conserve Exchange resources that would have to be expended to resolve untimely billing disputes. As such, the proposed rule change would alleviate administrative burdens related to billing disputes, which could divert staff resources away from the Exchange's regulatory and business purposes. The proposed rule change to provide all fees and rebates are final after three calendar months also provides both the Exchange and Members and Non-Members finality and the ability to close their books after a known period of time.

The Exchange notes that a number of exchanges have explicitly stated that they consider all fees to be final after a similar period of time.[6] Additionally, several other exchanges have adopted similar provisions in their rules that provide for a process for Members and Non-Members to submit fee disputes.[7] The proposed billing policy will apply to all charges and rebates reflected in the Exchange's fees schedules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] For example, if the Exchange becomes aware of a transaction fee billing error on January 4, 2021, the Exchange will resolve the error by crediting or debiting Members based on the fees or rebates that should have been applied to any impacted transactions during October, November and December 2020. The Exchange notes that because it bills in arrears, the Exchange would be able to correct the error in advance of issuing the January 2021 invoice and therefore, transactions impacted through the date of discovery (in this example, January 4, 2021) and thereafter, would be billed correctly.

[6] *See e.g.* Securities Exchange Act Release No. 87650 (December 3, 2019), 84 FR 67304 (December 9, 2019) (SR–NYSECHX–2019–024); Securities Exchange Act Release No. 84430 (October 16, 2018), 83 FR 53347 (October 22, 2018) (SR–NYSENAT–2018–23); and Securities Exchange Act Release No. 79060 (October 6, 2016), 81 FR 70716 (October 13, 2016) (SR–ISEGemini–2016–11).

[7] *See e.g.,* MEMX LLC, Rule 15.3, IEX Rule 15.120, Nasdaq Rule Equity 7, Section 70, Nasdaq BX Rule Equity 7, Section 111, and Nasdaq PHLX Rule Equity 7, Section 2.

Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

With respect to the proposed billing procedure, the Exchange believes that the requirement to submit all billing disputes in writing, and with supporting documentation is reasonable because the Exchange provides Members with ample tools to monitor and account for various charges incurred in a given month. Additionally, the Exchange notes that most Members and Non-Members that pay exchange fees are sophisticated entities, so it is appropriate to expect them to promptly review their invoices for errors and to be capable of identifying such errors. The proposed provision also promotes the protection of investors and the public interest by providing a clear and concise mechanism for Members and Non-Members to dispute fees and for the Exchange to review such disputes in a timely manner. Moreover, the proposed billing dispute language, which will lower the Exchange's administrative burden, is similar to billing dispute language of other exchanges.[11] In addition, the proposed billing procedure is fair, equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees).

The Exchange also believes that providing that all fees and rebates are final after three months (*i.e.,* resolving billing errors only for the three full calendar months preceding the month in which the Exchange became aware of the error), is reasonable as both the Exchange and Members and Non-Members have an interest in knowing when its fee assessments are final and when reliance can be placed on those assessments. Indeed, without some deadline on billing errors, the Exchange and Members and Non-Members would never be able to close their books with any confidence. Furthermore, as noted above, a number of Exchanges similarly consider their fees final after a similar period of time.[12] The proposed change is also equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees) and apply in cases where either the Member (or Non-Member) discovers the error or the Exchange discovers the error.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the billing procedure and billing error policy, the proposed rule change would establish a clear process that would apply equally to all Members. Additionally, the proposed rule change is similar to rules of other exchanges. The Exchange does not believe such proposed changes would impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets. Moreover, because the proposed changes would apply equally to all Members, the proposal does not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6)[14] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2020–064 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2020–064. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change;

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See* supra note 7.

[12] *See* supra note 6.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2020–064 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00818 Filed 1–14–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90894; File No. SR–PEARL–2020–37]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding Tape B Securities

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 31, 2020, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the fee schedule applicable for MIAX PEARL Equities, an equities trading facility of the Exchange (the ''Fee Schedule'').[3] The proposed changes will become effective January 1, 2021.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1901.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the MIAX PEARL Equities Fee Schedule to increase the rebate for displayed orders[4] that add liquidity in Tape B securities priced at or above $1.00 to the MIAX PEARL Equities Book[5] from $0.0032 to $0.0035 per share. The Exchange also proposes to decrease the fee for orders that remove liquidity in Tape B Securities priced at or above $1.00 from the MIAX PEARL Equities Book from $0.0028 to $0.0027 per share.

The Exchange does not propose to amend the rates to add or remove liquidity in Tapes A and C securities. The rebate provided to displayed orders that add liquidity in Tapes A and C securities priced at or above $1.00 will remain $0.0032 per share and the fee to remove liquidity in Tape A and C securities priced at or above $1.00 will remain $0.0028 per share. Lastly, the Exchange proposes to amend the Fee Schedule to delineate the rates applicable to displayed orders that add liquidity and orders that remove liquidity in Tapes A, B, and C securities priced at or above $1.00.

The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or rebates/incentives to be insufficient. More specifically, the Exchange is only one of several equities venues (including both registered exchanges and various alternative trading systems) to which market participants may direct their order flow and execute their trades. Indeed, equity trading is currently dispersed across 16 exchanges,[6] 31 alternative trading systems,[7] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 20% of total market share.[8] Thus, in such a low-concentrated and highly competitive market, no single equities trading venue possesses significant pricing power in the execution of trades, and, the Exchange currently represents a very small percentage of the overall market.

The purpose of this proposed change is for business and competitive reasons. As a new entrant into the equities market, the Exchange initially adopted a rebate of $0.0028 per share for displayed orders that add liquidity and fee of $0.0028 per share for orders that remove liquidity in securities priced at or above $1.00.[9] The Exchange later increased the rebate for displayed orders that add liquidity in securities priced at or above $1.00 to $0.0032 per share to further encourage market participants to submit displayed orders to the Exchange.[10] The fee to remove liquidity in securities priced at or above $1.00 has been unchanged since its adoption.

The Exchange now believes that it is appropriate to increase the rebate to $0.0035 per share for displayed orders that add liquidity in Tape B securities priced at or above $1.00. The Exchange believes that this proposed increased rebate will result in encouraging market participants to submit more displayed orders to the Exchange, thereby increasing displayed order liquidity on the MIAX PEARL Equities Book, which should benefit all Exchange participants by providing more trading opportunities and tighter spreads. The Exchange also believes a corresponding change to decrease the fee to $0.0027 per share for orders that remove liquidity in Tape B securities priced at or above $1.00 is similarly appropriate. The Exchange believes the decreased fee would

[4] *See* Exchange Rule 2614(c)(3).

[5] The term ''MIAX PEARL Equities Book'' means the electronic book of orders in equity securities maintained by the System. *See* Exchange Rule 1901. The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[6] *See* Cboe Global Markets, U.S Equities Market Volume Summary, available at *https://markets.cboe.com/us/equities/market_share/.*

[7] *See* FINRA ATS Transparency Data, available at *https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is available at *https://www.sec.gov/foia/docs/atslist.htm.*

[8] *See supra* note 6.

[9] *See* Securities Exchange Act Release No. 90102 (October 6, 2020), 85 FR 64559 (October 13, 2020) (SR–PEARL–2020–17).

[10] *See* Securities Exchange Act Release No. 90400 (November 12, 2020), 85 FR 73550 (November 18, 2020) (SR–PEARL–2020–24).

similarly encourage market participants to enter liquidity removing orders on the Exchange, thereby increasing the execution opportunities for the displayed orders resting on the MIAX PEARL Equities Book.

The proposed changes will become effective on January 1, 2021. The Exchange does not propose any other changes to the MIAX PEARL Equities Fee Schedule.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(4) of the Act [12] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or rebates/incentives to be insufficient. The Exchange believes that the amended Fee Schedule reflects a simple and competitive pricing structure, which is designed to incentivize market participants to add aggressively priced displayed liquidity and direct their order flow to the Exchange. The proposed changes are not unfairly discriminatory because they will apply equally to all Equity Members.[13]

The Exchange believes the proposed increased rebate for displayed orders that add liquidity in Tape B securities priced at or above $1.00 will continue to promote price discovery and price formation and deepen liquidity, thereby enhancing market quality to the benefit of all Equity Members and investors. The Exchange further believes the proposed increased rebate is reasonable because it would uniformly provide a rebate of $0.0035 per share to displayed orders in Tape B securities priced at or above $1.00 traded on the Exchange. The proposed rebate is also comparable to that provided by other exchanges.[14] However, those exchanges provide a tiered pricing structure that provides a comparable rebate for orders that add liquidity in Tape B securities only when certain volume thresholds are met.[15]

The Exchange believes its proposed decreased fee of $0.0027 per share for orders that remove liquidity in Tape B securities priced at or above $1.00 is reasonable, equitable and not unfairly discriminatory because it will apply to all orders in Tape B securities from all market participants and regardless of whether they are displayed or non-displayed. The proposed decreased fee should encourage market participants to enter liquidity removing orders on the Exchange, thereby increasing the execution opportunities for the displayed orders resting on the MIAX PEARL Equities Book. Therefore, coupled with the proposed increased rebate, the decreased fee should improve liquidity and price discovery in Tape B securities on the MIAX PEARL Equities Book. Lastly, the Exchange notes that the proposed decreased fee is also comparable to or lower than the standard fee to remove liquidity charged by other exchanges.[16]

Providing separate rates for orders in Tape A, B, and C securities is also equitable and reasonable because it is similar to pricing structures offered by other national securities exchanges that the Exchange directly competes with.[17] Further, the Exchange believes the proposed changes will encourage additional order flow on the Exchange resulting in greater liquidity to the benefit of all market participants on the Exchange by providing more trading opportunities in Tape B securities. The Exchange also continues to believe that it is reasonable, equitable and not unfairly discriminatory to provide a higher rebate to displayed orders that add liquidity than to non-displayed orders as this rebate structure is designed to incentivize Equity Members to send the Exchange displayed orders, thereby contributing to price discovery and price formation, consistent with the overall goal of enhancing market quality.

Further, the Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [18]

As the Commission itself recognized, the market for trading services in NMS stocks has become ''more fragmented and competitive.'' [19] Indeed, equity trading is currently dispersed across 16 exchanges,[20] 31 alternative trading systems,[21] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share (whether including or excluding auction volume).[22] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange only recently launched trading operations on September 25, 2020, and thus has a market share of approximately less than 1% of executed volume of equities trading.

The Exchange has designed its proposed changes to continue to balance the need to attract order flow as a new exchange entrant with the desire to continue to provide a simple fee structure to market participants. The Exchange believes its proposed changes will enable it to continue to compete for order flow, particularly in Tape B securities. The Exchange believes that the ever-shifting market share among

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4) and (5) [sic].

[13] The term ''Equity Member'' means a Member authorized by the Exchange to transact business on MIAX PEARL Equities. *See* Exchange Rule 1901.

[14] *See* the NYSE Arca, Inc. (''NYSE Arca'') fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (providing a rebate as high as $0.0034 per share for Tape B securities under Step Up Tier 4). *See also* footnotes 1, 12, and 13 of the Cboe BZX Exchange, Inc. (''BZX'') fee schedule *available at https://www.cboe.com/us/equities/membership/fee_schedule/* (providing cumulative rebate as high as $0.0034 per share for Tape B Securities).

[15] *Id.*

[16] *See* the Cboe EDGX Exchange, Inc. (''EDGX'') *available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/* (providing a standard fee of $0.0027 per share to orders that remove liquidity). *See also* the New York Stock Exchange LLC (''NYSE'') fee schedule *available at https://www.nyse.com/markets/nyse/trading-info/fees* (providing fees to ''take'' liquidity ranging from $0.0024—$0.00275 depending on the type of market participant, order, and execution).

[17] *See* the NYSE Arca fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (providing separate varying fees and rebates for Tape A, B, and C securities with a rebate as high as $0.0034 per share for Tape B securities under Step Up Tier 4). *See also* footnotes 1, 12, and 13 of the BZX fee schedule *available at https://www.cboe.com/us/equities/membership/fee_schedule/* (providing tier rebates only for Tape B Securities).

[18] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (File No. S7–10–04) (''Regulation NMS'').

[19] *See* Securities Exchange Act Release No. 82873 (March 14, 2018), 83 FR 13008 (March 26, 2018) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks).

[20] *See supra* note 6.

[21] *See supra* note 7.

[22] *See supra* note 6.

the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or decrease use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an exchange, Equity Members can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow. Given this competitive environment, the Exchange's proposed changes represent a reasonable attempt to attract order flow to a new exchange entrant.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed fee change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Equity Members and non-Equity Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [23]

The Exchange does not believe that the proposed fee change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed fee change will increase competition and is intended to draw volume to the Exchange. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to decrease use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. As a new exchange, the Exchange faces intense competition from existing exchanges and other non-exchange venues that provide markets for equities trading. The proposed increased rebate and decreased fee for Tape B securities are intended to attract liquidity to the Exchange, much like the way other exchanges offer multiple incentives to their participants, including tiered pricing that provides higher rebates or discounted executions. These other exchanges will be able to modify such incentives to compete with the Exchange.

Further, while pricing incentives do cause shifts of liquidity between trading centers, market participants make determinations on where to provide liquidity or route orders to take liquidity based on factors other than pricing, including technology, functionality, and other considerations. Consequently, the Exchange believes that the degree to which its proposed changes could impose any burden on competition is extremely limited, and does not believe that such increased rebate and decreased fee for Tape B securities would burden competition between Equity Members or competing venues in a manner that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed increased rebate and decreased fee for Tape B securities will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes will apply equally to all Equity Members. The proposed increased rebate is intended to encourage market participants to add liquidity to the Exchange by providing a rebate that is comparable to those offered by other exchanges, which the Exchange believes will help to encourage Equity Members to send orders to the Exchange to the benefit of all Exchange participants. Meanwhile, the proposed decreased fee is similarly intended to encourage market participants to send liquidity removing orders to attempt to execute against the orders that add liquidity to the MIAX PEARL Equities Book. The proposed rates are equally applicable to all market participants and, therefore, the Exchange does not believe they will impose any inappropriate burden on intramarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[24] and Rule 19b–4(f)(2) [25] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2020–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2020–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

[23] *See supra* note 18.

[24] 15 U.S.C. 78s(b)(3)(A)(ii).

[25] 17 CFR 240.19b–4(f)(2).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2020–37, and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00811 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90885; File No. 4–757]

Joint Industry Plan; Order Instituting Proceedings to Determine Whether To Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data

January 11, 2021.

I. Introduction

On August 11, 2020, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Financial Industry Regulatory Authority, Inc. (''FINRA'') (collectively, the ''SROs'' or ''Participants'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed new single national market system plan governing the public dissemination of real-time consolidated equity market data for national market system (''NMS'') stocks (the ''CT Plan''). The proposed CT Plan was published for comment in the **Federal Register** on October 13, 2020.[1]

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,[2] to determine whether to disapprove the CT Plan or to approve the plan with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.

II. Background

The SROs filed the CT Plan pursuant to a Commission order directing the SROs to act jointly in developing and filing with the Commission a proposed new single national market system plan to replace the three existing national market system plans that govern the public dissemination of real-time, consolidated equity market data for NMS stocks (the ''Governance Order'').[3]

In issuing the Governance Order, the Commission stated that developments in technology and changes in the equities markets have heightened an inherent conflict of interest between the Participants' collective responsibilities in overseeing the existing equity data plans[4] and their individual interests in maximizing the viability of proprietary data products that they sell to market participants.[5] This conflict of interest, the Commission stated, combined with the concentration of voting power in the existing equity data plans among a few large ''exchange groups''—multiple exchanges operating under one corporate umbrella—has contributed to significant concerns regarding whether the consolidated feeds meet the purposes for them set out by Congress and by the Commission in adopting the national market system.[6] The Commission therefore found it in the public interest to require the Participants to jointly develop and file with the Commission a single new consolidated data plan with specified terms and conditions regarding the governance of the new plan.[7]

The full text of the proposed CT Plan appears in Attachment A to the Notice.[8]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed CT Plan

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,[9] and Rules 700 and 701 of the Commission's Rules of Practice,[10] to determine whether to disapprove the CT Plan or to approve the plan with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed CT Plan to inform the Commission's analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission ''shall approve a national market system plan . . . with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan . . . is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.''[11] Rule 608(b)(2) further provides that the Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.[12] In the Notice, the Commission sought comment on elements of the proposed CT Plan that bear on the Commission's analysis of whether the plan should be approved, disapproved,

[1] *See* Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 34–90096 (Oct. 6, 2020), 85 FR 64565 (Oct. 13, 2020) (''Notice''). Comments received in response to the Notice can be found on the Commission's website at *https://www.sec.gov/comments/4-757/4-757.htm.*

[2] 17 CFR 242.608(b)(2)(i).

[3] Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 34–88827 (May 6, 2020), 85 FR 28702 (May 13, 2020).

[4] The three equity data plans that currently govern the collection, consolidation, processing, and dissemination of SIP data are (1) the Consolidated Tape Association Plan (''CTA Plan''), (2) the Consolidated Quotation Plan (''CQ Plan''), and (3) the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''UTP Plan''). *See* Governance Order, *supra* note 3, 85 FR at 28703 & n.34.

[5] *See* Governance Order, *supra* note 3, 85 FR at 28702.

[6] *See id.* The Commission also stated in the Governance Order that the continued existence of three separate NMS plans for equity market data creates inefficiencies and unnecessarily burdens ongoing improvements in the provision of equity market data to market participants. *See id.*

[7] *See* Governance Order, *supra* note 3, 85 FR at 28729–31.

[8] *See* Notice, *supra* note 1, 85 FR 64574–95.

[9] 17 CFR 242.608.

[10] 17 CFR 201.700; 17 CFR 201.701.

[11] *See* 17 CFR 242.608(b)(2).

[12] *See id.*

or approved with modifications.[13] In this order, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[14] the Commission is providing notice of the grounds for disapproval under consideration:

- Whether the proposed CT Plan is consistent with the Governance Order;
- Whether, consistent with Rule 608 of Regulation NMS, the proposed CT Plan is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act; [15]
- Whether modifications to the proposed CT Plan, or conditions to its approval, would be required to make the proposed plan necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act; [16]
- Whether the proposed CT Plan is consistent with Congress's finding, in Section 11A(1)(C)(iii) of the Act, that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure ''the availability to brokers, dealers, and investors or information with respect to quotations for and transactions in securities'' [17]
- Whether, consistent with the purposes of Section 11A(c)(1)(B) of the Act,[18] the proposed CT Plan is appropriately structured, and whether its provisions are appropriately drafted, to support the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS securities, and the fairness and usefulness of the form and content of such information;
- Whether the proposed CT Plan effectively addresses the inherent conflict of interest between the Participants' collective responsibilities in overseeing the existing equity data plans and their individual interests in maximizing the viability of proprietary data products that they sell to market participants, as well as the concentration of voting power in the existing equity data plans among a few large exchange groups; and
- Whether the provisions of the proposed CT Plan that were not mandated by the Governance Order are consistent with the Act and the rules and regulations issued thereunder that are applicable to NMS plans.[19]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised above.

IV. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposals. In particular, the Commission invites the written views of interested persons concerning whether the proposals are consistent with Section 11A or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[20] any request for an opportunity to make an oral presentation.[21]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals should be approved or disapproved by February 5, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 19, 2021. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number 4–757 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number 4–757. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the Participants' principal offices. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–757 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00810 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[13] *See* Notice, *supra* note 1, 85 FR at 64568–74.

[14] 17 CFR 242.608(b)(2)(i). *See also* Commission Rule of Practice 700(b)(2), 17 CFR 201.700(b)(2).

[15] *See* 17 CFR 242.608(b)(2).

[16] *See* 17 CFR 242.608(b)(2).

[17] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[18] *See* 15 U.S.C. 78k–1(c)(1)(B).

[19] *See* Rule 700(b)(3)(ii) of the Commission's Rules of Practice. 17 CFR 200.700(b)(3)(ii).

[20] 17 CFR 242.608(b)(2)(i).

[21] Rule 700(c)(ii) of the Commission's Rules of Practice provides that ''[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views.'' 17 CFR 201.700(c)(ii).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34169; 812–15171]

ETF Series Solutions and Distillate Capital Partners LLC

January 11, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under Section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from Section 15(a) of the Act, as well as from certain disclosure requirements in Rule 20a-1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of

Schedule 14A under the Securities Exchange Act of 1934 (''1934 Act''), and Sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements'').

APPLICANTS: ETF Series Solutions (''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series (each a ''Fund'') and Distillate Capital Partners LLC (''Initial Adviser''), an Illinois limited liability company registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') that serves an investment adviser to the Funds (collectively with the Trust, the ''Applicants'').

SUMMARY OF APPLICATION: The requested exemption would permit Applicants to enter into and materially amend sub-advisory agreements with sub-advisers without shareholder approval and would grant relief from the Disclosure Requirements as they relate to fees paid to the sub-advisers.

FILING DATES: The application was filed on October 14, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on February 5, 2021, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Michael D. Barolsky, ETF Series Solutions, by email: *michael.barolsky@usbank.com.*

FOR FURTHER INFORMATION CONTACT: Alfred Tierney, Senior Counsel, at (323) 965–4509, or Parisa Haghshenas, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number or an Applicant using the ''Company'' name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

I. Requested Exemptive Relief

1. Applicants request an order to permit the Adviser,[1] subject to the approval of the board of trustees of the Trust (collectively, the ''Board''),[2] including a majority of the trustees who are not ''interested persons'' of the Trust or the Adviser, as defined in Section 2(a)(19) of the Act (the ''Independent Trustees''), without obtaining shareholder approval, to: (i) select investment sub-advisers (''Sub-Advisers'') for all or a portion of the assets of one or more of the Funds pursuant to an investment sub-advisory agreement with each Sub-Adviser (each a ''Sub-Advisory Agreement''); and (ii) materially amend Sub-Advisory Agreements with the Sub-Advisers.

2. Applicants also request an order exempting the Sub-Advised Funds (as defined below) from the Disclosure Requirements, which require each Fund to disclose fees paid to a Sub-Adviser. Applicants seek relief to permit each Sub-Advised Fund to disclose (as a dollar amount and a percentage of the Fund's net assets): (i) the aggregate fees paid to the Adviser and any Wholly-Owned Sub-Advisers; and (ii) the aggregate fees paid to Affiliated and Non-Affiliated Sub-Advisers (''Aggregate Fee Disclosure'').[3] Applicants seek an exemption to permit a Sub-Advised Fund to include only the Aggregate Fee Disclosure.[4]

3. Applicants request that the relief apply to Applicants, as well as to any future Fund and any other existing or future registered open-end management investment company or series thereof that intends to rely on the requested order in the future and that: (i) Is advised by the Adviser; (ii) uses the multi-manager structure described in the application; and (iii) complies with the terms and conditions of the application (each, a ''Sub-Advised Fund'').[5]

II. Management of the Sub-Advised Funds

4. The Adviser serves or will serve as the investment adviser to each Sub-Advised Fund pursuant to an investment advisory agreement with the Fund (each an ''Investment Advisory Agreement''). Each Investment Advisory Agreement has been or will be approved by the Board, including a majority of the Independent Trustees, and by the shareholders of the relevant Sub-Advised Fund in the manner required by Sections 15(a) and 15(c) of the Act. The terms of these Investment Advisory Agreements comply or will comply with Section 15(a) of the Act. Applicants are not seeking an exemption from the Act with respect to the Investment Advisory Agreements. Pursuant to the terms of each Investment Advisory Agreement, the Adviser, subject to the oversight of the Board, will provide continuous investment management for each Sub-Advised Fund. For its services to each Sub-Advised Fund, the Adviser receives or will receive an investment advisory fee from that Fund as specified in the applicable Investment Advisory Agreement.

5. Consistent with the terms of each Investment Advisory Agreement, the Adviser may, subject to the approval of the Board, including a majority of the Independent Trustees, and the shareholders of the applicable Sub-Advised Fund (if required by applicable law), delegate portfolio management responsibilities of all or a portion of the assets of a Sub-Advised Fund to a Sub-Adviser. The Adviser will retain overall responsibility for the management and

[1] The term ''Adviser'' means (i) the Initial Adviser, (ii) its successors, and (iii) any entity controlling, controlled by or under common control with, the Initial Adviser or its successors that serves as the primary adviser to a Sub-Advised Fund. For the purposes of the requested order, ''successor'' is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization. Any other Adviser also will be registered with the Commission as an investment adviser under the Advisers Act.

[2] The term ''Board'' also includes the board of trustees or directors of a future Sub-Advised Fund (as defined below), if different from the board of trustees (''Trustees'') of the Trust.

[3] A ''Wholly-Owned Sub-Adviser'' is any investment adviser that is (1) an indirect or direct ''wholly-owned subsidiary'' (as such term is defined in Section 2(a)(43) of the Act) of the Adviser, (2) a ''sister company'' of the Adviser that is an indirect or direct ''wholly-owned subsidiary'' of the same company that indirectly or directly wholly owns the Adviser (the Adviser's ''parent company''), or (3) a parent company of the Adviser. An ''Affiliated Sub-Adviser'' is any investment sub-adviser that is not a Wholly-Owned Sub-Adviser, but is an ''affiliated person'' (as defined in Section 2(a)(3) of the Act) of a Sub-Advised Fund or the Adviser for reasons other than serving as investment sub-adviser to one or more Funds. A ''Non-Affiliated Sub-Adviser'' is any investment adviser that is not an ''affiliated person'' (as defined in the Act) of a Fund or the Adviser, except to the extent that an affiliation arises solely because the Sub-Adviser serves as a sub-adviser to one or more Funds.

[4] Applicants note that all other items required by Sections 6–07(2)(a), (b) and (c) of Regulation S–X will be disclosed.

[5] All registered open-end investment companies that currently intend to rely on the requested order are named as Applicants. All Funds that currently are, or that currently intend to be, Sub-Advised Funds are identified in this application. Any entity that relies on the requested order will do so only in accordance with the terms and conditions contained in the application.

investment of the assets of each Sub-Advised Fund. This responsibility includes recommending the removal or replacement of Sub-Advisers, allocating the portion of that Sub-Advised Fund's assets to any given Sub-Adviser and reallocating those assets as necessary from time to time.[6] The Sub-Advisers will be ''investment advisers'' to the Sub-Advised Funds within the meaning of Section 2(a)(20) of the Act and will provide investment management services to the Funds subject to, without limitation, the requirements of Sections 15(c) and 36(b) of the Act.[7] The Sub-Advisers, subject to the oversight of the Adviser and the Board, will determine the securities and other investments to be purchased, sold or entered into by a Sub-Advised Fund's portfolio or a portion thereof, and will place orders with brokers or dealers that they select.[8]

6. The Sub-Advisory Agreements will be approved by the Board, including a majority of the Independent Trustees, in accordance with Sections 15(a) and 15(c) of the Act. In addition, the terms of each Sub-Advisory Agreement will comply fully with the requirements of Section 15(a) of the Act. The Adviser may compensate the Sub-Advisers or the Sub-Advised Funds may pay advisory fees to the Sub-Advisers directly.

7. Sub-Advised Funds will inform shareholders of the hiring of a new Sub-Adviser pursuant to the following procedures (''Modified Notice and Access Procedures''): (a) within 90 days after a new Sub-Adviser is hired for any Sub-Advised Fund, that Fund will send its shareholders either a Multi-Manager Notice or a Multi-Manager Notice and Multi-Manager Information Statement;[9] and (b) the Sub-Advised Fund will make the Multi-Manager Information Statement available on the website identified in the Multi-Manager Notice no later than when the Multi-Manager Notice (or Multi-Manager Notice and Multi-Manager Information Statement) is first sent to shareholders, and will maintain it on that website for at least 90 days.[10]

III. Applicable Law

8. Section 15(a) of the Act states, in part, that it is unlawful for any person to act as an investment adviser to a registered investment company ''except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company.''

9. Form N–1A is the registration statement used by open-end investment companies. Item 19(a)(3) of Form N–1A requires a registered investment company to disclose in its statement of additional information the method of computing the ''advisory fee payable'' by the investment company with respect to each investment adviser, including the total dollar amounts that the investment company ''paid to the adviser (aggregated with amounts paid to affiliated advisers, if any), and any advisers who are not affiliated persons of the adviser, under the investment advisory contract for the last three fiscal years.''

10. Rule 20a-1 under the Act requires proxies solicited with respect to a registered investment company to comply with Schedule 14A under the 1934 Act. Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the ''rate of compensation of the investment adviser,'' the ''aggregate amount of the investment adviser's fee,'' a description of the ''terms of the contract to be acted upon,'' and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

11. Regulation S–X sets forth the requirements for financial statements required to be included as part of a registered investment company's registration statement and shareholder reports filed with the Commission. Sections 6–07(2)(a), (b), and (c) of Regulation S–X require a registered investment company to include in its financial statements information about investment advisory fees.

12. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief meets this standard for the reasons discussed below.

IV. Arguments in Support of the Requested Relief

13. Applicants assert that, from the perspective of the shareholder, the role of the Sub-Advisers is substantially equivalent to the limited role of the individual portfolio managers employed by an investment adviser to a traditional investment company. Applicants also assert that the shareholders expect the Adviser, subject to review and approval of the Board, to select a Sub-Adviser who is in the best position to achieve the Sub-Advised Fund's investment objective. Applicants believe that permitting the Adviser to perform the duties for which the shareholders of the Sub-Advised Fund are paying the Adviser—the selection, oversight and evaluation of the Sub-Adviser—without incurring unnecessary delays or expenses of convening special meetings of shareholders is appropriate and in the interest of the Fund's shareholders, and will allow such Fund to operate more efficiently. Applicants state that each Investment Advisory Agreement will continue to be fully subject to Section 15(a) of the Act and approved by the relevant Board, including a majority of the Independent Trustees, in the manner required by Section 15(a) and 15(c) of the Act.

[6] Applicants represent that if the name of any Sub-Advised Fund contains the name of a sub-adviser, the name of the Adviser that serves as the primary adviser to the Fund, or a trademark or trade name that is owned by or publicly used to identify the Adviser, will precede the name of the sub-adviser.

[7] The Sub-Advisers will be registered with the Commission as an investment adviser under the Advisers Act or not subject to such registration.

[8] A ''Sub-Adviser'' also includes an investment sub-adviser that will provide the Adviser with a model portfolio reflecting a specific strategy, style or focus with respect to the investment of all or a portion of a Sub-Advised Fund's assets. The Adviser may use the model portfolio to determine the securities and other instruments to be purchased, sold or entered into by a Sub-Advised Fund's portfolio or a portion thereof, and place orders with brokers or dealers that it selects.

[9] A ''Multi-Manager Notice'' will be modeled on a Notice of internet Availability as defined in Rule 14a-16 under the 1934 Act, and specifically will, among other things: (a) Summarize the relevant information regarding the new Sub-Adviser (except as modified to permit Aggregate Fee Disclosure); (b) inform shareholders that the Multi-Manager Information Statement is available on a website; (c) provide the website address; (d) state the time period during which the Multi-Manager Information Statement will remain available on that website; (e) provide instructions for accessing and printing the Multi-Manager Information Statement; and (f) instruct the shareholder that a paper or email copy of the Multi-Manager Information Statement may be obtained, without charge, by contacting the Sub-Advised Fund. A ''Multi-Manager Information Statement'' will meet the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the 1934 Act for an information statement, except as modified by the requested order to permit Aggregate Fee Disclosure. Multi-Manager Information Statements will be filed with the Commission via the EDGAR system.

[10] In addition, Applicants represent that whenever a new Sub-Adviser is retained, an existing Sub-Adviser is terminated, or a Sub-Advisory Agreement is materially amended, the Sub-Advised Fund's prospectus and statement of additional information will be supplemented promptly pursuant to Rule 497(e) under the Securities Act of 1933.

14. Applicants submit that the requested relief meets the standards for relief under Section 6(c) of the Act. Applicants state that the operation of the Sub-Advised Fund in the manner described in the application must be approved by shareholders of that Fund before it may rely on the requested relief. Applicants also state that the proposed conditions to the requested relief are designed to address any potential conflicts of interest or economic incentives, and provide that shareholders are informed when new Sub-Advisers are hired.

15. Applicants contend that, in the circumstances described in the application, a proxy solicitation to approve the appointment of new Sub-Advisers provides no more meaningful information to shareholders than the proposed Multi-Manager Information Statement. Applicants state that, accordingly, they believe the requested relief is necessary or appropriate in the public interest, and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

16. With respect to the relief permitting Aggregate Fee Disclosure, Applicants assert that disclosure of the individual fees paid to the Sub-Advisers does not serve any meaningful purpose. Applicants contend that the primary reasons for requiring disclosure of individual fees paid to Sub-Advisers are to inform shareholders of expenses to be charged by a particular Sub-Advised Fund and to enable shareholders to compare the fees to those of other comparable investment companies. Applicants believe that the requested relief satisfies these objectives because the Sub-Advised Fund's overall advisory fee will be fully disclosed and, therefore, shareholders will know what the Sub-Advised Fund's fees and expenses are and will be able to compare the advisory fees a Sub-Advised Fund is charged to those of other investment companies. In addition, Applicants assert that the requested relief would benefit shareholders of the Sub-Advised Fund because it would improve the Adviser's ability to negotiate the fees paid to Sub-Advisers. In particular, Applicants state that if the Adviser is not required to disclose the Sub-Advisers' fees to the public, the Adviser may be able to negotiate rates that are below a Sub-Adviser's ''posted'' amounts as the rate would not be disclosed to the Sub-Adviser's other clients. Applicants assert that the relief will also encourage Sub-Advisers to negotiate lower sub-advisory fees with the Adviser if the lower fees are not required to be made public.

V. Relief for Affiliated Sub-Advisers

17. The Commission has granted the requested relief with respect to Wholly-Owned and Non-Affiliated Sub-Advisers through numerous exemptive orders. The Commission also has extended the requested relief to Affiliated Sub-Advisers.[11] Applicants state that although the Adviser's judgment in recommending a Sub-Adviser can be affected by certain conflicts, they do not warrant denying the extension of the requested relief to Affiliated Sub-Advisers. Specifically, the Adviser faces those conflicts in allocating fund assets between itself and a Sub-Adviser, and across Sub-Advisers, as it has an interest in considering the benefit it will receive, directly or indirectly, from the fee the Sub-Advised Fund pays for the management of those assets. Applicants also state that to the extent the Adviser has a conflict of interest with respect to the selection of an Affiliated Sub-Adviser, the proposed conditions are protective of shareholder interests by ensuring the Board's independence and providing the Board with the appropriate resources and information to monitor and address conflicts.

18. With respect to the relief permitting Aggregate Fee Disclosure, Applicants assert that it is appropriate to disclose only aggregate fees paid to Affiliated Sub-Advisers for the same reasons that similar relief has been granted previously with respect to Wholly-Owned and Non-Affiliated Sub-Advisers.

VI. Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Sub-Advised Fund may rely on the order requested in the application, the operation of the Sub-Advised Fund in the manner described in the application will be, or has been, approved by a majority of the Sub-Advised Fund's outstanding voting securities as defined in the Act, or, in the case of a Sub-Advised Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the initial shareholder before such Sub-Advised Fund's shares are offered to the public.

2. The prospectus for each Sub-Advised Fund will disclose the existence, substance and effect of any order granted pursuant to the application. In addition, each Sub-Advised Fund will hold itself out to the public as employing the multi-manager structure described in the application. The prospectus will prominently disclose that the Adviser has the ultimate responsibility, subject to oversight by the Board, to oversee the Sub-Advisers and recommend their hiring, termination, and replacement.

3. The Adviser will provide general management services to each Sub-Advised Fund, including overall supervisory responsibility for the general management and investment of the Sub-Advised Fund's assets, and subject to review and oversight of the Board, will (i) set the Sub-Advised Fund's overall investment strategies, (ii) evaluate, select, and recommend Sub-Advisers for all or a portion of the Sub-Advised Fund's assets, (iii) allocate and, when appropriate, reallocate the Sub-Advised Fund's assets among Sub-Advisers, (iv) monitor and evaluate the Sub-Advisers' performance, and (v) implement procedures reasonably designed to ensure that Sub-Advisers comply with the Sub-Advised Fund's investment objective, policies and restrictions.

4. Sub-Advised Funds will inform shareholders of the hiring of a new Sub-Adviser within 90 days after the hiring of the new Sub-Adviser pursuant to the Modified Notice and Access Procedures.

5. At all times, at least a majority of the Board will be Independent Trustees, and the selection and nomination of new or additional Independent Trustees will be placed within the discretion of the then-existing Independent Trustees.

6. Independent Legal Counsel, as defined in Rule 0–1(a)(6) under the Act, will be engaged to represent the Independent Trustees. The selection of such counsel will be within the discretion of the then-existing Independent Trustees.

7. Whenever a Sub-Adviser is hired or terminated, the Adviser will provide the Board with information showing the expected impact on the profitability of the Adviser.

8. The Board must evaluate any material conflicts that may be present in a sub-advisory arrangement. Specifically, whenever a sub-adviser change is proposed for a Sub-Advised Fund (''Sub-Adviser Change'') or the Board considers an existing Sub-Advisory Agreement as part of its annual review process (''Sub-Adviser Review''):

(a) the Adviser will provide the Board, to the extent not already being provided pursuant to Section 15(c) of

[11] *Carillon Series Trust, et al.,* Investment Co. Act Rel. Nos. 33464 (May 2, 2019) (notice) and 33494 (May 29, 2019) (order).

the Act, with all relevant information concerning:

(i) any material interest in the proposed new Sub-Adviser, in the case of a Sub-Adviser Change, or the Sub-Adviser in the case of a Sub-Adviser Review, held directly or indirectly by the Adviser or a parent or sister company of the Adviser, and any material impact the proposed Sub-Advisory Agreement may have on that interest;

(ii) any arrangement or understanding in which the Adviser or any parent or sister company of the Adviser is a participant that (A) may have had a material effect on the proposed Sub-Adviser Change or Sub-Adviser Review, or (B) may be materially affected by the proposed Sub-Adviser Change or Sub-Adviser Review;

(iii) any material interest in a Sub-Adviser held directly or indirectly by an officer or Trustee of the Sub-Advised Fund, or an officer or board member of the Adviser (other than through a pooled investment vehicle not controlled by such person); and

(iv) any other information that may be relevant to the Board in evaluating any potential material conflicts of interest in the proposed Sub-Adviser Change or Sub-Adviser Review.

(b) the Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Board minutes, that the Sub-Adviser Change or continuation after Sub-Adviser Review is in the best interests of the Sub-Advised Fund and its shareholders and, based on the information provided to the Board, does not involve a conflict of interest from which the Adviser, a Sub-Adviser, any officer or Trustee of the Sub-Advised Fund, or any officer or board member of the Adviser derives an inappropriate advantage.

9. Each Sub-Advised Fund will disclose in its registration statement the Aggregate Fee Disclosure.

10. In the event that the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

11. Any new Sub-Advisory Agreement or any amendment to an existing Investment Advisory Agreement or Sub-Advisory Agreement that directly or indirectly results in an increase in the aggregate advisory fee rate payable by the Sub-Advised Fund will be submitted to the Sub-Advised Fund's shareholders for approval.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00803 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90891; File No. SR–NYSE–2021–03]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend its Price List To Extend a Waiver of New Firm Application Fees for Certain Applications and of Bond Trading License Fees

January 11, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 4, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to (1) extend a fee waiver for new firm application fees for applicants seeking only to obtain a bond trading license (''BTL'') for 2021; and (2) waive the BTL fee for 2021. The Exchange proposes to implement the fee changes effective January 4, 2021. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to (1) extend a fee waiver for new firm application fees for applicants seeking only to obtain a BTL for 2021; and (2) waive the BTL fee for 2021.[4] The Exchange proposes to implement the fee changes effective January 4, 2021.

The Exchange currently charges a New Firm Fee ranging from $2,500 to $20,000, depending on the type of firm, which is charged per application for any broker-dealer that applies to be approved as an Exchange member organization. The Exchange proposes to amend the Price List to waive the New Firm Fee for 2021 for new member organization applicants that are seeking only to obtain a BTL and not trade equities at the Exchange. The proposed waiver of the New Firm Fee would be available only to applicants seeking approval as a new member organization, including carrying firms, introducing firms, or non-public organizations, which would be seeking to obtain a BTL at the Exchange and not trade equities. Further, if a new firm that is approved as a member organization and has had the New Firm Fee waived converts a BTL to a full trading license within one year of approval, the New Firm Fee would be charged in full retroactively. The Exchange believes that charging the New Firm Fee retroactively within a year of approval is appropriate because it would discourage applicants to claim that they are applying for a BTL solely to avoid New Firm Fees.

Additionally, the Exchange currently charges a BTL fee of $1,000 per year. The Exchange proposes to amend the

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[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed to adopt the fee waiver and waive the BTL fee in 2015. *See* Securities Exchange Act Release No. 74031 (January 12, 2015), 80 FR 2462 (January 16, 2015) (SR–NYSE–2014–78). The Exchange has filed to extend the fee waiver and waive the BTL fee for each calendar year since 2017. *See* Securities Exchange Act Release Nos. 79710 (December 29, 2016), 82 FR 1395 (January 5, 2017) (SR–NYSE–2016–89); 82418 (December 28, 2017), 83 FR 568 (January 4, 2018) (SR–NYSE–2017–70); 84899 (December 20, 2018), 83 FR 67395 (December 28, 2018) (SR–NYSE–2018–65); and 87952 (January 13, 2020), 85 FR 3089 (January 17, 2020) (SR–NYSE–2019–73).

Price List to waive the BTL fee for 2021 for all member organizations.

The Exchange believes that the proposed fee changes would provide increased incentives for bond trading firms that are not currently Exchange member organizations to apply for Exchange membership and a BTL. The Exchange believes that having more member organizations trading on the Exchange's bond platform would benefit investors through the additional display of liquidity and increased execution opportunities in Exchange-traded bonds at the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable to waive the New Firm Fee and the annual BTL fee for 2021 to provide an incentive for bond trading firms to apply for Exchange membership and a BTL. The Exchange believes that providing an incentive for bond trading firms that are not currently Exchange member organizations to apply for membership and a BTL would encourage market participants to become members of the Exchange and bring additional liquidity to a transparent bond market. To the extent the existing New Firm Fees or the BTL fee serves as a disincentive for bond trading firms to become Exchange member organizations, the Exchange believes that the proposed fee change could expand the number of firms eligible to trade bonds on the Exchange. The Exchange believes creating incentives for bond trading firms to trade bonds on the Exchange protects investors and the public interest by increasing the competition and liquidity on a transparent market for bond trading. The proposed waiver of the New Firm Fee and BTL fee is equitable and not unfairly discriminatory because it would be offered to all market participants that wish to trade at the Exchange the narrower class of debt securities only.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4), (5).

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[7] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Debt securities typically trade in a decentralized over-the-counter (''OTC'') dealer market that is less liquid and transparent than the equities markets. The Exchange believes that the proposed change would increase competition with these OTC venues by reducing the cost of being approved as and operating as an Exchange member organization that solely trades bonds at the Exchange, which the Exchange believes will enhance market quality through the additional display of liquidity and increased execution opportunities in Exchange-traded bonds at the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues that are not transparent. In such an environment, the Exchange must continually review, and consider adjusting its fees and rebates to remain competitive with other exchanges as well as with alternative trading systems and other venues that are not required to comply with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed change will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

[7] 15 U.S.C. 78f(b)(8).

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[10] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–NYSE–2021–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSE–2021–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 15 U.S.C. 78s(b)(2)(B).

printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSE–2021–03, and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00819 Filed 1–14–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90900; File No. SR–CboeEDGA–2020–032]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish a Policy Relating to Billing Errors

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 31, 2020, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees schedule to adopt a provision relating to billing errors and fee disputes.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fees schedule to adopt a provision relating to billing errors and fee disputes. Particularly, the Exchange proposes to provide that after three calendar months, all fees and rebates assessed by the Exchange would be considered final. More specifically, the Exchange would adopt language in the fees schedule that would provide that all fees and rebates assessed prior to the three full calendar months before the month in which the Exchange becomes aware of a billing error shall be considered final. Particularly, the Exchange will resolve an error by crediting or debiting Members and Non-Members based on the fees or rebates that should have been applied in the three full calendar months preceding the month in which the Exchange became aware of the error, including to all impacted transactions that occurred during those months.[5] The Exchange will apply the three month look back regardless of whether the error was discovered by the Exchange or by a Member or Non-Member that submitted a fee dispute to the Exchange. The Exchange also proposes to provide all disputes concerning fees and rebates assessed by the Exchange would have to be submitted to the Exchange in writing and accompanied by supporting documentation.

The purpose of the proposed change is to encourage Members and Non-Members to promptly review their Exchange invoices so that any disputed charges can be addressed in a timely manner. The Exchange notes that it provides Members with both daily and monthly fee reports and thus believes they should be aware of any potential billing errors within three months. Requiring that Members and Non-Members submit disputes in writing and provide supporting documentation encourages them to promptly review their invoices so that any disputed charges can be addressed in a timely manner while the information and data underlying those charges (*e.g.,* applicable fees and order information) is still easily and readily available. This practice will avoid issues that may arise when Members or Non-Members do not dispute an invoice in a timely manner and will conserve Exchange resources that would have to be expended to resolve untimely billing disputes. As such, the proposed rule change would alleviate administrative burdens related to billing disputes, which could divert staff resources away from the Exchange's regulatory and business purposes. The proposed rule change to provide all fees and rebates are final after three calendar months also provides both the Exchange and Members and Non-Members finality and the ability to close their books after a known period of time.

The Exchange notes that a number of exchanges have explicitly stated that they consider all fees to be final after a similar period of time.[6] Additionally, several other exchanges have adopted similar provisions in their rules that provide for a process for Members and

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] For example, if the Exchange becomes aware of a transaction fee billing error on January 4, 2021, the Exchange will resolve the error by crediting or debiting Members based on the fees or rebates that should have been applied to any impacted transactions during October, November and December 2020. The Exchange notes that because it bills in arrears, the Exchange would be able to correct the error in advance of issuing the January 2021 invoice and therefore, transactions impacted through the date of discovery (in this example, January 4, 2021) and thereafter, would be billed correctly.

[6] *See e.g.* Securities Exchange Act Release No. 87650 (December 3, 2019), 84 FR 67304 (December 9, 2019) (SR–NYSECHX–2019–024); Securities Exchange Act Release No. 84430 (October 16, 2018), 83 FR 53347 (October 22, 2018) (SR–NYSENAT–2018–23); and Securities Exchange Act Release No. 79060 (October 6, 2016), 81 FR 70716 (October 13, 2016) (SR–ISEGemini–2016–11).

Non-Members to submit fee disputes.[7] The proposed billing policy will apply to all charges and rebates reflected in the Exchange's fees schedule.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

With respect to the proposed billing procedure, the Exchange believes that the requirement to submit all billing disputes in writing, and with supporting documentation is reasonable because the Exchange provides Members with ample tools to monitor and account for various charges incurred in a given month. Additionally, the Exchange notes that most Members and Non-Members that pay exchange fees are sophisticated entities, so it is appropriate to expect them to promptly review their invoices for errors and to be capable of identifying such errors. The proposed provision also promotes the protection of investors and the public interest by providing a clear and concise mechanism for Members and Non-Members to dispute fees and for the Exchange to review such disputes in a timely manner. Moreover, the proposed billing dispute language, which will lower the Exchange's administrative burden, is similar to billing dispute language of other exchanges.[11] In addition, the proposed billing procedure is fair, equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees).

The Exchange also believes that providing that all fees and rebates are final after three months (*i.e.,* resolving billing errors only for the three full calendar months preceding the month in which the Exchange became aware of the error), is reasonable as both the Exchange and Members and Non-Members have an interest in knowing when its fee assessments are final and when reliance can be placed on those assessments. Indeed, without some deadline on billing errors, the Exchange and Members and Non-Members would never be able to close their books with any confidence. Furthermore, as noted above, a number of Exchanges similarly consider their fees final after a similar period of time.[12] The proposed change is also equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees) and apply in cases where either the Member (or Non-Member) discovers the error or the Exchange discovers the error.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the billing procedure and billing error policy, the proposed rule change would establish a clear process that would apply equally to all Members. Additionally, the proposed rule change is similar to rules of other exchanges. The Exchange does not believe such proposed changes would impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets. Moreover, because the proposed changes would apply equally to all Members, the proposal does not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not (1) significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6)[14] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–2020–032 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2020–032. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

[7] *See e.g.,* MEMX LLC, Rule 15.3, IEX Rule 15.120, Nasdaq Rule Equity 7, Section 70, Nasdaq BX Rule Equity 7, Section 111, and Nasdaq PHLX Rule Equity 7, Section 2.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See* supra note 7.

[12] *See* supra note 6.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2020–032 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00820 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 86 FR 1557, January 8, 2021.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Wednesday, January 13, 2021 at 2:00 p.m.

CHANGES IN THE MEETING: The Closed Meeting scheduled for Wednesday, January 13, 2021 at 2:00 p.m. has been changed to Wednesday, January 13, 2021 at 2:30 p.m. In addition, the following matter will also be considered:

- Other matters relating to examination matters and enforcement proceedings.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: January 13, 2021.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–01101 Filed 1–13–21; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90895; File No. SR–DTC–2020–017]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change To Allow for the Deposit of Electronic Certificates of Deposit and Technical Changes

January 11, 2021.

I. Introduction

On November 20, 2020, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–DTC–2020–017. The proposed rule change was published for comment in the **Federal Register** on December 4, 2020.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change [4] will amend the OA and Underwriting Service Guide to implement a new application and secured electronic vault (''E-vault'') for requests for eligibility, execution, delivery, and storage of certificates of deposit (''CDs'') that are issued by state and federal chartered banks. Issuers and underwriters that choose not to use this new electronic CD program may continue to use the existing process, including making Deposits using physical certificates. Through the proposal, DTC will also make technical changes in its procedures to spelling, punctuation and spacing of text that are unrelated to the E–CD program.

A. Background

DTC is the central securities depository (''CSD'') for substantially all corporate and municipal debt and equity securities available for trading in the United States. As a covered clearing agency that provides CSD services,[5] DTC provides a central location in which securities may be immobilized, and interests in those securities are reflected in accounts maintained for DTC's Participants, which are financial institutions such as brokers or banks.

As part of its CSD services, DTC (i) makes eligible for deposit, processes, and holds physical CDs issued by various U.S. banks and deposited by Participants, and (ii) credits interests in those CDs to Participants' Securities Accounts.[6] DTC states that the use of physical CDs presents operational concerns to Participants and to DTC.[7] To address these operational concerns, DTC has developed a system that will eliminate the need for physical certificates for certain issue types of CDs by allowing them to be issued and held in electronic form, as described below.

Upon implementation, the proposed rule change will address operational concerns of Participants relating to the amount of time and manual effort currently required for the issuance and redemption of physical CDs by allowing for a fully electronic process for the execution and delivery of the affected CDs. As such, DTC states that the proposed rule change would also reduce the need for DTC to (i) perform manual processing relating to CD deposits and (ii) reserve space in its secure, physical vault, which is currently used for CDs, by allowing for the storage of CDs in electronic form in a secure E-vault.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 90534 (November 30, 2020), 85 FR 78371 (December 4, 2020) (SR–DTC–2020–017) (''Notice'').

[4] Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC (the ''Rules''), *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf,* the DTC Operational Arrangements (Necessary for Securities to Become and Remain Eligible for DTC Services) (''OA''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/issue-eligibility/eligibility/operational-arrangements.pdf,* and the DTC Underwriting Service Guide (''Underwriting Service Guide''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Underwriting-Service-Guide.pdf.*

[5] A covered clearing agency is defined as a registered clearing agency that provides the services of a central counterparty (''CCP'') or CSD. *See* 17 CFR 240.17Ad–22(a)(5). CSD services means services of a clearing agency that is a securities depository as described in Section 3(a)(23)(A) of the Exchange Act. *See* 17 CFR 240.17Ad–22(a)(3). Specifically, the definition of a clearing agency includes, in part, ''any person, such as a securities depository that (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.'' 15 U.S.C. 78c(a)(23)(A).

[6] *See* OA, *supra* note 4, at 9–10.

[7] *See* Notice, *supra* note 3, 85 FR at 78372.

[8] *Id.*

The proposed electronic process will also address concerns relating to potential disruptions in the physical transport of physical CDs to DTC currently made using courier and overnight delivery services. Such disruptions may be caused by weather-related issues, such as Superstorm Sandy in 2012, and other previously unforeseen circumstances, such as the onset of the COVID–19 pandemic in spring 2020, both of which impacted physical securities processing. DTC states that although it has maintained securities eligibility and processing operations during such circumstances, including by utilizing a letter of securities possession [9] (''LOP'') process that enables DTC to accept virtual delivery of securities represented in physical form even if the circumstances prevent actual physical delivery at that time, such disruptions could delay the deposit of CDs and impact the timely closing of issuances and otherwise affect liquidity in the marketplace for CDs.[10]

B. Current DTC Eligibility Process for CDs

Currently, DTC processes CDs as book entry-only (''BEO'') securities [11] registered to DTC's nominee, Cede & Co. BEO securities are DTC-eligible securities for which (i) physical certificates are not available to investors, and (ii) DTC, through its nominee, Cede & Co., would hold the entire balance of the offering, either at DTC (in physical form) or through a FAST Agent in DTC's Fast Automated Securities Transfer (''FAST'') program.

Once DTC has determined to make a security eligible for deposit at DTC, a Participant may deposit the security at DTC for crediting to its Securities Account. For a CD issuance, the issuing bank and Depositing Participant must coordinate the execution and delivery of the physical certificate to DTC in order for the Participant to timely receive credit by the anticipated closing date.[12] Once DTC receives an acceptable deposit of an eligible CD from a Participant, DTC credits a Security Entitlement [13] in the CD to the Participant's Securities Account,[14] and DTC holds the original paper certificate in its secure vault for the duration of the term of the CD.

C. Proposed DTC Eligibility Process for CDs

As noted above, DTC is proposing to launch a new program to support deposit of electronic CDs that are issued by banks (''E–CDs''). The program will allow E–CDs to be electronically generated, signed, delivered to DTC and held in electronic form in a secure E-vault.

Upon implementation of the proposed rule change, CDs of state and federally chartered banks containing certain standard terms that conform to one of four proposed templates (''System E–CD Templates'') will be eligible for the new program. The templates cover four basic types of CDs, specifically (i) Fixed Rate Non-Callable, (ii) Fixed Rate Callable, (iii) Step Rate Non-Callable and (iv) Step Rate Callable.[15]

After implementation of the proposed rule change, in order to facilitate needs of issuers and underwriters, DTC has the discretion to (i) edit the System E–CD Templates, and/or (ii) add additional templates for use in the E–CD program as System E–CD Templates that would be published via Important Notice. Any edits to the System E–CD Templates would not affect E–CDs that were previously issued into DTC.

DTC states that more complex CDs that do not conform to the System E–CD Templates would be excluded from the proposed new process, because they typically contain terms that are not amenable to the creation of fixed templates in the format proposed herein.[16]

Pursuant to the proposed rule change, Participants will be able to request eligibility for E–CDs that conform to the System E–CD Templates through a new system referred to as Underwriting Central (''UWC'').[17]

In order to request eligibility of a CD to be issued in electronic form, the Underwriter will provide all required information relating to the CD through UWC, including, but not limited to, offering documentation and the terms to be populated in the electronic certificate. DTC would then populate the relevant data (*e.g.,* interest rate(s) and maturity date) into the templates based upon the data entered by the underwriter into the UWC application. It will be the responsibility of the Underwriter to disseminate the electronic master certificate to the issuer for electronic signature via UWC. The issuer will be required to electronically sign and deliver the master certificate to DTC prior to closing.[18]

For CDs that do not conform to the System E–CD Templates, eligibility requests will continue to be entered by the Underwriter through UW SOURCE, with a physical certificate delivered to DTC prior to closing.

Pursuant to the proposed rule change, the OA will require each E–CD issuer to submit a new BLOR (''E–CD BLOR'') to DTC through UWC prior to its first issuance of E–CDs. In order to minimize the additional provisions in the Electronic Master Certificate (as defined below), the E–CD BLOR will contain supplemental terms related to the E–CD program (in addition to the representations that are currently included in a BLOR). The new E–CD BLOR will provide that all E–CDs issued in connection therewith and under one of the base CUSIP numbers set forth on the face of the E–CD BLOR would be part of the same transaction in which the E–CD BLOR was executed.[19]

E–CDs will be issued on a new form of master electronic certificate (''Electronic Master Certificate'') that has been created specifically for the E–CD program. A separate electronic Master Certificate would be issued by the issuer for each broker that participates in an E–CD offering. DTC will only make eligible E–CDs that have been initiated by the related broker/

[9] *See* Underwriting Service Guide, *supra* note 4 at 17.

[10] *See* Notice, *supra* note 3, 85 FR at 78372.

[11] Underwriting Service Guide, *supra* note 4 at 4.

[12] *See* DTC Deposits Service Guide (''Deposits Guide''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Deposits.pdf,* at 8. The closing date is the date on which DTC's Underwriting Department will distribute an issue to the underwriter's Participant account at DTC for book-entry delivery and settlement upon notification by both the underwriter and the issuer that an issue has closed (*i.e.,* the distribution date). *See* Underwriting Guide, *supra* note 4, at 6. On the closing date, when an issuer or its agent and the underwriter confirm with DTC that the issue has closed and verifies pertinent data, DTC releases the position from an internal DTC account and credits the underwriter's Participant account, provided that DTC has received the certificates. *See id.* at 9.

[13] Pursuant to Rule 1, the term ''Security Entitlement'' has the meaning given to the term ''security entitlement'' in Section 8–102 of the New York Uniform Commercial Code (''NYUCC''). *See* Rule 1, *supra* note 4; *see also* NYUCC 8–102. The interest of a Participant or Pledgee in a Security credited to its Account is a Security Entitlement. *See* Rule 1, *supra* note 4.

[14] *See* Deposits Guide, *supra* note 12, at 8.

[15] A Fixed Rate CD pays a fixed interest rate over the entire term of the CD. A Step Rate CD allows for increases in the interest rate at specific, intervals that are pre-defined by the issuer. A Callable CD contains a call feature that gives the issuing bank the ability to redeem the CD prior to its stated maturity, usually within a given time frame and at a preset call price as set forth in the ''call provision'' in the master certificate. A certificate without such a provision cannot be called by the issuer prior to maturity date (Non-Callable).

[16] *See* Notice, *supra* note 3, 85 FR at 78373.

[17] UW SOURCE, DTC's existing system for processing eligibility requests, will continue to remain available for other types of issuances, including the issuances of CDs in physical form.

[18] Whether issued in electronic or physical form, securities must be delivered to DTC by no later than noon Eastern Time on the business day prior to the Closing Date as currently specified in Exhibit B of the OA.

[19] Section 3–119 of the NYUCC provides that a negotiable instrument may be ''modified or affected by any other written agreement executed as part of the same transaction.''

dealer through UWC and then created, signed and submitted to DTC through an electronic signature system designed by DTC for this purpose. UWC will allow Participants to initiate a new E–CD issuance by creating a draft Electronic Master Certificate using the applicable System E–CD Template that would be sent to an issuer for verification and signature. The issuer will verify and affix its electronic signature to the Electronic Master Certificate created by the Participant in a manner that creates an executed Electronic Master Certificate.

Once an issuer verifies and affixes its electronic signature to an Electronic Master Certificate, the Electronic Master Certificate will be automatically stored in an E-vault repository, and the Electronic Master Certificate will immediately be deemed ''delivered'' to DTC. The E-vault will identify Cede & Co. as the entity to which the Electronic Master Certificate was issued. According to DTC, the E-vault would maintain an audit trail that would track all events that occur with respect to the Electronic Master Certificate, including any authorized changes, such as notations to reflect withdrawals, which would be noted in the audit trail instead of on the body of the Electronic Master Certificate.[20] The audit trail will be incorporated as part of the Electronic Master Certificate in accordance with the BLOR.

Pursuant to the proposed rule change, the parties must also select New York law as the governing law for all E–CDs, in order to better allow DTC to structure a single E–CD program that it believes would be valid for issuers in all U.S. jurisdictions.[21]

D. Technical Changes

DTC will also make technical changes with respect to spelling, punctuation and spacing of text that are unrelated to the E–CD program.

Proposed Changes to the Underwriting Service Guide

a. A glossary description provided for BLOR in the Underwriting Guide currently describes a BLOR as an agreement between DTC and an issuer of municipal securities. As described above, a BLOR or LOR is required to be submitted with respect to any issue of BEO Securities that also includes corporate securities. Pursuant to the proposed rule change, the text will be clarified so that the description of the term BLOR is not described as limited to applying only to municipal securities. DTC states that the proposed change to this glossary description would provide enhanced clarity for Participants and Issuers with respect to Procedures relating to eligibility documentation required for BEO Securities.[22]

b. Pursuant to the proposed rule change, DTC will eliminate references to the Participant Terminal System (''PTS'') functions ART and PUND as these functions have become obsolete. ART related to inquiries about transactions of a Participant processed by DTC, and PUND related to inquiries relating to issues and certificates for issues held by a Participant. Such Participant inquiries may now be directed to the Client Center available on dtcc.com.[23] The proposed rule change will update the Underwriting Service Guide to provide clarity for Participants on how to submit inquires relating to DTC's services.[24]

c. Pursuant to the proposed rule change, a reference to the IMPP function in PTS will be deleted. The IMPP function allowed Participants to view Important Notices about underwriting, transfer agents, and money market instruments (''MMI''). DTC states that this function is not being widely used by Participants.[25] All DTC Important Notices are accessible on dtcc.com.[26]

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [27] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC. In particular, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act and Rules 17Ad–22(e)(1), (e)(10), and (e)(11) promulgated under the Act,[28] for the reasons described below.

A. Consistency With Section 17A(b)(3)(F)

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as DTC, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and promote the prompt and accurate clearance and settlement of securities transactions.[29]

As described above, the proposed rule change will provide for the issuance of Electronic Master Certificates for E–CDs which will be stored in a secure E-Vault. First, the Commission believes that by providing for the storage of E–CDs in a secure electronic vault, the proposal should help safeguard CDs from potential disruptions caused by issues involving the use of a physical vault, such as weather-related or other operational issues. As such, the Commission believes that the proposal is designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. Second, the Commission believes that by eliminating the need for DTC to receive original paper master certificates in advance of CD issuances, the proposal should help reduce closing delays caused by disruptions to physical delivery of certificates. As a result, the Commission believes that the proposal is designed to promote the prompt and accurate clearance and settlement of securities transactions.

In addition, the proposed rule change will make technical changes to provide enhanced clarity for Participants and Issuers with respect to procedures relating to eligibility processing and the deposit of CDs. By providing Participants and Issuers with enhanced clarity with regard to the procedures relating to, and therefore facilitating, eligibility processing and the deposit of CDs, the Commission believes that the technical changes are designed to promote the prompt and accurate clearance and settlement of securities transactions.

B. Consistency With Rule 17Ad–22(e)(1)

Rule 17Ad–22(e)(1) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[30]

As described above, DTC will require E–CDs at DTC to be negotiable

[20] Notice, *supra* note 3, 85 FR at 78375.

[21] Notice, *supra* note 3, 85 FR at 78376.

[22] *See* Notice, *supra* note 3, 85 FR at 78378.

[23] *See* Securities Exchange Act Release No. 88050 (January 27, 2020), 85 FR 5728 (January 31, 2020) (File No. SR–DTC–2020–002).

[24] *Id.*

[25] *See* Notice, *supra* note 3, 85 FR at 78378.

[26] *See https://www.dtcc.com/legal/important-notices.*

[27] 15 U.S.C. 78s(b)(2)(C).

[28] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(e)(1), (e)(10), and (e)(11).

[29] *Id.*

[30] 17 CFR 240.17Ad–22(e)(1).

instruments governed by New York law. As described in the Notice, DTC believes that the proposed rules change would provide for a well-founded, clear, transparent, and enforceable legal basis for the valid issuance of E–CDs into DTC from issuers domiciled in any relevant jurisdiction.[31] Specifically, DTC conducted analysis of the legal basis for E–CDs under the Uniform Commercial Code, the New York Electronic Signatures and Records Act,[32] the Uniform Electronic Transactions Act,[33] and the federal Electronic Signatures in Global and National Commerce Act.[34] DTC believes that it has structured the E–CDs to meet the requirements of each law.[35] By conducting this analysis of applicable laws, the Commission believes that DTC designed the proposal to help ensure that E–CDs are well-founded, transparent, and legally enforceable in all relevant jurisdictions, consistent with Rule 17Ad–22(e)(1) under the Act.[36]

C. Consistency With Rule 17Ad–22(e)(10)

Rule 17Ad–22(e)(10) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to establish and maintain operational practices that manage the risks associated with physical deliveries.[37]

The proposed rule change will provide for the issuance of Electronic Master Certificates for E–CDs. As such, the proposal should help reduce risks of loss related to the physical CDs that would otherwise be physically transported to DTC for deposit and later returned to issuers or their agents for redemption upon maturity of the CD. By reducing the risk of loss of physical master certificates by allowing their replacement with Electronic Master Certificates, the Commission believes the proposal is designed to manage the risks associated with physical deliveries.[38]

D. Consistency With Rule 17Ad–22(e)(11)

Rule 17Ad–22(e)(11) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to (i) maintain securities in an immobilized or dematerialized form for their transfer by book entry; (ii) prevent the unauthorized creation or deletion of securities; and (iii) protect assets against custody risk through appropriate rules and procedures consistent with relevant laws, rules and regulations in jurisdictions where it operates.[39]

The proposed rule change will provide for the issuance of Electronic Master Certificates for E–CDs. First, by providing for the deposit of securities in the name of Cede & Co. to be deposited in electronic form and stored in an electronic vault, the proposed rule change will provide for the immobilization and dematerialization of these master certificates for the transfer of CDs by book entry. Thus, the Commission believes the proposal is designed to maintain securities in an immobilized or dematerialized form for their transfer by book entry. Second, by the use of this centralized process for issuance and processing of CDs, the proposed rule change should facilitate the prevention of the unauthorized creation or deletion of securities processed through the E–CD program. Therefore, the Commission believes the proposal is designed to prevent the unauthorized creation or deletion of securities. Third, by the utilization of Electronic Master Certificates in the forms of System E–CD Templates issued under the applicable E–CD BLOR to account for relevant laws, the Commission believes the proposal is designed to protect assets against custody risk through appropriate rules and procedures consistent with relevant laws, rules, and regulations in jurisdictions where it operates.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, with the requirements of Section 17A of the Act[40] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[41] that proposed rule change SR–DTC–2020–017, be, and hereby is, APPROVED.[42]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00815 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[31] *See* Notice, *supra* note 3, 85 FR at 78373–75.

[32] N.Y. State Tech. Law § 30 (McKinney 2012).

[33] Unif. Electronic Transactions Act (Unif. L. Comm'n 1999).

[34] Electronic Signatures in Global and National Commerce 15 U.S.C. § 70.

[35] *See* Notice, *supra* note 3, 85 FR at 78373–75.

[36] 17 CFR 240.17Ad–22(e)(1).

[37] 17 CFR 240.17Ad–22(e)(10).

[38] *Id.*

[39] 17 CFR 240.17Ad–22(e)(11).

[40] 15 U.S.C. 78q–1.

[41] 15 U.S.C. 78s(b)(2).

[42] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90890; File No. SR–NYSE–2020–103]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Section 902.02 of the NYSE Listed Company Manual

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 28, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 902.02 of the NYSE Listed Company Manual (the ''Manual'') to modify the terms of the Investment Management Entity Group Fee Discount. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 902.02 of the Manual, the Exchange provides a fee discount applicable only to an Investment Management Entity and its Eligible Portfolio Companies (the ''Investment Management Entity Group Fee Discount''). For purposes of Section 902.02, an Investment Management Entity is a listed company that manages private investment vehicles not registered under the Investment Company Act. An ''Eligible Portfolio Company'' of an Investment Management Entity is a company in which the Investment Management Entity has owned at least 20% of the common stock on a continuous basis since prior to that portfolio company's initial listing. The Investment Management Entity Group Fee Discount is (i) limited to annual fees and (ii) represents a 50% discount on all annual fees of an Investment Management Entity and each of its Eligible Portfolio Companies in any year in which the Investment Management Entity has one or more Eligible Portfolio Companies. As currently applied, the Investment Management Entity Group Fee Discount is subject to a maximum aggregate discount of $500,000 in any given year (the ''Maximum Discount'') distributed among the Investment Management Entity and each of its Eligible Portfolio Companies in proportion to their respective eligible fee obligations in such year.[3]

The Exchange proposes to eliminate the Maximum Discount limitation on the Investment Management Entity Group Fee Discount with effect from the calendar year commencing January 1, 2021. Consequently, the Investment Management Entity and each Eligible Portfolio Company would receive a discount from each company's annual fee bill equal to 50% of such company's annual fees, without any limitation imposed by the application of the Maximum Discount. The purpose of this proposal is to remove the arbitrary differences the application of the Maximum Discount imposes on the benefits companies receive from the Investment Management Entity Group Fee Discount.

The following is an illustrative example:

Scenario One: An Investment Management Entity incurs $500,000 in annual fees before the discount and has two Eligible Portfolio Companies, each of which incurs $250,000 in annual fees before the discount. Applying the Maximum Discount on a prorated basis, the Investment Management Entity would receive a discount of $250,000 (and pay $250,000 in annual fees), while each of the two Eligible Portfolio Companies would receive a discount of $125,000 (and each pay $125,000 in annual fees).

Scenario Two: An Investment Management Entity incurs $500,000 in annual fees before the discount and has four Eligible Portfolio Companies, each of which incurs $250,000 in annual fees before the discount. Applying the Maximum Discount on a prorated basis, the Investment Management Entity would receive a discount of $166,666.67 (and pay $333,333.33 in annual fees), while each of the four Eligible Portfolio Companies would receive a discount of $83,333.33 (and each pay $166,666.67 in annual fees).

In both these scenarios, the Investment Management Entity has the same annual fee bill before the application of the Investment Management Entity Group Fee Discount ($500,000) and each Eligible Portfolio Company also has the same annual fee bill prior to the application of the discount ($250,000). However, as a result of the limitation imposed by the Maximum Discount, the Investment Management Entity in Scenario One pays $250,000 in annual fees, while the Investment Management Entity in Scenario Two pays $333,333.33 in annual fees. Similarly, in both scenarios, all of the Eligible Portfolio Companies have the same annual fee obligation of $250,000 prior to application of the discount, but the limitation imposed by the Maximum Discount causes the Eligible Portfolio Companies in Scenario One to pay $125,000 in annual fees after application of the discount, while the Eligible Portfolio Companies in Scenario Two each pay $166,666.67 in annual fees. This proposal would eliminate this discrepancy in the treatment of companies that are the same size and would otherwise be subject to identical treatment for annual fee billing purposes.

The Exchange notes that the elimination of the Maximum Discount would result in reduction in revenue as the overall discount to annual fees that companies can claim pursuant to the Investment Management Entity Group Fee Discount would increase. Because only a small percentage of listed companies qualify for the Investment Management Entity Group Fee Discount, the proposed rule change would not affect the Exchange's commitment of resources to its regulatory programs.

The Exchange also proposes to make some nonsubstantive changes to Section 902.02 to remove provisions that are no longer needed, as they do not apply by their terms to any calendar year starting after January 1, 2019.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(4)[5] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange operates in a highly competitive marketplace for the listing of equity securities. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets.

The Exchange believes that the ever shifting market share among the exchanges with respect to new listings and the transfer of existing listings between competitor exchanges demonstrates that issuers can choose different listing markets in response to fee changes. Accordingly, competitive forces constrain exchange listing fees. Stated otherwise, changes to exchange listing fees can have a direct effect on the ability of an exchange to compete for new listings and retain existing listings.

The Exchange believes that the proposed amendment is equitable and is

[3] In addition to benefiting from the Investment Management Entity Group Fee Discount, the Investment Management Entity and each of the Eligible Portfolio Companies each continue to have its fees capped by the applicable company's individual total maximum fee of $500,000 per annum.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78f(b)(5).

not unfairly discriminatory as it being implemented solely to avoid arbitrarily different annual fee billing outcomes for companies based solely on the impact of the Maximum Discount.

Only a small percentage of listed companies qualify for the Investment Management Entity Group Fee Discount. Consequently, the proposed rule change would not affect the Exchange's commitment of resources to its regulatory programs.

The changes the Exchange proposes to make to Section 902.02 to remove provisions that are no longer needed, as they do not apply by their terms to any calendar year starting after January 1, 2019, are nonsubstantive in nature.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition.

The purpose of the proposed amendment is to eliminate the arbitrary effects of the of the [sic] Maximum Discount in the application of the Investment Management Entity Group Fee Discount. As only a small percentage of listed companies qualify for the Investment Management Entity Group Fee Discount and the proposal makes the application of the discount more consistent across that small category of listed issuers, the Exchange does not believe that the proposed rule change will have any meaningful effect on the competition among issuers listed on the Exchange.

Intermarket Competition.

The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable. Because competitors are free to modify their own fees in response, and because issuers may change their listing venue, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [7] of the Act and subparagraph (f)(2) of Rule 19b–4 [8] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [9] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2020–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–103. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–103, and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00812 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 15 U.S.C. 78s(b)(2)(B).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90899; File No. SR–CboeBYX–2020–034]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish a Policy Relating to Billing Errors

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 31, 2020, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees schedule to adopt a provision relating to billing errors and fee disputes.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fees schedule to adopt a provision relating to billing errors and fee disputes. Particularly, the Exchange proposes to provide that after three calendar months, all fees and rebates assessed by the Exchange would be considered final. More specifically, the Exchange would adopt language in the fees schedule that would provide that all fees and rebates assessed prior to the three full calendar months before the month in which the Exchange becomes aware of a billing error shall be considered final. Particularly, the Exchange will resolve an error by crediting or debiting Members and Non-Members based on the fees or rebates that should have been applied in the three full calendar months preceding the month in which the Exchange became aware of the error, including to all impacted transactions that occurred during those months.[5] The Exchange will apply the three month look back regardless of whether the error was discovered by the Exchange or by a Member or Non-Member that submitted a fee dispute to the Exchange. The Exchange also proposes to provide all disputes concerning fees and rebates assessed by the Exchange would have to be submitted to the Exchange in writing and accompanied by supporting documentation.

The purpose of the proposed change is to encourage Members and Non-Members to promptly review their Exchange invoices so that any disputed charges can be addressed in a timely manner. The Exchange notes that it provides Members with both daily and monthly fee reports and thus believes they should be aware of any potential billing errors within three months. Requiring that Members and Non-Members submit disputes in writing and provide supporting documentation encourages them to promptly review their invoices so that any disputed charges can be addressed in a timely manner while the information and data underlying those charges (*e.g.,* applicable fees and order information) is still easily and readily available. This practice will avoid issues that may arise when Members or Non-Members do not dispute an invoice in a timely manner and will conserve Exchange resources that would have to be expended to resolve untimely billing disputes. As such, the proposed rule change would alleviate administrative burdens related to billing disputes, which could divert staff resources away from the Exchange's regulatory and business purposes. The proposed rule change to provide all fees and rebates are final after three calendar months also provides both the Exchange and Members and Non-Members finality and the ability to close their books after a known period of time.

The Exchange notes that a number of exchanges have explicitly stated that they consider all fees to be final after a similar period of time.[6] Additionally, several other exchanges have adopted similar provisions in their rules that provide for a process for Members and Non-Members to submit fee disputes.[7] The proposed billing policy will apply to all charges and rebates reflected in the Exchange's fees schedule.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

With respect to the proposed billing procedure, the Exchange believes that the requirement to submit all billing disputes in writing, and with supporting documentation is reasonable because the Exchange provides Members with ample tools to monitor and account for various charges incurred in a given month. Additionally, the Exchange notes that most Members and Non-Members that pay exchange fees are sophisticated entities, so it is appropriate to expect them to promptly review their invoices for errors and to be capable of identifying such errors. The proposed provision also promotes the protection of investors and the public interest by providing a clear and concise mechanism for Members and Non-Members to dispute fees and for the Exchange to review such disputes in a timely manner. Moreover, the proposed billing dispute language, which will lower the Exchange's administrative burden, is similar to billing dispute

[5] For example, if the Exchange becomes aware of a transaction fee billing error on January 4, 2021, the Exchange will resolve the error by crediting or debiting Members based on the fees or rebates that should have been applied to any impacted transactions during October, November and December 2020. The Exchange notes that because it bills in arrears, the Exchange would be able to correct the error in advance of issuing the January 2021 invoice and therefore, transactions impacted through the date of discovery (in this example, January 4, 2021) and thereafter, would be billed correctly.

[6] *See e.g.* Securities Exchange Act Release No. 87650 (December 3, 2019), 84 FR 67304 (December 9, 2019) (SR–NYSECHX–2019–024); Securities Exchange Act Release No. 84430 (October 16, 2018), 83 FR 53347 (October 22, 2018) (SR–NYSENAT–2018–23); and Securities Exchange Act Release No. 79060 (October 6, 2016), 81 FR 70716 (October 13, 2016) (SR–ISEGemini–2016–11).

[7] *See e.g.,* MEMX LLC, Rule 15.3, IEX Rule 15.120, Nasdaq Rule Equity 7, Section 70, Nasdaq BX Rule Equity 7, Section 111, and Nasdaq PHLX Rule Equity 7, Section 2.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

language of other exchanges.[11] In addition, the proposed billing procedure is fair, equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees).

The Exchange also believes that providing that all fees and rebates are final after three months (*i.e.,* resolving billing errors only for the three full calendar months preceding the month in which the Exchange became aware of the error), is reasonable as both the Exchange and Members and Non-Members have an interest in knowing when its fee assessments are final and when reliance can be placed on those assessments. Indeed, without some deadline on billing errors, the Exchange and Members and Non-Members would never be able to close their books with any confidence. Furthermore, as noted above, a number of Exchanges similarly consider their fees final after a similar period of time.[12] The proposed change is also equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees) and apply in cases where either the Member (or Non-Member) discovers the error or the Exchange discovers the error.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the billing procedure and billing error policy, the proposed rule change would establish a clear process that would apply equally to all Members. Additionally, the proposed rule change is similar to rules of other exchanges. The Exchange does not believe such proposed changes would impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets. Moreover, because the proposed changes would apply equally to all Members, the proposal does not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) [14] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBYX–2020–034 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBYX–2020–034. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBYX–2020–034 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00813 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[11] *See* supra note 7.

[12] *See* supra note 6.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90883; File No. SR–NASDAQ–2020–100]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Modify the Quorum Requirement for Non-U.S. Companies Under Certain Limited Circumstances

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 31, 2020, the Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposal to modify the quorum requirement applicable to a non-U.S. company where such company's home country law is in direct conflict with Nasdaq's quorum requirement.

The text of the proposed rule change is detailed below: proposed new language is *italicized* and proposed deletions are in brackets.

* * * * *

The Nasdaq Stock Market Rules

* * * * *

5615. Exemptions From Certain Corporate Governance Requirements

This rule provides the exemptions from the corporate governance rules afforded to certain types of Companies, and sets forth the phase-in schedules for initial public offerings, Companies emerging from bankruptcy, Companies transferring from other markets and Companies ceasing to be Smaller Reporting Companies. This rule also describes the applicability of the corporate governance rules to Controlled Companies and sets forth the phase-in schedule afforded to Companies ceasing to be Controlled Companies.

(a) Exemptions to the Corporate Governance Requirements

(1)–(3) No change.

(4) Limited Partnerships

A limited partnership is not subject to the requirements of the Rule 5600 Series, except as provided in this Rule 5615(a)(4). A limited partnership may request a written interpretation pursuant to Rule 5602.

(A)–(D) No change.

(E) Quorum

(i) In the event that a meeting of limited partners is required pursuant to paragraph (D), the quorum for such meeting shall be not less than 33⅓ percent of the limited partnership interests outstanding.

(ii) Notwithstanding the quorum requirements in paragraph (i) above, Nasdaq may accept any quorum requirement for a non-U.S. Company if the Company's home country law mandates such quorum for the shareholders' meeting and prohibits the Company from establishing a higher quorum required by paragraph (i) above. A Company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such Company's home country describing the home country law that conflicts with Nasdaq's quorum requirement and certifying that, as the result, the Company is prohibited from complying with the quorum requirements in paragraph (i) above.

(F)–(J) No change

(5)–(6) No change.

(b)–(c) No change.

* * * * *

5620. Meetings of Shareholders

(a) No change.

IM–5620. Meetings of Shareholders or Partners—No change.

(b) No change.

(c) Quorum

(i) Each Company that is not a limited partnership shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33⅓% of the outstanding shares of the Company's common voting stock. Limited partnerships that are required to hold an annual meeting of partners are subject to the requirements of Rule 5615(a)(4)(E).

(ii) Notwithstanding the quorum requirements in paragraph (i) above, Nasdaq may accept any quorum requirement for a non-U.S. Company if the Company's home country law mandates such quorum for the shareholders' meeting and prohibits the Company from establishing a higher quorum required by paragraph (i) above. A Company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such Company's home country describing the home country law that conflicts with Nasdaq's quorum requirement and certifying that, as the result, the Company is prohibited from complying with the quorum requirements in paragraph (i) above.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discused any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to modify Listing Rules 5620(c) and 5615(a)(4)(E) (the ''Quorum Rules'') to allow Nasdaq to accept a quorum less than 33 ⅓% of the outstanding shares of a company's common voting stock where the company is incorporated outside of the U.S. and such company's home country law prohibits the company from establishing a quorum that satisfies the Quorum Rules.

Listing Rule 5620(c) establishes quorum requirements for an annual meeting of shareholders for Nasdaq companies listing common stock or voting preferred stock, and their equivalents.[3] Under this rule, each company that is not a limited partnership must provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33⅓% of the outstanding shares of the company's common voting stock (the ''Nasdaq Quorum Requirement''). Nasdaq notes that domestic listed companies are subject to quorum requirements under the laws of their states of incorporation.[4]

Nasdaq recently discovered that the laws of certain foreign jurisdictions are in direct conflict with the Nasdaq Quorum Requirement. In particular, Nasdaq was approached by a French company that took advantage of the foreign private issuer exception and relied on home country practices in lieu of the Nasdaq Quorum Requirement, but lost its foreign private issuer status and cannot comply with the Nasdaq Quorum Requirement due to certain French law requirements.[5] In that regard, Article L. 225–98 of the French Commercial code[6] provides that upon first notice, the ordinary shareholders' meeting shall have a quorum requirement of one-fifth (20%) of the shares entitled to vote. The Article further provides that by-laws of a

[3] Listing Rule 5620(a).

[4] For example, Delaware allows companies to establish their own quorum requirements in their certificates of incorporation or bylaws, provided that the quorum must be at least one-third of the shares entitled to vote on the matter. In the absence of a quorum provision in the company's certificate of incorporation or bylaws, Delaware requires a quorum of 50% of the shares entitled to vote on the matter. See Del. Code Sec. 216.

[5] Ordinary shares of at least one Nasdaq listed company DBV Technologies S.A. (DBV), are listed on Euronext Paris which is a regulated market under French and EU regulations. Accordingly, as explained below, DBV cannot amend its bylaws to increase the quorum requirement to comply with the Nasdaq Quorum Requirement. Since its IPO in 2014, DBV qualified as a foreign private issuer and relied on home country practices in lieu of complying with the Nasdaq Quorum Requirement.

[6] Available at *https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000038799445&cidTexte=LEGITEXT000005634379&dateTexte=20190721.*

French company whose shares are listed on a regulated market (which includes Euronext Paris) cannot provide for a higher quorum for shareholders' meetings than that set forth above. As this rule constitutes a public order under French law, it is required to be followed and compliance is enforced by the French courts and by the French stock exchange authority, the Autorité des marchés financiers. According to article L. 225–121, any decision taken in violation of the aforementioned rules on quorum is deemed null and void. As such, a French company listed on a regulated market cannot comply with the Nasdaq Quorum Requirement.

Listing Rule 5615(a)(3) allows a foreign private issuer [7] to follow its home country practice in lieu of the requirements of the Rule 5600 Series, including the Nasdaq Quorum Requirement, subject to certain disclosure requirements and the requirement that an independent counsel in such company's home country certify to Nasdaq that the company's practices are not prohibited by the home country's laws.[8] Accordingly, a French foreign private issuer could rely on Listing Rule 5615(a)(3) to remain in compliance with the Nasdaq corporate governance requirements in the Rule 5600 Series.[9]

A non-U.S. company [10] that is not a foreign private issuer currently is required to comply with the Nasdaq Quorum Requirement without regard to the requirements of such company's home country laws. As described above, for some companies, including DBV, the company's home country law prohibits the company from establishing a higher quorum required by the Nasdaq Quorum Requirement.

Accordingly, Nasdaq proposes to modify the Nasdaq Quorum Requirement to allow Nasdaq to accept any quorum requirement for a non-U.S. company if such company's home country law mandates such quorum for the shareholders' meeting and prohibits the company from establishing the higher quorum required the Nasdaq Quorum Requirement. This approach is consistent with the provisions of Listing Rule 5640 that allows Nasdaq to accept any action or issuance relating to the voting rights structure of a non-U.S. company that is not prohibited by the company's home country law.[11] Nasdaq proposes to require that a company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such company's home country describing the home country law that conflicts with Nasdaq's quorum requirement. Nasdaq also proposes to require such counsel to certify that, as the result of the conflict with the home country law, the company is prohibited from complying with the Nasdaq Quorum Requirement.

Nasdaq also proposes to modify Listing Rule 5615(a)(4)(E) governing the quorum requirements for limited partnerships listed on Nasdaq to also reflect this change to the Nasdaq Quorum Requirement.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendments to Listing Rules 5620(c) and 5615(a)(4)(E) are designed to protect interests and the public interest because the proposal would eliminate a conflict forcing a company to choose between following Nasdaq's rules or the law in its home jurisdiction. Further, while the Nasdaq Quorum Requirement would not apply, there would continue to be other protections for shareholders provided by the company's home country laws. Nasdaq also believes that Nasdaq's long experience of listing foreign private issuers, including DBV, while allowing such companies to rely on home country practices in lieu of the Nasdaq Quorum Requirement provides evidence of an appropriate level of investor protection. In addition, this modification is consistent with the provisions of Listing Rule 5640 that allows Nasdaq to accept any action or issuance relating to the voting rights structure of a non-U.S. company that is not prohibited by the company's home country law.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change will address conflicting requirements of jurisdictions affecting a small number of non-U.S. companies, as described above; and as such, these changes are neither intended to, nor expected to, impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[7] A foreign company will qualify as a foreign private issuer if 50% or less of its outstanding voting securities are held by U.S. residents; or if more than 50% of its outstanding voting securities are held by U.S. residents and none of the following three circumstances applies: the majority of its executive officers or directors are U.S. citizens or residents; more than 50% of the issuer's assets are located in the United States; or the issuer's business is administered principally in the United States. These tests are found in Securities Act Rule 405 and Exchange Act Rule 3b–4.

[8] *See* Listing Rule 5615(a)(3)(B) and Listing Rule IM–5615–3.

[9] As of December 31, 2019, approximately 62% of DBV's outstanding ordinary shares were held by U.S. residents. *See* company's Form 20–F filed on March 20, 2020. As of June 30, 2020, according to the information provided to Nasdaq by the company, more than 50% of DBV's outstanding ordinary shares were held by U.S. residents and the majority of DBV's executive officers were U.S. citizens and residents and DBV's business was administered principally in the United States. Accordingly, DBV will no longer qualify as a foreign private issuer and will be required to comply with SEC rules for domestic issuers as of January 1, 2021.

[10] The term non-US company refers to a company incorporated outside of U.S. *See also* Listing Rules 5630 and 5640 that use this term.

[11] The proposed modified Nasdaq Quorum Requirement will apply only in circumstances where the company's home country law specifically prohibits the company from establishing a higher quorum required the Nasdaq Quorum Requirement, whereas Listing 5640 allows Nasdaq to accept any voting rights structure of a non-U.S. company that is not prohibited by the company's home country law.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2020–100 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–100. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–100 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00814 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90897; File No. SR–CboeBZX–2020–094]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Options and Equities Fees Schedules To Adopt a Provision Relating to Billing Errors and Fee Disputes

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 31, 2020, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its options and equities fees schedules to adopt a provision relating to billing errors and fee disputes.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its options and equities fees schedules to adopt a provision relating to billing errors and fee disputes. Particularly, the Exchange proposes to provide that after three calendar months, all fees and rebates assessed by the Exchange would be considered final. More specifically, the Exchange would adopt language in the fees schedules that would provide that all fees and rebates assessed prior to the three full calendar months before the month in which the Exchange becomes aware of a billing error shall be considered final. Particularly, the Exchange will resolve an error by crediting or debiting Members and Non-Members based on the fees or rebates that should have been applied in the three full calendar months preceding the month in which the Exchange became aware of the error, including to all impacted transactions that occurred during those months.[5] The Exchange will apply the three month look back regardless of whether the error was discovered by the Exchange or by a Member or Non-Member that submitted a fee dispute to the Exchange. The Exchange also proposes to provide all disputes concerning fees and rebates assessed by the Exchange would have to be submitted to the Exchange in writing and accompanied by supporting documentation.

The purpose of the proposed change is to encourage Members and Non-Members to promptly review their Exchange invoices so that any disputed charges can be addressed in a timely manner. The Exchange notes that it provides Members with both daily and monthly fee reports and thus believes they should be aware of any potential billing errors within three months. Requiring that Members and Non-Members submit disputes in writing and provide supporting documentation encourages them to promptly review their invoices so that any disputed charges can be addressed in a timely

[5] For example, if the Exchange becomes aware of a transaction fee billing error on January 4, 2021, the Exchange will resolve the error by crediting or debiting Members based on the fees or rebates that should have been applied to any impacted transactions during October, November and December 2020. The Exchange notes that because it bills in arrears, the Exchange would be able to correct the error in advance of issuing the January 2021 invoice and therefore, transactions impacted through the date of discovery (in this example, January 4, 2021) and thereafter, would be billed correctly.

manner while the information and data underlying those charges (*e.g.,* applicable fees and order information) is still easily and readily available. This practice will avoid issues that may arise when Members or Non-Members do not dispute an invoice in a timely manner and will conserve Exchange resources that would have to be expended to resolve untimely billing disputes. As such, the proposed rule change would alleviate administrative burdens related to billing disputes, which could divert staff resources away from the Exchange's regulatory and business purposes. The proposed rule change to provide all fees and rebates are final after three calendar months also provides both the Exchange and Members and Non-Members finality and the ability to close their books after a known period of time.

The Exchange notes that a number of exchanges have explicitly stated that they consider all fees to be final after a similar period of time.[6] Additionally, several other exchanges have adopted similar provisions in their rules that provide for a process for Members and Non-Members to submit fee disputes.[7] The proposed billing policy will apply to all charges and rebates reflected in the Exchange's fees schedules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

With respect to the proposed billing procedure, the Exchange believes that the requirement to submit all billing disputes in writing, and with supporting documentation is reasonable because the Exchange provides Members with ample tools to monitor and account for various charges incurred in a given month. Additionally, the Exchange notes that most Members and Non-Members that pay exchange fees are sophisticated entities, so it is appropriate to expect them to promptly review their invoices for errors and to be capable of identifying such errors.

The proposed provision also promotes the protection of investors and the public interest by providing a clear and concise mechanism for Members and Non-Members to dispute fees and for the Exchange to review such disputes in a timely manner. Moreover, the proposed billing dispute language, which will lower the Exchange's administrative burden, is similar to billing dispute language of other exchanges.[11] In addition, the proposed billing procedure is fair, equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees).

The Exchange also believes that providing that all fees and rebates are final after three months (*i.e.,* resolving billing errors only for the three full calendar months preceding the month in which the Exchange became aware of the error), is reasonable as both the Exchange and Members and Non-Members have an interest in knowing when its fee assessments are final and when reliance can be placed on those assessments. Indeed, without some deadline on billing errors, the Exchange and Members and Non-Members would never be able to close their books with any confidence. Furthermore, as noted above, a number of Exchanges similarly consider their fees final after a similar period of time.[12] The proposed change is also equitable, and not unfairly discriminatory because it will apply equally to all Members (and Non-Members that pay Exchange fees) and apply in cases where either the Member (or Non-Member) discovers the error or the Exchange discovers the error.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the billing procedure and billing error policy, the proposed rule change would establish a clear process that would apply equally to all Members. Additionally, the proposed rule change is similar to rules of other exchanges. The Exchange does not believe such proposed changes would impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets. Moreover, because the proposed changes would apply equally to all Members, the proposal does not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6)[14] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

[6] *See e.g.* Securities Exchange Act Release No. 87650 (December 3, 2019), 84 FR 67304 (December 9, 2019) (SR–NYSECHX–2019–024); Securities Exchange Act Release No. 84430 (October 16, 2018), 83 FR 53347 (October 22, 2018) (SR–NYSENAT–2018–23); and Securities Exchange Act Release No. 79060 (October 6, 2016), 81 FR 70716 (October 13, 2016) (SR–ISEGemini–2016–11).

[7] *See e.g.* MEMX LLC, Rule 15.3, IEX Rule 15.120, Nasdaq Rule Equity 7, Section 70, Nasdaq BX Rule Equity 7, Section 111, and Nasdaq PHLX Rule Equity 7, Section 2.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See* supra note 7.

[12] *See* supra note 6.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeBZX–2020–094 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2020–094. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2020–094 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00822 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90896; File No. SR–CBOE–2021–001]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend its Fees Schedule With Respect to Expiring Fee Waivers and Incentive Programs

January 11, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 4, 2021, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule with respect to expiring fee waivers and incentive programs. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule to (1) amend the MSCI EAFE Index (''MXEA'') options and MSCI Emerging Markets Index (''MXEF'') options Lead Market Maker (''LMM'') Incentive Program, (2) amend the Global Trading Hours (''GTH'') S&P 500 Index (''SPX'') options and SPX Weekly (''SPXW'') options LMM Incentive Program and (3) remove reference to the FTSE 100 Mini Index (''UKXM'') options Designated Primary Market-Maker (''DPM'') Incentive Program. The Exchange proposes to implement these amendments to its Fees Schedule on January 4, 2021.

MXEA and MXEF LMM Incentive Program

The Exchange proposes to amend its financial program for LMMs quoting in Regular Trading Hours (''RTH'') appointed in MXEA and MXEF options (*i.e.,* the MSCI LMM Incentive Program). Currently, if the appointed LMM in MXEA and MXEF provides continuous electronic quotes during RTH that meet or exceed the heightened quoting standards[3] in at least 90% of the MXEA and MXEF series 80% of the time in a given month, the LMM will receive a payment for that month in the amount of $20,000 per class, per month. That is, an appointed LMM may reach the heightened quoting standards for the given percentage of series and time, measured across both the MXEF and MXEA series, in a given month to receive the $20,000 payment per class per month. Additionally, the Exchange notes that an LMM in MSCI options is not currently obligated to satisfy the heightened quoting standards described in the table above. Rather, an LMM is eligible to receive the rebate if it satisfies the heightened quoting standards, which the Exchange believes encourages LMMs to provide liquidity during GTH. The Exchange may also consider other exceptions to this quoting standard based on demonstrated legal or regulatory requirements or other mitigating circumstances.

Specifically, the Exchange proposes to amend certain near-term widths contained in the MSCI LMM Incentive Program's heightened quoting standards. Currently, for MXEA and MXEF options expiring in the near term (8 days to 60 days) the appointed LMM

[3] Located in the ''MSCI LMM Incentive Program'' table in the Fees Schedule.

must meet a heightened quoting standard of a $1.50 width for 20 size, a $3.00 width for 15 size, and a $7.50 width for a 10 size. The proposed rule change updates these widths to a $1.20 width for a quote with a size of 20 contracts, a $2.50 width for a quote with a size of 15 contracts, and a $5.00 width for a quote with a size of 10 contracts. The Exchange notes that these tighter heightened quoting standards for certain near-term sizes are more closely aligned with those heightened standards for comparable sizes in near term options under the GTH SPX/SPXW LMM and GTH VIX/VIXW programs. The Exchange believes that the proposed rule change will incentivize LMMs in MSCI options classes to meet tighter heightened quoting standards in orders to receive the rebate offered under the MSCI LMM Incentive Program. Tighter spreads generally signal an increase in activity from other market participants, contributing to overall deeper, more liquid markets, price discovery and transparency, and a robust market ecosystem to the benefit of all market participants.

GTH SPX/SPXW LMM Program

The Exchange also currently offers a financial incentive program for LMMs quoting in GTH appointed in SPX/SPXW (*i.e.,* the GTH SPX/SPXW LMM Incentive Program).[4] Currently, under the GTH SPX/SPXW LMM Incentive Program, if an LMM in SPX/SPXW provides continuous electronic quotes during GTH that meet or exceed the heightened quoting standards [5] in at least 85% of each of the SPX and SPXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $10,000 for SPX and $10,000 for SPXW. Like with the MSCI LMM Incentive Program, a GTH LMM in SPX/SPXW is not currently obligated to satisfy the heightened quoting standards described in the table above, but instead is eligible to receive the rebate if they satisfy the heightened quoting standards above, which are also designed to encourage LMMs to provide liquidity during GTH. The Exchange may also consider other exceptions to this quoting standard based on demonstrated legal or regulatory requirements or other mitigating circumstances.

The Exchange proposes to increase the rebate amount received for SPX and SPXW to $20,000 for SPX and $30,000 for SPXW, for meeting the heighten quoting standards in a given month. The proposed increase in the rebate amounts is designed to further encourage GTH LMMs to provide significant liquidity in SPX/SPXW options during GTH. The Exchange notes that the amounts are comparable to the amount currently offered under the MSCI LMM Program ($20,000 per each class) and to the amount currently offered under the RTH SPESG LMM Incentive Program, which offers a compensation pool of $50,000 that is split among LMMs that reach the program's heightened quoting standards (*e.g.,* if two LMMs were to meet the heightened quoting standards, they would each receive $25,000).

Removal of Expiring UKXM DPM Incentive Program

The Exchange currently has a compensation plan in place for the DPM(s) appointed in UKXM, which expires on December 31, 2020. Pursuant to footnote 43 in the Fees Schedule, the DPM appointed for an entire month in UKXM will receive a payment of $5,000 per month through December 31, 2020. As the program expires December 31, 2020, the proposed rule change eliminates footnote 43 and also removes references to footnote 43 in Rate Table—Underlying Symbol List A in the Fees Schedule.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

MXEA and MXEF LLM Incentive Program

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to amend certain widths in the heightened quoting standards under the MSCI LMM Incentive Program. The Exchange believes it is reasonable to tighten the widths for certain quote sizes with near-term expiry in the heightened quoting standards as it is reasonably designed to facilitate tighter quotes from LMMs in MXEA and MXEF options in order to meet the heightened quoting standards and receive the payment offered under the incentive program. Tighter quotes tend to signal additional corresponding increase in order flow from other market participants, which benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. As noted, the MSCI LMM Incentive Program, overall, is intended to continue incentivizing the LMM(s) in MSCI options classes to continue to provide key liquidity and active markets in these products. The Exchange also believes that the proposed widths are reasonable because they are generally aligned with the corresponding heightened standards for comparable sizes in near term options under the GTH SPX/SPXW LMM and GTH VIX/VIXW programs.

The Exchange believes that it is equitable and not unfairly discriminatory to amend the near-term quoting widths for select sizes within the program's heightened quoting standards, because such widths will equally apply to any and all LMMs with appointments in MXEF and MXEA options that seeks to meet the heightened quoting standards in order to receive the rebate offered under the MSCI LMM Incentive Program. The Exchange notes that, if a MSCI LMM does not satisfy the heightened quoting standards, then it simply will not receive the offered per class payment for that month.

GTH SPX/SPXW Incentive Programs

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to increase the rebate per class received under the GTH SPX/SPXW LMM Incentive Program. The Exchange believes that the proposed

[4] The Exchange notes that an LMM appointed in SPX also holds an appointment in SPXW.

[5] Located in the ''GTH SPX/SPXW LLM Incentive Program'' table in the Fees Schedule.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(4).

rebate amounts are reasonably designed to continue to incentivize an appointed LMM to meet the GTH quoting standards for SPX/SPXW, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants. As with the MSCI LMM Incentive Program, the GTH SPX/SPXW Incentive Program is intended, overall, to incentivize LMMs to continue to provide key liquidity and active markets in these products. The Exchange further believes that the proposed rule change to increase the rebate received for SPX ($20,000) and SPXW ($30,000) is reasonable because it is comparable to the rebates offered for products under similar LMM incentive programs in the Fees Schedule. For example, the MSCI LMM Program currently offers $20,000 per each class in which the heightened quoting standards are met in a given month and the RTH SPESG LMM Incentive Program offers a compensation pool of $50,000 that is split among LMMs that reach that program's heightened quoting standards in a given month (*e.g.,* if two LMMs were to meet the heightened quoting standards, they would each receive $25,000).

The Exchange believes the proposed rebates are equitable and not unfairly discriminatory because they equally apply to any TPH that is appointed as a GTH SPX/SPXW LMM. Additionally, if a GTH LMM does not satisfy the heightened quoting standard in SPX/SPXW for any given month, then it simply will not receive the offered payment for that month.

Regarding both the MSCI and SPX/SPXW LMM incentive programs generally, the Exchange believes it is equitable and not unfairly discriminatory to continue to offer these financial incentives, including as amended, to GTH SPX/SPXW LMMs and MSCI LMMs, because it benefits all market participants trading SPX/SPXW during GTH and trading MXEF and MXEA during RTH.[9] These incentive programs encourage the LMMs to satisfy the heightened quoting standards, which may increase liquidity and provide more trading opportunities and tighter spreads. Indeed, the Exchange notes that LMMs serve a crucial role in providing quotes and the opportunity for market participants to trade SPX/SPXW and MSCI options, which can lead to increased volume, providing for robust markets. The Exchange ultimately wishes to sufficiently incentive LMMs to provide liquid and active markets in SPX/SPXW during GTH and MXEF and MXEA during RTH to encourage liquidity. The Exchange believes that these programs, as amended, will continue to encourage increased quoting to add liquidity in SPX/SPXW and in MXEF and MXEA, thereby protecting investors and the public interest. The Exchange also notes that an LMM may have added costs each month that it needs to undertake in order to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity).

Removal of Expiring UKXM DPM Incentive Program

The Exchange believes the proposed rule change to remove references to an expiring incentive program is reasonable equitable and not unfairly discriminatory. The Exchange believes it is reasonable to remove the UKXM DPM incentive program as it will expire on December 31, 2020. The proposed removal of the UKXM DPM incentive program is not unfairly discriminatory and is equitable because it will no longer be applicable, as scheduled, to any DPMs in UKXM.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed rule change does impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to existing incentive programs will apply to all LMMs appointed to the applicable classes (*i.e.* MXEF, MXEA, SPX, and SPXW) in a uniform manner. To the extent these LMMs receive a benefit that other market participants do not, as stated, LMMs have different obligations and are held to different standards. For example, LMMs play a crucial role in providing active and liquid markets in their appointed products, thereby providing a robust market which benefits all market participants. Such Market-Makers also have obligations and regulatory requirements that other participants do not have. The Exchange also notes that an LMM may have added costs each month that it needs to undertake in order to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity). The Exchange also notes that the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity.

The Exchange notes the proposed change to remove footnote 43 is not intended to address any competitive issue, but rather to eliminate an expiring incentive program that the Exchange does not intend to extend.

The Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes in connection with the incentive programs only affect trading on Cboe Options, as the incentive programs apply to transactions in products exclusively listed on Cboe Options. Additionally, as noted above, the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity. The Exchange notes it operates in a highly competitive market. In addition to Cboe Options, TPHs have numerous alternative venues that they may participate on and director their order flow, including 15 other options exchanges, as well as off-exchange venues, where competitive products are available for trading. Based on publicly available information, no single options exchange has more than 15% of the market share of executed volume of options trades.[10] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has

[9] The Exchange notes that trading in MXEF and MXEA options is not currently available during GTH.

[10] See Cboe Global Markets, U.S. Options Market Volume Summary by Month (December 28, 2020), available at *http://markets.cboe.com/us/options/market_share/.*

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [11] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . .''.[12] Accordingly, the Exchange does not believe its proposed changes to the incentive programs impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and paragraph (f) of Rule 19b–4 [14] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number

SR–CBOE–2021–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2021–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2021–001 and should be submitted on or before February 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00816 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[11] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[12] NetCoalition v. SEC, 615 F.3d 525, 539 (DC Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90893; File No. SR–NYSE–2020–94]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change To Amend Section 907.00 of the Manual To Extend the Period of Time for the Entitlement of Certain Eligible Issuers To Receive Complimentary Products and Services Under That Rule

January 11, 2021.

I. Introduction

On November 6, 2020, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Section 907.00 of the NYSE Listed Company Manual (''Manual'') to extend the period of time for certain eligible issuers to be entitled to receive complimentary products and services under the rule. The proposed rule change was published in the **Federal Register** on November 27, 2020.[2] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposal

As set forth in Section 907.00 of the Manual, the Exchange offers certain complimentary products and services and access to discounted third-party products and services through the NYSE Market Access Center to currently and newly listed issuers, as described on the Exchange's website. In addition, the Exchange provides all listed issuers with complimentary access to whistleblower hotline services (with a commercial value of approximately $4,000 annually) for a period of 24 calendar months.[3] The Exchange also provides additional complimentary products and services to certain

[1] 15 U.S.C. 78s(b)(1).

[2] *See* Securities Exchange Act Release No. 90466 (November 20, 2020), 85 FR 76129 (''Notice'').

[3] *See* Section 907.00 of the Manual.

categories of currently and newly listed issuers, which complimentary services include market surveillance products and services (with a commercial value of approximately $55,000 annually), web-hosting products and services (with a commercial value of approximately $16,000 annually), web-casting services (with a commercial value of approximately $6,500 annually), market analytics products and services (with a commercial value of approximately $30,000 annually), and news distribution products and services (with a commercial value of approximately $20,000 annually).[4]

Section 907.00 of the Manual currently provides that the Exchange will offer complimentary products and services to Eligible New Listings[5] and Eligible Transfer Companies[6] based on two tiers as follows:[7] (i) for Eligible New Listings and Eligible Transfer Companies with a global market value of $400 million or more, in each case calculated as of the date of listing on the Exchange,[8] the Exchange offers market surveillance, market analytics, web-hosting, webcasting, and news distribution products and services for a period of 24 calendar months (''Tier A''); and (ii) for Eligible New Listings and Eligible Transfer Companies with a global market value of less than $400 million, in each case calculated as of the date of listing on the Exchange, the Exchange offers web-hosting, market analytics, web-casting, and news distribution products and services for a period of 24 calendar months (''Tier B'').[9] NYSE states that the products and services offered to Eligible New Listings and Eligible Transfer Companies under Section 907.00 of the Manual as part of the complimentary offering that is limited to those categories of issuers are, and under the proposal will continue to be, provided solely by third-party vendors.

The Exchange proposes to amend Section 907.00 of the Manual to extend the period for which Eligible New Listings and Eligible Transfer Companies that list on or after the date of Commission approval of the proposal[10] are eligible to receive complimentary products and services from 24 calendar months to 48 calendar months for both Tier A and Tier B issuers.[11] The complimentary products and services offered to Eligible New Listings and Eligible Transfer Companies for 48 calendar months under the proposal will remain the same products and services as those currently provided to such companies pursuant to Section 907.00 of the Manual, as described above. At the conclusion of the 48-month period, Eligible New Listings and Eligible Transfer Companies would continue to be eligible to receive products and services offered to Eligible Current Listings if they qualify under Section 907.00 of the Manual.[12]

The Exchange also proposes to remove two obsolete provisions of Section 907.00 of the Manual that relate to entitlements that no longer exist because the periods of time for which they were effective have ended.[13]

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act.[14] Specifically, the Commission believes it is consistent with the provisions of Sections 6(b)(4) and (5) of the Act,[15] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members, issuers, and other persons using the Exchange's facilities, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Moreover, the Commission believes that the proposed rule change is consistent with Section 6(b)(8) of the Act[16] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the Exchange is responding to competitive pressures in the market for listings in making this proposal.[17] The Exchange represents that the market for new listings and for the retention and transfer of listed companies is intensely competitive and the Commission understands that the Exchange competes, in part, by offering complimentary services to companies.[18] The Exchange states that the purpose of this proposal is to attract future new listings and transfers and, according to

[4] *See id.*

[5] For the purposes of Section 907.00, the term ''Eligible New Listing'' means (i) any U.S. company that lists common stock on the Exchange for the first time and any non-U.S. company that lists an equity security on the Exchange under Section 102.01 or 103.00 of the Manual for the first time, regardless of whether such U.S. or non-U.S. company conducts an offering and (ii) any U.S. or non-U.S. company emerging from a bankruptcy, spinoff (where a company lists new shares in the absence of a public offering), and carve-out (where a company carves out a business line or division, which then conducts a separate initial public offering).

[6] For purposes of Section 907.00, the term ''Eligible Transfer Company'' means any U.S. or non-U.S. company that transfers its listing of common stock or equity securities, respectively, to the Exchange from another national securities exchange. For purposes of Section 907.00, an ''equity security'' means common stock or common share equivalents such as ordinary shares, New York shares, global shares, American Depository Receipts, or Global Depository Receipts.

[7] Section 907.00 of the Manual provides for separate service entitlements for acquisition companies listed under Section 102.06 and the issuers of Equity Investment Tracking Stocks listed under Section 102.07. *See* Notice, supra note 2, at 76129, n.6.

[8] Global market value for an Eligible New Listing and Eligible Transfer Company is based on the public offering price; if there is no public offering in connection with listing on the Exchange, then the Exchange shall determine the issuer's global market value at the time of listing for purposes of determining whether the issuer qualifies for Tier A or B. *See* Section 907.00 of the Manual.

[9] *See* Section 907.00 of the Manual. The Exchange offers to certain companies currently listed on the Exchange (''Eligible Current Listings'') a suite of complimentary products and services that vary depending on the number of shares of common stock (for U.S. issuers) or other equity security (for non-U.S. issuers) that a company has issued and outstanding. At the conclusion of the 24-month period, Eligible New Listings and Eligible Transfer Companies would be eligible to receive products and services offered to Eligible Current Listings if they qualify under Section 907.00 of the Manual. *See id.*

[10] The Exchange stated that the proposed amendment would be applicable to Eligible New Listings and Eligible Transfer Companies that list on or after the date of Commission approval of the proposal. *See* Notice, *supra* note 2, at 76129. NYSE has stated that it will file a rule proposal to clarify in Section 907.00 of the Manual that listed companies that began receiving complimentary products and services as Eligible New Listings and Eligible Transfer Companies under the rule in effect prior to approval of this proposal will receive such complimentary products and services only for 24 months from the date of listing, as set forth under the prior rule.

[11] Eligible New Listings and Eligible Transfer Companies will continue to be entitled to complimentary whistleblower services for 24 months, as all listed companies currently receive under Section 907.00 of the Manual. *See* Notice, *supra* note 2, at 76129, n.7. *See also* Section 907.00 of the Manual.

[12] *See* proposed Section 907.00 of the Manual. *See also supra* note 9.

[13] Specifically, the Exchange proposes to remove the following text from Section 907.00: ''In addition, Eligible New Listings in both Tier A and Tier B that list before April 1, 2018 are eligible to receive complimentary corporate governance tools (with a commercial value of approximately $50,000 annually) for a period of 24 calendar months. Companies that list on or after April 1, 2018 will not be eligible to receive any corporate governance tools.''

[14] 15 U.S.C. 78f. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(4) and (5).

[16] 15 U.S.C. 78f(b)(8).

[17] *See* Securities Exchange Act Release No. 65127 (Aug. 12, 2011), 76 FR 51449 (Aug. 18, 2011) (SR–NYSE–2011–20) (''2011 Approval Order''). As stated above, the products and services offered to Eligible New Listings and Eligible Transfer Companies discussed herein are provided by third-party vendors. In its proposal, the Exchange stated that issuers are not forced or required to use the complimentary products and services and some issuers have selected competing products and services. *See* Notice, *supra* note 2, at 76130.

[18] *See* Notice, *supra* note 2, at 76129–30.

the Exchange, extending the time period that products and services are available to Eligible New Listings and Eligible Transfer Companies will help the Exchange to compete for new listings and transfers from other exchanges.[19] In addition, as noted by the Exchange, the Nasdaq Stock Market, Inc. (''Nasdaq'') currently provides four years of complimentary services to companies transferring from NYSE to the Nasdaq Global Market that have a market capitalization of at least $750 million.[20] Accordingly, the Commission believes that it is reasonable and consistent with Sections 6(b)(4)[21] and 6(b)(5) of the Act[22] for the Exchange to extend the time period that it offers complimentary products and services to Eligible New Listings and Eligible Transfer Companies that list on or after the date of Commission approval of the proposal from 24 calendar months to 48 calendar months. In addition, the Commission believes that the proposal reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) of the Act.[23]

The Commission has previously found that the package of complimentary services offered to Eligible New Listings and Eligible Transfer Companies is equitably allocated among issuers consistent with Section 6(b)(4) of the Act.[24] The Commission notes that all listed companies will continue to receive some level of free services and that, within each tier, all issuers will continue to receive the exact same package of services, for the same period of time. Given that under the proposal Eligible New Listings and Eligible Transfer Companies within each tier will continue to receive the same complimentary products and services for the same period of time, the Commission continues to believe that the package of complimentary services is equitably allocated among issuers consistent with Section 6(b)(4) of the Act[25] and the rule does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act.[26]

The Commission believes that describing in the Exchange's rules the products and services available to listed companies, their associated values, and the length of time for which issuers are entitled to receive such services adds greater transparency to the Exchange's rules and to the fees applicable to listed companies and will ensure that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which would raise unfair discrimination issues under the Act.[27] The Commission also believes that it is reasonable, and in fact required by Section 19(b) of the Act, that the Exchange amend its rules to update the products and services it offers to Eligible Current Listings, Eligible Transfer Companies, and Eligible New Listings, including the time periods for which such products and services are offered and the commercial value of such products and services. This provides greater transparency to the Exchange's rules and the fees, and the value of free products and services, applicable to listed companies. Based on the foregoing, the Commission believes that the Exchange has provided a sufficient basis for offering Eligible New Listings and Eligible Transfer Companies complimentary products and services for a period of 48 calendar months, and that this change does not unfairly discriminate among issuers and is consistent with the Act.

Finally, the Commission believes it is consistent with the Act for the Exchange to remove obsolete provisions of rule text in order to provide greater transparency to the Exchange's rules and fees and to avoid confusion.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[28] that the proposed rule change (SR–NYSE–2020–94) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00817 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[19] *See* Notice, *supra* note 2, at 76129–30.

[20] *See* Nasdaq Marketplace Rule IM–5900–7.

[21] 15 U.S.C. 78f(b)(4).

[22] 15 U.S.C. 78f(b)(5).

[23] 15 U.S.C. 78f(b)(8).

[24] *See* 2011 Approval Order, *supra* note 17, 76 FR at 51452. *See also* Exchange Act Release No. 76127 (Oct. 9, 2015), 80 FR 62584, 62587 (Oct. 15, 2015) (SR–NYSE–2015–36) (''2015 Approval Order'').

[25] 15 U.S.C. 78f(b)(4).

[26] 15 U.S.C. 78f(b)(5).

[27] *See* 2015 Approval Order, *supra* note 24, 80 FR at 62587. The Commission notes that the Exchange also stated that no other company will be required to pay higher fees as a result of the proposal and that providing the proposed services will have no impact on the resources available for its regulatory programs. *See* Notice, *supra* note 2, at 76130.

[28] 15 U.S.C. 78s(b)(2).

[29] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 11321]

Call for Expert Reviewers to Submit Comments on the Intergovernmental Panel on Climate Change (IPCC) Working Group III Contribution to the Sixth Assessment Report

The Department of State, in cooperation with the United States Global Change Research Program *(USGCRP),* requests expert review of the second-order draft of the IPCC Working Group III (WGIII) contribution to the Sixth Assessment Report cycle (AR6), including the first draft of the Summary for Policymakers (SPM).

The *United Nations Environment Programme (UNEP)* and the *World Meteorological Organization (WMO)* established the IPCC in 1988. As reflected in its governing documents, the role of the IPCC is to assess on a comprehensive, objective, open, and transparent basis the scientific, technical, and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts, and options for adaptation and mitigation. IPCC reports should be neutral with respect to policy, although they may need to deal objectively with scientific, technical, and socio-economic factors relevant to the application of particular policies. The principles and procedures for the IPCC and its preparation of reports can be found at: *https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf* and *https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf.* In accordance with these procedures, IPCC documents undergo peer review by experts and governments. The purpose of these reviews is to ensure the reports present a comprehensive, objective, and balanced view of the subject matter they cover.

As part of the U.S. government review—starting January 18, 2021—experts wishing to contribute to the U.S. government review are encouraged to register via the USGCRP Review and Comment System (*https://review.globalchange.gov).* Instructions and the second-order draft will be available for download via the system. *In accordance with IPCC policy, drafts of the report are provided for review purposes only and are not to be cited or distributed.* All technical comments received that are relevant to the text under review will be forwarded to the IPCC authors for their consideration. To be considered for inclusion in the U.S.

government submission, comments must be received by February 22, 2021.

Experts may choose to provide comments directly through the IPCC's expert review process, which occurs in parallel with the U.S. government review: *https://apps.ipcc.ch/comments/ar6wg3/sod/register.php.* To avoid duplication, experts are requested to submit comments via either the USGCRP or IPCC review websites, not both.

This notice will be published in the **Federal Register**.

Andrew A. Griffin,

Deputy Director, Office of Global Change, Department of State.

[FR Doc. 2021–00769 Filed 1–14–21; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Delegation of Authority No. 354–1]

Delegation of Authority to the Associate Comptroller of Certain Authorities Regarding Debt Collection and Waiver of Claims

Section 1. Delegation

By virtue of the authority vested in the Secretary of State by the laws and authorities of the United States, including those set forth in 22 U.S.C. 2651a; the Debt Collection Improvement Act of 1996, Public Law 104–134 (1996); the Office of Management and Budget's Determination with Respect to Transfer of Functions Pursuant to Public Law 104–316 (December 17, 1996); the Travel and Transportation Reform Act of 1998, Public Law 105–264 (1998); 5 U.S.C. 4108, 5379, 5514, 5522, 5524a, 5705, 5922, and 8707; 22 U.S.C. 2671, 2716, 4047 and 4071; and 31 U.S.C. Chapter 37, and delegated to the Comptroller by Delegation of Authority 354, dated April 23, 2013, I hereby delegate, to the extent authorized by law, the duties, functions and responsibilities for the administrative collection, compromise, suspension, termination of Department collection, advance decision, settlement, and waiver of claims of or against debtors of the Department of State, pursuant to the above-mentioned authorities, to the Associate Comptroller of the Department of State.

Section 2. General Provisions

(a) The Secretary of State, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Management, or the Comptroller may at any time exercise any function delegated by this delegation of authority. Functions delegated herein may not be re-delegated.

(b) Any reference in this delegation of authority to any act, executive order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, executive order, determination, delegation of authority, regulation, or procedure as amended from time to time.

(c) This Delegation of Authority shall be published in the **Federal Register**.

Dated: December 14, 2020.

Jeffrey C. Mounts,

Comptroller, Department of State.

[FR Doc. 2021–00793 Filed 1–14–21; 8:45 am]

BILLING CODE 4710–37–P

DEPARTMENT OF STATE

[Delegation of Authority No. 354–2]

Delegation of Authority to the Principal Officer at Post of Certain Authorities Regarding Debt Collection and Waiver of Claims

Section 1. Delegation

By virtue of the authority vested in the Secretary of State by the laws and authorities of the United States, including those set forth in 22 U.S.C. 2651a; the Debt Collection Improvement Act of 1996, Public Law 104–134 (1996); the Office of Management and Budget's Determination with Respect to Transfer of Functions Pursuant to Public Law 104–316 (December 17, 1996); the Travel and Transportation Reform Act of 1998, Public Law 105–264 (1998); 5 U.S.C. 4108, 5379, 5514, 5522, 5524a, 5705, 5922, and 8707; 22 U.S.C. 2671, 2716, 4047 and 4071; and 31 U.S.C. Chapter 37, and delegated to the Comptroller by Delegation of Authority 354, dated April 23, 2013, I hereby delegate, to the extent authorized by law, authority to approve the compromise, suspension, termination of Department of State collection, advance decision, settlement or waiver of claims of or against debtors of the Department of State not in excess of $500 originating at post to the Principal Officer at post.

Section 2. General Provisions

(a) The Secretary of State, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Management, or the Comptroller may at any time exercise any function delegated by this delegation of authority. Functions delegated herein may not be re-delegated.

(b) Any reference in this delegation of authority to any act, executive order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, executive order, determination, delegation of authority, regulation, or procedure as amended from time to time.

(c) This Delegation of Authority shall be published in the **Federal Register**.

Dated: December 14, 2020.

Jeffrey C. Mounts,

Comptroller, Department of State.

[FR Doc. 2021–00794 Filed 1–14–21; 8:45 am]

BILLING CODE 4710–37–P

DEPARTMENT OF STATE

[Delegation of Authority No. 354–4]

Delegation of Authority to The Deputy Comptroller Charleston of Certain Authorities Regarding Debt Collection and Waiver of Claims

Section 1. Delegation

By virtue of the authority vested in the Secretary of State by the laws and authorities of the United States, including those set forth in 22 U.S.C. 2651a; the Debt Collection Improvement Act of 1996, Public Law 104–134 (1996); the Office of Management and Budget's Determination with Respect to Transfer of Functions Pursuant to Public Law 104–316 (December 17, 1996); the Travel and Transportation Reform Act of 1998, Public Law 105–264 (1998); 5 U.S.C. 4108, 5379, 5514, 5522, 5524a, 5705, 5922, and 8707; 22 U.S.C. 2671, 2716, 4047 and 4071; and 31 U.S.C. Chapter 37, and delegated to the Comptroller by Delegation of Authority 354, dated April 23, 2013, I hereby delegate, to the extent authorized by law, authority to waive interest, penalties and costs, and to compromise, suspend, and terminate collection of claims against debtors of Department of State to the Deputy Comptroller of the Department of State in Charleston, South Carolina.

Section 2. General Provisions

(a) The Secretary of State, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Management, or the Comptroller may at any time exercise any function delegated by this delegation of authority. Functions delegated herein may not be re-delegated.

(b) Any reference in this delegation of authority to any act, executive order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, executive order, determination,

delegation of authority, regulation, or procedure as amended from time to time.

(c) This Delegation of Authority shall be published in the **Federal Register**.

Dated: December 14, 2020.

Jeffrey C. Mounts,

Comptroller, Department of State.

[FR Doc. 2021–00796 Filed 1–14–21; 8:45 am]

BILLING CODE 4710–37–P

DEPARTMENT OF STATE

[Delegation of Authority No. 354–3]

Delegation of Authority to the Director of Financial Policy, Reporting, and Analysis of Certain Authorities Regarding Debt Collection and Waiver of Claims

Section 1. Delegation

By virtue of the authority vested in the Secretary of State by the laws and authorities of the United States, including those set forth in 22 U.S.C. 2651a; the Debt Collection Improvement Act of 1996, Public Law 104–134 (1996); the Office of Management and Budget's Determination with Respect to Transfer of Functions Pursuant to Public Law 104–316 (December 17, 1996); the Travel and Transportation Reform Act of 1998, Public Law 105–264 (1998); 5 U.S.C. 4108, 5379, 5514, 5522, 5524a, 5705, 5922, and 8707; 22 U.S.C. 2671, 2716, 4047 and 4071; and 31 U.S.C. Chapter 37, and delegated to the Comptroller by Delegation of Authority 354, dated April 23, 2013, I hereby delegate, to the extent authorized by law, the duties, functions and responsibilities for the administrative collection, compromise, suspension, termination of Department collection, advance decision, settlement, and waiver of claims of or against debtors of the Department of State, pursuant to the above-mentioned authorities, to the Director of Financial Policy, Reporting, and Analysis of the Department of State.

Section 2. General Provisions

(a) The Secretary of State, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Management, or the Comptroller may at any time exercise any function delegated by this delegation of authority. Functions delegated herein may not be re-delegated.

(b) Any reference in this delegation of authority to any act, executive order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, executive order, determination, delegation of authority, regulation, or procedure as amended from time to time.

(c) This Delegation of Authority shall be published in the **Federal Register**.

Dated: December 14, 2020.

Jeffrey C. Mounts,

Comptroller, Department of State.

[FR Doc. 2021–00795 Filed 1–14–21; 8:45 am]

BILLING CODE 4710–37–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36478]

Dakota Northern Railroad, Inc.—Lease and Operation Exemption—Rail Lines of BNSF Railway Company

Dakota Northern Railroad, Inc. (DN), a Class III railroad, has filed a verified notice of exemption pursuant to 49 CFR 1150.41 to lease from BNSF Railway Company (BNSF) and operate two rail lines totaling 59.84 miles: (1) Between the point of connection to BNSF at milepost 0.0, at or near Grafton, N.D., and the end of the line at milepost 48.38, at or near Walhalla, N.D.; and (2) between milepost 38.79, at or near Grafton, and the end of the line at milepost 50.25, at or near St. Thomas, N.D.

DN states that the proposed lease and operation is a continuation of an existing lease.[1] DN states that the parties anticipate reaching an agreement on the terms for the lease continuation in the near future and that a signed agreement is expected well before expiration of the current lease on January 31, 2021. According to DN, the proposed lease agreement will not contain any interchange commitments.

Further, DN certifies that its projected annual revenue will not exceed $5 million and will not result in the creation of a Class I or II rail carrier.

The earliest this transaction may be consummated is January 29, 2021, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 22, 2021 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36478, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on DN's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 2230 Marston Lane, Flossmoor, IL 60422–1336.

According to DN, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: January 11, 2021.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Eden Besera,

Clearance Clerk.

[FR Doc. 2021–00773 Filed 1–14–21; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36447]

Lake Providence Port Commission—Feeder Line Application—Line of Delta Southern Railroad Located in East Carroll and Madison Parishes, La.

On November 12, 2020, Lake Providence Port Commission, a noncarrier political subdivision of the State of Louisiana (LPPC or Applicant), filed an application under 49 U.S.C. 10907 and 49 CFR part 1151 to acquire from Delta Southern Railroad, Inc. (DSR), a 20-mile rail line between milepost 471.0 and milepost 491.0, together with various ancillary tracks, in East Carroll and Madison Parishes, La. (the Line). Concurrently, LPPC and the Southeast Arkansas Economic Development District (SEAEDD) filed a petition seeking expedited consideration and acceptance of LPPC's application prior to submission of evidence regarding the Line's valuation. DSR filed a reply in opposition to the petition to expedite on December 2, 2020, and stated that it would respond to the application, if accepted, in accordance with the procedural schedule set by the Board.

By decision served December 11, 2020 (*December 11 Decision*), the Board found that the application was substantially complete, except for the absence of information pertaining to the net liquidation value (NLV) of the Line. *December 11 Decision,* slip op. at 1.[1]

[1] *See Dakota N. R.R.—Lease & Operation Exemption—Rail Lines of BNSF Ry.,* FD 34816 (STB served Jan. 27, 2006) (authorizing lease and operation of 69.79 miles of line in North Dakota).

[1] Section 1151.3(a)(4) requires an applicant to submit estimates and supporting information for

The Board waived its regulations at 49 CFR 1151.2(d) and conditionally accepted the application, even though the application did not contain the required NLV information, subject to Applicant's submission of an NLV estimate and supporting information by December 28, 2020. *Id.* at 1–2.[2] The Board also stated that LPPC should submit a copy of any contract pertaining to the Line with North Louisiana & Arkansas Railroad (NLA), the proposed operator of the Line, as soon as the parties reach an agreement. *Id.* at 6 n.17.

On December 22, 2020, LPPC submitted an estimate of the NLV and supporting evidence, along with the lease agreement between LPPC and NLA that would govern NLA's operation of the Line.[3] Accordingly, the Board will accept the application and will adopt the following procedural schedule as set out at 49 CFR 1151.2:

- Competing applications by other parties seeking to acquire all or any portion of the Line are due by February 16, 2021.
- Verified statements and comments addressing both the initial and competing applications must be filed by March 16, 2021.
- Verified replies by applicants and other interested parties must be filed by April 5, 2021.

It is ordered:

1. LPPC's feeder line application is accepted and notice will be published in the **Federal Register**.
2. The above schedule will govern this proceeding.
3. This decision is effective on its service date.

Decided Date: January 11, 2021.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Aretha Laws-Byrum,

Clearance Clerk.

[FR Doc. 2021–00885 Filed 1–14–21; 8:45 am]

BILLING CODE 4915–01–P

both the NLV and the going concern value (GCV) of the line. Here, however, LPPC asserts that the GCV of the Line is $0 so only an NLV estimate was required for purposes of making the application complete. *See December 11 Decision,* slip op. at 5 & n.14 (also noting that if the application were accepted, DSR would have the opportunity to provide evidence and argument to counter LPPC's assertion that the Line has no GCV).

[2] The Board stated that, upon receipt of the NLV evidence by the specified date, it would publish notice of acceptance of the application and a procedural schedule in the **Federal Register**. *December 11 Decision,* slip op. at 2.

[3] On December 22, 2020, LPPC filed both public and confidential versions of the agreement. On December 28, 2020, LPPC filed an unredacted public version of the agreement previously filed under seal.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Amendment to Product Exclusion and Product Exclusion Extension: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Effective September 24, 2018, the U.S. Trade Representative imposed additional duties on goods of China with an annual trade value of approximately $200 billion as part of the action in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. On June 24, 2019, the U.S. Trade Representative established a process by which U.S. stakeholders could request the exclusion of particular products subject to the action. The exclusions granted under the $200 billion action were scheduled to expire on August 7, 2020. On May 6 and June 3, 2020, the U.S. Trade Representative invited the public to comment on whether to extend particular exclusions. On August 11, 2020, the U.S. Trade Representative announced its determination to extend certain previously granted exclusions. This notice announces the U.S. Trade Representatives determination to make a technical amendment to a previously granted exclusion and the extension to that exclusion.

DATES: The product exclusion amendment announced in annex A of this notice will apply from September 24, 2018 to August 7, 2020. The product exclusion extension amendment announced in annex B of this notice will apply from August 7, 2020 and continue through December 31, 2020. This notice does not further extend the period for product exclusions or extensions. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Associate General Counsel Philip Butler or Assistant General Counsel Benjamin Allen, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see prior notices including 82 FR 40213 (August 24, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 47974 (September 21, 2018), 83 FR 49153 (September 28, 2018), 83 FR 65198 (December 19, 2018), 84 FR 7966 (March 5, 2019), 84 FR 20459 (May 9, 2019), 84 FR 29576 (June 24, 2019), 84 FR 38717 (August 7, 2019), 84 FR 46212 (September 3, 2019), 84 FR 49591 (September 20, 2019), 84 FR 57803 (October 28, 2019), 84 FR 61674 (November 13, 2019), 84 FR 65882 (November 29, 2019), 84 FR 69012 (December 17, 2019), 85 FR 549 (January 6, 2020), 85 FR 6674 (February 5, 2020), 85 FR 9921 (February 20, 2020), 85 FR 15015 (March 16, 2020), 85 FR 17158 (March 26, 2020), 85 FR 23122 (April 24, 2020), 85 FR 27011 (May 6, 2020), 85 FR 27489 (May 8, 2020), 85 FR 32094 (May 28, 2020), 85 FR 34279 (June 3, 2020), 85 FR 38000 (June 24, 2020), 85 FR 42968 (July 15, 2020), 85 FR 48600 (August 11, 2020), 85 FR 52188 (August 24, 2020), 85 FR 57925 (September 16, 2020), 85 FR 63329 (October 7, 2020), 85 FR 63332 (October 7, 2020).

Effective September 24, 2018, the U.S. Trade Representative imposed additional 10 percent *ad valorem* duties on goods of China classified in 5,757 full and partial subheadings of the Harmonized Tariff Schedule of the United States (HTSUS), with an approximate annual trade value of $200 billion. *See* 83 FR 47974, as modified by 83 FR 49153. In May 2019, the U.S. Trade Representative increased the additional duty to 25 percent. *See* 84 FR 20459. On June 24, 2019, the U.S. Trade Representative established a process by which stakeholders could request exclusion of particular products classified within an 8-digit HTSUS subheading covered by the $200 billion action from the additional duties. *See* 84 FR 29576 (June 24 notice). The U.S. Trade Representative issued a notice setting out the process for the product exclusions and opened a public docket. The exclusions the U.S. Trade Representative granted under the $200 billion action expired on August 7, 2020. *See* 84 FR 38717 (August 7, 2019).

On May 6 and June 3, 2020, the U.S. Trade Representative invited the public to comment on whether to extend by up to 12 months, particular exclusions granted under the $200 billion action. *See* 85 FR 27011 (May 6, 2020); 85 FR 34279 (June 3, 2020). On August 11, 2020, the U.S. Trade Representative

announced its determination to extend certain previously granted exclusions *See* 85 FR 48600 (August 11, 2020).

B. Technical Amendment to an Exclusion

Annex A contains one technical amendment to U.S. note 20(qq)(25) to subchapter III of chapter 99 of the HTSUS, as established in the annex of the notice published at 85 FR 6674 (February 5, 2020).

Annex A

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 24, 2018, and before August 7, 2020, U.S. note 20(qq)(25) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''zinc oxide absorbent'' and by inserting ''zinc oxide'' in lieu thereof.

C. Technical Amendment to an Exclusion Extension

Annex B contains one technical amendment to U.S. note 20(iii)(54), to subchapter III of chapter 99 of the HTSUS, as established in the annex of the notice published at 85 FR 48600 (August 11, 2020).

Annex B

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 7, 2020, and through December 31, 2020, U.S. note 20(iii)(54) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by deleting ''zinc oxide absorbent'' and by inserting ''zinc oxide'' in lieu thereof.

Joseph Barloon.

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2021–00865 Filed 1–14–21; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[FAA–2021–0012]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed

Approval of Information Collection: Reduced Vertical Separation Minimum

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew information collection. Aircraft Operators seeking specific operational approval to conduct Reduced Vertical Separation Minimum (RVSM) operations must submit application to the FAA. Specific approval is required when aircraft operators intend to operate outside the United States (U.S.) or their aircraft are not equipped with Automatic Dependent Surveillance—Broadcast (ADS–B) Out.

DATES: Written comments should be submitted by March 16, 2021.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field)

By mail: Christina Clausnitzer, Federal Aviation Administration (FAA), Flight Technologies and Procedures Division, 470 L'Enfant Plaza, Suite 4102, Washington, DC 20024

By fax: (202) 267–8791

FOR FURTHER INFORMATION CONTACT: Christina Clausnitzer by email at: *Christina.Clausnitzer@faa.gov;* phone: (303) 342–1965

SUPPLEMENTARY INFORMATION: *Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0679.

Title: Reduced Vertical Separation Minimum.

Form Numbers: N/A.

Type of Review: Renewal.

Background: The authority to collect data from aircraft operators seeking operational approval to conduct Reduced Vertical Separation Minimum (RVSM) operations is contained in Part 91, Section 91.180, as established by a final rule published in the **Federal Register** on October 27, 2003 (68 FR 61304) and in Part 91, Section 91.706, as established by a final rule published April 9, 1997 (62 FR 17487, Apr 9, 1997). Aircraft operators seeking specific operational approval to conduct RVSM operations outside the U.S. must submit their application to the responsible Flight Standards office. The responsible Flight Standards office registers RVSM approved airframes in the FAA RVSM Approvals Database to track the approval status for operator airframes. Application information includes evidence of aircraft equipment and RVSM qualification information along with operational training and program elements.

Respondents: Operators are required to submit application for RVSM specific approval if they desire to operate in RVSM airspace outside the U.S. or if they do not meet the provisions of Title 14 of the Code of Federal Regulations (14 CFR), Part 91, Appendix G, Section 9—Aircraft Equipped with Automatic Dependent Surveillance—Broadcast Out. The FAA estimates processing 856 initial applications annually and 1,998 annual updates to existing approvals.

Frequency: An Operator must make application for initial specific approval to operate in RVSM airspace, or whenever requesting an update to an existing approval.

Estimated Average Burden per Response: 4.00 hours for updates to existing applications and 6.8 hours for application of initial approvals.

Estimated Total Annual Burden: 13,813 hours [(1,998 × 4.00) + (856 × 6.8)].

Issued in District of Columbia on January 8, 2021.

Christina Clausnitzer,

Management and Program Analyst, FAA, Flight Technologies & Procedures Division.

[FR Doc. 2021–00779 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver of Aeronautical Land Use Assurance Astoria Regional Airport, Astoria, Oregon

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

ACTION: Notice.

SUMMARY: Notice is being given that the FAA is considering a proposal from the Port of Astoria Airport Director to change certain portions of the airport from aeronautical use to non-aeronautical use at Astoria Regional Airport, Astoria, Oregon. The proposal

consists of three parcels on the south side of the airfield.

DATES: Comments are due within 30 days of the date of the publication of this notice in the **Federal Register**. Written comments can be provided to Ms. Mandi M. Lesauis, Program Specialist, Seattle Airports District Office, 2200 S. 216th St., Des Moines, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Matt McGrath, Airport Director, Port of Astoria, 10 Pier 1, Ste. 103, Astoria, OR 97103; or Mandi M. Lesauis, Program Specialist, Seattle Airports District Office, 2200 S. 216 St., Des Moines, WA 98198, (206) 231–4140. Documents reflecting this FAA action may be reviewed at the above locations.

SUPPLEMENTARY INFORMATION: Under the provisions of Title 49, U.S.C. 47153(c), and 47107(h)(2), the FAA is considering a proposal from the Airport Director, Port of Astoria, to change a portion of the Astoria Regional Airport from aeronautical use to non-aeronautical use. The proposal consists of a 3-acre parcel on the south side of the airport.

The parcels are vacant, landlocked and do not have airfield access. The proposed property will be developed as a protein processing plant. The FAA concurs that the parcels are no longer needed for aeronautical purposes. The proposed use of this property is compatible with other airport operations in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in **Federal Register** on February 16, 1999.

Issued in Des Moines, Washington on January 11, 2021.

William C. Garrison,

Acting Manager, Seattle Airports District Office.

[FR Doc. 2021–00776 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Intent To prepare a Draft Environmental Impact Statement for the State Route 67 Operational Improvements Project, in San Diego County, California

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of Intent (NOI) to prepare a Draft Environmental Impact Statement (Draft EIS) for the State Route 67 (SR 67) Operational Improvements Project.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans), is issuing this notice to advise the public that a Draft EIS will be prepared for the SR 67 operational improvements project (Project), a proposed highway project in San Diego County, California.

DATES: This notice will be accompanied by a 30-day public scoping comment period from Thursday, January 14, 2021, to Monday, February 15, 2021. The deadline for public comments is 5:00 p.m. (PST) on February 15, 2021. The Virtual scoping meeting will be held from 5:30 p.m. to 7:30 p.m. PST on Wednesday, January 27, 2021.

ADDRESSES: *https://dot.ca.gov/sr67-improvements.*

FOR FURTHER INFORMATION CONTACT: For Caltrans: contact Shay Lynn M. Harrison, Chief, Environmental Analysis—Branch C, Caltrans District 11, M.S. 242 4050 Taylor Street, San Diego, CA 92110, telephone 619–453–8481, or email *shay.lynn.harrison@dot.ca.gov.* For FHWA, contact David Tedrick, telephone (916) 498–5024, or email *david.tedrick@dot.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans as the assigned National Environmental Policy Act (NEPA) agency, will prepare a joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on a proposal for operational improvements along State Route 67 (SR 67) project in San Diego County, California.

Caltrans, along with our partner the San Diego Association of Governments (SANDAG) are proposing operational improvements to SR 67 with emphasis on mobility and safety for the traveling public and goods, utilizing various modes of travel during typical and emergency highway conditions including emergency access, recreational access, and wildlife connectivity. Within this effort, deficiencies in multimodal transportation and recreational and wildlife movement will be addressed. Multimodal transportation includes bus as well as active bicycle and pedestrian options. Located along SR 67 (PM R5.48/21.35) from Maple view Street to Highland Valley/Dye Road in the City of Poway and the unincorporated communities of Lakeside and Ramona in San Diego County, California. The preliminary six alternatives currently under consideration include features such as: Additional lanes; auxiliary lanes, sliver widening; lane reconfiguration with two-way left turn lanes and/or turn pockets; median improvements, possible barriers, possible channelizers, and Intelligent Transportation Systems (ITS); extended shoulder, bus stops; bike paths and/or lanes; pedestrian improvements with sidewalks, signals, and/or bridges; recreational access improvements with additional parking lots, scenic turnouts, an/or paths; wildlife improvements with enhanced culverts and crossings. There is also the No Build alternative with no improvements proposed.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, Participating Agencies, Tribal governments, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. The Scoping period to submit comment is from January 14, 2021 to February 15, 2021. Public scoping meeting will be held Virtually from 5:30 p.m. to 7:30 p.m. PST on Wednesday, January 27, 2021 from link at *https://dot.ca.gov/sr67-improvements.* In addition, a public hearing will be held once the Draft EIR/EIS is completed. Public notice will be given with the time and place of the meeting and hearing. The joint EIR/EIS will be available for public and agency review and comment prior to the public hearing. Comments may be submitted by: phone: (619) 688–4263; email: *D11.SR67Improvements@dot.ca.gov;* or letter to 4050 Taylor Street MS 242, San Diego, CA 92110 with Attention to Debra Soifer, Associate Environmental Planner. Spanish translations will be available on the website. All comments received in Spanish will be accepted and translated.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: January 12, 2021.

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2021–00860 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0014]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt three individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on December 29, 2020. The exemptions expire on December 29, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0014* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

On November 27, 2020, FMCSA published a notice announcing receipt of applications from three individuals requesting an exemption from vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (85 FR 76151). The public comment period ended on December 28, 2020, and one comment was received.

FMCSA has evaluated the eligibility of these applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received one comment in this proceeding. An anonymous individual submitted a comment in support of the Agency's decision to grant the exemptions.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on medical reports about the applicants' vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the November 27, 2020, **Federal Register** notice (85 FR 76151) and will not be repeated here.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The three exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, cataract, and retinal detachment. In most cases, their eye conditions did not develop recently. Two of the applicants were either born with their vision impairments or have had them since childhood. The individual who developed their vision condition as an adult has had it for 20 years. Although each applicant has one eye that does not meet the vision requirement in § 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors' opinions are supported by the applicants' possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 7 to 40 years. In the past 3 years, no drivers were involved in crashes, and no drivers were convicted of moving violations in CMVs. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the

likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in § 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in § 391.41(b)(10) and (b) by a certified medical examiner (ME) who attests that the individual is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the three exemption applications, FMCSA exempts the following drivers from the vision requirement, § 391.41(b)(10), subject to the requirements cited above:

Terence L. Broadwater (WV)
Shannon L. Cagle (GA)
Frank L. Crenshaw (OH)

In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2021–00797 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0154; FMCSA–2014–0106; FMCSA–2014–0384; FMCSA–2015–0328; FMCSA–2017–0057; FMCSA–2018–0136]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for nine individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates provided below. Comments must be received on or before February 16, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0154, Docket No. FMCSA–2014–0106, Docket No. FMCSA–2014–0384, Docket No. FMCSA–2015–0328, Docket No. FMCSA–2017–0057, or Docket No. FMCSA–2018–0136 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2012–0154, Docket No. FMCSA–2014–0106, Docket No. FMCSA–2014–0384, Docket No. FMCSA–2015–0328, Docket No. FMCSA–2017–0057, or Docket No. FMCSA–2018–0136) indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2012–0154, FMCSA–2014–0106, FMCSA–2014–0384, FMCSA–2015–0328, FMCSA–2017–0057, or FMCSA–2018–0136, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2012–0154, FMCSA–2014–0106, FMCSA–2014–0384, FMCSA–2015–0328, FMCSA–2017–0057, or FMCSA–2018–0136, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The nine individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the nine applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The nine drivers in this notice remain in good standing with the Agency. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of January and are discussed below.

As of January 15, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following eight individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Stephen Goen (GA)
Jerry Jones (TX)
James Laughrey (KS)
Christopher McKenzie (TX)
Kathy Miller (IA)
Lesley O'Rorke (IL)
Gerson Ramirez (MT)
Michael Wilkes (MA)

The drivers were included in docket number FMCSA–2012–0154, FMCSA–2014–0106, FMCSA–2014–0384, FMCSA–2017–0057, or FMCSA–2018–0136. Their exemptions are applicable as of January 15, 2021, and will expire on January 15, 2023.

As of January 22, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), Jaymes Haar (IA) has satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers.

This driver was included in docket number FMCSA–2015–0328. The exemption is applicable as of January 22, 2021, and will expire on January 22, 2023.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in § 390.5; (2) report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver is prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the nine exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41(b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for two years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2021–00798 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2021–0004]

Request for Comments on Draft Strategic Plan on Accessible Transportation

AGENCY: Office of the Secretary of Transportation (OST), Department of Transportation.

ACTION: Notice; request for comments (RFC).

SUMMARY: The U.S. Department of Transportation (DOT) seeks public comment on a draft Strategic Plan on Accessible Transportation. The proposed document guides the DOT's efforts to create a transportation system that is inclusive of people with disabilities. The document may be found on the Federal regulations website at *http://www.regulations.gov* as an attachment to Docket No. DOT–OST–2021–0004.

DATES: Individuals who are interested in submitting comments must do so by February 16, 2021, no later than 5:00 p.m. (ET), to receive full consideration by DOT for incorporation into the final Strategic Plan on Accessible Transportation.

ADDRESSES: Written comments may be submitted using any one of the following methods:

- *Electronic mail:* Email comments to the monitored inbox at *usdotaccessibility@dot.gov.* Responses must be provided as attachments to an email. It is recommended that attachments with file sizes exceeding 25MB be compressed (*i.e.,* zipped) to ensure message delivery. Responses must be provided as a Microsoft Word (.docx) attachment to the email, and be no more than 10 pages in length, with 12-point font and 1-inch margins.
- *Internet:* To submit comments electronically, go to the Federal regulations website at *http://www.regulations.gov.* Search by using the docket number (DOT–OST–2021–0004). Follow the online instructions for submitting comments.

Please identify Docket No. DOT–OST–2021–0004 at the beginning of your comments. DOT will not respond to individual submissions or publish publicly a compendium of responses. In accordance with 5 U.S.C. 553(c), the DOT solicits comments from the public to better inform its rulemaking process. The DOT posts these comments without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments in response to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 CFR 190.343, you may ask DOT to provide confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ''Confidential;'' (2) send DOT a copy of the original document with the CBI deleted along with the original, unaltered document; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, DOT will treat such marked submissions as confidential under the Freedom of Information Act and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to *usdotaccessibility@dot.gov.* Any commentary DOT receives that is not specifically designated as CBI will be placed in the public docket for this guidance.

FOR FURTHER INFORMATION CONTACT: Ariel Gold, Transportation Policy Analyst, at *Ariel.Gold@dot.gov* or 202–695–6833, with a courtesy copy to *usdotaccessibility@dot.gov.*

Please reference ''Strategic Plan on Accessible Transportation RFC'' in the subject line when submitting your response.

DOT looks forward to your submission in response to this notice.

SUPPLEMENTARY INFORMATION: The Strategic Plan on Accessible Transportation lays out the Department's vision of amultimodaltransportation system that is inclusive of people with disabilities. It is the first plan of its type in the Department, and covers a five-year period from 2021 through 2025. Broad strategic goals are supported by objectives, which are in turn expanded upon in several strategies. Select examples of current and future activities by DOT Operating Administrations and the Office of the Secretary are shown for illustrative purposes.

Secretary of Transportation Elaine L. Chao announced the intention to develop the Department's first accessibility strategic plan at the *Access and Mobility for All Summit* on October29, 2019. Aframework for this plan was presented to the public atthe virtual event, *Breaking Down Barriers: Celebrating the 30thAnniversary of the Americans with Disabilities Act,* on July 30, 2020. An online forum engaged the public on the framework in August 2020, generating 128 ideas from 1,123 participants overa three-week period. The Strategic Plan on Accessible Transportation is consistent with related documents, such as the *DOT Strategic Plan for FY 2018–2022* and *DOT Research, Development, and Technology Strategic Plan FY 2017–2021.*

Issued on: January 12, 2021.

Thomas Finch Fulton,

Deputy Assistant Secretary for Transportation Policy.

[FR Doc. 2021–00871 Filed 1–14–21; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treas.gov/ofac*).

Notice of OFAC Action(s)

On January 11, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals:

1. ONYSHCHENKO, Oleksandr (Cyrillic: ОНИЩЕНКО, Олександр) (a.k.a. KADYROV, Aleksandr Romanovych; a.k.a. KADYROV, Oleksandr; a.k.a. KADYROV, Oleksandr Romanovych; a.k.a. ONISHCHENKO, Aleksandr Romanovych; a.k.a. ONISHCHENKO, Oleksandr; a.k.a. ONISHCHENKO, Oleksandr Romanovych (Cyrillic: ОНИЩЕНКО, Олександр Романович); a.k.a. ONYSHCHENKO, Oleksandr Romanovych), Germany; Redutnyi Pereulok 10A, Kiev, Ukraine; UL. Natalii Ushvii 4 G App. 36, Kiev 04108, Ukraine; DOB 31 Mar 1969; POB Russia; nationality Ukraine; Gender Male; Passport 2529210098 (Ukraine) expires 29 Mar 2021; alt. Passport EX600377 (Ukraine) issued 01 Oct 2013 expires 01 Oct 2023; National ID No. 2529210098 (Ukraine) (individual) [ELECTION-EO13848].

   Designated pursuant to section 2(a)(i) of Executive Order 13848 of September 12, 2018, "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election," 83 FR 46843, 3 CFR, 2018 Comp., p. 869, (E.O. 13848) for having directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election.

2. TELIZHENKO, Andrii (Cyrillic: ТЕЛІЖЕНКО, Андрій) (a.k.a. TELIZHENKO, Andrii Grygorovych (Cyrillic: ТЕЛІЖЕНКО, Андрій Григорович); a.k.a. TELIZHENKO, Andriy), 7 Koshytsa Street, Apartment 136, Kiev 02068, Ukraine; Stepana Rudanskogo 3A, Apartment 170, Kiev 04112, Ukraine; DOB 02 Sep 1990; POB Kyiv, Ukraine; nationality Ukraine; Gender Male; Passport DU000524 (Ukraine) issued 10 Nov 2015 expires 10 Nov 2020; alt. Passport ES505702 (Ukraine) issued 13 Nov 2014 expires 13 Nov 2024; National ID No. 3311706819 (Ukraine) (individual) [ELECTION-EO13848].

   Designated pursuant to section 2(a)(i) of E.O. 13848 for having directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election.

3. KOVALCHUK, Dmytro Volodymyrovych (Cyrillic: КОВАЛЬЧУК, Дмитро Володимирович), Str. 9 A Grushevskogo Apt V 5 1, Kiev 01021, Ukraine; DOB 13 Jun 1987; POB Ukraine; nationality Ukraine; Gender Male; Identification Number 3194020675 (Ukraine) (individual) [ELECTION-EO13848] (Linked To: DERKACH, Andrii Leonidovych).

   Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, ANDRII LEONIDOVYCH DERKACH (DERKACH), a person whose property or interests in property are blocked pursuant to E.O. 13848.

4. SIMONENKO, Anton Oleksandrovych (Cyrillic: СІМОНЕНКО, Антон Олександрович), Mishugi 2 App 361, Kiev 02140, Ukraine; DOB 08 Jan 1987; POB Russia; nationality Ukraine; Gender Male; Passport FE229065 (Ukraine) (individual) [ELECTION-EO13848] (Linked To: DERKACH, Andrii Leonidovych).

   Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, DERKACH, a person whose property or interests in property are blocked pursuant to E.O. 13848.

5. ZHURAVEL, Petro Anatoliyovich (Cyrillic: ЖУРАВЕЛЬ, Петро Анатолійович), Kiev, Ukraine; DOB 04 Nov 1988; nationality Ukraine; Gender Male (individual) [ELECTION-EO13848] (Linked To: DERKACH, Andrii Leonidovych).

   Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, DERKACH, a person whose property or interests in property are blocked pursuant to E.O. 13848.

6. DUBINSKY, Oleksandr (Cyrillic: ДУБІНСЬКИЙ, Олександр) (a.k.a. DUBINSKY, Alexander), Ukraine; DOB 18 Apr 1981; POB Kiev, Ukraine; nationality Ukraine; Gender Male (individual) [ELECTION-EO13848].

   Designated pursuant to section 2(a)(i) of E.O. 13848 for having directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election.

7. KULYK, Konstantin (Cyrillic: КУЛИК, Костянтин) (a.k.a. KULIK, Konstantin; a.k.a. KULYK, Konstantyn Hennadiyovych; a.k.a. KULYK, Kostiantyn; a.k.a. KULYK, Kostyantyn), Ukraine; DOB 03 Nov 1977; nationality Ukraine; Gender Male (individual) [ELECTION-EO13848].

   Designated pursuant to section 2(a)(i) of E.O. 13848 for having directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election.

Entities:

1. ERA-MEDIA TOV (Cyrillic: ЕРА-МЕДІА ТОВ), Bul. Verhovnoe Radi 20, Kiev, Dniprovskyi R-N 02100, Ukraine; Website eramedia.com.ua; Identification Number 37292551 (Ukraine) [ELECTION-EO13848] (Linked To: DERKACH, Andrii Leonidovych).

   Designated pursuant to section 2(a)(iii) of E.O. 13848 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, DERKACH, a person whose property or interests in property are blocked pursuant to E.O. 13848.

2. INFORMATSIYNE AGENSTVO ONLI N'YUZ TOV (Cyrillic: ІНФОРМАЦІЙНЕ АҐЕНСТВО ОНЛІ Н'ЮЗ ТОВ) (a.k.a. "ONLY NEWS"), Vul. Hotkevicha Gnata 12,

Of. 177, Kiev, Dniprovskyi R-N 02094, Ukraine; Website onmedia.io; Identification Number 42283491 (Ukraine) [ELECTION-EO13848] (Linked To: ZHURAVEL, Petro Anatoliyovich).

Designated pursuant to section 2(a)(iii) of E.O. 13848 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, PETRO ANATOLIYOVICH ZHURAVEL (ZHURAVEL), a person whose property or interests in property are blocked pursuant to E.O. 13848.

3. NABULEAKS, Ukraine; Website nabu-leaks.com; alt. Website nabu-leaks.org; alt. Website nabu-leaks.info; alt. Website nabu-leaks.net; Email Address democorruption2020@gmail.com; alt. Email Address nabu.leaks@gmail.com [ELECTION-EO13848] (Linked To: DERKACH, Andrii Leonidovych).

Designated pursuant to section 2(a)(iii) of E.O. 13848 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, DERKACH, a person whose property or interests in property are blocked pursuant to E.O. 13848.

4. SKEPTIK TOV (Cyrillic: СКЕПТИК ТОВ) (a.k.a. BEGEMOT MEDIA), Vul. Harkivske Shose 201/203, Kiev, Darnitskyi R-N 02121, Ukraine; Website sceptic.online; alt. Website begemot.media; Email Address begemot.media@gmail.com; Identification Number 39988031 (Ukraine) [ELECTION-EO13848] (Linked To: ZHURAVEL, Petro Anatoliyovich).

Designated pursuant to section 2(a)(iii) of E.O. 13848 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, ZHURAVEL, a person whose property or interests in property are blocked pursuant to E.O. 13848.

BILLING CODE 4810–AL–C

Dated: January 11, 2021.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2021–00767 Filed 1–14–21; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Manufacturers Excise Taxes on Sporting Goods and Firearms and Other Administrative Provisions of Special Application to Manufacturers and Retailers Excise Taxes; Reporting and Recordkeeping Requirements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Manufacturers Excise Taxes on Sporting Goods and Firearms and Other Administrative Provisions of Special Application to Manufacturers and Retailers Excise Taxes; Reporting and Recordkeeping Requirements.

DATES: Written comments should be received on or before March 16, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Manufacturers Excise Taxes on Sporting Goods and Firearms and Other Administrative Provisions of Special Application to Manufacturers and Retailers Excise Taxes; Reporting and Recordkeeping Requirements.

OMB Number: 1545–0723.

Regulation Project Number: T.D. 8043.

Abstract: Chapters 31 and 32 of the Internal Revenue Code impose excise taxes on the sale or use of certain articles. Code section 6416 allows a credit or refund of the tax to manufacturers in certain cases. Code sections 6420, 6421, and 6427 allow credits or refunds of the tax to certain users of the articles. This regulation contains reporting and recordkeeping requirements that enable the IRS and taxpayers to verify that the proper amount of tax is reported or excluded.

Current Actions: There is no change in the paperwork burden previously approved by OMB. The regulation is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit or not-for-profit institutions.

Estimated Number of Respondents: 1,500,000.

Estimated Time per Response: 19 minutes.

Estimated Total Annual Burden Hours: 475,000.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 12, 2021.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2021–00840 Filed 1–14–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Changes in Periods of Accounting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning changes in periods of accounting.

DATES: Written comments should be received on or before March 16, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Changes in Periods of Accounting.

OMB Number: 1545–1786.

Revenue Procedures: 2003–79, 2007–64, and 2006–46.

Abstract: Revenue Procedures 2003–79, 2007–64, and 2006–46, provide the comprehensive administrative rules and guidance, for affected taxpayers adopting, changing, or retaining annual accounting periods, for federal income tax purposes. In order to determine whether a taxpayer has properly adopted, changed to, or retained an annual accounting period, certain information regarding the taxpayer's qualification for and use of the requested annual accounting period is required. The revenue procedures request the information necessary to make that determination when the information is not otherwise available.

Current Actions: There is no change in the paperwork burden previously approved by OMB. The revenue procedures are being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, and farms.

Estimated Number of Respondents: 900.

Estimated Time per Response: 40 minutes.

Estimated Total Annual Burden Hours: 600.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 11, 2021.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2021–00839 Filed 1–14–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Sales of Business Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning sales of business property.

DATES: Written comments should be received on or before March 16, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Sales of Business Property.

OMB Number: 1545–0184.

Form Number: Form 4797.

Abstract: Form 4797 is used by taxpayers to report sales, exchanges, or involuntary conversions of assets used in a trade or business. It is also used to compute ordinary income from recapture and the recapture of prior year losses under section 1231 of the Internal Revenue Code.

Current Actions: There is no change in the paperwork burden previously approved by OMB. The forms are being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, and farms.

Estimated Number of Respondents: 325,000.

Estimated Time per Response: 50 hours, 38 minutes.

Estimated Total Annual Burden Hours: 16,454,750.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 12, 2021.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2021–00841 Filed 1–14–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Coronavirus Relief Fund for States, Tribal Governments, and Certain Eligible Local Governments

AGENCY: Department of the Treasury.

ACTION: Coronavirus Relief Fund program guidance.

SUMMARY: The Department of the Treasury (Treasury) is re-publishing in final form the guidance it previously made available on its website regarding the Coronavirus Relief Fund for States, tribal governments, and certain eligible local governments.

FOR FURTHER INFORMATION CONTACT: Stephen T. Milligan, Deputy Assistant General Counsel (Banking & Finance), 202–622–4051.

SUPPLEMENTARY INFORMATION: Section 601 of the Social Security Act, as added by section 5001(a) of Division A of the Coronavirus Aid, Relief, and Economic Security Act (''CARES Act'') established the Coronavirus Relief Fund (the ''Fund'') and appropriated $150 billion for payments by Treasury to States, tribal governments, and certain local governments.

The Secretary of the Treasury has adopted this guidance for recipients of payments from the Fund pursuant to his authority under the Social Security Act to adopt rules and regulations as may be necessary to the efficient administration of the functions with which he is charged under the Social Security Act. 42 U.S.C. 1302(a). This guidance primarily concerns the use of payments from the Fund set forth in section 601(d) of the Social Security Act. Treasury's Office of Inspector General (OIG) will use this guidance in its audits of recipients' use of funds. Section 601(f)(2) of the Social Security Act provides that if the Treasury OIG determines that a recipient of payments from the Fund has failed to comply with the use of funds provisions of section 601(d), the amount equal to the amount of funds used in violation of such subsection shall be booked as a debt of such entity owed to the federal government.

The guidance published below is unchanged from the last version of the guidance dated September 2, 2020,[1] and the frequently asked questions document dated October 19, 2020,[2] each of which was published on Treasury's website, except for the following changes. The introduction of the guidance and frequently asked questions have been modified to reflect this publication in the **Federal Register**; the guidance and frequently asked questions have been revised throughout to reflect that the end date of the period during which eligible expenses may be incurred has been extended to December 31, 2021;[3] footnote 2 of the guidance has been revised to reflect additional restrictions imposed by section 5001(b) of Division A the CARES Act; FAQ A.59 has been updated to correct the cross-reference to Treasury OIG's FAQs; and the application of FAQ B.6 has been clarified. Treasury is also adding to the guidance instructions regarding the return to Treasury of unused Coronavirus Relief Fund payments.

Administrative Procedure Act

The Administrative Procedure Act (APA) provides that the notice, public comment, and delayed effective date requirements of 5 U.S.C. 553 do not apply ''to the extent that there is involved . . . a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.'' 5 U.S.C. 553(a). The rule involves a matter relating to public property, loans, grants, benefits, or contracts and is therefore exempt under the terms of the APA.

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[1] As noted previously on Treasury's website, on June 30, 2020, the guidance provided under ''Costs incurred during the period that begins on March 1, 2020, and ends on December 30, 2020'' was updated. On September 2, 2020, the ''Supplemental Guidance on Use of Funds to Cover Payroll and Benefits of Public Employees'' and ''Supplemental Guidance on Use of Funds to Cover Administrative Costs'' sections were added.

[2] As noted previously on Treasury's website, on August 10, 2020, the frequently asked questions were revised to add Questions A.49–52. On September 2, 2020, Questions A.53–56 were added and Questions A.34 and A.38 were revised. On October 19, 2020, Questions A.57–59 and B.13 were added and Questions A.42, 49, and 53 were revised.

[3] Section 1001 of Division N of the Consolidated Appropriations Act, 2021 amended section 601(d)(3) of the Social Security Act by extending the end of the covered period for Coronavirus Relief Fund expenditures from December 30, 2020 to December 31, 2021.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act does not apply to a rulemaking when a general notice of proposed rulemaking is not required.

Paperwork Reduction Act

The final rule contains no requirements subject to the Paperwork Reduction Act.

Authority and Issuance

42 U.S.C. 1302(a).

Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments

The purpose of this document is to provide guidance to recipients of the funding available under section 601(a) of the Social Security Act, as added by section 5001 of the Coronavirus Aid, Relief, and Economic Security Act (''CARES Act''). The CARES Act established the Coronavirus Relief Fund (the ''Fund'') and appropriated $150 billion to the Fund. Under the CARES Act, the Fund is to be used to make payments for specified uses to States and certain local governments; the District of Columbia and U.S. Territories (consisting of the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands); and Tribal governments.

The CARES Act provides that payments from the Fund may only be used to cover costs that—

1. are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19);

2. were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and

3. were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021.[1]

The guidance that follows sets forth the Department of the Treasury's interpretation of these limitations on the permissible use of Fund payments.

Necessary Expenditures Incurred Due to the Public Health Emergency

The requirement that expenditures be incurred ''due to'' the public health emergency means that expenditures must be used for actions taken to respond to the public health emergency. These may include expenditures incurred to allow the State, territorial, local, or Tribal government to respond directly to the emergency, such as by addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID–19-related business closures. Funds may not be used to fill shortfalls in government revenue to cover expenditures that would not otherwise qualify under the statute. Although a broad range of uses is allowed, revenue replacement is not a permissible use of Fund payments.

The statute also specifies that expenditures using Fund payments must be ''necessary.'' The Department of the Treasury understands this term broadly to mean that the expenditure is reasonably necessary for its intended use in the reasonable judgment of the government officials responsible for spending Fund payments.

Costs Not Accounted for in the Budget Most Recently Approved as of March 27, 2020

The CARES Act also requires that payments be used only to cover costs that were not accounted for in the budget most recently approved as of March 27, 2020. A cost meets this requirement if either (a) the cost cannot lawfully be funded using a line item, allotment, or allocation within that budget *or* (b) the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation.

The ''most recently approved'' budget refers to the enacted budget for the relevant fiscal period for the particular government, without taking into account subsequent supplemental appropriations enacted or other budgetary adjustments made by that government in response to the COVID–19 public health emergency. A cost is not considered to have been accounted for in a budget merely because it could be met using a budgetary stabilization fund, rainy day fund, or similar reserve account.

Costs Incurred During the Period That Begins on March 1, 2020, and Ends on December 31, 2021

Finally, the CARES Act provides that payments from the Fund may only be used to cover costs that were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021 (the ''covered period''). Putting this requirement together with the other provisions discussed above, section 601(d) may be summarized as providing that a State, local, or tribal government may use payments from the Fund only to cover previously unbudgeted costs of necessary expenditures incurred due to the COVID–19 public health emergency during the covered period.

Initial guidance released on April 22, 2020, provided that the cost of an expenditure is incurred when the recipient has expended funds to cover the cost. Upon further consideration and informed by an understanding of State, local, and tribal government practices, Treasury is clarifying that for a cost to be considered to have been incurred, performance or delivery must occur during the covered period but payment of funds need not be made during that time (though it is generally expected that this will take place within 90 days of a cost being incurred). For instance, in the case of a lease of equipment or other property, irrespective of when payment occurs, the cost of a lease payment shall be considered to have been incurred for the period of the lease that is within the covered period but not otherwise. Furthermore, in all cases it must be necessary that performance or delivery take place during the covered period. Thus the cost of a good or service received during the covered period will not be considered eligible under section 601(d) if there is no need for receipt until after the covered period has expired.

Goods delivered in the covered period need not be used during the covered period in all cases. For example, the cost of a good that must be delivered in December in order to be available for use in January could be covered using payments from the Fund. Additionally, the cost of goods purchased in bulk and delivered during the covered period may be covered using payments from the Fund if a portion of the goods is ordered for use in the covered period, the bulk purchase is consistent with the recipient's usual procurement policies and practices, and it is impractical to track and record when the items were used. A recipient may use payments from the Fund to purchase a durable good that is to be used during the current period and in subsequent periods if the acquisition in the covered period was necessary due to the public health emergency.

Given that it is not always possible to estimate with precision when a good or service will be needed, the touchstone in assessing the determination of need for a good or service during the covered period will be reasonableness at the time delivery or performance was sought, *e.g.,* the time of entry into a procurement contract specifying a time

[1] *See* Section 601(d) of the Social Security Act, as added by section 5001 of the CARES Act and as amended by section 1001 of Division N of the Consolidated Appropriations Act, 2021.

for delivery. Similarly, in recognition of the likelihood of supply chain disruptions and increased demand for certain goods and services during the COVID–19 public health emergency, if a recipient enters into a contract requiring the delivery of goods or performance of services by December 31, 2021, the failure of a vendor to complete delivery or services by December 31, 2021, will not affect the ability of the recipient to use payments from the Fund to cover the cost of such goods or services if the delay is due to circumstances beyond the recipient's control.

This guidance applies in a like manner to costs of subrecipients. Thus, a grant or loan, for example, provided by a recipient using payments from the Fund must be used by the subrecipient only to purchase (or reimburse a purchase of) goods or services for which receipt both is needed within the covered period and occurs within the covered period. The direct recipient of payments from the Fund is ultimately responsible for compliance with this limitation on use of payments from the Fund.

Nonexclusive Examples of Eligible Expenditures

Eligible expenditures include, but are not limited to, payment for:

1. Medical expenses such as:

• COVID–19-related expenses of public hospitals, clinics, and similar facilities.

• Expenses of establishing temporary public medical facilities and other measures to increase COVID–19 treatment capacity, including related construction costs.

• Costs of providing COVID–19 testing, including serological testing.

• Emergency medical response expenses, including emergency medical transportation, related to COVID–19.

• Expenses for establishing and operating public telemedicine capabilities for COVID–19-related treatment.

2. Public health expenses such as:

• Expenses for communication and enforcement by State, territorial, local, and Tribal governments of public health orders related to COVID–19.

• Expenses for acquisition and distribution of medical and protective supplies, including sanitizing products and personal protective equipment, for medical personnel, police officers, social workers, child protection services, and child welfare officers, direct service providers for older adults and individuals with disabilities in community settings, and other public health or safety workers in connection with the COVID–19 public health emergency.

• Expenses for disinfection of public areas and other facilities, *e.g.,* nursing homes, in response to the COVID–19 public health emergency.

• Expenses for technical assistance to local authorities or other entities on mitigation of COVID–19-related threats to public health and safety.

• Expenses for public safety measures undertaken in response to COVID–19.

• Expenses for quarantining individuals.

3. Payroll expenses for public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID–19 public health emergency.

4. Expenses of actions to facilitate compliance with COVID–19-related public health measures, such as:

• Expenses for food delivery to residents, including, for example, senior citizens and other vulnerable populations, to enable compliance with COVID–19 public health precautions.

• Expenses to facilitate distance learning, including technological improvements, in connection with school closings to enable compliance with COVID–19 precautions.

• Expenses to improve telework capabilities for public employees to enable compliance with COVID–19 public health precautions.

• Expenses of providing paid sick and paid family and medical leave to public employees to enable compliance with COVID–19 public health precautions.

• COVID–19-related expenses of maintaining state prisons and county jails, including as relates to sanitation and improvement of social distancing measures, to enable compliance with COVID–19 public health precautions.

• Expenses for care for homeless populations provided to mitigate COVID–19 effects and enable compliance with COVID–19 public health precautions.

5. Expenses associated with the provision of economic support in connection with the COVID–19 public health emergency, such as:

• Expenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures.

• Expenditures related to a State, territorial, local, or Tribal government payroll support program.

• Unemployment insurance costs related to the COVID–19 public health emergency if such costs will not be reimbursed by the federal government pursuant to the CARES Act or otherwise.

6. Any other COVID–19-related expenses reasonably necessary to the function of government that satisfy the Fund's eligibility criteria.

Nonexclusive Examples of Ineligible Expenditures [2]

The following is a list of examples of costs that would not be eligible expenditures of payments from the Fund.

1. Expenses for the State share of Medicaid.[3]

2. Damages covered by insurance.

3. Payroll or benefits expenses for employees whose work duties are not substantially dedicated to mitigating or responding to the COVID–19 public health emergency.

[2] In addition, pursuant to section 5001(b) of Division A of the CARES Act, payments from the Fund are subject to the requirements contained in the Further Appropriations Act of 2020 (Pub. L. 116–94) for funds for programs authorized under section 330 through 340 of the Public Health Service Act (42 U.S.C. 254 through 256). Section 5001(b) thereby applies to payments from the Fund the general restrictions on the Department of Health and Human Services' appropriations. Of particular relevance for the Fund, payments may not be expended for an abortion, for health benefits coverage—meaning a package of services covered by a managed health care provider or organization pursuant to a contract or other arrangement—that includes coverage of abortion, for the creation of a human embryo or embryos for research purposes, or for research in which a human embryo is destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.204(b) and 42 U.S.C. 289g(b)). The prohibition on payment for abortions and health benefits coverage that includes coverage of abortion does not apply to an abortion if the pregnancy is the result of an act of rape or incest; or in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. These provisions do not prohibit the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds). These provisions do not restrict the ability of a managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds). Furthermore, no government which receives payments from the Fund may discriminate against a health care entity on the basis that the entity does not provide, pay for, provide coverage of, or refer for abortions. Except with respect to certain law enforcement and adjudication activities, no funds may be used to maintain or establish a computer network unless such network blocks the viewing, downloading, and exchanging of pornography. No payments from the Fund may be provided to the Association of Community Organizations for Reform Now (ACORN) or any of its affiliates, subsidiaries, allied organizations, or successors. For the full text of these requirements, see Title V of Pubic Law 116–94 (133 Stat. 2605 *et seq.*), available at *https://www.congress.gov/116/plaws/publ94/PLAW-116publ94.pdf.*

[3] *See* 42 CFR 433.51 and 45 CFR 75.306.

4. Expenses that have been or will be reimbursed under any federal program, such as the reimbursement by the federal government pursuant to the CARES Act of contributions by States to State unemployment funds.
5. Reimbursement to donors for donated items or services.
6. Workforce bonuses other than hazard pay or overtime.
7. Severance pay.
8. Legal settlements.

Supplemental Guidance on Use of Funds To Cover Payroll and Benefits of Public Employees

As discussed in the Guidance above, the CARES Act provides that payments from the Fund must be used only to cover costs that were not accounted for in the budget most recently approved as of March 27, 2020. As reflected in the Guidance and FAQs, Treasury has not interpreted this provision to limit eligible costs to those that are incremental increases above amounts previously budgeted. Rather, Treasury has interpreted this provision to exclude items that were already covered for their original use (or a substantially similar use). This guidance reflects the intent behind the Fund, which was not to provide general fiscal assistance to state governments but rather to assist them with COVID–19-related necessary expenditures. With respect to personnel expenses, though the Fund was not intended to be used to cover government payroll expenses generally, the Fund was intended to provide assistance to address increased expenses, such as the expense of hiring new personnel as needed to assist with the government's response to the public health emergency and to allow recipients facing budget pressures not to have to lay off or furlough employees who would be needed to assist with that purpose.

Substantially Different Use

As stated in the Guidance above, Treasury considers the requirement that payments from the Fund be used only to cover costs that were not accounted for in the budget most recently approved as of March 27, 2020, to be met if either (a) the cost cannot lawfully be funded using a line item, allotment, or allocation within that budget *or* (b) the cost is for a *substantially different use* from any expected use of funds in such a line item, allotment, or allocation.

Treasury has provided examples as to what would constitute a substantially different use. Treasury provided (in FAQ A.3) that costs incurred for a substantially different use would include, for example, the costs of redeploying educational support staff or faculty to develop online learning capabilities, such as through providing information technology support that is not part of the staff or faculty's ordinary responsibilities.

Substantially Dedicated

Within this category of substantially different uses, as stated in the Guidance above, Treasury has included payroll and benefits expenses for public safety, public health, health care, human services, and similar employees whose services are *substantially dedicated* to mitigating or responding to the COVID–19 public health emergency. The *full amount* of payroll and benefits expenses of substantially dedicated employees may be covered using payments from the Fund. Treasury has not developed a precise definition of what ''substantially dedicated'' means given that there is not a precise way to define this term across different employment types. The relevant unit of government should maintain documentation of the ''substantially dedicated'' conclusion with respect to its employees.

If an employee is not substantially dedicated to mitigating or responding to the COVID–19 public health emergency, his or her payroll and benefits expenses may not be covered *in full* with payments from the Fund. A *portion* of such expenses may be able to be covered, however, as discussed below.

Public Health and Public Safety

In recognition of the particular importance of public health and public safety workers to State, local, and tribal government responses to the public health emergency, Treasury has provided, as an administrative accommodation, that a State, local, or tribal government may presume that public health and public safety employees meet the substantially dedicated test, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise. This means that, if this presumption applies, work performed by such employees is considered to be a substantially different use than accounted for in the most recently approved budget as of March 27, 2020. All costs of such employees may be covered using payments from the Fund for services provided during the period that begins on March 1, 2020, and ends on December 31, 2021.

In response to questions regarding which employees are within the scope of this accommodation, Treasury is supplementing this guidance to clarify that public safety employees would include police officers (including state police officers), sheriffs and deputy sheriffs, firefighters, emergency medical responders, correctional and detention officers, and those who directly support such employees such as dispatchers and supervisory personnel. Public health employees would include employees involved in providing medical and other health services to patients and supervisory personnel, including medical staff assigned to schools, prisons, and other such institutions, and other support services essential for patient care (*e.g.,* laboratory technicians) as well as employees of public health departments directly engaged in matters related to public health and related supervisory personnel.

Not Substantially Dedicated

As provided in FAQ A.47, a State, local, or tribal government may also track time spent by employees related to COVID–19 and apply Fund payments on that basis but would need to do so consistently within the relevant agency or department. This means, for example, that a government could cover payroll expenses allocated on an hourly basis to employees' time dedicated to mitigating or responding to the COVID–19 public health emergency. This result provides equitable treatment to governments that, for example, instead of having a few employees who are substantially dedicated to the public health emergency, have many employees who have a minority of their time dedicated to the public health emergency.

Covered Benefits

Payroll and benefits of a substantially dedicated employee may be covered using payments from the Fund to the extent incurred between March 1 and December 31, 2021.

Payroll includes certain hazard pay and overtime, but not workforce bonuses. As discussed in FAQ A.29, hazard pay may be covered using payments from the Fund if it is provided for performing hazardous duty or work involving physical hardship that in each case is related to COVID–19. This means that, whereas payroll and benefits of an employee who is substantially dedicated to mitigating or responding to the COVID–19 public health emergency may generally be covered in full using payments from the Fund, hazard pay specifically may only be covered to the extent it is related to COVID–19. For example, a recipient may use payments from the Fund to cover hazard pay for a police officer coming in close contact with members of the public to enforce public health or

public safety orders, but across-the-board hazard pay for all members of a police department regardless of their duties would not be able to be covered with payments from the Fund. This position reflects the statutory intent discussed above: the Fund was intended to be used to help governments address the public health emergency both by providing funds for incremental expenses (such as hazard pay related to COVID–19) and to allow governments not to have to furlough or lay off employees needed to address the public health emergency but was not intended to provide across-the-board budget support (as would be the case if hazard pay regardless of its relation to COVID–19 or workforce bonuses were permitted to be covered using payments from the Fund).

Relatedly, both hazard pay and overtime pay for employees that are not substantially dedicated may only be covered using the Fund if the hazard pay and overtime pay is for COVID–19-related duties. As discussed above, governments may allocate payroll and benefits of such employees with respect to time worked on COVID–19-related matters.

Covered benefits include, but are not limited to, the costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (federal and state), workers compensation insurance, and Federal Insurance Contributions Act (FICA) taxes (which includes Social Security and Medicare taxes).

Supplemental Guidance on Use of Funds To Cover Administrative Costs

General

Payments from the Fund are not administered as part of a traditional grant program and the provisions of the Uniform Guidance, 2 CFR part 200, that are applicable to indirect costs do not apply. Recipients may not apply their indirect costs rates to payments received from the Fund.

Recipients may, if they meet the conditions specified in the guidance for tracking time consistently across a department, use payments from the Fund to cover the portion of payroll and benefits of employees corresponding to time spent on administrative work necessary due to the COVID–19 public health emergency. (In other words, such costs would be eligible direct costs of the recipient). This includes, but is not limited to, costs related to disbursing payments from the Fund and managing new grant programs established using payments from the Fund.

As with any other costs to be covered using payments from the Fund, any such administrative costs must be incurred by December 31, 2021, with an exception for certain compliance costs as discussed below. Furthermore, as discussed in the Guidance above, as with any other cost, an administrative cost that has been or will be reimbursed under any federal program may not be covered with the Fund. For example, if an administrative cost is already being covered as a direct or indirect cost pursuant to another federal grant, the Fund may not be used to cover that cost.

Compliance Costs Related to the Fund

As previously stated in FAQ B.11, recipients are permitted to use payments from the Fund to cover the expenses of an audit conducted under the Single Audit Act, subject to the limitations set forth in 2 CFR 200.425. Pursuant to that provision of the Uniform Guidance, recipients and subrecipients subject to the Single Audit Act may use payments from the Fund to cover a reasonably proportionate share of the costs of audits attributable to the Fund.

To the extent a cost is incurred by December 31, 2021, for an eligible use consistent with section 601 of the Social Security Act and Treasury's guidance, a necessary administrative compliance expense that relates to such underlying cost may be incurred after December 31, 2021. Such an expense would include, for example, expenses incurred to comply with the Single Audit Act and reporting and recordkeeping requirements imposed by the Office of Inspector General. A recipient with such necessary administrative expenses, such as an ongoing audit continuing past December 31, 2021, that relates to Fund expenditures incurred during the covered period, must report to the Treasury Office of Inspector General by the quarter ending September 2022 an estimate of the amount of such necessary administrative expenses.

Instructions for State, Territorial, Local, and Tribal Governments To Return Unused Coronavirus Relief Fund Payments to the Department of the Treasury

Any remaining amount of payments from the Fund not used for eligible expenses incurred during the covered period must be returned to Treasury in one of three ways, set forth below.

Please note that these instructions are for Fund recipients to return the balance of unused Fund payments to Treasury. If the Treasury Office of Inspector General determines that a Fund recipient has failed to comply with the use restrictions set forth in section 601(d) of the Social Security Act, the Fund recipient should follow the instructions provided by the Treasury Office of Inspector General for satisfaction of the related debt rather than following these instructions.

1. *Fedwire receipts*—Treasury can accept Fedwire payments for the return of funds to Treasury.

Please provide the following instructions to your Financial Institution for the remittance of Fedwire payments to the *Department of the Treasury.*

FEDWIRE INSTRUCTIONS

Fedwire field tag	Fedwire field name	Required information
{1510}	Type/Subtype	1000
{2000}	Amount	*(enter payment amount)*
{3400}	Receiver ABA routing number*	021030004
{3400}	Receiver ABA short name	TREAS NYC
{3600}	Business Function Code	CTR
{4200}	Beneficiary Identifier (account number)	820010001000
{4200}	Beneficiary Name	DEPARTMENT OF THE TREASURY
{5000}	Originator	*(enter the name of the originator of the payment)*
{6000}	Originator to Beneficiary Information—Line 1	*(enter information to identify the purpose of the payment)*
{6000}	Originator to Beneficiary Information—Line 2	*(enter information to identify the purpose of the payment)*
{6000}	Originator to Beneficiary Information—Line 3	*(enter information to identify the purpose of the payment)*

FEDWIRE INSTRUCTIONS—Continued

Fedwire field tag	Fedwire field name	Required information
{6000}	Originator to Beneficiary Information—Line 4	*(enter information to identify the purpose of the payment)*

*The financial institution address for Treasury's routing number is 33 Liberty Street, New York, NY 10045.

2. ACH receipts —Treasury can accept ACH payment for the return of funds to Treasury.

Please provide the following instructions to your Financial Institution for the remittance of Automated Clearing House (ACH) credits to the *Department of the Treasury.*

ACH CREDIT INSTRUCTIONS

NACHA record type code	NACHA field	NACHA data element name	Required information
5	3	Company Name	*(enter the name of the payor)*
5	6	Standard Entry Class Code	CCD
5	9	Effective Entry Date	*(enter intended settlement date)*
6	2	Transaction Code*	22
6	3 & 4	Receiving DFI Identification (ABA routing #)	051036706
6	5	DFI Account Number	820010001000
6	6	Amount	*(enter payment amount)*
6	8	Receiving Company Name	Department of the Treasury

*ACH *debits* are not permitted to this ABA routing number. All debits received will be automatically returned.

3. *Check receipts (not preferred)*—Checks may be sent to one of the following addresses (depending on the method of delivery).

U.S. MAIL/PARCEL DELIVERY ADDRESS

U.S. Mail address—processing	Parcel delivery address—processing
Fiscal Accounting Program, Admin & Training Group. Avery Street A3–G, Bureau of the Fiscal Service, P.O. Box 1328, Parkersburg, WV 26106–1328.	Fiscal Accounting Program, Admin & Training Group. Avery Street A3–G, Fiscal Service Warehouse & Operations Center Dock 1, 257 Bosley Industrial Park Drive, Parkersburg WV 26106.

Frequently Asked Questions

The following answers to frequently asked questions supplement Treasury's Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments.

A. Eligible Expenditures

1. Are governments required to submit proposed expenditures to Treasury for approval?

No. Governments are responsible for making determinations as to what expenditures are necessary due to the public health emergency with respect to COVID–19 and do not need to submit any proposed expenditures to Treasury.

2. The Guidance says that funding can be used to meet payroll expenses for public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID–19 public health emergency. How does a government determine whether payroll expenses for a given employee satisfy the ''substantially dedicated'' condition?

The Fund is designed to provide ready funding to address unforeseen financial needs and risks created by the COVID–19 public health emergency. For this reason, and as a matter of administrative convenience in light of the emergency nature of this program, a State, territorial, local, or Tribal government may presume that payroll costs for public health and public safety employees are payments for services substantially dedicated to mitigating or responding to the COVID–19 public health emergency, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise.

3. The Guidance says that a cost was not accounted for in the most recently approved budget if the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation. What would qualify as a ''substantially different use'' for purposes of the Fund eligibility?

Costs incurred for a ''substantially different use'' include, but are not necessarily limited to, costs of personnel and services that were budgeted for in the most recently approved budget but which, due entirely to the COVID–19 public health emergency, have been diverted to substantially different functions. This would include, for example, the costs of redeploying corrections facility staff to enable compliance with COVID–19 public health precautions through work such as enhanced sanitation or enforcing social distancing measures; the costs of redeploying police to support management and enforcement of stay-at-home orders; or the costs of diverting educational support staff or faculty to develop online learning capabilities, such as through providing information technology support that is not part of the staff or faculty's ordinary responsibilities.

Note that a public function does not become a ''substantially different use'' merely because it is provided from a different location or through a different manner. For example, although developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.

4. May a State receiving a payment transfer funds to a local government?

Yes, provided that the transfer qualifies as a necessary expenditure incurred due to the public health emergency and meets the other criteria of section 601(d) of the Social Security

Act. Such funds would be subject to recoupment by the Treasury Department if they have not been used in a manner consistent with section 601(d) of the Social Security Act.

5. May a unit of local government receiving a Fund payment transfer funds to another unit of government?

Yes. For example, a county may transfer funds to a city, town, or school district within the county and a county or city may transfer funds to its State, provided that the transfer qualifies as a necessary expenditure incurred due to the public health emergency and meets the other criteria of section 601(d) of the Social Security Act outlined in the Guidance. For example, a transfer from a county to a constituent city would not be permissible if the funds were intended to be used simply to fill shortfalls in government revenue to cover expenditures that would not otherwise qualify as an eligible expenditure.

6. Is a Fund payment recipient required to transfer funds to a smaller, constituent unit of government within its borders?

No. For example, a county recipient is not required to transfer funds to smaller cities within the county's borders.

7. Are recipients required to use other federal funds or seek reimbursement under other federal programs before using Fund payments to satisfy eligible expenses?

No. Recipients may use Fund payments for any expenses eligible under section 601(d) of the Social Security Act outlined in the Guidance. Fund payments are not required to be used as the source of funding of last resort. However, as noted below, recipients may not use payments from the Fund to cover expenditures for which they will receive reimbursement.

8. Are there prohibitions on combining a transaction supported with Fund payments with other CARES Act funding or COVID–19 relief Federal funding?

Recipients will need to consider the applicable restrictions and limitations of such other sources of funding. In addition, expenses that have been or will be reimbursed under any federal program, such as the reimbursement by the federal government pursuant to the CARES Act of contributions by States to State unemployment funds, are not eligible uses of Fund payments.

9. Are States permitted to use Fund payments to support state unemployment insurance funds generally?

To the extent that the costs incurred by a state unemployment insurance fund are incurred due to the COVID–19 public health emergency, a State may use Fund payments to make payments to its respective state unemployment insurance fund, separate and apart from such State's obligation to the unemployment insurance fund as an employer. This will permit States to use Fund payments to prevent expenses related to the public health emergency from causing their state unemployment insurance funds to become insolvent.

10. Are recipients permitted to use Fund payments to pay for unemployment insurance costs incurred by the recipient as an employer?

Yes, Fund payments may be used for unemployment insurance costs incurred by the recipient as an employer (for example, as a reimbursing employer) related to the COVID–19 public health emergency if such costs will not be reimbursed by the federal government pursuant to the CARES Act or otherwise.

11. The Guidance states that the Fund may support a ''broad range of uses'' including payroll expenses for several classes of employees whose services are ''substantially dedicated to mitigating or responding to the COVID–19 public health emergency.'' What are some examples of types of covered employees?

The Guidance provides examples of broad classes of employees whose payroll expenses would be eligible expenses under the Fund. These classes of employees include public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID–19 public health emergency. Payroll and benefit costs associated with public employees who could have been furloughed or otherwise laid off but who were instead repurposed to perform previously unbudgeted functions substantially dedicated to mitigating or responding to the COVID–19 public health emergency are also covered. Other eligible expenditures include payroll and benefit costs of educational support staff or faculty responsible for developing online learning capabilities necessary to continue educational instruction in response to COVID–19-related school closures. Please see the Guidance for a discussion of what is meant by an expense that was not accounted for in the budget most recently approved as of March 27, 2020.

12. In some cases, first responders and critical health care workers that contract COVID–19 are eligible for workers' compensation coverage. Is the cost of this expanded workers compensation coverage eligible?

Increased workers compensation cost to the government due to the COVID–19 public health emergency incurred during the period beginning March 1, 2020, and ending December 31, 2021, is an eligible expense.

13. If a recipient would have decommissioned equipment or not renewed a lease on particular office space or equipment but decides to continue to use the equipment or to renew the lease in order to respond to the public health emergency, are the costs associated with continuing to operate the equipment or the ongoing lease payments eligible expenses?

Yes. To the extent the expenses were previously unbudgeted and are otherwise consistent with section 601(d) of the Social Security Act outlined in the Guidance, such expenses would be eligible.

14. May recipients provide stipends to employees for eligible expenses (for example, a stipend to employees to improve telework capabilities) rather than require employees to incur the eligible cost and submit for reimbursement?

Expenditures paid for with payments from the Fund must be limited to those that are necessary due to the public health emergency. As such, unless the government were to determine that providing assistance in the form of a stipend is an administrative necessity, the government should provide such assistance on a reimbursement basis to ensure as much as possible that funds are used to cover only eligible expenses.

15. May Fund payments be used for COVID–19 public health emergency recovery planning?

Yes. Expenses associated with conducting a recovery planning project or operating a recovery coordination office would be eligible, if the expenses otherwise meet the criteria set forth in section 601(d) of the Social Security Act outlined in the Guidance.

16. Are expenses associated with contact tracing eligible?

Yes, expenses associated with contact tracing are eligible.

17. To what extent may a government use Fund payments to support the operations of private hospitals?

Governments may use Fund payments to support public or private hospitals to the extent that the costs are necessary expenditures incurred due to the COVID–19 public health emergency, but the form such assistance would take may differ. In particular, financial assistance to private hospitals could take the form of a grant or a short-term loan.

18. May payments from the Fund be used to assist individuals with enrolling in a government benefit program for those who have been laid off due to COVID–19 and thereby lost health insurance?

Yes. To the extent that the relevant government official determines that these expenses are necessary and they meet the other requirements set forth in section 601(d) of the Social Security Act outlined in the Guidance, these expenses are eligible.

19. May recipients use Fund payments to facilitate livestock depopulation incurred by producers due to supply chain disruptions?

Yes, to the extent these efforts are deemed necessary for public health reasons or as a form of economic support as a result of the COVID–19 health emergency.

20. Would providing a consumer grant program to prevent eviction and assist in preventing homelessness be considered an eligible expense?

Yes, assuming that the recipient considers the grants to be a necessary expense incurred due to the COVID–19 public health emergency and the grants meet the other requirements for the use of Fund payments under section 601(d) of the Social Security Act outlined in the Guidance. As a general matter, providing assistance to recipients to enable them to meet property tax requirements would not be an eligible use of funds, but exceptions may be made in the case of assistance designed to prevent foreclosures.

21. May recipients create a ''payroll support program'' for public employees?

Use of payments from the Fund to cover payroll or benefits expenses of public employees are limited to those employees whose work duties are substantially dedicated to mitigating or responding to the COVID–19 public health emergency.

22. *May recipients use Fund payments to cover employment and training programs for employees that have been furloughed due to the public health emergency?*

Yes, this would be an eligible expense if the government determined that the costs of such employment and training programs would be necessary due to the public health emergency.

23. *May recipients use Fund payments to provide emergency financial assistance to individuals and families directly impacted by a loss of income due to the COVID–19 public health emergency?*

Yes, if a government determines such assistance to be a necessary expenditure. Such assistance could include, for example, a program to assist individuals with payment of overdue rent or mortgage payments to avoid eviction or foreclosure or unforeseen financial costs for funerals and other emergency individual needs. Such assistance should be structured in a manner to ensure as much as possible, within the realm of what is administratively feasible, that such assistance is necessary.

24. The Guidance provides that eligible expenditures may include expenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures. What is meant by a ''small business,'' and is the Guidance intended to refer only to expenditures to cover administrative expenses of such a grant program?

Governments have discretion to determine what payments are necessary. A program that is aimed at assisting small businesses with the costs of business interruption caused by required closures should be tailored to assist those businesses in need of such assistance. The amount of a grant to a small business to reimburse the costs of business interruption caused by required closures would also be an eligible expenditure under section 601(d) of the Social Security Act, as outlined in the Guidance.

25. The Guidance provides that expenses associated with the provision of economic support in connection with the public health emergency, such as expenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures, would constitute eligible expenditures of Fund payments. Would such expenditures be eligible in the absence of a stay-at-home order?

Fund payments may be used for economic support in the absence of a stay-at-home order if such expenditures are determined by the government to be necessary. This may include, for example, a grant program to benefit small businesses that close voluntarily to promote social distancing measures or that are affected by decreased customer demand as a result of the COVID–19 public health emergency.

26. May Fund payments be used to assist impacted property owners with the payment of their property taxes?

Fund payments may not be used for government revenue replacement, including the provision of assistance to meet tax obligations.

27. *May Fund payments be used to replace foregone utility fees? If not, can Fund payments be used as a direct subsidy payment to all utility account holders?*

Fund payments may not be used for government revenue replacement, including the replacement of unpaid utility fees. Fund payments may be used for subsidy payments to electricity account holders to the extent that the subsidy payments are deemed by the recipient to be necessary expenditures incurred due to the COVID–19 public health emergency and meet the other criteria of section 601(d) of the Social Security Act outlined in the Guidance. For example, if determined to be a necessary expenditure, a government could provide grants to individuals facing economic hardship to allow them to pay their utility fees and thereby continue to receive essential services.

28. *Could Fund payments be used for capital improvement projects that broadly provide potential economic development in a community?*

In general, no. If capital improvement projects are not necessary expenditures incurred due to the COVID–19 public health emergency, then Fund payments may not be used for such projects.

However, Fund payments may be used for the expenses of, for example, establishing temporary public medical facilities and other measures to increase

COVID–19 treatment capacity or improve mitigation measures, including related construction costs.

29. The Guidance includes workforce bonuses as an example of ineligible expenses but provides that hazard pay would be eligible if otherwise determined to be a necessary expense. Is there a specific definition of ''hazard pay''?

Hazard pay means additional pay for performing hazardous duty or work involving physical hardship, in each case that is related to COVID–19.

30. The Guidance provides that ineligible expenditures include ''[p]ayroll or benefits expenses for employees whose work duties are not substantially dedicated to mitigating or responding to the COVID–19 public health emergency.'' Is this intended to relate only to public employees?

Yes. This particular nonexclusive example of an ineligible expenditure relates to public employees. A recipient would not be permitted to pay for payroll or benefit expenses of private employees and any financial assistance (such as grants or short-term loans) to private employers are not subject to the restriction that the private employers' employees must be substantially dedicated to mitigating or responding to the COVID–19 public health emergency.

31. *May counties pre-pay with CARES Act funds for expenses such as a one or two-year facility lease, such as to house staff hired in response to COVID–19?*

A government should not make prepayments on contracts using payments from the Fund to the extent that doing so would not be consistent with its ordinary course policies and procedures.

32. Must a stay-at-home order or other public health mandate be in effect in order for a government to provide assistance to small businesses using payments from the Fund?

No. The Guidance provides, as an example of an eligible use of payments from the Fund, expenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures. Such assistance may be provided using amounts received from the Fund in the absence of a requirement to close businesses if the relevant government determines that such expenditures are necessary in response to the public health emergency.

33. Should States receiving a payment transfer funds to local governments that did not receive payments directly from Treasury?

Yes, provided that the transferred funds are used by the local government for eligible expenditures under the statute. To facilitate prompt distribution of Title V funds, the CARES Act authorized Treasury to make direct payments to local governments with populations in excess of 500,000, in amounts equal to 45% of the local government's per capita share of the statewide allocation. This statutory structure was based on a recognition that it is more administratively feasible to rely on States, rather than the federal government, to manage the transfer of funds to smaller local governments. Consistent with the needs of all local governments for funding to address the public health emergency, States should transfer funds to local governments with populations of 500,000 or less, using as a benchmark the per capita allocation formula that governs payments to larger local governments. This approach will ensure equitable treatment among local governments of all sizes.

For example, a State received the minimum $1.25 billion allocation and had one county with a population over 500,000 that received $250 million directly. The State should distribute 45 percent of the $1 billion it received, or $450 million, to local governments within the State with a population of 500,000 or less.

34. May a State impose restrictions on transfers of funds to local governments?

Yes, to the extent that the restrictions facilitate the State's compliance with the requirements set forth in section 601(d) of the Social Security Act outlined in the Guidance and other applicable requirements such as the Single Audit Act, discussed below. Other restrictions, such as restrictions on reopening that do not directly concern the use of funds, are not permissible.

35. If a recipient must issue tax anticipation notes (TANs) to make up for tax due date deferrals or revenue shortfalls, are the expenses associated with the issuance eligible uses of Fund payments?

If a government determines that the issuance of TANs is necessary due to the COVID–19 public health emergency, the government may expend payments from the Fund on the interest expense payable on TANs by the borrower and unbudgeted administrative and transactional costs, such as necessary payments to advisors and underwriters, associated with the issuance of the TANs.

36. May recipients use Fund payments to expand rural broadband capacity to assist with distance learning and telework?

Such expenditures would only be permissible if they are necessary for the public health emergency. The cost of projects that would not be expected to increase capacity to a significant extent until the need for distance learning and telework have passed due to this public health emergency would not be necessary due to the public health emergency and thus would not be eligible uses of Fund payments.

37. Are costs associated with increased solid waste capacity an eligible use of payments from the Fund?

Yes, costs to address increase in solid waste as a result of the public health emergency, such as relates to the disposal of used personal protective equipment, would be an eligible expenditure.

38. May payments from the Fund be used to cover across-the-board hazard pay for employees working during a state of emergency?

No. Hazard pay means additional pay for performing hazardous duty or work involving physical hardship, in each case that is related to COVID–19. Payments from the fund may only be used to cover such hazard pay.

39. May Fund payments be used for expenditures related to the administration of Fund payments by a State, territorial, local, or Tribal government?

Yes, if the administrative expenses represent an increase over previously budgeted amounts and are limited to what is necessary. For example, a State may expend Fund payments on necessary administrative expenses incurred with respect to a new grant program established to disburse amounts received from the Fund.

40. May recipients use Fund payments to provide loans?

Yes, if the loans otherwise qualify as eligible expenditures under section 601(d) of the Social Security Act as implemented by the Guidance. Any amounts repaid by the borrower before December 31, 2021, must be either returned to Treasury upon receipt by the unit of government providing the loan or used for another expense that qualifies as an eligible expenditure under section 601(d) of the Social

Security Act. Any amounts not repaid by the borrower until after December 31, 2021, must be returned to Treasury upon receipt by the unit of government lending the funds.

41. May Fund payments be used for expenditures necessary to prepare for a future COVID–19 outbreak?

Fund payments may be used only for expenditures necessary to address the current COVID–19 public health emergency. For example, a State may spend Fund payments to create a reserve of personal protective equipment or develop increased intensive care unit capacity to support regions in its jurisdiction not yet affected, but likely to be impacted by the current COVID–19 pandemic.

42. May funds be used to satisfy non-federal matching requirements under the Stafford Act?

Yes, payments from the Fund may be used to meet the non-federal matching requirements for Stafford Act assistance, including FEMA's Emergency Management Performance Grant (EMPG) and EMPG Supplemental programs, to the extent such matching requirements entail COVID–19-related costs that otherwise satisfy the Fund's eligibility criteria and the Stafford Act. Regardless of the use of Fund payments for such purposes, FEMA funding is still dependent on FEMA's determination of eligibility under the Stafford Act.

43. Must a State, local, or tribal government require applications to be submitted by businesses or individuals before providing assistance using payments from the Fund?

Governments have discretion to determine how to tailor assistance programs they establish in response to the COVID–19 public health emergency. However, such a program should be structured in such a manner as will ensure that such assistance is determined to be necessary in response to the COVID–19 public health emergency and otherwise satisfies the requirements of the CARES Act and other applicable law. For example, a per capita payment to residents of a particular jurisdiction without an assessment of individual need would not be an appropriate use of payments from the Fund.

44. May Fund payments be provided to non-profits for distribution to individuals in need of financial assistance, such as rent relief?

Yes, non-profits may be used to distribute assistance. Regardless of how the assistance is structured, the financial assistance provided would have to be related to COVID–19.

45. May recipients use Fund payments to remarket the recipient's convention facilities and tourism industry?

Yes, if the costs of such remarketing satisfy the requirements of the CARES Act. Expenses incurred to publicize the resumption of activities and steps taken to ensure a safe experience may be needed due to the public health emergency. Expenses related to developing a long-term plan to reposition a recipient's convention and tourism industry and infrastructure would not be incurred due to the public health emergency and therefore may not be covered using payments from the Fund.

46. May a State provide assistance to farmers and meat processors to expand capacity, such to cover overtime for USDA meat inspectors?

If a State determines that expanding meat processing capacity, including by paying overtime to USDA meat inspectors, is a necessary expense incurred due to the public health emergency, such as if increased capacity is necessary to allow farmers and processors to donate meat to food banks, then such expenses are eligible expenses, provided that the expenses satisfy the other requirements set forth in section 601(d) of the Social Security Act outlined in the Guidance.

47. The guidance provides that funding may be used to meet payroll expenses for public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID–19 public health emergency. May Fund payments be used to cover such an employee's entire payroll cost or just the portion of time spent on mitigating or responding to the COVID–19 public health emergency?

As a matter of administrative convenience, the entire payroll cost of an employee whose time is substantially dedicated to mitigating or responding to the COVID–19 public health emergency is eligible, provided that such payroll costs are incurred by December 31, 2021. An employer may also track time spent by employees related to COVID–19 and apply Fund payments on that basis but would need to do so consistently within the relevant agency or department.

48. May Fund payments be used to cover increased administrative leave costs of public employees who could not telework in the event of a stay at home order or a case of COVID–19 in the workplace?

The statute requires that payments be used only to cover costs that were not accounted for in the budget most recently approved as of March 27, 2020. As stated in the Guidance, a cost meets this requirement if either (a) the cost cannot lawfully be funded using a line item, allotment, or allocation within that budget or (b) the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation. If the cost of an employee was allocated to administrative leave to a greater extent than was expected, the cost of such administrative leave may be covered using payments from the Fund.

49. Are States permitted to use Coronavirus Relief Fund payments to satisfy non-federal matching requirements under the Stafford Act, including ''lost wages assistance'' authorized by the Presidential Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019 (August 8, 2020)?

Yes. As previous guidance has stated, payments from the Fund may be used to meet the non-federal matching requirements for Stafford Act assistance to the extent such matching requirements entail COVID–19-related costs that otherwise satisfy the Fund's eligibility criteria and the Stafford Act. States are fully permitted to use payments from the Fund to satisfy 100% of their cost share for lost wages assistance recently made available under the Stafford Act. If a State makes a payment to an individual under the ''lost wages assistance'' program and later determines that such individual was ineligible for the program, the ineligibility determination has the following consequences:

- The State incurs an obligation to FEMA in the amount of the payment to the ineligible individual. A State's obligation to FEMA for making an improper payment to an individual under the ''lost wages assistance'' program is not incurred due to the public health emergency and, therefore, payments made pursuant to this obligation would not be an eligible use of the Fund.
- The ''lost wages assistance'' payment to the ineligible individual would be deemed to be an ineligible

expense for purposes of the Fund, and any amount charged to the Fund (*e.g.,* to satisfy the initial non-federal matching requirement) would be subject to recoupment.

50. At what point would costs be considered to be incurred in the case of a grant made by a State, local, or tribal government to cover interest and principal amounts of a loan, such as might be provided as part of a small business assistance program in which the loan is made by a private institution?

A grant made to cover interest and principal costs of a loan, including interest and principal due after the period that begins on March 1, 2020, and ends on December 31, 2021 (the ''covered period''), will be considered to be incurred during the covered period if (i) the full amount of the loan is advanced to the borrower within the covered period and (ii) the proceeds of the loan are used by the borrower to cover expenses incurred during the covered period. In addition, if these conditions are met, the amount of the grant will be considered to have been used during the covered period for purposes of the requirement that expenses be incurred within the covered period. Such a grant would be analogous to a loan provided by the Fund recipient itself that incorporates similar loan forgiveness provisions. As with any other assistance provided by a Fund recipient, such a grant would need to be determined by the recipient to be necessary due to the public health emergency.

51. If governments use Fund payments as described in the Guidance to establish a grant program to support businesses, would those funds be considered gross income taxable to a business receiving the grant under the Internal Revenue Code (Code)?

Please see the answer provided by the Internal Revenue Service (IRS) available at *https://www.irs.gov/newsroom/cares-act-coronavirus-relief-fund-frequently-asked-questions.*

52. If governments use Fund payments as described in the Guidance to establish a loan program to support businesses, would those funds be considered gross income taxable to a business receiving the loan under the Code?

Please see the answer provided by the IRS available at *https://www.irs.gov/newsroom/cares-act-coronavirus-relief-fund-frequently-asked-questions.*

53. May Fund recipients incur expenses associated with the safe reopening of schools?

Yes, payments from the Fund may be used to cover costs associated with providing distance learning (*e.g.,* the cost of laptops to provide to students) or for in-person learning (*e.g.,* the cost of acquiring personal protective equipment for students attending schools in-person or other costs associated with meeting Centers for Disease Control guidelines).

Treasury recognizes that schools are generally incurring an array of COVID–19-related expenses to either provide distance learning or to re-open. To this end, as an administrative convenience, Treasury will presume that expenses of up to $500 per elementary and secondary school student are eligible expenditures, such that schools do not need to document the specific use of funds up to that amount.

If a Fund recipient avails itself of the presumption in accordance with the previous paragraph with respect to a school, the recipient may not also cover the costs of additional re-opening aid to that school other than those associated with the following, in each case for the purpose of addressing COVID–19:

- Expanding broadband capacity;
- hiring new teachers;
- developing an online curriculum;
- acquiring computers and similar digital devices;
- acquiring and installing additional ventilation or other air filtering equipment;
- incurring additional transportation costs; or
- incurring additional costs of providing meals.

Across all levels of government, the presumption is limited to $500 per student, *e.g.,* if a school is funded by a state and a local government, the presumption claimed by each recipient must add up to no more than $500. Furthermore, if a Fund recipient uses the presumption with respect to a school, any other Fund recipients providing aid to that school may not use the Fund to cover the costs of additional aid to schools other than with respect to the specific costs listed above.

The following examples help illustrate how the presumption may or may not be used:

Example 1: State A may transfer Fund payments to each school district in the State totaling $500 per student. State A does not need to document the specific use of the Fund payments by the school districts within the State.

Example 2: Suppose State A from example 1 transferred Fund payments to the school districts in the State in the amount of $500 per elementary and secondary school student. In addition, because State A is availing itself of the $500 per elementary and secondary school student presumption, State A also may use Fund payments to expand broadband capacity and to hire new teachers, but it may not use Fund payments to acquire additional furniture.

54. May Fund recipients upgrade critical public health infrastructure, such as providing access to running water for individuals and families in rural and tribal areas to allow them to maintain proper hygiene and defend themselves against the virus?

Yes, fund recipients may use payments from the Fund to upgrade public health infrastructure, such as providing individuals and families access to running water to help reduce the further spread of the virus. As required by the CARES Act, expenses associated with such upgrades must be incurred by December 31, 2021. Please see Treasury's Guidance as updated on June 30 regarding when a cost is considered to be incurred for purposes of the requirement that expenses be incurred within the covered period.

55. How does a government address the requirement that the allowable expenditures are not accounted for in the budget most recently approved as of March 27, 2020, once the government enters its new budget year on July 1, 2020 (for governments with June 30 fiscal year ends) or October 1, 2020 (for governments with September 30 year ends)?

As provided in the Guidance, the ''most recently approved'' budget refers to the enacted budget for the relevant fiscal period for the particular government, without taking into account subsequent supplemental appropriations enacted or other budgetary adjustments made by that government in response to the COVID–19 public health emergency. A cost is not considered to have been accounted for in a budget merely because it could be met using a budgetary stabilization fund, rainy day fund, or similar reserve account.

Furthermore, the budget most recently approved as of March 27, 2020, provides the spending baseline against which expenditures should be compared for purposes of determining whether they may be covered using payments from the Fund. This spending baseline will carry forward to a subsequent budget year if a Fund recipient enters a different budget year between March 27, 2020 and December 31, 2021. The

spending baseline may be carried forward without adjustment for inflation.

56. Does the National Environmental Policy Act, 42 U.S.C. 4321 et seq, (NEPA) apply to projects supported by payments from the Fund?

NEPA does not apply to Treasury's administration of the Fund. Projects supported with payments from the Fund may still be subject to NEPA review if they are also funded by other federal financial assistance programs

57. Public universities have incurred expenses associated with providing refunds to students for education-related expenses, including tuition, room and board, meal plans, and other fees (such as activities fees). Are these types of public university student refunds eligible uses of Fund payments?

If the responsible government official determines that expenses incurred to refund eligible higher education expenses are necessary and would be incurred due to the public health emergency, then such expenses would be eligible as long as the expenses satisfy the other criteria set forth in section 601(d) of the Social Security Act. Eligible higher education expenses may include, in the reasonable judgment of the responsible government official, refunds to students for tuition, room and board, meal plan, and other fees (such as activities fees). Fund payments may not be used for expenses that have been or will be reimbursed by another federal program (including, for example, the Higher Education Emergency Relief Fund administered by the Department of Education).

58. May payments from the Fund be used for real property acquisition and improvements and to purchase equipment to address the COVID–19 public health emergency?

The expenses of acquiring or improving real property and of acquiring equipment (*e.g.,* vehicles) may be covered with payments from the Fund in certain cases. For example, Treasury's initial guidance referenced coverage of the costs of establishing temporary public medical facilities and other measures to increase COVID–19 treatment capacity, including related construction costs, as an eligible use of funds. Any such use must be consistent with the requirements of section 601(d) of the Social Security Act as added by the CARES Act.

As with all uses of payments from the Fund, the use of payments to acquire or improve property is limited to that which is necessary due to the COVID–19 public health emergency. In the context of acquisitions of real estate and acquisitions of equipment, this means that the acquisition itself must be necessary. In particular, a government must (i) determine that it is not able to meet the need arising from the public health emergency in a cost-effective manner by leasing property or equipment or by improving property already owned and (ii) maintain documentation to support this determination. Likewise, an improvement, such as the installation of modifications to permit social distancing, would need to be determined to be necessary to address the COVID–19 public health emergency.

Previous guidance regarding the requirement that payments from the Fund may only be used to cover costs that were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021 focused on the acquisition of goods and services and leases of real property and equipment, but the same principles apply to acquisitions and improvements of real property and acquisitions of equipment. Such acquisitions and improvements must be completed and the acquired or improved property or acquisition of equipment be put to use in service of the COVID–19-related use for which it was acquired or improved by December 30. Finally, as with all costs covered with payments from the Fund, such costs must not have been previously accounted for in the budget most recently approved as of March 27, 2020.

59. If a small business received a Small Business Administration (SBA) Payment Protection Program (PPP) or Economic Injury Disaster Loan (EIDL) grant or loan due to COVID–19, may the small business also receive a grant from a unit of government using payments from the Fund?

Receiving a PPP or EIDL grant or loan for COVID–19 would not necessarily make a small business ineligible to receive a grant from Fund payments made to a recipient. As discussed in previous Treasury guidance on use of the Fund, a recipient's small business assistance program should be tailored to assist those businesses in need of such assistance. In assessing the business' need for assistance, the recipient would need to take into account the business' receipt of the PPP or EIDL loan or grant. If the business has received a loan from the SBA that may be forgiven, the recipient should assume for purposes of determining the business' need that the loan will be forgiven. In determining the business' eligibility for the grant, the recipient should not rely on self-certifications provided to the SBA.

If the grant is being provided to the small business to assist with particular expenditures, the business must not have already used the PPP or EIDL loan or grant for those expenditures. The assistance provided from the Fund would need to satisfy all of the other requirements set forth in section 601(d) of the Social Security Act as discussed in Treasury's guidance and FAQs, and the business would need to comply with all applicable requirements of the PPP or EIDL program.

Treasury's Office of Inspector General has provided the following guidance in its FAQ no. 75 on reporting and recordkeeping that would apply to the recipient:

The prime recipient is responsible for determining the level and detail of documentation needed from the sub-recipient of small business assistance to satisfy [the requirements of section 601(d) of the Social Security Act], however, there would need to be some proof that the small business was impacted by the public health emergency and was thus eligible for the CRF funds.

In the above OIG FAQ, ''sub-recipient'' refers to the beneficiary of the assistance, *i.e.,* the small business.

B. Questions Related to Administration of Fund Payments

1. Do governments have to return unspent funds to Treasury?

Yes. Section 601(f)(2) of the Social Security Act, as added by section 5001(a) of the CARES Act, provides for recoupment by the Department of the Treasury of amounts received from the Fund that have not been used in a manner consistent with section 601(d) of the Social Security Act. If a government has not used funds it has received to cover costs that were incurred by December 31, 2021, as required by the statute, those funds must be returned to the Department of the Treasury.

2. What records must be kept by governments receiving payment?

A government should keep records sufficient to demonstrate that the amount of Fund payments to the government has been used in accordance with section 601(d) of the Social Security Act.

3. May recipients deposit Fund payments into interest bearing accounts?

Yes, provided that if recipients separately invest amounts received from

the Fund, they must use the interest earned or other proceeds of these investments only to cover expenditures incurred in accordance with section 601(d) of the Social Security Act and the Guidance on eligible expenses. If a government deposits Fund payments in a government's general account, it may use those funds to meet immediate cash management needs provided that the full amount of the payment is used to cover necessary expenditures. Fund payments are not subject to the Cash Management Improvement Act of 1990, as amended.

4. May governments retain assets purchased with payments from the Fund?

Yes, if the purchase of the asset was consistent with the limitations on the eligible use of funds provided by section 601(d) of the Social Security Act.

5. What rules apply to the proceeds of disposition or sale of assets acquired using payments from the Fund?

If such assets are disposed of prior to December 31, 2021, the proceeds would be subject to the restrictions on the eligible use of payments from the Fund provided by section 601(d) of the Social Security Act.

6. Are Fund payments to State, territorial, local, and tribal governments subject to the provisions of the Uniform Guidance applicable to grant agreements?

No. Fund payments made by Treasury to State, territorial, local, and Tribal governments do not entail grant agreements and thus the provisions of the Uniform Guidance (2 CFR part 200) applicable to grant agreements do not apply. The payments constitute ''other financial assistance'' under 2 CFR 200.40.

7. Are Fund payments considered federal financial assistance for purposes of the Single Audit Act?

Yes, Fund payments are considered to be federal financial assistance subject to the Single Audit Act (31 U.S.C. 7501–7507) and the related provisions of the Uniform Guidance, 2 CFR 200.303 regarding internal controls, §§ 200.330 through 200.332 regarding subrecipient monitoring and management, and subpart F regarding audit requirements.

8. Are Fund payments subject to other requirements of the Uniform Guidance?

Fund payments are subject to the following requirements in the Uniform Guidance (2 CFR part 200): 2 CFR 200.303 regarding internal controls, 2 CFR 200.330 through 200.332 regarding subrecipient monitoring and management, and subpart F regarding audit requirements.

9. Is there a Catalog of Federal Domestic Assistance (CFDA) number assigned to the Fund?

Yes. The CFDA number assigned to the Fund is 21.019.

10. If a State transfers Fund payments to its political subdivisions, would the transferred funds count toward the subrecipients' total funding received from the federal government for purposes of the Single Audit Act?

Yes. The Fund payments to subrecipients would count toward the threshold of the Single Audit Act and 2 CFR part 200, subpart F re: audit requirements. Subrecipients are subject to a single audit or program-specific audit pursuant to 2 CFR 200.501(a) when the subrecipients spend $750,000 or more in federal awards during their fiscal year.

11. Are recipients permitted to use payments from the Fund to cover the expenses of an audit conducted under the Single Audit Act?

Yes, such expenses would be eligible expenditures, subject to the limitations set forth in 2 CFR 200.425.

12. If a government has transferred funds to another entity, from which entity would the Treasury Department seek to recoup the funds if they have not been used in a manner consistent with section 601(d) of the Social Security Act?

The Treasury Department would seek to recoup the funds from the government that received the payment directly from the Treasury Department. State, territorial, local, and Tribal governments receiving funds from Treasury should ensure that funds transferred to other entities, whether pursuant to a grant program or otherwise, are used in accordance with section 601(d) of the Social Security Act as implemented in the Guidance.

13. What are the differences between a subrecipient and a beneficiary under the Fund for purposes of the Single Audit Act and 2 CFR part 200, subpart F regarding audit requirements?

The Single Audit Act and 2 CFR part 200, subpart F regarding audit requirements apply to any non-federal entity, as defined in 2 CFR 200.69, that receives payments from the Fund in the amount of $750,000 or more. Non-federal entities include subrecipients of payments from the Fund, including recipients of transfers from a State, territory, local government, or tribal government that received a payment directly from Treasury. However, subrecipients would not include individuals and organizations (*e.g.,* businesses, non-profits, or educational institutions) that are beneficiaries of an assistance program established using payments from the Fund. The Single Audit Act and 2 CFR part 200, subpart F regarding audit requirements do not apply to beneficiaries.

Please see Treasury Office of Inspector General FAQs at *https://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG-CA-20-028.pdf* regarding reporting in the GrantSolutions portal.

Dated: January 11, 2021.

Alexandra H. Gaiser,

Executive Secretary.

[FR Doc. 2021–00827 Filed 1–14–21; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board, Amended Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Federal Advisory Committee Act, 5 U.S.C. App.2, that a meeting of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board (JBL/CS SMRB) will be held Thursday, January 21, 2021, via WebEx. The meeting will begin at 3:00 p.m. and end at 5:00 p.m. Eastern daylight time. The meeting will have an open session from 3:00 p.m. until 3:30 p.m. and a closed session from 3:30 p.m. until 5:00 p.m.

The purpose of the open session is to meet with the JBL/CS Service Directors to discuss the overall policies and process for scientific review, as well as disseminate information among the Board members regarding the VA research priorities.

The purpose of the closed session is to provide recommendations on the scientific quality, budget, safety and mission relevance of investigator-initiated research applications submitted for VA merit review evaluation. Applications submitted for review include various medical specialties within the general areas of biomedical, behavioral and clinical science research. The JBL/CS SMRB meeting will be closed to the public for

the review, discussion, and evaluation of initial and renewal research applications, which involve reference to staff and consultant critiques of research applications. Discussions will deal with scientific merit of each application and qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Additionally, premature disclosure of research information could significantly obstruct implementation of proposed agency action regarding the research applications. As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the subcommittee meetings is in accordance with Title 5 U.S.C. 552b(c) (6) and (9)(B).

Members of the public who wish to attend the open JBL/CS SMRB meeting should join via WebEx at: Meeting number (access code) 199 877 4715, meeting password: 5WDkEZaG?48. *https://veteransaffairs.webex.com/webappng/sites/veteransaffairs/meeting/download/28f6da1fcb6a4eb9b65f249b841ff391?siteurl=veteransaffairs&MTID=md9552f12d41ecc3645d2e9a6258fdd61.* Those who would like to obtain a copy of the minutes from the closed subcommittee meetings and rosters of the subcommittee members should contact Pauline Cilladi-Rehrer, MSBA, Designated Federal Officer, (14RD), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202–443–5607 or at *Pauline.Cilladi-Rehrer@va.gov.*

Dated: January 12, 2021.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2021–00888 Filed 1–14–21; 8:45 am]

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Part II

Environmental Protection Agency

40 CFR Parts 141 and 142

National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 141 and 142

[EPA–HQ–OW–2017–0300; FRL–10019–23–OW]

RIN 2040–AF15

National Primary Drinking Water Regulations: Lead and Copper Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is publishing final regulatory revisions to the National Primary Drinking Water Regulation (NPDWR) for lead and copper under the authority of the Safe Drinking Water Act (SDWA). These revised requirements provide greater and more effective protection of public health by reducing exposure to lead and copper in drinking water. The rule will better identify high levels of lead, improve the reliability of lead tap sampling results, strengthen corrosion control treatment requirements, expand consumer awareness and improve risk communication. This final rule requires, for the first time, community water systems to conduct lead-in-drinking-water testing and public education in schools and child care facilities. In addition, the rule will accelerate lead service line replacements by closing existing regulatory loopholes, propelling early action, and strengthening replacement requirements.

DATES:

Effective date: This final rule is effective as of March 16, 2021. For judicial review purposes, this final rule is promulgated as of January 15, 2021.

Compliance dates: The compliance date for the revisions to 40 CFR part 141, subpart I, is set forth in § 141.80(a). The compliance date for the revisions to 40 CFR 141.2 is January 16, 2024, and the compliance date for 40 CFR 141.31 is January 16, 2024. The compliance date for changes made to 40 CFR part 141, subpart O (40 CFR 141.153(d)(4)(vi) and (xi) and 141.154(d)(1)), is January 16, 2024. The compliance date for changes made to 40 CFR part 141, subpart Q (§ 141.202 and appendices A and B), is January 16, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2017–0300. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Jeffrey Kempic, Standards and Risk Management Division, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Mail Code 4607M, Washington, DC 20460; telephone number: (202) 564–4880 (TTY 800–877–8339); email address: *Kempic.Jeffrey@EPA.gov.* For more information visit *https://www.epa.gov/dwreginfo/lead-and-copper-rule.*

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I. General Information

The United States has made tremendous progress in lowering children's blood lead levels. As a result of multiple Federal laws and regulations, including the 1973 phase-out of lead in automobile gasoline (40 CFR part 80, subpart B), the 1978 Federal regulation banning lead paint for residential and consumer use (16 CFR part 1303), the 1991 LCR (40 CFR part 141, subpart I), and the 1995 ban on lead in solder in food cans (21 CFR 189.240), the median concentration of lead in the blood of children aged 1 to 5 years dropped from 15 micrograms (µg) per deciliter in 1976–1980 to 0.7 µg per deciliter in 2015–2016, a decrease of 95 percent (USEPA, 2019a).

Although childhood blood lead levels have been substantially reduced as a result of these actions, exposure to lead in the environment continues to be a concern, especially for vulnerable populations such as children and pregnant women. Data evaluated by the National Toxicology Program (NTP, 2012) demonstrates that there is sufficient evidence to conclude that there are adverse health effects associated with low-level lead exposure. Moreover, no safe blood lead level in children has been identified (*https://www.cdc.gov/nceh/lead/prevention/default.htm*). Sources of lead include lead-based paint, drinking water, and soil contaminated by historical sources. The Federal Action Plan (Action Plan) to Reduce Childhood Lead Exposures and Associated Health Impacts, issued in December 2018, provides a blueprint for reducing further lead exposure and associated harm through collaboration among Federal agencies and with a range of stakeholders, including states, tribes, and local communities, along with businesses, property owners, and parents. The Action Plan is the product of the President's Task Force on Environmental Health Risks and Safety Risks to Children (Task Force). The Task Force is comprised of 17 Federal departments and offices including the U.S. Department of Health and Human Services (HHS) and the U.S Department of Housing and Urban Development, which co-chaired the development of the Action Plan with EPA.

Through this plan, EPA committed to reducing lead exposures from multiple sources including paint, ambient air, and soil and dust contamination, especially to children who are among the most vulnerable to the effects of lead.

On June 21, 2019, EPA announced new, tighter standards for lead in dust on floors and windowsills to protect children from the harmful effects of lead exposure. The standards were lowered from 40 µg of lead in dust per square foot (ft^2) on floors and 250 µg of lead in dust per ft^2 on interior windowsills, to 10 µg/ft^2 and 100 µg/ft^2, respectively. The lead hazard standards help property owners, lead paint professionals, and government agencies identify lead hazards in residential paint, dust and soil. On June 19, 2020 EPA released a proposal to lower the clearance levels for lead in dust on floors and windowsills after lead removal activities from 40 µg/ft^2 to 10 µg/ft^2 for floor dust and from 250 µg/ft^2 to 100 µg/ft^2 for windowsill dust (85 FR 37810). The dust lead clearance levels are used to demonstrate that abatement activities effectively and permanently eliminate those hazards. They apply in most pre-1978 housing and child-occupied facilities. The proposed, tighter standards would increase the effectiveness of abatement in pre-1978 homes and child care facilities.

To address lead in soil, EPA will continue to remove, remediate, and take corrective actions at contaminated sites, including Superfund, Resource Conservation and Recovery Act (RCRA) Corrective Action, and other cleanup sites. EPA will also continue to work with state and tribal air agencies to help nonattainment areas meet the National Ambient Air Quality Standards. EPA is also focused on conducting critical research and improving public awareness by consolidating and streamlining Federal messaging.

Lead and copper enter drinking water mainly from the corrosion of plumbing materials containing lead and copper. Lead was widely used in plumbing materials until Congress prohibited the use or introduction into commerce of pipes and pipe fittings and fixtures that contained more than eight percent lead and solder or flux that contained more than 0.2 percent lead in 1986. On September 1, 2020, EPA published the final rule: Use of Lead Free Pipes, Fittings, Fixtures, Solder, and Flux for Drinking Water. The Lead-Free final rule significantly limits the lead content allowed in plumbing materials (*e.g.,* pipes, fittings, and fixtures) used in new construction and replacement of existing plumbing. Specifically, the Lead-Free rule reduces the percentage of lead content allowed in these materials from eight percent to 0.25 percent in accordance with the 2011 Reduction of Lead in Drinking Water Act.

Many buildings were constructed prior to the restrictions on the use of plumbing materials that contained lead. There are currently an estimated 6.3 to 9.3 million homes served by lead service lines (LSLs) in thousands of communities nationwide, in addition to millions of older buildings with lead solder and faucets that contain lead. To reduce exposure to lead through drinking water, the Action Plan highlights several key actions, including EPA's commitment to making regulatory changes to implement the statutory definition of lead-free plumbing products and assisting schools and child care centers with the 3Ts approach (Training, Testing, and Taking Action) for lead in drinking water. The Action Plan also highlights EPA's support to states and communities by identifying funding opportunities through the Drinking Water State Revolving Fund and the Water Infrastructure Finance and Innovation Act loan program for updating and replacing drinking water infrastructure. In addition, the Action Plan highlights three newly authorized grant programs under the Water Infrastructure Improvements for the Nation (WIIN) Act, for which Congress appropriated $50 million in fiscal year (FY) 2018, to fund grants to small and disadvantaged communities for developing and maintaining infrastructure, for lead reduction projects, and to support the voluntary testing of drinking water in schools and child care centers. The Action Plan also highlights the importance of preventing lead exposure from drinking water by working with states, tribes, and local

stakeholders to share best practices and tools to better implement the NPDWR for Lead and Copper. For more information about the Federal Lead Action Plan see *https://www.epa.gov/sites/production/files/2018-12/documents/fedactionplan_lead_final.pdf.*

Since the implementation of the Lead and Copper Rule (LCR), drinking water exposures have declined significantly, resulting in major improvements in public health. For example, the number of the nation's large drinking water systems that have exceeded the LCR action level of 15 parts per billion has decreased by over 90 percent. Between 2017 and 2019, fewer than 5 percent of all water systems reported an action level exceedance (EPA–815–F–19–007). Despite this progress, there is a compelling need to modernize and improve the rule by strengthening its public health protections and clarifying its implementation requirements to make it more effective and more readily enforceable.

The LCR is a complicated rule due, in part, to the need to control corrosivity of drinking water as it travels through often antiquated distribution and plumbing systems on the way to the consumer's tap. States and public water systems need expertise and resources to identify the sampling locations and to work with customers to collect samples for analysis. Even greater expertise is needed for systems and states to identify the optimal corrosion control treatment and water quality parameter monitoring to assure that lead and copper levels are reduced to the extent feasible. The determination of the optimal corrosion control treatment is specific to each water system because it is based on the specific chemistry of the system's source water, and must be designed and implemented to take into account treatments used to comply with other applicable drinking water standards (56 FR 26487).

Water systems cannot unilaterally implement all of the actions that are needed to reduce levels of lead in drinking water. Homeowners must also be engaged to assure successful LSL replacement because, in most communities, a portion of the LSL is owned by the water system and the remaining portion is the property of the homeowner. Water systems must also engage with consumers to encourage actions such as flushing of taps before use to reduce their exposure to lead in drinking water, where necessary. The ability of water systems to successfully engage with consumers is critical to reducing drinking water lead exposure.

EPA sought input over an extended period on ways in which the Agency could address the challenges to further reducing drinking water lead exposure. Section VII of this preamble describes the engagements the Agency has had with small water systems, state and local officials, the Science Advisory Board, and the National Drinking Water Advisory Council (NDWAC). The Science Advisory Board provided recommendations in 2012 (SAB, 2012) and provided recommendations on the proposed Lead and Copper Rule revisions (LCRR) in 2020 (SAB, 2020). The NDWAC also provided recommendations on potential LCR revisions to EPA. The NDWAC provided written recommendations in December 2015 (NDWAC, 2015) and provided input to the Agency as part of consultation on the proposed LCRR in December 2019.

This final rule includes a suite of actions to address lead contamination in drinking water that, taken together, will improve the LCR and further reduce lead exposure from the previous LCR, resulting in an enduring positive public health impact. This approach focuses on six key areas:

a. *Identifying areas most impacted.* To help identify areas with the greatest potential for lead contamination of drinking water and most in need of remediation, EPA's final rule requires that all water systems complete and maintain a LSL inventory and collect tap samples from homes with LSLs if lead is present in the distribution system. To reduce elevated levels of lead in certain locations, EPA's final rule also requires water systems to engage in a ''find-and-fix'' process to identify the causes of these elevated levels as well as take potential actions to reduce lead levels.

b. *Strengthening treatment requirements.* EPA is finalizing expanded requirements for corrosion control treatment (CCT) based on tap sampling results. The final rule also establishes a new trigger level of 10 µg/L. At this trigger level, systems that currently treat for corrosion are required to re-optimize their existing treatment. Systems that do not currently treat for corrosion will be required to conduct a corrosion control study so that the system is prepared to respond quickly if necessary. Flexibility is important for small systems so that they can protect public health by taking the treatment actions that make sense for their communities. The LCRR provides new alternatives to CCT for small systems including Point-of-Use (POU) treatment and replacement of lead bearing plumbing materials.

c. *Systematically replacing lead service lines.* The final LCRR requires water systems with high lead levels to initiate LSL removal, permanently reducing a significant source of lead in many communities. All water systems with LSLs or lead status unknown service lines must create an LSLR plan by the rule compliance date. The more stringent sampling requirements in the final rule will better identify elevated lead levels, which will result in more systems replacing LSLs. Systems that are above the trigger level but at or below the lead action level must conduct replacements at a goal rate approved by the state, and, systems that are above the action level, must annually replace a minimum of three percent per year, based upon a 2 year rolling average of the number of known or potential LSLs in the inventory at the time the action level exceedance occurs. Systems cannot end their replacement program until they demonstrate lead levels less than the action level for two years. Only full LSL replacements will be counted towards the required rate, not partials and not ''in lieu of'' samples. The final rule requires water systems to provide awareness to homes with LSLs annually, and replace the water system-owned portion of an LSL when a customer chooses to replace their customer-owned portion of the line within 45 days with the ability to have up to 180 days with notification to the state.

d. *Increasing sampling reliability.* EPA is changing the criteria for selecting homes at which to collect tap samples and the way in which those samples are collected. EPA is requiring tap sample site selection to focus on sites with LSLs (where present) and is requiring a new way to collect tap samples at these sites. Systems must collect fifth liter samples that are representative of water that has been in the LSL for several hours, which will provide better information on the highest concentration of lead in drinking water. The final LCR revisions prohibit tap sampling instructions that call for pre-stagnation flushing or, the cleaning or removing of faucet aerators, and include a requirement that tap samples be collected in bottles with a wide-mouth configuration. Collectively, these new, more stringent sampling requirements will better identify elevated lead levels and result in more water systems taking required lead mitigation actions.

e. *Improving risk communication.* EPA is requiring systems to notify consumers of a system-wide action level exceedance within 24 hours. For individual tap samples that exceed 15 µg/L, EPA is requiring systems to notify

the individual consumer within three days. EPA is also requiring the consistent use of clear and concise language in public notifications and all public education materials including the LCR Public Education (PE) and Consumer Confidence Report (CCR) on the health effects of exposure to lead in drinking water. The final rule increases the number, forms, and comprehensiveness of public education materials on lead in drinking water that are provided to the public. It also requires systems to conduct regular outreach to customers with LSLs. Systems must make their LSL inventory publicly available and must notify occupants of homes with LSL every year about their LSL, drinking water exposure risks, and mitigation options, including removal. The final rule's requirements to provide understandable and consistent information about the levels of lead in drinking water, the sources of lead in a system, and the risks of lead in drinking water, will increase public actions to limit exposure to lead in drinking water.

f. *Protecting children in schools.* Since children are at most risk of significant harm from lead exposure, EPA is requiring that community water systems (CWS) test for lead in drinking water in schools and child care facilities. Systems must conduct drinking water sampling at each elementary school and each child care facility they serve over no more than five years, testing 20 percent of the facilities they serve each year. The system will be required to provide sampling results to the school or child care facility and information on actions that can be taken by the school or child care facility to reduce lead in the drinking water. The system will also be required to provide information to the school or child care facility on methods to communicate results to users of the facility and parents. CWSs are also required to provide testing to secondary schools on request during the 5 years of mandatory elementary and child care facility testing, and also to elementary schools and child care facilities on request after the first round of mandatory testing. These requirements will provide schools and child care facilities with an understanding of how to create and manage a drinking water testing program that is customizable to their needs and an appreciation of the benefits of such a program.

Through strengthened treatment procedures, expanded sampling, and improved protocols for identifying lead in drinking water, EPA's LCR revisions will require more water systems to progressively take more actions to reduce lead levels at the tap. Additionally, by improving transparency and communication, the rule is expected to increase community awareness and accelerate the replacement of LSLs. By taking these collective actions EPA, states, and water systems will implement a proactive, holistic approach to more aggressively manage lead in drinking water.

A. What are EPA's final revisions?

EPA is promulgating revisions to the LCR that strengthen public health protection and improve implementation of the regulation in the following areas: Lead tap sampling; CCT; LSLR; consumer awareness; and public education (PE). This final rule adopts a regulatory framework recommended, in part, by state co-regulators through the Association of State Drinking Water Administrators (ASDWA) and incorporates many recommendations provided to EPA by the National Drinking Water Advisory Council (NDWAC). NDWAC is a Federal Advisory Committee established pursuant to section 1446 of the Safe Drinking Water Act (SDWA) that provides EPA with advice and recommendations related to the national drinking water program. EPA is finalizing revisions to the LCR that will require water systems to take actions at lower lead tap water levels than previously required; this will reduce lead in drinking water and better protect public health. The Agency is establishing a new lead ''trigger level'' of 10 μg/L in addition to the 15 μg/L lead action level. Public health improvements will be achieved as water systems are required to take a progressive set of actions to reduce lead levels at the tap. These actions are designed to reduce lead and copper exposure by ensuring effective CCT and re-optimization of CCT when the lead trigger level or action level is exceeded; enhancing water quality parameter (WQP) monitoring; establish a ''find-and-fix'' process to evaluate and remediate elevated lead at a site where the individual tap sample exceeds 15 μg/L; require water systems to create an LSL inventory to identify the full extent of LSLs in the system; ensure tap sampling pools are targeted to the sites with elevated lead; and make consumers aware of the presence of a LSL, if applicable, to facilitate replacement of LSLs. The LCR revisions will improve tap sampling by improving the tap sampling protocol, taking samples that are more representative of the highest levels of lead in drinking water taps and better targeting higher risk sites for lead contamination, *i.e.,* sites with LSLs or lead containing plumbing materials. EPA's revisions to the LCR Public Education (PE) and Consumer Confidence Report (CCR) requirements will improve communication with consumers. In addition, this final rule includes requirements for CWSs to conduct lead in drinking water testing and PE in schools and child care facilities.

Together, these revisions to the existing framework and new requirements will result in greater public health protection at all sizes of CWSs and non-transient non-community water systems (NTNCWSs). Implementation of the revisions will better identify when and where lead contamination occurs, or has the potential to occur, and require systems to take actions to address it more effectively and sooner than under the previous rule.

The following table compares the major differences between the previous Lead and Copper Rule (LCR) (promulgated in 1991 and last revised in 2007), the 2019 proposed Lead and Copper Rule revisions (LCRR), and the final rule requirements. In general, requirements that are unchanged are not listed.

Previous LCR	Proposed LCRR	Final LCRR
Action Level (AL) and Trigger Level (TL)		
○ 90th percentile (P90) level above lead AL of 15 μg/L or copper AL of 1.3 mg/L requires additional actions.	○ 90th percentile (P90) level above lead AL of 15 μg/L or copper AL of 1.3 mg/L requires more actions than the current rule. ○ Defines lead trigger level (TL) of 10 <P90> ≤15 μg/L that triggers additional planning, monitoring, and treatment requirements.	○ 90th percentile (P90) level above lead AL of 15 μg/L or copper AL of 1.3 mg/L requires more actions than the previous rule. ○ Defines lead trigger level (TL) of 10 <P90 ≤15 μg/L that triggers additional planning, monitoring, and treatment requirements.

Previous LCR	Proposed LCRR	Final LCRR
Lead and Copper Tap Monitoring		
Sample Site Selection: ○ Prioritizes collection of samples from sites with sources of lead in contact with drinking water. ○ Highest priority given to sites served by copper pipes with lead solder installed after 1982 but before the state ban on lead pipes and/or LSLs. ○ Systems must collect 50% of samples from LSLs, if available.	*Sample Site Selection:* ○ Changes priorities for collection of samples with a greater focus on LSLs. ○ Prioritizes collecting samples from sites served by LSLs –all samples must be collected from sites served by LSLs, if available. ○ No distinction in prioritization of copper pipes with lead solder by installation date.	*Sample Site Selection:* ○ Changes priorities for collection of samples with a greater focus on LSLs. ○ Prioritizes collecting samples from sites served by LSLs –all samples must be collected from sites served by LSLs, if available. ○ No distinction in prioritization of copper pipes with lead solder by installation date. ○ Improved tap sample site selection tiering criteria.
Collection Procedure: ○ Requires collection of the first liter sample after water has sat stagnant for a minimum of 6 hours.	*Collection Procedure:* ○ Adds requirement that samples must be collected in wide-mouth bottles. ○ Prohibits sampling instructions that include recommendations for aerator cleaning/removal and pre-stagnation flushing prior to sample collection.	*Collection Procedure:* ○ Requires collection of the fifth-liter sample in homes with LSLs after water has sat stagnant for a minimum of 6 hours and maintains first-liter sampling protocol in homes without LSLs. ○ Adds requirement that samples must be collected in wide-mouth bottles. ○ Prohibits sampling instructions that include recommendations for aerator cleaning/removal and pre-stagnation flushing prior to sample collection.
Monitoring Frequency: ○ Samples are analyzed for both lead and copper. ○ Systems must collect standard number of samples, based on population; semi-annually unless they qualify for reduced monitoring. ○ Systems can qualify for annual or triennial monitoring at reduced number of sites. Schedule based on number of consecutive years meeting the following criteria: ○ Serves ≤50,000 people and ≤ lead & copper ALs. ○ Serves any population size, meets state-specified optimal water quality parameters (OWQPs), and ≤ lead AL. ○ Triennial monitoring also applies to any system with lead and copper 90th percentile levels ≤0.005 mg/L and ≤0.65 mg/L, respectively, for 2 consecutive 6-month monitoring periods. ○ 9-year monitoring waiver available to systems serving ≤3,300.	*Monitoring Frequency:* ○ Some samples may be analyzed for lead only when lead monitoring is conducted more frequently than copper. ○ Copper follows the same criteria as the current rule. ○ Lead monitoring schedule is based on P90 level for all systems as follows: ○ *P90 >15 μg/L:* Semi-annually at the standard number of sites. ○ *P90 >10 to 15 μg/L:* Annually at the standard number of sites. ○ *P90 ≤10 μg/L:* ▪ Annually and triennially at reduced number of sites using same criteria as current rule except for large systems and the copper 90th percentile level is not considered. ▪ Every 9 years based on current rule requirements for a 9-year monitoring waiver.	*Monitoring Frequency:* ○ Some samples may be analyzed for only lead when lead monitoring is conducted more frequently than copper. ○ Copper follows the same criteria as the current rule. ○ Lead monitoring schedule is based on P90 level for all systems as follows: ○ *P90 >15 μg/L:* Semi-annually at the standard number of sites. ○ *P90 >10 to 15 μg/L:* Annually at the standard number of sites. ○ *P90 ≤10 μg/L:* ▪ Annually at the standard number of sites and triennially at reduced number of sites using same criteria as previous rule except copper 90th percentile level is not considered. ▪ Every 9 years based on current rule requirements for a 9-year monitoring waiver.
Corrosion Control Treatment (CCT) and Water Quality Parameters (WQPs)		
CCT: ○ Systems serving >50,000 people were required to install treatment by January 1, 1997 with limited exception. ○ Systems serving ≤50,000 that exceed lead and/or copper AL are subject to CCT requirements (*e.g.,* CCT recommendation, study if required by primacy agency, CCT installation). They can discontinue CCT steps if no longer exceed both ALs for two consecutive 6-month monitoring periods. ○ Systems must operate CCT to meet any primacy agency-designated OWQPs that define optimal CCT. ○ There is no requirement for systems to re-optimize.	*CCT:* ○ Specifies CCT requirements for systems with 10 <P90 level ≤15 μg/L: ○ *No CCT:* must conduct a CCT study if required by primacy agency. ○ *With CCT:* must follow the steps for re-optimizing CCT, as specified in the rule. ○ Systems with P90 level >15 μg/L: ○ *No CCT:* must complete CCT installation regardless of their subsequent P90 levels. ○ *With CCT:* must re-optimize CCT. ○ CWSs serving ≤10,000 people and non-transient water systems (NTNCWSs) can select an option other than CCT to address lead. *See Small System Flexibility.*	*CCT:* ○ Specifies CCT requirements for systems with 10 <P90 level ≤15 μg/L: ○ *No CCT:* must conduct a CCT study if required by primacy agency. ○ *With CCT:* must follow the steps for re-optimizing CCT, as specified in the rule. ○ Systems with P90 level >15 μg/L: ○ *No CCT:* must complete CCT installation regardless of their subsequent P90 levels. ○ *With CCT:* must re-optimize CCT. ○ CWSs serving ≤10,000 people and non-transient water systems (NTNCWSs) can select an option other than CCT to address lead. *See Small System Flexibility.*
CCT Options: Includes alkalinity and pH adjustment, calcium hardness adjustment, and phosphate or silicate-based corrosion inhibitor.	*CCT Options:* Removes calcium hardness as an option and specifies any phosphate inhibitor must be orthophosphate.	*CCT Options:* Removes calcium hardness as an option and specifies any phosphate inhibitor must be orthophosphate.
Regulated WQPs: ○ *No CCT:* pH, alkalinity, calcium, conductivity, temperature, orthophosphate (if phosphate-based inhibitor is used), silica (if silica-based inhibitor is used). ○ *With CCT:* pH, alkalinity, and based on type of CCT either orthophosphate, silica, or calcium.	*Regulated WQPs:* ○ Eliminates WQPs related to calcium hardness (*i.e.,* calcium, conductivity, and temperature).	*Regulated WQPs:* ○ Eliminates WQPs related to calcium hardness (*i.e.,* calcium, conductivity, and temperature).

Previous LCR	Proposed LCRR	Final LCRR
WQP Monitoring: ○ Systems serving ≥50,000 people must conduct regular WQP monitoring at entry points and within the distribution system. ○ Systems serving ≤50,000 people conduct monitoring only in those periods > lead or copper AL. ○ Contains provisions to sample at reduced number of sites in distribution system less frequency for all systems meeting their OWQPs. *Sanitary Survey Review:* ○ Treatment must be reviewed during sanitary surveys; no specific requirement to assess CCT or WQPs. *Find-and-Fix:* No required follow-up samples or additional actions if an individual sample exceeds 15 μg/L.	*WQP Monitoring:* ○ Systems serving ≥50,000 people must conduct regular WQP monitoring at entry points and within the distribution system. ○ Systems serving ≤50,000 people must continue WQP monitoring until they no longer > lead and/or copper AL for two consecutive 6-month monitoring periods. ○ To qualify for reduced WQP distribution monitoring, P90 must be ≤10 μg/L and the system must meet its OWQPs. *Sanitary Survey Review:* ○ CCT and WQP data must be reviewed during sanitary surveys against most recent CCT guidance issued by EPA. *Find-and-Fix:* If individual tap sample >15 μg/L, systems must: ○ Collect a follow-up sample at each location >15 μg/L. ○ Conduct WQP monitoring at or near the site >15 μg/L. ○ Perform needed corrective action.	*WQP Monitoring:* ○ Systems serving ≥50,000 people must conduct regular WQP monitoring at entry points and within the distribution system. ○ Systems serving ≤50,000 people must continue WQP monitoring until they no longer > lead and/or copper AL for two consecutive 6-month monitoring periods. ○ To qualify for reduced WQP distribution monitoring, P90 must be ≤10 μg/L and the system must meet its OWQPs. *Sanitary Survey Review:* ○ CCT and WQP data must be reviewed during sanitary surveys against most recent CCT guidance issued by EPA. *Find-and-Fix:* If individual tap samples >15 μg/L. ○ Find-and-fix steps: ○ Collect tap sample at the same tap sample site within 30 days. ○ For LSL, collect any liter or sample volume. ○ If LSL is not present, collect 1 liter first draw after stagnation. ○ For systems with CCT. ○ Conduct WQP monitoring at or near the site >15 μg/L. ○ Perform needed corrective action. ○ Document customer refusal or non-response after 2 attempts. ○ Provide information to local public health officials.
LSL Inventory and LSLR Plan		
Initial LSL Program Activities: ○ Systems were required to complete a materials evaluation by the time of initial sampling. No requirement to update materials evaluation. ○ No LSLR plan is required.	*Initial LSL Program Activities:* ○ All systems must develop an LSL inventory or demonstrate absence of LSLs within first 3 years of final rule publication. ○ LSL inventory must be updated annually. ○ All systems with known or possible LSLs must develop an LSLR plan.	*Initial LSL Program Activities:* ○ All systems must develop an LSL inventory or demonstrate absence of LSLs within 3 years of final rule publication. ○ LSL inventory must be updated annually or triennially, based on their tap sampling frequency. ○ All systems with known or possible LSLs must develop an LSLR plan.
LSLR: ○ Systems with LSLs with P90 >15 μg/L after CCT installation must annually replace ≥7% of number of LSLs in their distribution system when the lead action level is first exceeded. ○ Systems must replace the LSL portion they own and offer to replace the private portion at the owner's expense. ○ Full LSLR, partial LSLR, and LSLs with lead sample results ≤15 μg/L ("test-outs") count toward the 7% replacement rate. ○ Systems can discontinue LSLR after 2 consecutive 6-month monitoring periods ≤ lead AL.	*LSLR:* ○ Rule specifies replacement programs based on P90 level for CWSs serving >10,000 people: ○ If P90 >15 μg/L: Must fully replace 3% of LSLs per year (mandatory replacement) for 4 consecutive 6-month monitoring periods. ○ If P90 >10 to 15 μg/L: Implement an LSLR program with replacement goals in consultation with the primacy agency for 2 consecutive 1-year monitoring periods. ○ Small CWSs and NTNCWSs that select LSLR as their compliance option must complete LSLR within 15 years if P90 >15 μg/L *See Small System Flexibility.* ○ Annual LSLR rate is based on number of LSLs when the system first exceeds the action level plus the current number of lead status unknown service lines. ○ Only full LSLR (both customer-owned and system-owned portion) count toward mandatory rate or goal-based rate.	*LSLR:* ○ Rule specifies replacement programs based on P90 level for CWSs serving >3,300 people: ○ If P90 >15 μg/L: Must fully replace 3% of LSLs per year based upon a 2 year rolling average (mandatory replacement) for at least 4 consecutive 6-month monitoring periods. ○ If P90 >10 to 15 μg/L: Implement an LSLR program with replacement goals in consultation with the primacy agency for 2 consecutive 1-year monitoring periods. ○ Small CWSs and NTNCWSs that select LSLR as their compliance option must complete LSLR within 15 years if P90 >15 μg/L *See Small System Flexibility.* ○ Annual LSLR rate is based on number of LSLs and galvanized requiring replacement when the system first exceeds the action level plus the current number of lead status unknown service lines. ○ Only full LSLR (both customer-owned and system-owned portion) count toward mandatory rate or goal-based rate.

Previous LCR	Proposed LCRR	Final LCRR
	○ All systems must replace their portion of an LSL if notified by consumer of private side replacement within 45 days of notification of the private replacement. ○ Following each LSLR, systems must: ○ Provide pitcher filters/cartridges to each customer for 3 months after replacement. Must be provided within 24 hours for full and partial LSLRs. ○ Collect a lead tap sample at locations served by replaced line within 3 to 6 months after replacement. ○ Requires replacement of galvanized service lines that are or ever were downstream of an LSL.	○ All systems replace their portion of an LSL if notified by consumer of private side replacement within 45 days of notification of the private replacement. If the system cannot replace the system's portion within 45 days, it must notify the state and replace the system's portion within 180 days. ○ Following each LSLR, systems must: ○ Provide pitcher filters/cartridges to each customer for 6 months after replacement. Provide pitcher filters/cartridges within 24 hours for full and partial LSLRs. ○ Collect a lead tap sample at locations served by replaced line within 3 to 6 months after replacement. ○ Requires replacement of galvanized service lines that are or ever were downstream of an LSL.
LSL-Related Outreach: ○ When water system plans to replace the portion it owns, it must offer to replace customer-owned portion at owner's expense. ○ If system replaces its portion only: ○ Provide notification to affected residences within 45 days prior to replacement on possible elevated short-term lead levels and measures to minimize exposure. ○ Include offer to collect lead tap sample within 72 hours of replacement. ○ Provide test results within 3 business days after receiving results.	*LSL-Related Outreach:* ○ Inform consumers annually that they are served by LSL or service line of unknown lead status. ○ Systems subject to goal-based program must: ○ Conduct targeted outreach that encourages consumers with LSLs to participate in the LSLR program. ○ Conduct an additional outreach activity if they fail to meet their goal. ○ Systems subject to mandatory LSLR include information on LSLR program in public education (PE) materials that are provided in response to P90 > AL.	*LSL-Related Outreach:* ○ Inform consumers annually that they are served by LSL or lead status unknown service line. ○ Systems subject to goal-based program must: ○ Conduct targeted outreach that encourages consumers with LSLs to participate in the LSLR program. ○ Conduct an additional outreach activity if they fail to meet their goal. ○ Systems subject to mandatory LSLR include information on LSLR program in public education (PE) materials that are provided in response to P90 > AL.
Small System Flexibility		
No provisions for systems to elect an alternative treatment approach but sets specific requirements for CCT and LSLR.	Allows CWSs serving ≤10,000 people and all NTNCWSs with P90 >10 μg/L to elect their approach to address lead with primacy agency approval: ○ Systems can choose CCT, LSLR, or provision and maintenance of point-of-use devices. ○ NTNCWSs can also elect to replace all lead-bearing materials.	Allows CWSs serving ≤10,000 people and all NTNCWSs with P90 >10 μg/L to select their approach to address lead with primacy agency approval: ○ Systems can choose CCT, LSLR, provision and maintenance of point-of-use devices; or replace all lead-bearing plumbing materials.
Public Education and Outreach		
○ All CWSs must provide education material in the annual Consumer Confidence Report (CCR). ○ Systems with P90 >AL must provide PE to customers about lead sources, health effects, measures to reduce lead exposure, and additional information sources. ○ Systems must provide lead consumer notice to individuals served at tested taps within 30 days of learning results. ○ Customers can contact the CWS to get PE materials translated in other languages.	○ CWSs must provide updated health effects language in all PE materials and the CCR. ○ If P90 > AL: ○ Current PE requirements apply. ○ Systems must notify consumers of P90 > AL within 24 hours. ○ In addition, CWSs must: ○ Improve public access to lead information including LSL locations and respond to requests for LSL information. ○ Deliver notice and educational materials to consumers during water-related work that could disturb LSLs. ○ Provide increased information to local and state health agencies. ○ Provide lead consumer notice to consumers whose individual tap sample is >15 μg/L within 24 hours. ○ *Also see LSL-Related Outreach in LSLR section of table.*	○ CWSs must provide updated health effects language in all PE materials and the CCR. ○ Customers can contact the CWS to get PE materials translated in other languages. ○ All CWSs are required to include information on how to access the LSL inventory and how to access the results of all tap sampling in the CCR. ○ Revises the mandatory health effects language to improve accuracy and clarity. ○ If P90 > AL: ○ Current PE requirements apply. ○ Systems must notify consumers of P90 > AL within 24 hours. ○ In addition, CWSs must: ○ Deliver notice and educational materials to consumers during water-related work that could disturb LSLs. ○ Provide information to local and state health agencies. ○ Provide lead consumer notice to consumers whose individual tap sample is >15 μg/L as soon as practicable but no later than 3 days. *Also see LSL-Related Outreach section of table.*
Change in Source or Treatment		
Systems on a *reduced* tap monitoring schedule must obtain prior primacy agency approval before changing their source or treatment.	Systems on *any* tap monitoring schedule must obtain prior primacy agency approval before changing their source or treatment.	Systems on *any* tap monitoring schedule must obtain prior primacy agency approval before changing their source or treatment. These systems must also conduct tap monitoring biannually.

Previous LCR	Proposed LCRR	Final LCRR
Source Water Monitoring and Treatment		
○ Periodic source water monitoring is required for systems with: ○ Source water treatment; or ○ P90 > AL and no source water treatment.	○ Primacy Agencies can waive continued source water monitoring if the: ○ System has already conducted source water monitoring for a previous P90 > AL; ○ primacy agency has determined that source water treatment is not required; *and* ○ System has not added any new water sources.	○ Primacy Agencies can waive continued source water monitoring if the: ○ System has already conducted source water monitoring for a previous P90 > AL; ○ primacy agency has determined that source water treatment is not required; *and* ○ System has not added any new water sources.
Lead in Drinking Water at Schools and Child Care Facilities		
○ Does not include separate testing and education program for CWSs at schools and child care facilities. ○ Schools and child cares that are classified as NTNCWSs must sample for lead and copper.	○ CWSs must conduct lead in drinking water testing and PE at 20% of K–12 schools and licensed child cares in service area every 5 years. ○ Sample results and PE must be provided to each sampled school/child care, primacy agency and local or state health department. ○ Excludes facilities built after January 1, 2014.	○ CWS must conduct sampling at 20% of elementary schools and 20% of child care facilities per year and conduct sampling at secondary schools on request for 1 testing cycle (5 years) and conduct sampling on request of all schools and child care facilities thereafter. ○ Sample results and PE must be provided to each sampled school/child care, primacy agency and local or state health department. ○ Excludes facilities built or replaced all plumbing after January 1, 2014.
Primacy Agency Reporting		
Primacy Agencies must report information to EPA that includes but is not limited to: ○ All P90 levels for systems serving >3,300 people, and only levels >15 µg/L for smaller systems. ○ Systems that are required to initiate LSLR and the date replacement must begin. ○ Systems for which optimal corrosion control treatment (OCCT) has been designated.	Expands current requirements to include: ○ All P90 values for all system sizes. ○ The current number of LSLs and lead status unknown service lines for every water system. ○ OCCT status of all systems including primacy agency-specified OWQPs.	Expands current requirements to include: ○ All P90 values for all system sizes. ○ The current number of LSLs and lead status unknown service lines for every water system. ○ OCCT status of all systems including primacy agency-specified OWQPs.

B. Does this action apply to me?

Entities that could potentially be affected include the following:

Category	Examples of potentially affected entities
Public water systems	Community water systems (a public water system that (A) serves at least 15 service connections used by year-round residents of the area served by the system; or (B) regularly serves at least 25 year-round residents). Non-transient, non-community water systems (a public water system that is not a community water system and that regularly serves at least 25 of the same persons over 6 months per year).
State and tribal agencies	Agencies responsible for drinking water regulatory development and enforcement.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that could be affected by this action. To determine whether your facility or activities could be affected by this action, you should carefully examine this final rule.

As part of this document for the LCRR, ''state'' refers to the agency of the state or tribal government which has jurisdiction over public water systems consistent with the definition of ''state'' in 40 CFR 141.2. During any period when a state or tribal government does not have primary enforcement responsibility pursuant to section 1413 of the SDWA, the term ''state'' means the applicable Regional Administrator of the U.S. Environmental Protection Agency. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Health Effects of Lead and Copper

Exposure to lead is known to present serious health risks to the brain and nervous system of children. Lead exposure causes damage to the brain and kidneys and can interfere with the production of red blood cells that carry oxygen to all parts of the body. Lead has acute and chronic impacts on the body. The most robustly studied and most susceptible subpopulations are the developing fetus, infants, and young children. Even low level lead exposure is of particular concern to children because their growing bodies absorb more lead than adults do, and their brains and nervous systems are more sensitive to the damaging effects of lead. EPA estimates that drinking water can make up 20 percent or more of a person's total exposure to lead. Infants who consume mostly formula mixed with tap water can, depending on the level of lead in the system and other sources of lead in the home, receive 40 percent to 60 percent of their exposure to lead from drinking water used in the formula (USEPA, 1988). Scientists have linked lead's effects on the brain with lowered intelligence quotient (IQ) and attention disorders in children (USEPA, 2013). Young children and infants are particularly vulnerable to lead because the physical and behavioral effects of lead occur at lower exposure levels in children than in adults. During

pregnancy, lead exposure may affect prenatal brain development. Lead is stored in the bones and it can be released later in life. Even at low levels of lead in blood, there is an increased risk of health effects in children (*e.g.,* less than 5 micrograms per deciliter) and adults (*e.g.,* less than 10 micrograms per deciliter) (National Toxicology Program, 2012).

The 2013 Integrated Science Assessment for Lead (USEPA, 2013) and the HHS National Toxicology Program Monograph on Health Effects of Low-Level Lead (National Toxicology Program, 2012) have both documented the association between lead and adverse cardiovascular effects, renal effects, reproductive effects, immunological effects, neurological effects, and cancer. EPA's Integrated Risk Information System (IRIS) Chemical Assessment Summary provides additional health effects information on lead (USEPA, 2004a). For a more detailed explanation of the health effects associated with lead for children and adults see Appendix D of the Economic Analysis.

Acute copper exposure causes gastrointestinal distress. Chronic exposure to copper is particularly a concern for people with Wilson's disease because they are prone to copper accumulation in body tissue, which can lead to liver damage, neurological, and/or psychiatric symptoms. For a more detailed explanation of the health effects associated with copper see Appendix E of the final rule Economic Analysis (USEPA, 2020). EPA did not propose revisions to the copper requirements; thus, the final rule does not revise the copper requirements.

B. Statutory Authority

EPA is publishing revisions to the LCR under the authority of the Safe Drinking Water Act (SDWA), including sections 1412, 1413, 1414, 1417, 1445, and 1450 of the SDWA. 42 U.S.C. 300f *et seq.*

Section 1412(b)(9) provides that ''[T]he Administrator shall, not less often than every 6 years, review and revise, as appropriate, each national primary drinking water regulation promulgated under this subchapter. Any revision of a national primary drinking water regulation shall be promulgated in accordance with this section, except that each revision shall maintain, or provide for greater, protection of the health of persons.'' 42 U.S.C. 300g–1(b)(9). In promulgating this revised NPDWR, EPA followed the applicable procedures and requirements described in section 1412 of the SDWA, including those related to (1) the use of the best available, peer-reviewed science and supporting studies; (2) presentation of information on public health effects; and (3) a health risk reduction and cost analysis of the rule in 1412(b)((3)(A), (B), (C) of the SDWA, 42 U.S.C. 300g–1(b)(3)(A)–(C).

This rule revises the Lead and Copper Rule which established treatment technique requirements instead of a maximum contaminant level. Section 1412(b)(7)(A) of the SDWA authorizes EPA to ''promulgate a national primary drinking water regulation that requires the use of a treatment technique in lieu of establishing a maximum contaminant level, if the Administrator makes a finding that it is not economically or technologically feasible to ascertain the level of the contaminant.'' EPA's decision to promulgate a treatment technique rule for lead instead of a maximum contaminant level (MCL) in 1991 has been upheld by the United States Court of Appeals for the District of Columbia Circuit. *American Water Works Association* v. *EPA,* 40 F.3d 1266, 1270–71 (D.C. Cir. 1994).

In establishing treatment technique requirements, the Administrator is required to identify those treatment techniques ''which in the Administrator's judgment, would prevent known or anticipated adverse effects on the health of persons to the extent feasible.'' 42 U.S.C. 300g–1(b)(7)(A). ''Feasible'' is defined in Section 1412(b)(4)(D) of the SDWA as ''feasible with the use of the best technology, treatment techniques and other means which the Administrator finds after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration).'' The legislative history for this provision makes it clear that ''feasibility'' is to be defined relative to ''what may reasonably be afforded by large metropolitan or regional public water systems.'' *A Legislative History of the Safe Drinking Water Act,* Committee Print, 97th Cong., 2d Sess. (1982) at 550. See also *City of Portland* v. *EPA,* 507 F.3d 706 (D.C. Cir. 2007) (upholding EPA's treatment technique for *Cryptosporidium* and the Agency's interpretation that ''feasible'' means technically possible and affordable, rather than a cost/benefit determination). If the ''feasible'' treatment technique requirement would result in an increase in the health risk from drinking water by increasing the concentration of other contaminants in drinking water, or interfering with the efficacy of treatment techniques or processes that are used to comply with other national primary drinking water regulations, then the treatment techniques ''shall minimize the overall risk of adverse health effects by balancing the risk from the contaminant and the risk from other contaminants''; however, the resulting requirements may not be more stringent than what is ''feasible''. 42 U.S.C. 300g–1(b)(5).

Section 1414(c) of the SDWA, as amended by the WIIN Act, requires public water systems to provide notice to the public if the water system exceeds the lead action level. 42 U.S.C. 300g–3(c). The SDWA section 1414(c)(2) provides that the Administrator ''shall, by regulation . . . prescribe the manner, frequency, form, and content for giving notice'' under section 1414(c). 42 U.S.C. 300g–3(c)(2). The SDWA section 1414(c)(2)(C) specifies additional requirements for those regulations related to public notification of a lead action level exceedance ''that has the potential to have serious adverse effects on human health as a result of short-term exposure.'' The public notice must be distributed as soon as practicable, but not later than 24 hours after the water systems learns of the action level exceedance and the system must report the exceedance to both the Administrator and the primacy agency in that same time period. 42 U.S.C. 300g–3(c)(2)(C)(i) and (iii). The requirement in Section 1414(c)(2)(C)(iii) to provide notification to EPA as well as the primacy agency was enacted in 2016 as part of the WIIN Act. One purpose of this requirement is to allow EPA to implement Section 1414(c)(2)(D), which was also enacted as part of the WIIN Act. It directs EPA to issue the required public notice for an exceedance of the lead action level, not later than 24 hours after the Administrator is notified of the exceedance, if the water system or the primacy agency has not issued the required public notice. EPA may receive this information directly from water systems or states. Because the Administrator's duty under Section 1414(c)(2)(D) is triggered only in the event of an action level exceedance and not any violation of an NPDWR, EPA interprets 1414(c)(2)(C)(iii) to require systems to report only action level exceedances (ALEs) to the Administrator.

Section 1417(a)(2) of the SDWA provides that public water systems ''shall identify and provide notice to persons that may be affected by lead contamination of their drinking water where such contamination results from the lead content of the construction materials of the public water distribution system and/or corrosivity of the water supply sufficient to cause

leaching of lead. 42 U.S.C. 300g–6(a)(2)(A)(i) and (ii). The notice ''shall be provided notwithstanding the absence of a violation of any national drinking water standard.'' 42 U.S.C. 300g–6(a)(2)(A).

Section 1445(a) of the SDWA authorizes the Administrator to establish monitoring, recordkeeping, and reporting regulations, to assist the Administrator in establishing regulations under the SDWA, in determining compliance with the SDWA, and in administering any program of financial assistance under the SDWA. 42 U.S.C. 300j–4(a). In requiring a public water system to monitor under section 1445(a) of the SDWA, the Administrator may take into consideration the water system size and the contaminants likely to be found in the system's drinking water. 42 U.S.C. 300j–4(a). The SDWA section 1445(a)(1)(C) provides that ''every person who is subject to a national primary drinking water regulation'' must provide such information as the Administrator may reasonably require to assist the Administrator in establishing regulations under section 1412. 42 U.S.C 300j–4(a)(1)(C). The monitoring, recordkeeping, and reporting requirements in today's rule, including the inventory requirements, are part of the NPDWR treatment technique requirements; in addition, EPA expects to consider the information collected in any future revisions to the Lead and Copper Rule and in administering financial assistance programs (*e.g.,* grant programs for the replacement of LSLs and/or school sampling).

Under section 1413(a)(1) of the SDWA a state may exercise primary enforcement responsibility (''primacy'') for NPDWRs when EPA has determined, among other things, that the state has adopted regulations that are no less stringent than EPA's. 42 U.S.C. 300g–2(a)(1). To obtain primacy for this rule, states must adopt regulations that are at least as stringent as this rule within two years of EPA's promulgation, unless EPA grants the state a two-year extension. State primacy requires, among other things, adequate enforcement (including monitoring and inspections) and reporting requirements. EPA must approve or deny state primacy applications within 90 days of submission to EPA. 42 U.S.C. 300g–2(b)(2). In some cases, a state submitting revisions to adopt an NPDWR has interim primary enforcement authority for the new regulation while EPA's decision on the revision is pending. 42 U.S.C. 300g–2(c). Section 1413(b)(1) of the SDWA requires EPA to establish regulations governing the primacy application and review process ''with such modifications as the Administrator deems appropriate.'' In addition to the LCR revisions promulgated today which are more stringent than the previous LCR, this rule includes changes to primacy requirements related to this rule.

Section 1450 of the SDWA authorizes the Administrator to prescribe such regulations as are necessary or appropriate to carry out his or her functions under the Act. 42 U.S.C. 300j–9.

C. Regulatory History

EPA published the LCR on June 7, 1991, to control lead and copper in drinking water at the consumer's tap. The rule established a NPDWR for lead and copper consisting of treatment technique requirements that include CCT, source water treatment, lead service line replacement (LSLR), and PE. The rule established an action level of 0.015 mg/L or 15 µg/L for lead and 1.3 mg/L or 1,300 µg/L for copper. The action level is a concentration of lead or copper in the water that determines, in some cases, whether a water system must install CCT, monitor source water, replace LSLs, and undertake a PE program. The action level is exceeded if the concentration in more than 10 percent of tap samples collected during any monitoring period is greater than the action level (*i.e.,* if the 90th percentile level is greater than the action level). If the 90th percentile value for tap samples is above the action level, it is not a treatment technique violation, but rather compels actions, such as WQP monitoring, CCT, source water monitoring/treatment, PE, and LSLR. Failure to take these actions results in the water system being in violation of the treatment technique or monitoring and reporting requirements.

In 2000, EPA promulgated the Lead and Copper Rule Minor Revisions or LCRMR, which streamlined requirements, promoted consistent national implementation, and in many cases, reduced burden for water systems. One of the provisions of the LCRMR required states to report the lead 90th percentile to EPA's Safe Drinking Water Information System (SDWIS) database for all water systems serving greater than 3,300 persons. States must report the lead 90th percentile value for water systems serving 3,300 or fewer persons only if the water system exceeds the action level. The new reporting requirements became effective in 2002. In 2004, EPA published minor corrections to the LCR to reinstate text that was inadvertently dropped from the rule during the previous revision.

In 2004, EPA undertook a national review of the LCR and performed a number of activities to help identify needed actions to improve implementation of the LCR. EPA collected and analyzed lead concentration data and other information required by the LCR, carried out review of implementation by states, held four expert workshops to further discuss elements of the LCR, and worked to better understand local and state efforts to test for lead in school drinking water, including a national meeting to discuss challenges and needs. EPA used the information collected during the national review to identify needed short-term and long-term regulatory revisions to the LCR.

In 2007, EPA promulgated a set of short-term regulatory revisions and clarifications to strengthen implementation of the LCR in the areas of monitoring, treatment, customer awareness, LSLR, and improve compliance with the PE requirements to ensure drinking water consumers receive meaningful, timely, and useful information needed to help them limit their exposure to lead in drinking water. Long-term issues, requiring additional research and input, were identified for a subsequent set of rule revisions.

EPA published proposed revisions to the LCR on November 13, 2019 for public review and comment (84 FR 61684). The proposal included provisions to strengthen procedures and requirements related to health protection and the implementation of the existing LCR in the following areas: Lead tap sampling; corrosion control treatment; LSL replacement; consumer awareness; and public education. In addition, the proposal included new requirements for CWSs to conduct lead in drinking water testing and public education in schools and child care facilities.

III. Revisions to 40 CFR Part 141, Subpart I, Control of Lead and Copper

A. Lead Trigger Level

1. Proposed Revisions

EPA proposed a lead ''trigger level'' of 10 µg/L in addition to the LCR's current 15 µg/L lead action level. The trigger level is not a health based standard. EPA proposed 10 µg/L as a reasonable concentration that is below the action level and above the Practical Quantitation Level of 5 µg/L at which to require water systems to take a progressive set of actions to reduce lead levels prior to an action level exceedance and to have a plan in place

to rapidly respond if there is an action level exceedance. For large and medium water systems, EPA proposed action that included optimizing CCT, a goal based LSLR program, and annual tap sampling (no reduced monitoring). EPA proposed that small water systems would be required to designate the actions they would take if they exceed the action level.

2. Public Comment and EPA's Response

A number of commenters supported the trigger level, stating that it would be beneficial because it initiates actions by public water systems to decrease their lead levels and requires the utility to take proactive steps to remove lead from the distribution system, reducing exposure to lead from drinking water throughout the utility's community. A commenter suggested that the trigger level be lowered to 5 µg/L (the stakeholder added a reference to ''CDC'' however, the Centers for Disease Control and Prevention established a blood lead reference level of 5 µg/deciliter, that is not a drinking water level). Other commenters suggested a trigger level of 1 µg/L (recommended by the American Academy of Pediatrics (AAP, 2016)).

The use of a trigger level of 10 µg/L in the implementation of this treatment technique rule provides a reasonable concentration that is below the action level and above the Practical Quantitation Level of 5 µg/L at which to require water systems to take a progressive set of actions to reduce lead levels prior to an action level exceedance and to have a plan in place to rapidly respond if there is an action level exceedance. Requiring such actions of systems only when a trigger level 10 µg/L is exceeded, rather than all systems prioritizes actions at systems with higher lead levels and allows states to work proactively with water systems that are a higher priority. The actions water systems will be required to undertake if their 90th percentile exceeds the trigger level will require review and oversight from states to assure that they are effective in reducing drinking water lead levels. As shown in Exhibits 4–13 and 4–20 of the Economic Analysis, setting a lower trigger level would substantially increase the number of water systems required to obtain review and input from their primacy agency to comply with the CCT and LSLR requirements. EPA has concluded it is not practicable for this significant number of water systems to obtain this state review and approval.

The LCR's action level prioritizes systems with the highest lead levels for state interaction and mandates actions to reduce drinking water lead levels. Similarly, the Agency has determined that 10 µg/L is a reasonable level to trigger water systems with higher (but not the highest) lead levels to have interactions with states to prepare for and to undertake actions to reduce drinking water lead levels.

Other commenters expressed concerns about the potential for confusion caused by separate trigger level and action level requirements. One of these commenters stated that the trigger level would be another decision-criterion for the public to mis-construe as a level of health concern. EPA does not agree with these commenters. The Agency has established a health based maximum contaminant level goal (MCLG) of zero for lead. The trigger level is not a health based level, rather it is a reasonable level at which to require systems to begin to take a progressive set of actions based upon lead levels at the tap that are appropriate to assure reduced exposure to lead. The concept of including additional thresholds to compel actions before an action level exceedance was suggested by the Association of State Drinking Water Administrators as a way to focus actions towards the systems with the greatest potential concerns (USEPA, 2018). This regulatory framework is similar to other NPDWRs, such as the Long-Term 2 Enhanced Surface Water Treatment Rule (LT2ESWTR), which requires increasing levels of remedial action based on the concentration of the contaminant. EPA has revised the regulatory text in the final rule to improve its clarity and will work with primacy agencies and water systems to assure they understand the different actions that must be taken when systems exceed the trigger level or action level.

Additional commenters suggested EPA lower the action level and eliminate the trigger level, stating the trigger level makes the rule unnecessarily complicated and needlessly adds to the regulatory burden. EPA disagrees that the action level should be lowered. EPA established the lead action level in 1991 to require small and medium-sized systems exceeding it to install corrosion control treatment and to require large systems and other systems with optimal corrosion control treatment (OCCT) to conduct LSLR. The action level was based on examination of data at 39 medium sized systems; while it was ''limited as a basis for making broad-based estimates of treatment efficacy,'' EPA concluded that ''the data are useful as general indictors of the range of levels systems have achieved with various treatment measures in place.'' (56 FR 26490). EPA acknowledged in 1991 that the selection of the action level ''is not based on a precise statistical analysis of the effectiveness of treatment'' but it ''reflects EPA's assessment of a level that is generally representative of effective corrosion control treatment, and that is, therefore, useful as a tool for simplifying the implementation of the treatment technique'' at those systems. (56 FR 26490). EPA decided to use the same action level as a screen to determine which systems with CCT must also replace LSLs (56 FR 26491). While EPA is not lowering the action level, the Agency is strengthening the public health protections of the treatment technique by improving the sampling procedures to better identify elevated levels of lead. This will result in more systems exceeding the action level and more actions to reduce drinking water exposure to lead.

EPA disagrees with commenters that the trigger level results in unnecessary complexity and regulatory burden. While there is burden associated with the actions that systems must take when they exceed the trigger level, EPA determined that a progressive set of actions based upon lead levels at the tap are feasible to assure reduced exposure to lead. EPA in its Health Risk Reduction Cost Analysis (HRRCA) has found that a significant number of benefits accrue from systems being required to take mitigation activities as a result of trigger level exceedances. EPA also examined the costs and found that it is feasible for systems to take the actions required when there is a trigger level exceedance. Requiring these actions when a system's lead levels are high, but not exceeding the action level, will help both systems and states to engage in a manageable and orderly process to reduce lead levels in drinking water so that they remain below the lead action level. Accordingly, inclusion of the trigger level in the final rule will provide for ''greater protection of the health of persons'' consistent with the statutory authority in Section 1412(b)(9) of the Safe Drinking Water Act (SDWA) for revising existing drinking water standards. Additionally, this proactive approach to lead contamination in response to a trigger level will allow systems to quickly take action if there is a ALE, while reducing the likelihood that a water system will exceed the action level in the future or be faced with the need to implement emergency measures such as the distribution of water filters or bottled water in response to a lead crisis.

3. Final Revisions

EPA is finalizing the lead trigger level of 10 μg/L and maintaining the lead action level of 15 μg/L. In the event of a trigger level exceedance, the actions water systems are required to take vary based on characteristics of the system. Each of the requirements brought about by a trigger level exceedance is discussed in detail elsewhere in this document. However, in summary, small CWSs serving populations of 10,000 or fewer persons and all sizes of NTNCWS that exceed the lead trigger level, but not the lead action level, must evaluate the small system flexibilities described in Section III.E of this preamble and identify the action they will take if they exceed the action level. Medium and large CWSs that exceed the trigger level, but do not exceed the action level, must implement requirements based on their CCT and LSL status as described below.

Water systems with CCT in place and with no LSLs or service lines of unknown lead status are required to re-optimize CCT (see Section III.B); and conduct annual tap sampling (no reduced monitoring (see Section III.G)).

Water systems without CCT in place and with no LSLs or service lines of unknown lead status are required to: conduct a CCT study and obtain state approval for designated CCT (see Section III.B.); and conduct annual tap sampling (no reduced monitoring (see Section III.G)).

Water systems with CCT in place and with LSLs or service lines of unknown lead status are required to: Re-optimize CCT (see Section III.B); notify customers with LSLs or unknowns (see Section III.F); implement a goal-based LSLR program (see Section III.D); and conduct annual tap sampling (no reduced monitoring (see Section III.G)).

Water systems without CCT in place and with LSLs or service lines (*i.e.,* the pipe that connects the water main to the building) of unknown lead status are required to: Conduct a CCT study and obtain state approval for designated CCT (see Section III.B) notify customers with an LSL or unknowns (see Section III.F); implement a goal based LSLR program (see Section III.D); and conduct annual tap sampling (no reduced monitoring (see Section III.G).

B. Corrosion Control Treatment Requirements Based on Lead 90th Percentile

1. Proposed Revisions

EPA proposed revised CCT requirements based on the water system's lead 90th percentile level and CCT status. The proposed rule required all water systems with CCT that have a lead trigger level exceedance (>10 μg/L but ≤15 μg/L) or a lead action level exceedance (>15 μg/L) to re-optimize their CCT. The proposed rule would require water systems to evaluate other corrosion control treatments, make a re-optimization recommendation, and receive state approval of any changes to CCT or water quality parameters (WQPs). The state could require the water system to conduct a CCT study under the proposed rule.

The proposal required water systems without CCT that exceed the lead trigger level (10 μg/L) to conduct a CCT study *and make a CCT recommendation to the state.* Once approved by the state, the CCT recommendation would be implemented if the water system exceeds the lead action level in subsequent tap sampling. Water systems without CCT that have previously conducted a CCT study and made CCT recommendations would not be required to prepare a new CCT study if they exceed the trigger level again unless the state determines that a new study is required due to changed circumstances, such as addition of a new water source or changes in treatment or if revised CCT guidance has been issued by EPA since the study was conducted. Under the proposed rule the state could also determine that a new CCT study is needed due to other significant information becoming available.

EPA proposed changes to the CCT options that water systems must consider and the methods by which water systems would evaluate those options. EPA proposed removing calcium carbonate stabilization as a CCT option. EPA also proposed requiring water systems to evaluate two additional options for orthophosphate-based corrosion control: Maintaining a 1 mg/L orthophosphate residual concentration and maintaining a 3 mg/L orthophosphate residual concentration.

EPA also proposed changes to the methodologies by which systems evaluate CCT options. EPA proposed that metal coupon tests could only be used as a screen to reduce the number of options that are evaluated using pipe rig/loops and would no longer be able to be used as the basis for determining the OCCT.

EPA proposed that when systems choose to conduct coupon studies to screen potential options and/or pipe rig/loop studies, these systems cannot exclude a treatment option from the study based upon potential effects on other water quality treatment processes. Systems that are conducting coupon screening studies and/or pipe loop/rig studies should identify potential constraints, such as the impact that CCT options or treatment chemicals may have on other water quality treatment processes. Those impacts should be noted and considered as part of the CCT study design.

EPA proposed that a medium or small water system that exceeds the lead action level (15 μg/L), that has previously not exceeded the lead trigger level and does not have CCT installed, would be required to conduct a CCT study, make a treatment recommendation, and obtain state approval of the OCCT determination. EPA proposed that systems be required to complete these steps even if the system meets the lead action level in two subsequent, consecutive 6-month monitoring periods over the course of this process. Water systems that meet the action level for two consecutive 6-month monitoring periods before installing the state-approved treatment would be required to install that CCT upon any subsequent action level exceedance. EPA proposed to retain the current LCR provision that allows a state to waive the requirement for a CCT study.

2. Public Comment and EPA's Response

Commenters generally supported the evaluation or re-evaluation of corrosion control treatment based on a trigger level or action level exceedance because it would increase public health protection by prioritizing systems with the highest 90th percentiles. Many commenters had objections to the proposed re-optimization process. Some commented that the re-optimization process was too prescriptive, and that more flexibility was needed. Commenters wrote that the steps needed to optimize or reoptimize treatment varied based on factors including the presence/absence of LSLs, system size, 90th percentile lead concentration, and existing corrosion control treatment. Several commenters suggested a toolbox or ''bin approach'' that allows consideration of these factors by systems and states to determine which optimization/re-optimization process or ''bin'' is most appropriate. For example, water systems with LSLs and OCCT would be in a different ''bin'' than water systems with LSLs and no OCCT. Many commenters suggested that systems be allowed to modify the existing corrosion control treatment before considering alternate treatments. Commenters stated that the proposed re-optimization process might limit a system's ability to quickly and efficiently reduce lead levels. EPA agrees that optimization and re-optimization processes should

provide more flexibility. EPA agrees that for some systems, lead reductions can be achieved quickly with slight modifications of the existing CCT and should not be delayed potentially by two years for the results of the corrosion control study. EPA agrees it is appropriate for states to approve modifications of the system's existing CCT for the ''bin'' of systems that are between the trigger level and action level without a corrosion control study.

EPA agrees that the process to optimize/reoptimize CCT should be determined based on system characteristics such as system size, the presence of LSLs and 90th percentile value. EPA agrees that a ''bin approach'' in which the steps of the optimization/re-optimization process depend upon system characteristics can provide flexibility for some systems to more effectively establish optimal CCT. EPA agrees that requirements to conduct harvested pipe loop studies and coupon studies are best delineated through such a bin approach. Harvested pipe loop studies are only required for systems with LSLs that exceed the lead action level. To the extent that there are any large systems without corrosion control treatment that have LSLs and exceed the lead practical quantitation level of 0.005 mg/L, those systems would also need to conduct a harvested pipe loop study. EPA believes that the CCT changes needed for systems of any size above the action level merit a thorough investigation of the impacts of the options on the existing LSL pipe scale. Commenters noted that some small systems may not have the technical capacity to construct and operate a harvested pipe loop study. EPA notes that in these cases the final rule provides flexibility to these small systems to implement a LSLR program or POU program. Coupon studies can serve as a screen to reduce the number of options for the harvested pipe loop study. Commenters noted that the construction of harvested flow-through pipe loops and the stabilization of those loops can take six months to one year before options can be evaluated. EPA agrees that more time is needed to construct pipe loops from harvested pipes and therefore is removing the requirement for initial treatment recommendations in the final rule for large and medium systems. For these systems, the final rule directs them to start constructing and operating the flow-through pipe loops after the action level exceedance in place of the initial treatment recommendation step, since the pipe loop study will be the basis for their treatment recommendation. Commenters indicated that for some systems, coupon studies rather than pipe loop studies may be an appropriate treatment recommendation tool. EPA agrees that coupon studies can be used for systems that do not have LSLs. The final rule only requires harvested pipe loop studies for systems that have LSLs.

Many commenters had concerns with orthophosphate impacts on wastewater treatment. The use of orthophosphate for corrosion control can increase the phosphorus loading to wastewater treatment facilities. However, water systems conducting corrosion control studies cannot rule out orthophosphate simply based on the increase in loading to wastewater treatment facilities. The definition of optimal corrosion control treatment means the corrosion control treatment that minimizes lead and copper concentrations at users' taps while ensuring that the system does not violate any national primary drinking water regulations. SDWA Section 1412(b)(7)(A) requires that a treatment technique prevent known or anticipated adverse effects on the health of persons to the extent feasible. EPA has determined that orthophosphate treatment is a feasible corrosion control technology in accordance with SDWA Section 1412(b)(4)(E). Therefore, eliminating orthophosphate as an option because of concerns unrelated to compliance with national primary drinking water regulations may prevent a system from installing the treatment technique that reduces to the extent feasible the risks of adverse health effects from lead in drinking water. In designing the CCT studies, water systems should evaluate the orthophosphate treatment options in the coupon screening and/or pipe loop/rig studies. EPA has examined the potential costs of additional phosphorus usage on wastewater treatment systems and has included this in the Economic Analysis for the final rule. Many commenters objected to the required evaluations of orthophosphate addition at 1 mg/L and 3 mg/L. Some commenters characterized these as high orthophosphate doses. EPA disagrees that these orthophosphate doses are too high to be considered in the corrosion control study. The commenters may have assumed that the dose was measured as P which would be three times greater than the dose measured as PO_4. EPA is clarifying that the orthophosphate doses to be studied are measured as PO_4. The high-end dose in the corrosion control study of 3 mg/L as PO_4 is at the low end of the typical range used in the United Kingdom where 95 percent of public water supplies are dosed with orthophosphate (Hayes and Hydes, 2010). EPA also notes that the 2018 edition of Recommended Standards for Water Works published by the Great Lakes—Upper Mississippi Board of State and Provincial Public Health and Environmental Managers includes a requirement that total phosphate not exceed 10 mg/L as phosphate sequestering iron and manganese, which are aesthetic concerns and not a health concern. There are also standards in the document for orthophosphate and blended phosphates for corrosion control noting that the system shall have a chemical feed system capable of maintaining an orthophosphate residual of at least 1.0 mg/L as P (3.0 mg/L as PO_4) throughout the distribution system. The member states for this document are Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, and Wisconsin (Great Lakes, 2018).

Some commenters supported the elimination of calcium carbonate stabilization as a corrosion control treatment alternative because they agreed with EPA's rationale that it is not an effective CCT option, but others did not, stating that it worked in some specific circumstances. EPA does not agree that calcium carbonate stabilization should remain as a CCT option. Based upon the available peer reviewed science, EPA has determined that calcium carbonate stabilization treatment does not form a consistent scale on lead and copper pipes to a level that makes it effective as a CCT option (AwwaRF and DVGW-Technologiezentrum Wasser, 1996; Schock and Lytle, 2011; Hill and Cantor, 2011). Therefore, EPA has determined it is not appropriate to require water systems to evaluate it as an option as part of a corrosion control study. Some commenters noted that some water systems have already been deemed optimized using this technique. EPA notes that states will still have the authority to designate the necessary water quality parameters to allow these systems to maintain this treatment as optimal corrosion control unless the system exceeds the lead trigger level or action level.

3. Final Rule Requirements

EPA has included a provision in the final LCRR to identify ''bins'' of systems for specific corrosion control treatment optimization requirements. The first bin is to provide flexibility regarding corrosion control studies for systems that are reoptimizing existing corrosion control treatment following a trigger level exceedance. In the final rule, states are allowed to approve existing

corrosion control treatment modifications without a corrosion control study for systems with lead levels between the trigger level and the action level. To clarify the systems that are not eligible for this flexibility, EPA added a definition of ''systems without corrosion control treatment'' that includes a public water system that does not have, or purchases all of its water from a system that does not have: (1) An optimal corrosion control treatment approved by the State; or (2) any pH adjustment, alkalinity adjustment, and or corrosion inhibitor addition resulting from other water quality adjustments as part of its treatment train infrastructure. Another bin created in the final rule identifies the subset of systems that must do a harvested pipe loop study. This bin includes large and medium systems with LSLs that exceed the lead action levels and any small system with LSLs that selected corrosion control treatment option. For the systems in this bin, Step 1 of the optimization or re-optimization process is the construction and operation of the flow-through pipe loops after the action level exceedance, which must be completed within one year of the exceedance. EPA retained the requirement that coupon studies can only be used as a screening tool for these systems. The final rule includes requirements to allow coupon studies to be the basis for a treatment recommendation tool for other systems that do not have a lead action level exceedance and LSLs.

In the final rule, EPA has also clarified that the orthophosphate doses and benchmarks are orthophosphate measured as PO_4. EPA removed calcium carbonate stabilization as a corrosion control treatment alternative in the final rule.

C. Lead Service Line Inventory

1. Proposed Revisions

EPA proposed to improve the available information regarding LSL numbers and locations by requiring an inventory of service line materials to be prepared by CWSs and NTNCWSs. EPA proposed to require these systems to submit an initial inventory within three years of publication of the rule, and for the water systems to update the inventory annually as they gather more information through the course of their normal activities. EPA proposed requiring the inventory to identify not only LSLs but also galvanized service lines that are or were downstream of an LSL, service lines whose material composition is unknown, and service lines known not to be LSLs. The proposed rule required each LSL to be associated with a locational identifier. EPA proposed that the inventory be made publicly available and proposed that water systems serving greater than 100,000 people would be required to make their inventory available electronically.

2. Public Comment and EPA's Response

Several commenters supported requiring systems to make the LSL inventory publicly accessible because transparency is a critical step for building trust, informing and educating consumers about the sources of lead in drinking water, and reducing risk. Some commenters did not support a requirement to make the inventory publicly accessible, raising concerns that it could infringe on customer privacy and add to confusion, panic, and distrust of the water system, especially if the inventory identifies a high number of LSLs or service lines where the lead status is unknown. Commenters also raised concerns that the requirement could result in unintended impacts to economic development for a community and property values for individual locations with LSLs or lead status unknown service lines. Some commenters raised concerns with the requirement because there are alternatives to allowing open access to the general public (*e.g.,* the requirement for the PWS to provide annual disclosure to customers with LSLs; a requirement to release the information after account verification; or other non-binding measures such as pre-purchase residential inspections).

Many commenters supported the inclusion of specific street addresses in the inventory, citing the increased transparency and the potential to drive proactive LSLR. Some commenters noted that an inventory without addresses would be of limited utility to consumers, given that LSLs impact the individual locations where they are found. Some commenters did not support a requirement to include addresses in the inventory, citing local or state privacy laws that they claim would prohibit the publication of address-level information in their inventory.

EPA agrees with commenters who support a requirement for water systems to make the inventory publicly accessible. Informed customers are better able to take actions to limit exposure to lead in drinking water and make decisions regarding replacement of their portion of a LSL, and to better understand the prevalence of lead sources in drinking water. A Federal requirement for a publicly accessible inventory that uses specific addresses is not necessary, and could complicate implementation of the inventory requirements for those systems that may have concerns about potential conflicts with state or local privacy laws or constitutional protections; therefore, the final rule only requires systems to provide a general location identifier in the publicly accessible inventory. An address is not the only means by which water systems can convey the location of LSLs, other location identifiers could be used such as blocks, streets, landmarks, or other geographic markers that are associated with an individual service line. An inventory that is publicly available with location information provides communities with updated information regarding the total number of LSLs, galvanized requiring replacement lines, lead status unknown lines, and non-LSLs, as well as the general areas where LSLs and galvanized requiring replacement service lines are located. Making this information publicly available also allows the community to track LSLR and material composition verification progress over time. In addition, prospective homebuyers could use the publicly accessible inventory to determine whether and how to work with the homeowner, real estate agent, or home inspector to identify a service line's material composition. For publicly available inventories that do not include addresses as location identifiers, consumers will be individually notified of their service line material classification under 40 CFR 141.85(e), after the water system conducts its initial inventory and annually thereafter. Finally, even though EPA has determined not to establish a Federal requirement to provide specific addresses in the inventory, this does not preclude water systems from doing so. Nor are states precluded by the SDWA from requiring water systems to do so.

EPA received a comment suggesting the final rule strengthen inventory public accessibility requirements, making the inventory available online and extending this requirement to systems serving less than the proposed benchmark of 100,000 people. Requiring more inventories to be available online, commenters said, would allow consumers to more easily access the inventories. EPA agrees with these commenters and is requiring online publishing in the final rule for water systems serving over 50,000 persons, given that websites, social media platforms, and cloud-based file sharing applications are widely available and

can host information for free or low-cost.

EPA received comments on other aspects of the inventory requirements such as the feasibility of creating initial inventories within three years after publication of the final rule. Some commenters believed an inventory could be created within three years, while others claimed that such an effort is not feasible. Some commenters noted the absence of a deadline to verify all service line materials, as is required in Michigan's LCR, and suggested that the final rule include a deadline. Some commenters needed clarification regarding methods for identifying LSLs.

The Agency determined it is practicable and feasible for water systems to prepare the initial inventory by the rule compliance date, as the rule does not require a deadline to verify each service line's composition, allowing unidentified materials to be classified as lead status unknown. It is important that water systems complete the initial LSL inventory within three years of publication of the final rule to facilitate, for example, selection of tap sampling sites under new tiering criteria and to inform consumers about the presence of a known or potential LSL by the compliance date, which is based on Section 1412(b)(10) of the SDWA. The inventory is also critical to determining the number of LSLs to be applied to the LSLR rate under a lead trigger level exceedance and action level exceedance.

EPA disagrees that an end date by which all LSLs and lead status unknown service lines must be verified is warranted or appropriate. The LCR is a national rule which applies to over 60,000 water systems with very different circumstances, including but not limited to the number of service connections, system size, the proportion of LSLs to total service lines, the age of the system, and the accessibility or existence of service line materials records. Water systems with limited or nonexistent records will be more reliant on physical inspection of service line materials, which will require more time and resources than systems with robust records. Additionally, some service line material investigations may require access to private property, but the customer may deny access or not respond to water system outreach, which could challenge a water system's ability to comply with a verification deadline. Some records used for the initial inventory may be outdated or inaccurate, requiring the inventory to be updated over time as new information becomes available. For other systems (such as those with very few lead status unknown service lines), a Federal deadline may discourage or unnecessarily prolong the water system's inventorying efforts. Therefore, EPA determined it is impractical to impose a single deadline for completing an accurate inventory; it is more appropriately treated as an ongoing effort that systems must engage in, while clearly communicating to the public and the state the progress towards completion. The final rule facilitates timely development and verification of the inventory by requiring service line materials to be tracked as they are encountered and through incentives to verify unknowns. By requiring water systems to issue annual notification to consumers served by unknowns, to include unknowns in the replacement rate if the water system exceeds the lead trigger or action level, and to implement risk mitigation measures after disturbance of an unknown, EPA has created incentives for water systems to reduce the number of unknown service lines in their inventory. EPA also requires that water systems include in their LSLR plan a strategy for verifying the material composition of lead status unknown service lines. An inventory verification strategy can improve efficiency by allowing the water system to integrate material composition investigations into its existing standard operating procedures for other activities. For example, if water system personnel are already deployed on a street for a main replacement, they may visually inspect system-owned lead status unknown service lines on that street or engage with affected customers to determine the material composition of the service line entering the home. Water systems may also create a strategy that involves proactive investigation of service line material compositions which is independent of other water system activities, such as the use of predictive models to evaluate the probability a service line is lead and other methods provided or required by the state. Such predictive models could also inform water systems in how they can approach LSLR in a more efficient manner. EPA encourages but does not require this practice as it allows consumers with lead status unknown service lines to be informed sooner about their service line material.

EPA requested comment on the scope of the inventory, including whether it should be required to include customer-owned service lines, galvanized service lines, and lead status unknown service lines. Some commenters believed that the water system should only be responsible for inventorying the service lines under its control, which would exclude all customer-owned service lines. Some commenters suggested that lead status unknown service lines should not be included because inventories with large numbers of unknowns could cause public alarm. Other commenters did not object to inclusion of unknowns but sought for water systems to have the ability to make a judgment about the probability of an unknown being an LSL (for example, a new classification such as ''Unknown but likely non-lead''). Some commenters suggested lead connectors be inventoried.

EPA disagrees with comments suggesting that the inventory requirement in the rule should only apply to service lines if they are owned by the system. Customer owned service lines are connected to either a system-owned service line or main and therefore, they are accessible to the system and historically, the LCR has not been limited to system-owned portions of the distribution system. The LCR has required systems to take actions with respect to portions of the distribution system that are not owned by the water system, including actions related to the materials evaluation and the determination of the number of LSLs in the distribution system for calculating the number of service lines required to be replaced. For example, the LCR has required that ''[t]he system shall identify the initial number of LSLs in its distribution system, including an identification of the portion(s) owned by the system. . . .'' Similarly, the previous LCR has provided that ''where the system does not own the entire LSL, the system shall notify the owner of the line that the system will replace the portion of the line that it owns and shall offer to replace the owner's portion of the line.'' Moreover, where service line ownership is divided between the system and the customer, water system actions can release lead from customer-owned pipes and cause subsequent customer lead exposure. For example, partial LSLR of the system-owned portion can result in a lead spike on the customer-owned portion from physical disturbance as well as lead release from galvanic corrosion. Regarding inventory development, EPA notes that customer-owned service lines are connected to either a system-owned service line or system-owned water main and are therefore accessible to the system. Accounting for locations of customer-owned LSLs will continue to be an integral part of the rule; without it, water systems would not be able to

coordinate replacement of customer-owned LSLs simultaneously with system-owned LSL, take required risk mitigation actions after replacement of a partial LSLR, or provide notice to persons served by LSLs.

EPA disagrees that lead status unknown service lines should be excluded from the inventory. As EPA explained in the proposal, ''[b]ecause water systems may not have complete records to enable them to identify the material for every service line'' the proposed rule would require water systems to identify those lines as unknown, and then update the inventory on an annual basis to reflect more precise information about those lines. (84 FR 61695). EPA determined that such an approach strikes an appropriate balance between a voluntary and mandatory requirement to conduct an accurate and complete inventory of the service line materials in the distribution system. It provides significant flexibility that would not be available if the rule required an accurate and complete inventory by a fixed date; on the other hand, by structuring the replacement requirements so as to incentivize systems to verify the materials of unknown service lines, completion of an accurate inventory is more than an aspirational goal. Including unknown service lines in the inventory will demonstrate transparency, build trust, and present an opportunity for customer engagement, all of which should mitigate commenter concerns about potential customer alarm about the presence of lead status unknown service lines. Exclusion of lead status unknown service lines from the inventory would likely cause significantly more confusion and alarm to the consumers at locations that are excluded from the inventory entirely. Some commenters asked that multiple classifications be introduced for unknowns, for example ''unknown but likely non-lead'' or ''unknown—not lead,'' where records do not exist, but the water system believes the service line is likely not an LSL. A requirement to distinguish the categories of unknown service lines is not necessary for the portions of the rule that use the inventory, and therefore, EPA concluded it would not be appropriate to require in the final rule. Water systems may elect to provide more information in the inventory regarding their unknown lines as long as it clearly distinguishes service lines classified as ''Lead status unknown'' from those whose material has been verified through records or inspection. The distinction between unknown and verified service lines is critical to implementation of the LSLR requirements and will also help to avoid confusion. EPA adjusted the terminology for unknowns from ''service line of unknown material'' in the proposal to ''lead status unknown service line'' in the final rule. This change clarifies that water systems may classify a service line as ''non-lead'' rather than ''service line of unknown material'' where it knows that the service line is not an LSL but does not know the precise material, such as copper or plastic.

EPA disagrees that the final rule should require lead connectors to be included in the inventory. In many cases, records on lead connectors are often extremely limited or may not exist at all. Unlike an inventory of service lines, whose material can be visually inspected often without excavation from inside the home or in the meter box, a complete and accurate inventory of connectors would require excavation that disturbs road pavement and repaving post-inspection—an undertaking that EPA expects would not be feasible or practical for most systems. Instead, EPA addresses the presence of lead connectors by requiring that water systems replace system-owned lead connectors whenever they are encountered during water system activities, such as emergency repairs or planned infrastructure work, and to offer to replace a customer-owned connector at no cost to the system. EPA encourages water systems to voluntarily include information about lead connectors in the inventory where such records exist.

Commenters suggested that annual submission of the inventory to the state would create burden for the water system to submit its inventory and for the state to review it. EPA agrees that for some water systems, annual inventory updates may not be necessary. For example, water systems below the lead trigger level are not required to execute a system-wide LSLR program, meaning they will have fewer inventory changes to report. EPA agrees that linking inventory update frequency with the tap sampling monitoring period would be efficient for water systems and states because tap sampling must be conducted at LSL sites. Changes in the inventory and any resulting changes to the tap sampling plan made to ensure samples are collected at LSL sites can be reviewed by states concurrently. EPA also agrees that for water systems on 6-month monitoring, annual inventory updates are more appropriate given that LSLR rates apply annually.

3. Final Rule Requirements

The final rule requires all water systems to create a publicly accessible LSL inventory. The initial inventory must be available within three years and updated over time to reflect changes, such as verification of lead status unknown service line material compositions or LSLs that have been replaced. All water systems must create an inventory, regardless of size or other water system characteristics, and the inventory must include all service lines in the distribution system, without exclusions. Water systems with only non-LSLs are required to conduct an initial inventory, but they are not required to provide inventory updates to the state or the public and they may fulfill the requirement to make the inventory publicly accessible with a statement that there are no LSLs, along with a general description of the methods used to make that determination. For example, water systems where the entire distribution system (including customer-owned portions of the service line) was constructed after a state or Federal lead ban may designate applicable service lines as ''Non-lead.'' There is no deadline to investigate the material composition of all lead status unknown service lines. Water systems must create a strategy in their LSLR plan for investigating lead status unknown service lines in their inventory. This strategy, coupled with the incentive to investigate unknowns to ease future LSLR burden, will encourage water systems to verify all unknown service line materials in a timely manner. Other rule provisions ensure that customers served by lead status unknown service lines receive protections while inventory development is in progress, such as the requirement to receive targeted information that their service line material is unknown but may be an LSL.

While EPA retained the proposed inventory classifications, the final rule modifies some terminology. To avoid potential customer confusion, galvanized service lines that are or were downstream of an LSL are no longer required to be classified as an LSL. Instead, they must be labeled ''Galvanized requiring replacement'' which allows their correct material composition to be listed while maintaining they are not to be classified as ''Non-lead'' because they must be replaced as part of the system's LSLR program. As previously described, the proposed ''Service lines of unknown material'' are referred to as ''Lead status unknown service lines'' in the final rule.

The classification of ''non-lead'' means that, as in the proposed rule, the water system does not need to identify the exact material of a service line, such as plastic or copper, if it is not an LSL or galvanized requiring replacement service line.

The final rule does not include a requirement to investigate or inventory lead connectors for the reasons discussed above. EPA recommends reviewing records on connector material composition during the records search for the initial inventory. EPA also recommends but is not requiring that water systems inventory connector materials where records exist to provide additional information to consumers about additional lead sources that could contribute to lead in drinking water serving the residence.

The final rule incorporates commenter suggestions to link the inventory update submission frequency with the system's compliance monitoring period or annually, whichever is greater. Because tap sampling must be conducted at LSL sites, changes in the inventory and any resulting changes to the tap sampling plan, to ensure samples are collected at LSL sites, can be reviewed by states concurrently. Water systems on triennial monitoring will be required to provide LSL inventory updates every three years. Water systems that exceed the lead trigger level must conduct tap sampling annually, and therefore, these systems must provide LSL inventory updates annually. Water systems that exceed the lead action level will conduct tap sampling every six months; however, they are required to update the inventory annually.

The final rule requires the LSL inventory to be publicly accessible. The threshold required for water systems to publish their inventory online was reduced to 50,000 persons from the threshold of 100,000 as proposed. Internet platforms, such as websites, cloud-based file sharing applications, and social media, are widely available and can host information for free or low-cost.

These provisions will strengthen the public accessibility to information in the inventory. EPA also added a requirement for the Consumer Confidence Report to include a statement that a service line inventory has been prepared and is available for review either online or at the water system offices.

The final rule requires the publicly accessible inventory to provide a location identifier for lead service lines. The location identifier could be a general location such as a street, block, intersection, or landmark, or other geographic marker associated with the service line. An inventory created and maintained internally by water systems to track service line materials may use the specific address of each service line in order for the water system to provide the required notification under § 141.85(e), but the final rule does not require that the system make the exact street addresses publicly available. Instead, the final rule gives the water system flexibility to determine which location identifier best meets the needs of its own community.

D. Lead Service Line Replacement

1. Proposed Revisions

EPA proposed to accelerate lead service line replacement (LSLR) by proposing LSLR requirements target systems with higher lead levels and that address weaknesses in the current rule to achieve full LSLR in the communities where they are needed most. EPA proposed to require all water systems to replace the system-owned portion of an LSL after they were notified of a customer-initiated replacement of their portion. EPA proposed that water systems above the lead trigger level but at or below the lead action level would be required to implement a ''goal-based'' LSLR program at a rate approved by the state primacy agency. Water systems that exceeded the lead action level would be required to conduct mandatory, full LSLR at a minimum rate of three percent annually. While the proposal did not include a prohibition on partial replacements, it did not incentivize them and included required notification and risk mitigation actions. The proposal promoted full LSLR by allowing only full replacements to count towards the LSLR rate. Partial LSLR and ''test-outs'' would no longer count as a replacement as they do in the current LCR. EPA proposed a provision for water systems to create an LSLR plan by the rule compliance date, which would ensure operating procedures are in place that would ready the water system to perform the technical, financial, and other aspects of LSLR.

EPA proposed that galvanized service lines that are currently or were formerly downstream of an LSL be replaced as part of a water system's LSLR program. These galvanized lines would be included when calculating the annual number of replacements applicable under goal-based or mandatory LSLR. Lead status unknown service lines (called ''service lines of unknown material'' in the proposal) were also proposed to be included in the LSLR rate calculation until the system determines that it is non-lead.

EPA proposed requirements to address elevated lead levels that can result from disturbance of an LSL, such as after a meter replacement or lead connector replacement. EPA proposed risk mitigation steps required after an LSL disturbance, including flushing and delivery of a pitcher filter. EPA also proposed to require systems to replace the lead connectors (including goosenecks, pigtails that have been used to connect service lines to water mains) whenever encountered by the water system in the course of conducting maintenance or replacement of the water mains or adjacent infrastructure.

2. Public Comment and EPA's Response

EPA requested comment on the proposed requirements for water systems to create a LSLR plan. Specifically, EPA asked whether small water systems should be exempt from the requirement to prepare a LSLR plan concurrent with their inventory. Some commenters expressed that small water systems should not be required to create a LSLR plan, claiming that the requirement is too burdensome and potentially unnecessary, given that a small system may not choose LSLR as its compliance option following a lead action level exceedance. EPA agrees that small water systems should not have to recommend a goal LSLR rate within the LSLR plan because small systems would not conduct goal-based LSLR program under the small system compliance path. EPA disagrees, however, that small systems should be exempt from preparing a LSLR plan, as its other components are still relevant to small systems. For example, given that small systems must respond to customer-initiated LSLR, the requirement to develop procedures to conduct LSLR in their plan still applies. Additionally, given that small water systems may still replace LSLs at any time (*i.e.,* after planned infrastructure work or an emergency repair), they must develop a strategy to inform customers before a full or partial LSLR. Furthermore, flushing procedures in the LSLR plan apply after an LSL is disturbed or replaced, which could apply, for example, to small systems replacing water mains or water meters. While there is some upfront burden associated with creating an LSLR plan, the plan could significantly reduce future burden for water systems and will reduce the response time if LSLR is needed. Plan components like the strategy to investigate the material of lead status unknown service lines, identify potential LSLR funding and have

procedures established for LSLR have the potential to significantly reduce the investigation burden that small systems choosing a LSLR compliance path would face after exceeding the action level and will ensure faster implementation. Investigating unknowns will also benefit public health by providing consumers with information about their service line material.

EPA also requested comment on how water systems could identify and prioritize LSLR. Many commenters supported the concept and provided several examples of how LSLR could be prioritized. Commenter recommendations include prioritizing LSLR where large numbers of LSLs are present, tap sampling data indicates high lead levels, construction work is already scheduled, susceptible populations are served (such as child care facilities), areas with older infrastructure, or where disadvantaged populations are located. EPA agrees that water systems should include a prioritization strategy in the LSLR plan, as these and other factors could inform systems' LSLR efforts. Water systems could give specific consideration to, for example, prioritizing locations where susceptible populations are concentrated (such as child care facilities) and where disadvantaged populations live because these populations may be more susceptible to the impacts of lead exposure, or may be more likely to live in environments with other lead exposure sources. Data from the 2005 American Housing Survey suggest that non-Hispanic black individuals are more than twice as likely as non-Hispanic whites to live in moderately or severely substandard housing (Leech et al., 2016). Substandard housing is more likely to present risks from deteriorating lead-based paint (White et al., 2016). Additionally, minority and low-income children are more likely to live in proximity to lead-emitting industries and to live in urban areas, which are more likely to have contaminated soils (Leech et al., 2016). In addition, a water system could identify in its LSLR plan the factors that will guide the prioritization of the LSLRs and how the system will facilitate full LSLR where the customer is unable to pay for replacement of the customer-owned portion of the service line.

EPA requested comment on the proposed requirement that water systems complete the replacement of the water system-owned portion of the LSL within 45 days of a customer-initiated replacement. Many commenters supported this requirement but suggested that water systems should be allowed more time to complete the replacement. Several cities in northern states, commenters noted, have construction moratoriums during winter months. EPA agrees that it may not be possible for water systems to obtain permits and complete LSLR within 45 days, therefore the final rule includes a provision to allow up to 180 days after notification to the state. EPA recommends water systems to establish a process for customer-initiated LSLRs that would allow for up front coordination on timing and would avoid the need for a reactionary replacement, where possible.

EPA sought comment on how the number of replacements under a goal-based or mandatory LSLR program should be calculated. Some commenters pointed out that customer-owned LSLs are outside of the water system's control and they should not be included in the water system's LSLR rate calculation. EPA disagrees that customer-owned LSLR should be excluded from the LSLR program requirements. Under the currently applicable LCR, customer owned service lines are included in the LSLR calculations. Customer-owned service lines must be accounted for in determining the number of initial service lines in section 141.84(b)(1) The initial number of LSLs is the number of LSLs in place at the time the replacement program begins. The system shall identify the initial number of LSLs in its distribution system, including an identification of the portion(s) owned by the system. Excluding customer owned LSLs would continue to promote partial LSLR, which have not been shown to reliably reduce drinking water lead levels in the short-term, ranging from days to months, and potentially even longer. Partial replacements are often associated with elevated drinking water lead levels in the short-term (USEPA, 2011b). EPA notes that while customer-owned lines are not under the direct control of the water systems, there are many actions the water system can take to influence the customers behavior including educating the customer and providing financial assistance, such as loans or grants, to the customer (water systems are not required to bear the cost to replace the customer-owned portion). Moreover, the ''ownership'' status of LSLs is not necessarily static (*e.g.,* it may change as a result of state law or regulations governing public utilities).

EPA specifically requested comment on including galvanized service lines in goal-based and mandatory LSLR rates under the proposed LCR revisions. Some commenters agreed that galvanized lines should be replaced under LSLR programs, noting that science demonstrates that galvanized service lines that are or ever were downstream from an LSL can adsorb lead and contribute to lead in drinking water. Some commenters sought clarification regarding the burden of proof required to determine if a galvanized service line ''ever was'' downstream of an LSL. A few commenters recommended that the final rule take an approach that either requires replacement of all or no galvanized service lines due to the difficulty and burden often required to determine whether a galvanized line ''ever was'' downstream of an LSL. EPA agrees galvanized lines that are or were downstream of an LSL can contribute to lead in drinking water and should be replaced under a system's LSLR program.

Some commenters believed that lead status unknown service lines should not be used in calculating the number of replacements required, while others suggested that water systems should receive replacement credit whenever an unknown is investigated and verified to be non-lead. EPA disagrees that unknowns should be excluded from the LSLR rate calculation. In the final rule, partial LSLR no longer count as a replacement because they do not result in a full LSLR, so allowing unknown verifications to count as a replacement without actually conducting a LSLR would run counter to the final rule's emphasis on full LSLR. Additionally, this policy would not incentivize, and would instead discourage, systems from conducting robust material investigations for their initial inventory or updating their inventory over time, given that improving the inventory would increase their LSLR burden as some unknowns are found to be LSLs. EPA also disagrees that verification of unknowns to be non-lead should count as a replacement. Counting a verification as ''replaced'' could also disincentivize a robust initial inventory in attempts to lower the LSLR burden and allow compliance with LSLR requirements without conducting an LSLR.

EPA requested comment on the goal-based LSLR requirement for systems that exceed the trigger level, asking if a goal-based program provides adequate incentives for water systems to achieve meaningful LSLR, and such a program could be incorporated into existing infrastructure improvement programs. Commenters offered a wide range of views on the new construct. Commenters expressed some support for the proposed requirement, noting it

would increase the number of systems with an LSLR program. Many commenters asked for EPA to be more prescriptive regarding the goal LSLR rate in the final rule. For example, some commenters suggested that EPA should set a Federal goal LSLR rate, while others thought that EPA should set a minimum goal LSLR rate while maintaining the current provision which requires states to set a higher goal rate where feasible. Other commenters suggested that EPA set a maximum goal rate, such as three percent. EPA also requested comment on what criteria must be met for the Agency to establish a Federal goal rate for an individual water system under § 142.19. Some commenters disagreed that EPA should maintain authority to supersede a state-approved goal LSLR rate. EPA disagrees that it should be more prescriptive regarding the goal LSLR rate. The goal-based LSLR program is intended to reflect the specific water system and state's priorities and community characteristics. EPA agrees with commenters that the final rule should not include a provision for the Regional Administrator to establish a goal LSLR rate that would supersede a state decision. States best understand individual water system's characteristics, its technical, financial, and managerial capacity, as well as community demographics. States may also set goal LSLR rates in accordance with statewide replacement policies, such as conducting LSLR in tandem with existing infrastructure work, taking a more active approach to LSLR, or making a determination that a higher replacement rate is feasible.

EPA requested comment on the feasibility of a minimum annual LSLR rate of three percent as a result of a lead action level exceedance. While some commenters thought that a three percent LSLR was too burdensome, others believed the rate was not stringent enough and should be higher. Some noted that the current rule requires seven percent LSLR and claimed that a replacement rate of three percent would be backsliding in violation of the statutory requirement that revisions to existing drinking water standards ''maintain, or provide for greater, protection of the health of persons'' as the existing rule. Some commenters believed that a mandatory LSLR rate should apply at all times and regardless of a water system's lead levels, effectively requiring mandatory, proactive LSLR program at all water systems.

EPA disagrees that a requirement to fully replace three percent of all known and unknown LSLs annually is too slow. Under the previous LCR, many water systems delayed or never initiated LSLR because the rule allows a system to stop LSLR with two bi-annual rounds of tap sampling at or below the action level (AL). A number of scenarios allowed water systems to delay or not begin LSLR. For example, under the previous LCR, water systems without CCT must conduct a study, obtain state approval for the recommended CCT, and obtain state approved optimal WQPs prior to beginning LSLR. Because a CCT study takes longer than one year, many water systems were able to complete two rounds of tap sampling at or below the AL and were not required to complete the CCT study. Further, a water system could delay initiation if the system did not have an accurate LSL inventory and needed time to identify the total number of LSLs in order to determine the number of LSLs required for 7 percent replacement. Meanwhile, that water system could complete two rounds of tap sampling at or below the AL resulting in an end of the LSLR program having replaced few or no LSLs. As a result, very few water systems have conducted LSLR programs under the previous rule. The LCRR no longer allows these delays; systems that exceed the trigger level (TL) must conduct a CCT study so they are prepared to quickly install CCT if there is a subsequent ALE. Also, water systems must prepare an LSL inventory prior to the compliance effective date and systems must conduct four rounds (two years) of bi-annual tap sampling at or below the AL before LSLR may stop. Requiring only full LSLR to count as a replacement will require more time and resources per replacement than partial LSLR, which was allowed in the previous rule because water systems will likely require customer consent to replace their portion of an LSL at customer cost and may need access to the customer's property. EPA notes that as in the previous LCR, states must require systems to replace LSLs on a shorter schedule, *i.e.,* a higher annual percentage than required under the Federal rule, where the state determines a shorter schedule is feasible.

EPA disagrees that reducing the LSLR rate to three percent is backsliding relative to the current LCR. The current LCR does not require full replacement of LSLs and the required seven percent replacement rate is rarely occurring since there are provisions in the current rule that allow for avoidance of LSLR. EPA has determined that the revisions to the LCR, as a whole, maintain or provide for greater public health protection. Because a treatment technique rule is not centered on a single compliance level, but rather on an integrated set of actions designed to reduce the level of exposure to a contaminant, the backsliding analysis for a treatment technique rule should be based on an assessment of public health protection as a result of implementation of the rule as a whole, rather than a comparison of numerical benchmarks within the treatment technique rule. Even when the lead service line removal rates are compared directly, this rule results in a greater rate of removal. Based on data presented in Tables 6–7 and 6–8 of this preamble, improvements in the final rule will result in a 5 to 73 fold increase in full LSLR investments by closing loopholes, improving sampling and monitoring requirements, compelling early action, and strengthening replacement requirements. LSL replacement programs are required to be initiated at systems that exceed the lead trigger level of 10 μg/L versus 15 μg/L in the previous LCR. The requirement for a LSLR plan for all systems will avoid delays in initiating LSLR that have hampered progress under the current rule. Furthermore, the more stringent sampling requirements in the final rule will better identify elevated lead levels associated with LSLs, which will result in more systems that exceed the trigger and action levels and are thus required to replace LSLs. The current rule allows systems to count the line as replaced towards their seven percent removal if a sample taken from an individual line is below 15 μg/L—called ''testing out''—even when no replacement has occurred. The final rule eliminates the ability of water systems to ''test out'' lines from replacement. In addition, while the current rule requires a minimum of one year of mandatory LSLR, the final rule requires water systems to demonstrate lead levels below the 15 μg/L action level for two years before ceasing mandatory LSLR. EPA also notes that the final rule's three percent LSLR rate includes a greater pool of service lines covered by the replacement requirements than the current rule, including not only LSLs, but also lead status unknown service lines and galvanized requiring replacement service lines. Including these known and potential lead sources is expected to result in more service lines requiring replacement under this construct at three percent than under the seven percent required in the previous LCR. Furthermore, the final rule includes provisions requiring water systems to replace lead connectors when encountered and complete

customer-initiated LSLR regardless of their 90th percentile lead levels, rather than requiring those actions only for systems that exceed the action level. This is bolstered by requirements for systems to make their LSL inventory publicly available and notify occupants of homes with LSL every year about their LSL, drinking water exposure risks, and mitigation options, including removal. In addition, only full LSLs will count towards the mandated replacement rate; partial LSLR may still be conducted in certain limited situations, but they will not count in calculating the number of lead lines that have been replaced, in contrast to the current LCR. Therefore, this element of the rule, taken by itself, meets the statutory standard for this rule that it maintains or provides for greater health protection. Lastly, LSLR is just one component of the revised rule. Other strengthened provisions in the rule such as corrosion control treatment, find-and-fix, and public education, will mitigate lead exposure to a greater extent relative to the current rule, and thus the rule as a whole provides more protection than the current rule.

Some commenters suggested use of a rolling average replacement rate across several years to provide more flexibility to the water system than a static annual rate. Commenters noted that in the first year of mandatory LSLR, water systems may receive a high number of requests from customers to have their LSL replaced, while the pool of willing customers may decline in later years. Commenters believed that water systems should respond to as many customer requests as they can, even if it exceeds their mandatory LSLR rate, in order to remove lead sources sooner. Water systems should not be incentivized, commenters said, to replace the minimum number of LSLs in the first year to ensure a sufficient number of willing participants to meet the mandatory LSLR rate in later years. The Agency agrees that a rolling average construct is appropriate for the final rule. As commenters mentioned, a water system may receive heightened customer interest in LSLR immediately following a lead AL exceedance. Replacing more than 3% LSLs in the first year of an LSLR program under a rolling average rate will result in earlier reductions in drinking water lead exposure for those households served by systems that are able to obtain resources for a short term expedited replacement program. This would remove a potential unintended incentive under a fixed rate of 3% to replace the minimum number of LSLs in the first year to ensure there is sufficient customer participation to achieve 3% in the second year. For example, under a rolling average, a system that is able to expedite LSLRs in the first year following an ALE to replace 4% but in the second year is only able to replace 2% will achieve a 3% two year rolling average. EPA notes that while the final rule requires states to set the mandatory LSLR rate higher than 3% where feasible, the short-term ability of a water system to replace more than 3% immediately following a lead AL exceedance when customer interest is highest is not necessarily indicative of long-term feasibility. EPA also notes that a rolling average approach could provide flexibility to water systems that experience delays in initiating LSLR programs. While not mentioned by commenters, some systems may not immediately have access to LSLR financing following a lead AL exceedance, and therefore would face increased challenges to meet the mandatory 3% LSLR in the first year. These challenges could be compounded where the water system experiences delays securing financing and then faces, as commenters noted in the context of customer-initiated replacement, construction moratoriums in the winter months. The rolling average approach could alleviate these challenges. For example, a system that is only able to replace 2% in the first year due to delays may be able to expedite the LSLR program to replace 4% in the second year and achieve a 3% rolling two year average. EPA acknowledges that some households would experience delays in reductions to drinking water lead exposure under this example in comparison to a fixed annual rate. EPA recommends that water systems begin LSLR as quickly as possible following an ALE to assure that the system achieves the required 3% rolling annual average by the end of the second year following the ALE. EPA notes that by having the LSLR plan prepared in advance as required by the rule, systems should be positioned to avoid delays and have timely implementation of their LSLR program. EPA recognizes that potential funding or scheduling delays that may impede a water system's ability to achieve the LSLR rate or circumstances such as higher than average customer interest that may expedite a water system's ability to achieve the LSLR rate may occur throughout implementation of the LSLR program. Therefore, EPA has constructed the rolling average approach for the duration of the LSLR. For example, a water system that continually exceeds the lead AL may expend its initial funding source and need to seek new funding to continue LSLR. The rolling average approach is not intended to address delays caused by customer refusals, as the final rule includes a mechanism for a water system to cease LSLR after it shows no unknowns in its inventory and has received replacement refusals from all customers served by an LSL or galvanized requiring replacement service line.

EPA sought comment on proposed risk mitigation procedures following LSLR or a LSL disturbance, such as the appropriateness of pitcher filters. The proposed rule categorized disturbances into two types: Minor disturbances that require consumer notification and flushing, and more significant disturbances requiring consumer notification, flushing, and pitcher filters. Some commenters claimed that high velocity flushing is appropriate for all disturbances and that filters should not be required as a result of any disturbance. EPA agrees that flushing can be effective at reducing lead in drinking water but disagrees that it is adequate in response to all disturbances. Use of pitcher filters or POU devices over a period of months can help reduce lead exposure from more significant disturbances that may cause sustained elevated lead concentrations over weeks or months. EPA has determined that pitcher filters provide the most viable and efficient option for both water systems and consumers. EPA agrees that POU devices are also effective for risk mitigation and acknowledges that some water systems may prefer POU devices to pitcher filters. It is important to note that systems that elect to distribute POU for risk mitigation after an LSLR are not required to maintain and/or own the devices since they would be used only for short-term mitigation and not for compliance purposes. Small water systems that select POU devices as their compliance alternative must maintain and test devices to be in compliance with the LCRR. EPA also received comments suggesting that notification and risk mitigation be provided after a customer's water is turned back on. A commenter noted that some work may require a customer's water to be turned on and off multiple times. EPA agrees with the commenter that providing notification and risk mitigation before the consumer uses the water is of primary importance and has revised the requirement for notification and risk communication to be provided prior to the water system returning the affected service line to service.

EPA received many comments calling for the final rule to ban partial LSLR

under all circumstances. Commenters noted that partial replacements are not effective at reducing lead in drinking water and may cause a temporary lead spike. Many other comments supported the proposal's allowance of partial replacements, claiming that in some cases partial replacements are unavoidable, such as during emergency repairs. EPA agrees that it is not feasible to ban partial LSLR in all situations. Although partial LSLR can cause lead levels to be temporarily elevated, the practice may sometimes be unavoidable, such as resulting from an emergency repair. In another scenario, other water system activities may result in a significant LSL disturbance and the water system may find it appropriate to remove the portion it owns, while the customer does not agree to replace his or her portion. Because of circumstances such as those, it is appropriate for the rule to not prohibit all partial LSLR. The final rule discourages the practice of partial LSLR by excluding it from counting towards goal and mandatory LSLR rates, while also ensuring risk mitigation steps are taken when partials are conducted. One commenter noted that their state prohibits partial LSLR and considers lead connectors to be part of the LSL. The commenter sought clarification in the final rule as to how systems would comply with their partial LSLR ban as well as the proposed requirement to replace lead connectors as they are encountered. EPA agrees with this commenter and has provided clarification in the final rule to allow an exemption from the requirement to replace lead connectors as they are encountered if state law bans partial LSLR, includes lead connectors in the LSL definition, and requires systems to remove all LSLs irrespective of a system's 90th percentile lead level. This new provision will facilitate compliance with both state and Federal law while ensuring that consistent progress towards the replacement of lead connectors will occur over time.

Some commenters requested that EPA allow verbal refusals or documented attempts to reach a non-responsive customer rather than limiting refusals to customer signatures turning down LSLR as was proposed. EPA agrees with commenters, noting that there may be times where, despite a good faith effort to engage the customer, the water system is unable to reach the customer to obtain a consent or refusal for LSLR. EPA agrees that compliance should be based on the effort to reach the customer to obtain a refusal, and that the water system should not be penalized as a result of customer actions.

3. Final Rule Requirements

All water systems with LSLs or lead status unknown service lines in their initial inventory must create and submit an LSLR plan to their state by the rule's compliance date. The LSLR plan must include a description of: (1) A strategy for determining the composition of lead status unknown service lines in its inventory, (2) procedures to conduct full LSLR, (3) a strategy for informing customers before a full or partial LSLR, (4) for systems that serve more than 10,000 persons, a recommended LSLR goal rate in the event of a lead trigger level exceedance, (5) a procedure for customers to flush service lines and premise plumbing of particulate lead, (6) a LSLR prioritization strategy based on factors including but not limited to the targeting of known LSLs, LSLR for disadvantaged consumers and populations most sensitive to the effects of lead, and (7) a funding strategy for conducting LSLRs which considers ways to accommodate customers that are unable to pay to replace the portion they own. Completing a LSLR plan will prepare water systems to take the steps necessary to remove a source of drinking water lead exposure when required. Water systems will be able to initiate removals in a more timely manner and may be able to more cost effectively identify and remove LSLs with careful preparation and planning.

The final rule does not include a requirement for water systems to include pitcher filter tracking and maintenance plan because water systems will likely distribute the filter and all replacement cartridges simultaneously, making it unnecessary to track filters replacement schedules over time. The final rule adds a new LSLR plan component for water systems to include a strategy for accommodating customers who wish to replace the LSL but are unable to pay the cost of replacing the portion of they own. Nothing in this provision obligates the water system to pay for replacement of a customer-owned LSL. EPA notes potential environmental justice concerns associated with full LSLR when the customer is expected to pay the entire cost to replace the customer-owned portion of the LSL. EPA believes that these impacts can be mitigated by water systems developing a financial assistance strategy ahead of time. In recent years, EPA has become aware of water systems around the country that have successfully adopted one or more approaches for facilitating full LSLR (''Strategies for Achieving Full LSLR,'' docket EPA–HQ–OW–2017–0300). As part of their plan, water systems could investigate whether rate revenue can contribute to customer-owned LSLR or identify external LSLR funding, such as Federal or state grants or loans, that could be used to finance a customer's LSLR. EPA maintains a list of some funding sources that can be used for lead in drinking water reduction activities which can be reached at *https://www.epa.gov/ground-water-and-drinking-water/funding-lead-service-line-replacement.* EPA is also requiring that the LSLR plan must include a replacement prioritization strategy, which will inform how a water system will execute their LSLR program.

The final rule requires the replacement of lead goosenecks, pigtails, and connectors any time they are encountered by the water system. Coupling lead connector replacement with other water system activities, such as main replacement or LSLR, will facilitate consistent progress is made toward elimination of this lead source from drinking water infrastructure over time. A new provision was added to allow systems to comply with state regulations which ban partial LSLR and consider lead connectors part of the LSL.

The final rule requires that water systems complete customer-initiated LSLR within 45 days of being notified by the customer, with the possibility of an extension to 180 days after notification to the state. EPA encourages water systems to establish a process for customer-initiated LSLRs that would allow for up front coordination on timing and would avoid the need for a reactionary replacement of the water system portion of the LSL. To mitigate potential lead exposure associated with a partial LSLR until the system completes the full replacement, the water system must provide the consumer with a pitcher filter or POU device with six months of replacement cartridges, to consumers until the replacement is completed. Because of the potential for partial LSLR to contribute higher levels of lead into drinking water, water systems must also provide the customer with a filter within 24 hours of learning of a customer replacement that left a system-owned LSL in place within the past six months. This new requirement will ensure customers are protected from the effects of partial LSLR, regardless of who owns the remaining LSL portion. Water systems that conduct a full LSLR must also provide customer notification and risk mitigation before the service line is returned to service.

EPA has retained the inclusion of galvanized service lines that are or were downstream of an LSL in the calculation

of the LSLR rate. Water systems are required to presume the galvanized service line was downstream of an LSL if unable to demonstrate that the galvanized service line was never downstream of a lead service line. This approach ensures that all galvanized service lines that may contribute lead into drinking water may be counted towards replacement under the water system's LSLR program. In the final rule, lead status unknown service lines must be considered in determining a water system's annual LSLR rate under a goal-based or mandatory LSLR program. This provides an incentive to water systems to verify the material of lead status unknown service lines.

In the final rule, water systems must recommend a goal LSLR rate in their LSLR plan to be implemented after a lead trigger level exceedance. There is no required minimum or maximum for the recommended goal rate but it must be approved by the state. States may set a different LSLR goal rate than the rate recommended by the system. EPA expects that some systems may propose to conduct goal based LSLR in coordination with planned infrastructure work, while other systems may propose more expansive goal based LSLRs to address the most susceptible or disadvantaged populations. EPA believes it is appropriate for the system to propose a goal LSLR rate based upon an understanding of its individual opportunities and challenges in conducting LSLRs and the priorities in the community for improved public health protection. EPA believes that the primacy agency is in the best position to evaluate the system's recommendation and determine a goal rate.

The final rule retains the proposed minimum mandatory full LSLR rate of three percent after a lead action level exceedance (ALE). The final rule also maintains the LCR's existing requirement that water systems conduct LSLR on a shorter schedule (*i.e.,* greater than three percent annually) where the state has determined it is feasible for the system. The final rule incorporates commenters' suggestions to require that the mandatory LSLR rate be determined based upona rolling two year average. A water system that exceeds the action level must replace a rolling two year average of 3% per year (*i.e.,* starting in year 2 following an ALE, a water system's compliance is determined every year based upon whether it replaced at least 6% in the prior two-year period). As stated in § 141.84(a)(7), the number of LSLRs required under the mandatory LSLR program must be calculated using the number of LSLs and galvanized requiring replacement service lines at the time the system first exceeds the action level plus the number of unknowns at the beginning of each years of the system's LSLR program. A water system that has an ALE must conduct the mandatory LSLR program until the water system's 90th percentile lead levels are at or below the action level for 2 years and the cumulative percentage of LSLs replaced by the system is greater than or equal to 3% times the number of years that elapsed between the system's first ALE and the date on which the system's 90th percentile lead levels are at or below the action level for 2 years. A system with 90th percentile lead levels at or below the action level for 2 years that has not yet replaced the required cumulative percentage of lines, may discontinue LSLR only if it achieves replacement of the cumulative percentage of LSLRs before the end of the third year in which its 90th percentile lead levels are at or below the action level. For example, if a system exceeds the action level and replaces 2% in the first year following the ALE, 4% in the second year, and 2% in the third year that system will have met the requirement for a rolling two year 3% average. However if that system's 90th percentile lead levels drop below the action level in the second year and stays below the action level in the third year, that system cannot stop its LSLR program unless it replaces 1% in the fourth year to achieve a cumulative replacement of 9%.Where a water system fails to achieve its mandatory LSLR rate, it may remain in compliance if it has no remaining lead status unknown service lines in its distribution system and it provides documentation of refusals, or non-response, to the water system's efforts to fully replace all LSLs and galvanized requiring replacement service lines. The final rule builds on the proposal by allowing documentation of two good faith attempts to reach the customers that either resulted in a signed or verbal refusal, or non-response. This provision allows a water system to maintain compliance with the rule in the expected limited cases when customers do not cooperate enough with systems to meet the minimum LSLR requirements in the rule. This provision does not allow refusal of an individual customer to count as a replaced LSL.

The final rule mandates risk mitigation best practices after partial replacements or other actions that cause LSL disturbances. These practices include consumer notification, flushing, a free pitcher filter or POU and replacement cartridges delivered to the affected consumer, and an offer to conduct a follow up tap sample between three and six months following the replacement to ensure lead levels have subsided. While the final rule does not include a ban on partial LSLR, provisions in the revised rule requirements will discourage partial LSLR relative to the previous rule; in addition, the revised requirements will reduce consumer exposure to lead in drinking water when partials and other LSL disturbances occur.

E. Compliance Alternatives for a Lead Action Level Exceedance for Small Community Water Systems and Non-Transient, Non-Community Water Systems

1. Proposed Revisions

EPA proposed revisions that provide small Community Water Systems (CWSs), serving 10,000 or fewer persons, and all Non-Transient, Non-Community Water Systems (NTNCWSs) greater flexibility to comply with the requirements of the LCRR. In 1998, EPA designated corrosion control treatment as an affordable compliance technology for all categories of small systems in accordance with SDWA Section 1412(b)(4)(E)(iii) (USEPA, 1998c). EPA has determined that corrosion control treatment is still an affordable technology for the three categories of small systems, however, EPA recognized that small systems tend to have more limited technical, financial, and managerial capacity to implement complex treatment techniques. Small system flexibilities will provide alternatives to chemical treatment, as it is difficult for many small systems to find operators that have the more advanced skills necessary to implement and maintain such treatment.

EPA proposed three compliance alternatives for a lead action level exceedance to allow increased flexibility for small CWSs that serve 10,000 or fewer people and four compliance alternatives for NTNCWSs of any size. The proposed rule would allow water systems to select the most financially and technologically viable strategy that is effective in reducing lead in drinking water. EPA proposed the following compliance alternatives for small CWSs: (1) Full LSLR, (2) installation and maintenance of Optimized Corrosion Control Treatment (OCCT), or (3) installation and maintenance of point-of-use (POU) treatment devices. EPA proposed the above three compliance alternatives for NTNCWSs and an additional compliance alternative of replacement of all lead bearing plumbing materials.

As proposed, the NTNCWS must have control of all plumbing materials and must have no LSLs to select this option.

2. Public Comment and EPA's Response

EPA requested comment on whether small system flexibility is needed by systems serving between 3,301 and 10,000 persons and whether a different threshold is more appropriate. Several commenters recommended the final LCRR revise the threshold for small systems to those serving 3,300 persons or fewer to be consistent with other drinking water rules. Some commenters supported the proposed LCRR small system definition and recommended that the small system flexibility provisions apply to systems serving 10,000 persons or fewer. Other commenters argue that the proposed threshold of 10,000 or fewer persons is too broad and it would apply to over ninety percent of the nation's water suppliers. These commenters stated that most systems serving 3,301 to 10,000 people likely have sufficient resources to comply with the regulatory requirements for larger systems and do not require the flexibility needed by smaller water systems.

EPA agrees that the appropriate threshold to provide flexibility to small CWS is 10,000 or fewer persons served. The Agency agrees that small water systems serving 10,000 or fewer persons typically do not have the capacity to implement multiple measures simultaneously such as corrosion control treatment and LSLR programs. Small CWSs and NTNCWSs tend to have more limited technical, financial, and managerial capacity to implement complex treatment technique rules such as the LCR (USEPA, 2011a). Many small public water systems face challenges in reliably providing safe drinking water to their customers and consistently meeting the requirements of the SDWA and the National Primary Drinking Water Regulations (NPDWRs) (USEPA, 2011a). The cost of providing service places significant pressure on small water systems because they lack resources and economies of scale (USEPA, 2000c). The Agency determined the compliance flexibility options would be most appropriate for small water systems that serve 10,000 or fewer persons, as they are most frequently the systems that are struggling to maintain compliance with the current LCR and/or do not have the capacity to operate corrosion control treatment in conjunction with other complex treatment technique requirements. Small water systems serving 10,000 or fewer persons have more monitoring and reporting (M&R) violations, approximately 90 percent of all M&R violations for all NPDWRs. Recurring M&R violations can obscure more important water quality problems because MCL and maximum disinfectant residual level (MRDL) violations may not be discovered if a system fails to conduct routine monitoring. M&R requirements are often the simplest compliance requirements and systems that cannot complete these procedures may have other technical, financial and managerial issues (USEPA, 2011a). Small system flexibilities will provide alternatives to chemical treatment as it is difficult for many small systems to find operators that have the more advanced skills necessary to implement and maintain such treatment, particularly given the limited financial and programmatic capacity of many small utilities (Kane, 2018). EPA has concluded that these small systems can work with their state to identify an affordable and feasible treatment technique to reduce drinking water lead exposure. EPA expects that small systems will work with their state to identify the single most cost-effective measure from this list of affordable and feasible compliance options. That measure will depend upon the characteristics of the small system including the number of service connections, the number of LSLs and the technical capacity of the system's operators.

Some commenters recommended that a threshold 3,300 or fewer persons should be used in the final rule as it would allow for consistency across NPDWRs. EPA notes that the NPDWR for lead and copper is a unique and complicated treatment technique rule that requires water systems with elevated lead to take a suite of actions to reduce lead levels in drinking water. To improve public health protection, the final rule maintains or modifies regulatory requirements from the previous LCR and includes new requirements that apply to all system sizes, for example, preparing an LSL inventory, collecting all tap samples from homes with LSLs, conducting ''find-and-fix'' assessments, conducting water system side LSLR when customer initiated LSLR occurs and providing filters, providing filters in the event of an LSL disturbance, and conducting public education outreach to customers served by an LSL. Additionally, the final rule establishes a new trigger level that, when exceeded, prompts a set of actions designed to protect public health. Given the complex requirements associated with this treatment technique rule, EPA has determined that it is not feasible for water systems serving 10,000 or fewer persons to implement the full suite of treatment technique requirements for systems that exceed the action under the final LCRR because, in most cases, they lack the technical, financial, and managerial capacity to do so. EPA has concluded that small system flexibilities are appropriate and allow water systems that exceed the action level, with state approval, to take the lead reduction approaches that both maximize public health protection to the extent feasible and are best tailored to their communities.

EPA does not agree with commenters that support the small system flexibilities only for systems serving 3,300 or fewer persons. EPA recognizes that while small systems serving between 3,301 and 10,000 persons may have greater technical, managerial, and financial capacity than smaller systems, they still face limitations in their capacity to implement multiple treatment technique actions. EPA has determined that it is not feasible for most systems serving 10,000 or fewer persons to implement the multiple treatment technique actions of optimized CCT, PE and LSLR due to limitations in financial, managerial and technical capacity. Implementing such a complex NPDWR as the LCRR treatment technique rule requires consequential managerial, operational, and financial resources investment. New rule requirements, such as implementation of an LSLR goal based program when the lead TL is exceeded and mandatory 3% per year rate based on a two year rolling average LSLR when the AL is exceeded, preparing and updating an LSL inventory, collecting 5th liter samples from LSL sites and collecting tap samples from 100% LSL sites, conducting find-and-fix actions, testing in schools and child care facilities and conducting enhanced PE all represent significant new requirements for water systems. Small water systems will need to comply with all of these new LCRR components. Therefore, EPA has determined that systems serving 10,000 or fewer persons have less professional staff than larger systems; these systems have an average of 0.4 to 2.4 full time operators and 0.5 to 2.4 managers per system, which is approximately 2 to11 times less than the average number of operators in the larger systems. Average revenues for systems serving 10,000 or fewer persons are about 4 to 170 times smaller than average revenues for large systems (USEPA, 2009).

Other commenters assert that POU treatment is implementable only in very small water systems. Some commenters

stated that POU treatment is not an appropriate option for small systems since they could not properly train users on how to maintain them. Other commenters suggested the POU treatment option is not cost-effective compared to corrosion control treatment for systems serving more than 3,300 people.

EPA also recognizes the concerns over POU device maintenance problems; however, with proper installation and maintenance provided by the water system, including changing filter cartridges and resolving operational issues experienced by the user, POU devices are an effective option for some small CWSs and NTNCWSs. When POUs are identified by EPA in the list of technologies for small system compliance, Section 1412(b)(4)(E)(ii) of the SDWA requires PWSs using POU treatment units to own, control, and maintain the treatment units to ensure proper operation and maintenance and compliance with the treatment technique. It also requires that the POUs be equipped with mechanical warning devices to ensure that customers are automatically notified of operational problems. EPA believes that some small water systems can cost effectively install and maintain POU devices in their customer's homes and can educate their customers on the proper operation of these devices. Most NTNCWSs own and control all the outlets in their system and can ensure proper operation and maintenance of installed units. In addition, smaller CWSs serve fewer persons for which they would need to provide POU devices compared to larger CWSs.

In the proposal, EPA also requested comment on whether different flexibilities would be more appropriate for small systems. Many commenters recommended that the lead-bearing plumbing replacement option proposed for NTNCWSs should be also extended as a compliance option for small CWSs. Commenters noted that this option could be beneficial for some small CWSs that do not wish to operate OCCT or install POU devices in perpetuity but have lead bearing plumbing materials that are in their control. One commenter wrote that small CWSs that control the premise plumbing include public water systems that are owned and operated by assisted living facilities, boarding schools, prisons, and apartment buildings. EPA agrees with the commenters and acknowledges that in certain circumstances, when small CWSs have no LSLs and have control of all of the plumbing materials in the system, replacement of all lead-bearing plumbing material might be feasible, affordable, and a more effective option than CCT for the system to reduce drinking water lead exposure.

Some commenters expressed concerns that small CWSs that elect to conduct LSLR would not be required to implement immediate measures to reduce lead exposures. One commenter noted this approach ''is not acceptable from public health, health equity or environmental justice perspectives'' because it creates the potential for consumers to be exposed to high lead levels for up to 15 years without CCT or POU devices in place. Other commenters were concerned that small CWSs that elect to implement CCT would not be required to undertake LSLR. These commenters noted that this approach allows LSLs to remain in the ground indefinitely, thus raising ''serious environmental justice concerns.''

EPA agrees that systems serving greater than10,000 persons can and should implement both corrosion control treatment and LSLR programs if the system exceeds the action level. For systems serving less than 10,000 people, EPA has determined it is appropriate to retain both LSLR and CCT as compliance alternative options as outlined in the proposed LCRR. CCT may be the most appropriate option for small CWSs and NTNCWSs that have many LSLs because LSLR is a resource-intensive process and may not be a feasible solution for some systems. LSLR, on the other hand, may be a feasible option for small CWSs and NTNCWSs that have fewer LSLs and that could be removed within a few years. The state must require a system to replace LSLs on a shorter schedule, taking into account the number of LSLs in the system, where a shorter replacement schedule is feasible. The LSLR option could allow those systems to avoid the need to add a CCT process that would require continual operation and maintenance. EPA has determined that it is not feasible for small systems serving fewer than 10,000 to both operate optimized CCT and conduct LSLR. As explained in greater detail above, these systems have limited operator staff to manage CCT and LSLR programs. Systems serving 10,000 or fewer persons do not enjoy the economies of scale of larger systems therefore the cost of multiple treatment technique actions may not be affordable for these smaller systems. Additionally, the LCRR includes several public education requirements including annual notice to sites served by an LSL that will provide consumers with information about the risks of the LSLs and the actions they can take to reduce their risks. Regardless of the compliance options selected, all water systems are required to conduct public education when the lead action level is exceeded. Finally, the LCRR will afford all NTNCWSs and small CWSs the flexibility to evaluate the best treatment technique for them to control lead and to implement their chosen approach based on state approval.

3. Final Rule Requirements

Under the final LCRR, small CWSs that serve 10,000 persons or fewer and any NTNCWS that exceeds the lead trigger level but do not exceed the lead and copper action levels must evaluate the four compliance alternatives and make a recommendation to the state within six months on which compliance alternative the water system would implement if the water system subsequently exceeds the lead action level. The state must approve the recommendation or designate an alternative compliance option within six months of submittal. In the event these water systems exceed the lead action level, they must implement the state-approved compliance option.

Any small CWSs and any NTNCWS that exceeds the lead action level and had not previously exceeded the trigger level, must evaluate the compliance alternatives and make a recommendation to the state within six months. The state must approve the system's recommendations or designate an alternative compliance option within six months; these water systems must implement the state-approved compliance option.

a. Lead Service Line Replacement

Water systems that select and are approved for LSLR and subsequently exceed the lead action level are required to implement a full LSLR program on a schedule specified by the state, not to exceed 15 years. EPA is requiring that NTNCWSs and small CWSs with LSLs that exceed the lead action level of 15 µg/L that choose to fully replace all of their LSLs until none remain must ensure they have the authority or consent to remove the customer-owned portion of every LSL in its distribution system or obtain refusals from customers. If the water system's 90th percentile drops below the lead action level, the water system must continue to replace LSLs until none remain. This option is projected to be a feasible and affordable, as well as practical choice for small systems that have few LSLs that could be removed within a few years, thus potentially avoiding the need to add a CCT process that would

need to be continually operated and maintained.

b. Corrosion Control Treatment

Water systems that select and are approved for implementation of optimized CCT and subsequently exceed the lead action level are required to implement the state-approved option for CCT. The final rule provides flexibility for NTNCWSs and small CWSs to install and maintain optimized CCT as a compliance alternative after exceeding the lead action level. EPA has determined in its analysis that some water systems may choose this alternative as the feasible, affordable, and most effective strategy for reducing lead in drinking water (*e.g.,* small water systems with many LSLs to replace or a large number of households and non-residential buildings that would make installation and maintenance of POU devices logistically challenging) (see section VI.C.4 of this preamble). EPA is requiring water systems, including small water systems, that have already installed CCT and subsequently exceed the lead action level to re-optimize CCT.

c. Point-of-Use Devices

Water systems that select and are approved for the POU option and subsequently exceed the lead action level, are required to implement a POU program on a schedule specified by the state, but not to exceed one year for CWSs and three months for NTNCWSs. The final rule provides flexibility for NTNCWSs and small CWSs to install and maintain POU devices, independently certified by a third party to meet the American National Standards Institute standard applicable to the specific type of POU unit to reduce lead in drinking water, as a compliance alternative to a lead action level exceedance in lieu of CCT and LSLR. EPA is requiring small CWSs that select this compliance alternative to provide a minimum of one POU device per household and one for every tap that is used for cooking and/or drinking in every building in its distribution system, regardless of whether that household or building is served by an LSL, to ensure the residents can access filtered water. Since system-wide CCT is not being provided under this option, even homes and non-residential buildings without LSLs would need to be provided with a POU device to address lead leaching from old lead solder or brass plumbing fittings and fixtures. EPA is requiring NTNCWSs to provide a POU device for every tap intended for drinking or cooking to ensure all building users can easily access filtered water. The water system is responsible for maintenance of the device, including changing filter cartridges and resolving operational issues experienced by the customer. Small CWSs that serve relatively few households, or NTNCWSs that are responsible for the facility's plumbing, may find this to be the feasible, affordable, and most effective compliance alternative (see section VI.C.4 of this preamble). Small CWSs must ensure water system personnel have access to the homes of the residents and the non-residential structures to install and maintain the POU devices, including changing the filters. Systems are also required to provide instructions on the proper use of POU devices to maximize the units' lead level reduction effectiveness.

d. Replacement of Lead Bearing Plumbing Materials

Water systems that select and are approved to replace all lead-bearing plumbing and subsequently exceed the action level are required to replace all lead bearing plumbing on a schedule specified by the state, but not to exceed one year. Under the final rule, NTNCWSs and small CWSs that have control over all plumbing in its buildings and no LSLs may choose to replace all lead bearing plumbing in response to a lead action level exceedance. EPA is requiring that the replacement of all lead bearing plumbing occur on a schedule set by the state which must not exceed one year.

F. Public Education

Under the current LCR, water systems that exceed the lead action level must initiate a public education program within 60 days of the end of the tap sampling period in which the action level exceedance occurred. The purpose of public education is to inform consumers that elevated levels of lead have been found in the drinking water, provide information about sources of lead in drinking water, provide information about the health effects of lead, and explain the actions consumers can take to reduce exposure as well as the actions the water system is taking to reduce drinking water lead levels. Under the current rule, water systems are required to provide consumers with their tap sample results within 30 days.

1. Proposed Revisions

Proposed revisions included a requirement for systems to update public education materials with revised mandatory health effects language. EPA proposed to modify requirements to provide consumers with their lead tap sample results within 24 hours if the sample is greater than 15 μg/L, while maintaining the current rule requirement to provide tap sample results within 30 days for sample results less than or equal to 15 μg/L.

EPA proposed additional public education requirements following a lead action level exceedance. EPA proposed that CWSs conduct annual outreach to state and local health agencies to explain the sources of lead in drinking water, describe health effects of lead, with the expectation they would explore collaborative efforts. EPA proposed a requirement for systems with LSLs to annually notify consumers served by an LSL or service line of unknown lead status and to provide them with public education annually until the LSL is replaced or the unknown service line is determined not to be an LSL. EPA proposed that this notification inform consumers of the health effects and sources of lead in drinking water (including LSLs), how to have water tested for lead, actions consumers can take to reduce exposure to lead, and information about the opportunities for LSLR, including the water system's requirement to replace its portion of an LSL when notified by a customer that they intend to replace the customer-owned portion of the LSL.

EPA also proposed additional public education requirements for water systems that are required to conduct a goal based LSLR program but that fail to meet their annual LSLR goal. EPA proposed to require those systems to conduct additional public outreach activities to increase customer awareness of the potential higher exposure to lead from an LSL and advance customer interest in participating in the goal based LSLR program. EPA proposed that CWSs conduct one or more of the following annual public outreach activities, until the water system meets its replacement goal: (1) A social media campaign (*e.g.,* Facebook, Twitter), (2) outreach to organizations representing plumbers and contractors to provide information about lead in drinking water including health effects, sources of lead, and the importance of using lead free plumbing materials, (3) certified mail to LSL customers inviting them to participate in the LSLR program, (4) conduct a town hall meeting or participate in a community event to provide information on the LSLR program, (5) visit targeted customers to discuss LSLR program and opportunities for LSLR, or (6) obtain written refusal from all LSL customers to participate in the LSLR program. Outreach to organizations representing plumbers and contractors is included as an outreach activity that

systems may conduct, as plumbers and contractors may also be a source of information about lead in drinking water for customers and may help with identifying LSLs during home repair.

EPA proposed that CWSs conduct annual outreach to state and local health agencies to explain the sources of lead in drinking water, describe health effects of lead, and explore collaborative efforts.

2. Public Comment and EPA's Response

EPA received many comments on the mandatory health effects language required in all public education materials, the CCR, and the 24 hour public notice of a lead action level exceedance. Some commenters characterized the proposed language as redundant, too long and not clearly stating the level of risk. Some commenters recommended using more definitive language about the health risk in adults. Some commented that the language improperly describes the scientific evidence on adult risks as ''recent.'' Several commenters provided suggestions for making the language clearer and more concise. EPA has revised the mandatory health effects language in the final rule to address many of these suggestions and to provide better risk communication and improve accuracy and clarity, resulting in a more concise message and simpler sentence structure for clearer communication.

EPA also received comments on the proposed consumer notice requirement for individual samples that exceed 15 µg/L. Many commenters expressed concern over the ability of water systems to deliver a notice to consumers within 24 hours of learning of a tap sample over 15 µg/L and recommended that water systems be allowed two business days to notify consumers. After considering these comments, EPA has determined that it may not be possible for water systems to provide consumer notification within 24 hours, therefore the final rule will require water systems to provide the consumer notification as soon as practicable but no later than 3 calendar days. Once systems receive tap sample results that exceed 15 µg/L, they can choose from several options that make it feasible to provide the consumer notice within 3 days, including delivery electronically, by phone, hand delivery, mailing with a post mark within 3 days, or any other method approved by the state.

EPA requested comment on whether the Agency should require water systems to distribute public education materials to homes with unknown service line types to inform them of the potential for their service line to be made of lead and the actions they can take to reduce their exposure to drinking water lead. Many commenters supported the new provision and noted that it would encourage homeowner engagement in LSLR, while some expressed concern that notifying consumers that their service lines are of unknown lead status may cause fear and distrust of the water system. EPA does not find any compelling evidence that public education to consumers with lead status unknown service lines would cause increased fear and distrust so is finalizing requirements to notify customers with an LSL and lead status unknown lines. Persons served by a lead status unknown service line may decide to take steps to determine the material of their service line and/or take measures to reduce their potential exposure to lead in drinking water. Providing information to aid customer decision making should provide greater transparency increasing trust.

EPA requested comment on the appropriateness of required outreach activities a water system should conduct if they do not meet the goal LSLR rate in response to a trigger level exceedance. EPA also requested comment on other actions or additional outreach efforts water systems could take to meet their LSLR goal rate. Many commenters supported outreach to encourage participation in the LSLR program but expressed concern about how well the activities followed risk communication best practices. Commenters expressed concern that some of the outreach activities (*e.g.,* social media campaign) would exclude some consumers. EPA agrees that a social media campaign on its own may exclude some segments of the population and has revised the outreach requirements in the final rule to be more inclusive. In the final rule, conducting a social media campaign is still an option but must be accompanied by at least two other forms of outreach to ensure that water systems reach individuals who may not use social media. At least one of the activities must include the following: (1) Send certified mail to customers with lead or galvanized requiring replacement service lines, inviting them to participate in the LSLR program, (2) conduct a townhall meeting, (3) participate in a community event to provide information about its LSLR program and distribute public education materials, (4) contact customers by phone, text message, email or door hanger, or (5) use another method approved by the state to discuss the LSLR program and opportunities for LSLR. Many commenters suggested alternative means for reaching customers such as newspapers, television, radio, and reverse 911 calls, or that states be able to approve alternative methods. EPA has added some of the outreach efforts commenters suggested (*e.g.,* newspaper, television, and radio) as additional options that CWSs may select if they continue to fail to meet their goal LSLR. In addition to conducting at least one of the above five activities, CWSs must conduct at least two activities from the following list if they continue to fail to meet their goal LSLR: (1) Conduct a social media campaign, (2) conduct outreach via newspaper, television, or radio, (3) contact organizations representing plumbers and contractors by mail to provide information about lead in drinking water, or (4) visit targeted customers to discuss the LSLR program and opportunities for replacement.

EPA requested comment on the appropriateness, frequency, and content of required outreach to state and local health agencies and whether the requirement should apply only to a subset of the country's CWSs. Many commenters supported requiring water systems to engage with public health agencies; however, they expressed concern that an annual report from all CWSs to local and state health agencies would not be an effective way to encourage collaboration and would overload health agencies with virtually the same information. Some commenters suggested that the outreach requirement be limited to CWSs with action level exceedances or CWSs with LSLs. Additionally, many commenters recommended that outreach be led by the state. EPA acknowledges concerns about the amount of information health agencies would be receiving from water systems; however, under the final rule each CWS will provide unique information. In addition to providing important information on sources of lead in drinking water and actions to reduce lead in drinking water that health agencies may incorporate in their lead poisoning program materials, CWSs must also provide system-specific information about find-and-fix activities and information about school and child care facility testing. Therefore, it is important that all CWSs provide this information so that the state and local health agencies in their service area can evaluate it along with other data they may have such as blood lead levels and take steps to investigate other potential sources of lead in the communities they serve. The purpose of this outreach is

also to provide an opportunity for CWSs to explore collaborative efforts with local and state health agencies and work together on public education programs; therefore, EPA believes it is important for all CWSs to participate. Collaborating with local and state health agencies serves as an additional way for CWSs to reach consumers who may be affected by lead in their drinking water, so they can take measures to reduce their exposure.

Many commenters requested clarification of whether this provision requires systems to provide public education to health care providers and caregivers. EPA acknowledges commenters' confusion and has clarified that is not required in the final rule. The requirement is for annual outreach to local and state health agencies. Some commenters also expressed concern with the January 15 deadline and recommended that it be conducted on the same schedule with the Consumer Confidence Report (CCR) or other required outreach. In response, EPA has updated the reporting date to July 1, consistent with the CCR.

3. Final Rule Requirements

EPA is requiring public education materials to include the following revised mandatory health effects statement:

Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to new learning and behavior problems or exacerbate existing learning and behavior problems. The children of women who are exposed to lead before or during pregnancy can have increased risk of these adverse health effects. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.

EPA is requiring that water systems must notify persons served at the sampling site for any individual tap sample that exceeds 15 µg/L, as soon as practicable but no later than 3 days after receiving the sampling results. This is in addition to the existing LCR requirement to provide a notice of the individual tap sample results from lead testing to persons served at the sampling site, which must be sent within 30 days of receiving results. For tap samples that do not exceed 15 µg/L, the 30-day consumer notice will remain in effect. In the final rule, water systems that have individual tap samples greater than 15 µg/L must also implement the ''find-and-fix'' provisions as described in section III.K of this preamble.

EPA is requiring systems with lead, galvanized requiring replacement, or lead status unknown service lines in their inventory to notify and provide public education materials to households served by a lead, galvanized requiring replacement, or lead status unknown service line. Targeted public education for persons served by a lead, galvanized requiring replacement, or lead status unknown service line is intended to raise awareness of people in a household that may have higher lead exposures so that they may take actions to reduce exposure to lead and participate in LSLR programs. CWSs must provide this notification and public education annually until the LSL or galvanized requiring replacement service line is replaced or the lead status unknown service line is determined not to be an LSL. The notice is required to include a statement that the person served by the water system has an LSL, galvanized requiring replacement, or lead status unknown service line, information on the health effects of lead, and actions they can take to reduce exposure to lead. For persons served by an LSL or galvanized requiring replacement service line, the notice must also provide information about the opportunities for LSLR, including the water system's requirement to replace its portion of an LSL when notified by a property owner that they intend to replace their portion of the LSL. This notification must include a description of any programs that provide financing solutions for property owners seeking to replace their portion of an LSL, if such funding is available. For persons served by a lead status unknown service line, this notice must include information about ways that homeowners can verify the material of the service line. EPA is also requiring water systems with LSLs that exceed the lead trigger level of 10 µg/L to provide information about their LSLR program and opportunities for LSLR to persons served by LSLs or lead status unknown service lines. Systems must send the notification within 30 days of the end of the monitoring period in which the trigger level exceedance occurred and repeat it annually until the system is no longer in exceedance.

Additionally, EPA is requiring water systems that cause a disturbance to a lead, galvanized requiring replacement, or lead status unknown service line to notify persons at the service connection and provide them with information to reduce their exposure to potentially elevated lead levels. This can include disturbances resulting in the water to an individual service line being shut off or bypassed, such as operating a valve on a service line or meter setter. It can also include disturbances caused by partial or full LSLR or those resulting from the replacement of an inline water meter, a water meter setter, or gooseneck, pigtail, or connector.

EPA is requiring CWSs serving more than 10,000 persons that fail to meet their annual LSLR goal to conduct additional public outreach activities. Failure to meet the LSLR goal, by itself, will not be a violation of the treatment technique or monitoring and reporting requirements; however, failure to conduct public outreach activities will result in a treatment technique violation. To increase customer awareness of the potential higher exposure to lead from an LSL and advance customer interest in participating in the goal based LSLR program, water systems must conduct annual public outreach activities until the water system meets its replacement goal or a water system is no longer required to perform a goal based LSLR program. To enhance community engagement and allow water system flexibility as suggested by the NDWAC, EPA is providing options to meet this requirement, so water systems can conduct effective community engagement. A water system that does not meet its LSLR goal rate must select at least one of the following outreach activities to conduct in the following year: (1) Send certified mail to customers with lead or galvanized requiring replacement service lines inviting them to participate in the LSLR program, (2) conduct a town hall meeting, (3) participate in a community event to provide information on the LSLR program and distribute public education materials, (4) contact customers by phone, text message, email, or door hanger, or (5) use another method approved by the state to discuss the LSLR program and opportunities for LSLR. If the water system continues to fail to meet the annual replacement goal in the following year, the water system must conduct one of the above activities and at least two additional outreach activities per year from the following activities to promote participation in the LSLR program: (1) Conduct a social media campaign (*e.g.,* Facebook, Twitter), (2) conduct outreach via newspaper, television, or radio, (3) contact organizations representing plumbers and contractors by mail to provide information about lead in drinking water including health effects, sources of lead, and the importance of using lead free plumbing materials, (4) visit targeted customers to discuss the LSLR program and opportunities for

replacement, or (5) obtain written refusal from all LSL or galvanized requiring replacement service line customers to participate in the LSLR program. A refusal includes a signed or verbal statement by the customer refusing LSLR, or documentation of no response after two good faith attempts to reach the customer. Water systems must provide written certification to the state that they have conducted the required outreach activities under this rule.

In addition, EPA is requiring that CWSs conduct annual outreach to state and local health agencies to discuss the sources of lead in drinking water, health effects of lead, steps to reduce exposure to lead in drinking water, and information on find-and-fix activities. CWSs are expected to use this as an opportunity to collaborate with state and local health agencies. State and local health agencies include the state health department and city or county health department. For tribal systems, this would be the Indian Health Service Area, Division of Environmental Health Services program, or applicable tribal program if administered through self-determination contracts or compacts under the Indian Self-Determination and Education Assistance Act. This annual outreach will provide an opportunity for water utilities to participate in joint communication efforts, led by state health departments, state lead poisoning prevention agencies, and/or state drinking water primacy agencies (NDWAC, 2015). By working together, CWSs and health agencies can help ensure that caregivers, health care providers, and communities they serve hear and respond appropriately to information about lead in drinking water. CWSs may also use this as an opportunity to develop public education materials in consultation with health agencies. EPA is clarifying the content of the annual outreach to local and state health agencies in the final rule to include providing information about find-and-fix activities conducted in the previous calendar year, including the location of the tap sample site that exceeded 15 μg/L, the result of the initial tap sample, the result of the follow up tap sample, the result of water quality parameter monitoring and any distribution system management actions or corrosion control treatment adjustments made. EPA is also changing the reporting date from January 15 to July 1 to coincide with notifying local and state health agencies of school sampling results, consistent with the CCR. CWSs may send one letter that covers both find-and-fix activities and school sampling results to local and state health agencies.

EPA is requiring that small CWSs and NTNCWSs that select POU devices as their compliance option in response to a lead action level exceedance must provide public education materials to inform users how to properly use POU devices to maximize the units' effectiveness in reducing lead levels in drinking water.

G. Monitoring Requirements for Lead and Copper in Tap Water Sampling

1. Proposed Revisions

Several changes to the LCR were proposed in the LCRR to improve tap sampling requirements in the areas of site selection tiering criteria, sample collection methods, and sampling frequency. In addition, to improve transparency and raise consumer awareness, EPA proposed that water systems make the results of these tap samples publicly available within 60 days of the end of the tap sampling monitoring period.

EPA proposed revisions to tiering criteria for selection of tap sampling sites to better target locations expected to have higher levels of lead in drinking water. Under the proposed LCRR, Tier 1 sampling sites for CWSs consist of single-family structures (SFS) that are served by an LSL. When multiple-family residences (MFRs) comprise at least 20 percent of the structures served by a water system, the water system may include these types of structures (served by an LSL) in its sampling pool as Tier 1 sampling sites. However, a large apartment building would be unlikely to have an LSL. EPA proposed Tier 2 sampling sites for CWSs to be buildings, including MFRs that are served by an LSL. EPA also proposed that Tier 3 sampling sites for CWSs consist of SFSs that contain copper pipes with lead solder installed before the effective date of the applicable state's lead ban. EPA proposed that NTNCWS Tier 1 sampling sites consist of buildings that are served by an LSL and the remaining tap samples be taken at buildings with copper pipe and lead solder installed before the effective date of the applicable state's lead ban (Tier 3 sites). EPA did not modify the definition of a ''representative site'' but referred to it as a ''Tier 4'' site in the proposal.

EPA proposed additional requirements for water systems to enable prioritization of LSL sites in tap sampling. Under the LCRR proposal, all water systems with LSLs or potential LSLs must re-evaluate their lead sampling sites based on their LSL inventory. These water systems would be required to update their inventory annually and ensure tap sampling sites are served by an LSL. Under the current LCR, water systems with LSLs must collect at least half of their tap samples from sites with known LSLs. However, in the proposal, water systems with LSLs would be required to collect all tap samples from sites with known LSLs if possible. Under the proposal, water systems with an adequate number of LSL sites to meet the required minimum number of tap sampling sites must calculate their lead 90th percentile using only tap samples from LSL sites (100 percent LSLs).

EPA proposed that if a water system does not have an adequate number of LSL sites to meet the minimum number of tap samples to calculate the 90th percentile level, it may collect the remainder of the samples from non-LSL sites only after all the LSL tap sampling sites are utilized. If the water system conducts tap sampling at non-LSL sites beyond what is required, EPA proposed that the water system could only include the tap samples with the highest lead concentrations to meet the number of requisite sites for the 90th percentile calculation. EPA also proposed that tap samples collected which are not used in the lead 90th percentile calculation must still be reported to the state.

EPA proposed the use of grandfathered data to determine their tap sampling monitoring schedule if the data were from sites that met new requirements. Water systems that collect lead tap samples after the publication date of the final rule, but before the rule compliance date (three years after final rule publication), in accordance with the proposed tap sample site selection criteria, could use data to determine the tap sampling monitoring schedule. EPA proposed that water systems which do not have qualifying grandfathered data, must use the lead 90th percentile results from the first tap sampling monitoring period after the compliance date of the final rule. There were no proposed changes to the copper sampling requirements. However, due to the proposed increased tap sampling frequency requirements for lead, each tap sample collected may not need to be analyzed for both lead and copper as schedules may diverge for some water systems.

EPA proposed a lead trigger level of 10 μg/L which affects the tap sampling frequency. Under the proposal, water systems that exceed the lead trigger level of 10 μg/L but do not exceed the copper and lead action levels and are conducting tap sampling on a triennial basis, would begin annual tap sampling at the standard number of sites for lead

but may remain on triennial sampling for copper at the reduced number of sites. EPA proposed that water systems that do not exceed the lead trigger level for three consecutive years of annual monitoring could reduce their lead monitoring to triennial at the reduced number of sites.

Under the proposal, qualification for reduced monitoring would be contingent upon several factors, including but not limited to, results of lead and copper tap sampling, the size of the water system, and maintaining water quality parameters (WQPs) for optimized CCT. The schedule for tap sampling may be affected when these factors change. Criteria for reduction in tap sampling frequency and number of sites were more stringent in the proposal compared to the current rule. A water system must not exceed the trigger level of 10 µg/L to be eligible for a triennial monitoring schedule at the reduced number of tap sample sites for lead, and large water systems are not eligible for triennial monitoring unless they meet the practical quantitation level (PQL). The proposed revisions to tap sampling frequency and locations were meant to ensure more frequent tap sampling would occur at sites more likely to have elevated lead levels.

EPA proposed several changes to the tap sampling protocol, consistent with the Agency's February 2016 memorandum (USEPA, 2016d). Specifically, EPA proposed to prohibit tap sample instructions that include pre-stagnation flushing, aerator removal prior to tap sampling, and use of narrow mouth collection bottles. EPA also proposed that tap samples be collected in wide-mouth bottles that are one liter in volume. Wide-mouth bottles are advantageous for lead and copper tap samples because they allow for a higher water flow rate compared to a narrow-necked bottle. Collection of tap samples using a wide-mouth bottle is more characteristic of faucet water flow when filling a glass of water.

2. Public Comment and EPA's Response

EPA did not propose to change the current LCR sampling protocol requirement for samples to be one liter first draw tap samples. However, EPA did request comment on alternative tap sampling procedures for locations with an LSL; specifically, whether water systems with LSLs should collect a tap sample representative of water in contact with the LSL (*i.e.,* the ''fifth liter''). EPA received a wide variety of comments on this topic, with many in support of the fifth liter and several opposed to it. Some commenters suggested collecting both a first liter and a fifth liter sample and using the highest copper and lead result in the 90th percentile calculation. Others commented on the method in EPA's request for comment of collecting a first draw copper sample and a fifth liter lead sample. Those that supported collecting a fifth liter state that the current first liter tap sampling protocol does not capture lead from the highest source, the LSL, thereby providing a false sense of security to residents, while a fifth liter could more accurately capture the highest lead levels at the site. These commenters state that the first liter protocol fails to measure the impact of the greatest contributor to lead levels in the home, the LSL. Commenters emphasized that the first liter can capture lead from premise plumbing but does not effectively capture lead levels from the service line, since it may extend 50 feet or more from the building. Commenters stated the fifth liter sample will better identify systems that should take action to address elevated lead levels. The commenters that were opposed to the fifth liter sample, stated that this technique would be too complicated for residents to carry out, resulting in more confusion and sampling errors. Commenters noted that if the fifth liter sample option is finalized, samplers will need to be well trained in this method. Other commenters disagreed with the fifth liter sample, because they argue it is not consistent with how a consumer would use the water.

Tap sampling is required under the LCR to evaluate the effectiveness of corrosion control treatment and to determine if additional actions including LSLR are needed to reduce drinking water lead exposure. EPA agrees with commenters who support the fifth liter sample option for locations with LSLs. EPA has determined that in locations with LSLs, first liter samples can underestimate system lead levels compared to a fifth liter sample. Such underestimation of system lead levels based on first-draw sampling could allow water systems to be unaware that their corrosion control treatment is not working well (Lytle et al., 2019). Without appropriate awareness from tap sampling, systems will not take actions to reduce lead exposure and communicate lead in drinking water risks to consumers.

Numerous studies have evaluated the contribution of lead in drinking water from different sources (*e.g.,* service lines, faucets, meters). A study published by American Water Works Association (AWWA) Water Research Foundation (2008) ''Contributions of Service Line and Plumbing Fixtures to Lead and Copper Rule Compliance Issues'' (Sandvig et al., 2008) estimates that 50 percent to 75 percent of lead in drinking water comes from LSLs. Thus, when present, LSLs are the greatest contributor of lead in a home's drinking water. Research using sequential tap sample collection techniques on homes with LSLs indicates that a first draw sample may not represent the significant contributions of LSLs to a home's drinking water lead levels (Lytle et al., 2019). Therefore, relying on first liter samples for lead could allow a situation in which there may be high lead levels in a system but a 90th percentile concentration below the trigger level or action level.

Given that LSLs are the greatest contributor of lead in drinking water, EPA reviewed the sampling data in the AwwaRF, 2008, Del Toral, 2013, and Lytle et al., 2019 studies to determine the liter in any given sequential sampling profile that was most likely to contain the water that remained stagnant within a customer-owned LSL. Based on this information, EPA selected the fifth liter as the most likely to capture this water and any elevated levels of lead. Additionally, the fifth liter is more likely to capture the water from the customer-owned portion of the service line, which may remain in place from partial LSLRs conducted by systems under the previous rule. The first draw sample represents water that has traveled through the service line but that has sat in contact with the plumbing materials inside the home prior to the tap for the stagnation period. The first draw is an effective sampling technique to identify lead corrosion from taps, solder, pipes and fittings within the home but is not an effective sampling approach to capture corrosion from LSLs. Therefore, the final LCRR requires systems to collect fifth liter samples at LSL sites because the data gathered from fifth liter samples to calculate the 90th percentile is a better indicator of the effectiveness of corrosion control treatment in a system.

EPA finds that requiring the fifth liter sample for tap sampling would be more representative of lead concentrations in service lines than the first liter sample, which will provide better information on the highest concentration of lead in the system's drinking water. This better information will more appropriately identify the need for required actions designed to reduce lead and copper exposure by ensuring effective CCT and re-optimization of CCT when water quality declines; enhancing water quality parameter (WQP) monitoring; implementing a ''find-and-fix'' process

to evaluate and remediate elevated lead at a site where the individual tap sample exceeds 15 µg/L; and making consumers aware of the presence of a LSL, if applicable, to facilitate replacement of LSLs.

EPA disagrees with commenters who stated that a fifth liter sample option is too complicated for samplers to perform. To address commenters' concern regarding the proposed fifth liter protocol, EPA modified it to no longer require the use of a gallon container as some customers may not be able to manage a gallon container of water. EPA also modified the protocol so that samplers collect five one liter bottles which allows for collection of a first liter for copper analysis and a fifth liter for lead analysis, thus reducing the potential need for two separate sampling events. Although there are additional steps in the fifth liter protocol for LSL sites, EPA will work with states and stakeholders to provide templates for sampling instructions that are clear and simple. Samplers will be able to collect samples in accordance to this new protocol with minimal error. The EPA disagrees with commenters who stated that the fifth liter sample option should not be required because it does not represent water that is typically consumed. The LCR tap sampling requirements are not intended to represent typical consumption; rather, the tap sampling is intended to determine the effectiveness of corrosion control treatment and to determine if additional actions are needed including LSLR to reduce drinking water exposure to lead.

EPA received many comments on the proposed tiering criteria for selection of tap sampling sites. Some commenters stated the proposed tiers were biasing samples against copper sites and suggested EPA should diversify tap sample sites. Other comments suggested the removal of Tier 2 sites altogether due to the difficulty of reaching this population to carry out the sampling. EPA disagrees with these comments because the changes in the tiering requirements are designed to increase the likelihood of collecting tap samples at sites expected to have elevated lead levels. Many commenters recommended EPA modify the tiers to consider sites with plumbing materials other than LSLs, such as galvanized pipes, lead goosenecks, and other lead fittings. Some of these comments raised concerns about water systems with few or no LSLs, but that have galvanized service lines impacted by lead, or lead goosenecks, pigtails, or connectors in their distribution system. Several comments supported the proposed tiering criteria, while others offered alternative approaches. EPA agrees that galvanized service lines impacted by lead, or lead goosenecks, pigtails, or connectors should be considered in the tiering criteria for selecting tap samples and has modified the final rule to reflect this.

Many commenters requested clarification on how the 90th percentile calculation should be performed when systems have a mix of Tier 1 through 4 sites. Commenters suggest that for systems with a mix of Tier 1 through 4 sites, they should not be permitted to ''dilute'' the sampling pool with Tier 4 sites if they have a sufficient number of Tier 3 sites, similar to how EPA proposed calculating the 90th percentile when there is a mix of Tier 1 and Tier 2 sites. EPA agrees and notes this is addressed in the regulatory text under § 141.86(a). For example, for a water system to use Tier 4 sites it must have an insufficient number of Tier 1 through 3 sites: A CWS with insufficient Tier 1, Tier 2, and Tier 3 sampling sites shall complete its sampling pool with ''Tier 4 sampling sites''.

Many commenters state that the rule does not capture worst-case scenario copper concentrations, since the proposed tiering criteria focus on high risk sites for lead. While EPA agrees more emphasis has been placed on LSL sites, water systems without LSLs will be focusing on sites with copper pipe with lead solder.

Several commenters asked that the method for calculating the 90th percentile in the current rule be maintained. A commenter noted how follow-up samples from find-and-fix are not included in the 90th percentile calculation and suggested that if the follow-up sample provides information confirming that the initial sample was taken in error, the initial sample result should not be used in the 90th percentile calculation Several commenters also requested clarification whether follow-up samples taken after a partial or full LSLR are included in the 90th percentile calculation. Some commenters disagree with this inclusion, stating it may deter water systems from carrying out replacement activities. EPA clarifies that follow-up samples collected under the find-and-fix provisions or after a LSLR are not included in the 90th percentile calculation but must be submitted to the state. The find-and-fix samples may be outside of the tap sampling monitoring period or collected using a different tap sample protocol.

EPA received many comments on the tap sampling protocol in the proposed LCRR. EPA proposed the use of wide-mouth collection bottles and the prohibition of flushing the taps prior to the 6-hour stagnation period and cleaning or removing tap aerators in anticipation of sampling. Many commenters supported these updated provisions, stating it will limit these practices which were altering sample results and could make them lower, while others disagreed with them, stating it will negatively impact lead results. In addition, some commenters explained that there is confusion when, in certain cases, customers should be flushing stagnant water out of taps or cleaning aerators to prevent lead exposure. EPA disagrees with commenters who were in favor of allowing pre-stagnation flushing in LCR tap sampling. Flushing, or running taps, has long been understood to decrease water lead levels in a home, and thus has been a recommendation by Federal, state, and local authorities as a way to reduce lead exposure prior to water use, especially in residences of higher risk (*e.g.,* houses containing LSLs) as well as a beneficial practice at homes that may have lead solder or faucets and fixtures that are not ''lead-free''. Flushing removes water that may be in contact with LSLs for extended periods of time, which is when lead typically leaches into drinking water (USEPA, 2016). As a general matter, EPA recommends consumers flush taps as a regular public health protective practice to reduce household exposure to lead in drinking water. However, in the case of collecting tap samples to determine whether corrosion control is effective or additional actions must be taken to reduce exposure, this practice may mask potential higher lead levels and is prohibited in this final rule. EPA also disagrees with commenters that supported removing and cleaning the faucet aerator prior to sampling. The taps used for monitoring likely contain an aerator as part of the faucet assembly, and particulate matter, including lead, may accumulate within these aerators. Thus, removing and/or cleaning these aerators just prior to sample collection could mask the contribution of particulate lead. It is advisable to regularly remove and clean faucet aerators to avoid particulate matter build-up. As a general matter, EPA recommends consumers clean faucet aerators as a regular public health protective practice to reduce household exposure to lead in drinking water. However, if customers only remove and clean the aerators before sample collection, the sample results will not be representative. Thus, EPA has prohibited the removal and/or cleaning

of the faucet aerator as part of the procedures for collection of lead and copper tap samples.

EPA did not propose revisions to the requirement that tap samples be taken after the water has stood motionless in the plumbing system for at least six hours. Some commenters asked that a maximum stagnation time also be included in the protocol to avoid situations where water has been stagnant for such an extended period of time (*i.e.,* vacation homes) that results would not be representative of regular use. EPA does not believe that a maximum stagnation period is necessary for the rule. Water systems can choose other sites from the same tier in the sample pool if they are aware that this is a problem. Therefore, EPA has not added a maximum stagnation time into the final rule requirements.

Several commenters suggested that EPA include alternative sampling techniques such as random-daytime sampling or using filters to measure the lead levels after water is used under normal circumstances for a specified period of time. EPA considered suggestions for other sampling methodologies such as random-daytime sampling. EPA disagrees with these commenters. EPA determined that first liter samples at non-LSL sites and the fifth liter at LSL sites are the most appropriate means to evaluate CCT for both lead and copper. Suggested methods such as random-daytime sampling are too complex for compliance sampling that is implemented by customers and would require an increased cost and burden to water systems. Random daytime sampling is a practice that collects samples at random locations in the distribution system at random times throughout the day. Lead levels vary significantly from location to location based upon differing plumbing materials. Lead levels also vary over time based upon water use at a location. The LCRR controls for these variables by tiering sampling locations to select sites with leaded plumbing materials and by requiring a stagnation period prior to collecting a sample. These protocols will assure that elevated lead levels will be found, if present, which enables the system to evaluate corrosion.

EPA proposed to expand to all systems the current LCR requirement applicable to most systems that change their source water or make a significant treatment change, to obtain approval from their primacy agency prior to making the change. EPA requested comment on whether the regulation should specify a minimum tap sampling frequency following the source water change or significant treatment change and if so, whether it should be annual or biannual tap sampling. EPA received substantial comments from this request. Some commenters asked EPA to define ''significant'' as this can include a wide range of changes, some of which may not warrant increased sampling requirements. They noted that there are several factors that come into play that should determine the appropriate tap sampling frequency following the change, factors include: Full water quality parameter sampling of the new source, applicable saturation indices results, current or proposed corrosion control treatment, blending with existing sources, size of system, and previous LCR tap sampling.

Some commenters expressed that this should be determined by the state based on these factors and the risk profile of the type of change proposed. Many commenters asked EPA to establish a minimum tap sampling frequency of every six months following these changes to fully account for the impact to water quality from the addition or change in source water or long term treatment while others stated annual monitoring would be appropriate because it is more feasible for water systems. Some requested six-month monitoring for new sources and annual monitoring for treatment changes. After a full evaluation of these comments, EPA has determined a minimum tap sampling frequency of once every six months following a change in source water or a significant treatment change is appropriate. Deterioration in water quality or unintended consequences of source water or treatment changes will be more quickly identified and therefore addressed when tap sampling occurs every six months. To provide additional clarification if a significant change would include any long-term change in treatment and the addition of a new source as specified in § 141.90(a)(3), which includes examples of long term treatment changes. States have the expertise to determine which changes qualify as significant to warrant standard 6-month monitoring.

EPA received comments on customer-requested tap sampling. Many commenters disagreed with including the results of this sampling in the 90th percentile. They state that EPA should provide clear guidance on how to discard these samples before including them in the calculation. However, other commenters mention how carrying out customer-requested tap sampling is positive and can empower customers to take action upon receipt of results. Others assert that when samples are taken upon customer request, they should be collected with the standard compliance protocol to standardize the sampling process, especially if they are included in the 90th percentile calculation. Some commenters asked how to include these samples in the compliance pool and whether they should be included only if they are sites served by an LSL. Some asked for clarification on customer-requested samples that are collected outside of the compliance period or not in accordance with the tap sampling compliance protocol. EPA agrees that samples taken upon customer-request should be used in the 90th percentile calculation only if they are from known LSL sites (or appropriate tier if no LSLs), collected during the tap sampling period, and use the appropriate tap sampling protocol. EPA encourages water systems to create and maintain a program for testing at residences where customers request it and to share the sampling results with customers.

3. Final Rule Requirements

The frequency of monitoring and number of samples to be collected and analyzed is based primarily on how many people the water system serves and previous tap water monitoring results. If residents are collecting tap samples, the water system must recruit volunteers at the sites that are most likely to have elevated lead based on the tiering criteria described in the section below.

To the extent feasible, water systems are required to use the same tap sample sites each monitoring period. If a resident decides to discontinue participation in tap sampling, the water system must select a similarly ''tiered'' site. Due to potential non-response from resident volunteers, EPA recommends including more sampling sites in the pool of targeted sampling sites than is required. The water system is required to calculate a 90th percentile of the sampling results from all sites separately for lead and copper at the end of each monitoring period. This 90th percentile value is reported to the state and used to determine whether the system must comply with other requirements of the rule, such as corrosion control treatment, source water monitoring, public education, and LSLR. Water systems with LSLs are required to collect samples from all LSL sites (Tier 1 and 2) unless there is an insufficient number to meet the minimum number of samples required. In those cases, the water system must use Tier 3, 4, or 5 sites, in that order.

In the final rule, EPA revised the tap sample tiering criteria to include 5 tiers for several reasons. First, this revision

ensures that priority is given to highest risk lead sources in the absence of LSLs; galvanized service lines that have been impacted by a lead source such as lead goosenecks, pigtails and connectors. Galvanized lines that are or were downstream of a lead source such as a LSL can contribute to lead in drinking water. These lines have zinc coating containing lead that can leach into drinking water when corroded. They also can capture lead from upstream lead sources and release lead if water quality changes or these pipes are disturbed. These sites have been designated as Tier 3. In this way, these materials are prioritized in tap sampling site selection and will be sampled for non-LSL systems that have these. In the final rule, Tier 4 sites will be comprised of single-family structures containing copper pipes with lead solder and Tier 5 sites are representative of sites throughout the distribution system. NTNCWSs must sample at sites with LSLs (Tier 1), unless they have insufficient numbers to meet the minimum requirement of sites, then they can choose from Tier 3 sites and then Tier 5 sites.

REVISED LEAD AND COPPER SITE SELECTION CRITERIA

Tier	CWS		NTNCWS	
	Proposed rule	Final rule	Proposed rule	Final rule
Tier 1	Collect samples from SFSs served by LSLs. Tier 1 samples can be collected from MFRs if they represent at least 20 percent of structures served by the water system.	Collect samples from SFSs served by LSLs. Tier 1 samples can be collected from MFRs if they represent at least 20 percent of structures served by the water system.	Collect samples from building served by LSL.	Collect samples from buildings served by LSL.
Tier 2	Collect samples from buildings and MFRs served by LSLs.	Collect samples from buildings and MFRs served by LSLs.	N/A	N/A.
Tier 3	Collect samples from SFSs with copper pipes with lead solder installed before *the effective date of the state's lead ban*.	Collect samples from SFSs with galvanized service lines downstream of an LSL, currently or in the past or known to be downstream of a lead connector.	Collect samples from buildings with copper pipe and lead solder installed before *the effective date of the state's lead ban*.	Collect samples from SFSs with galvanized service lines downstream of an LSL, currently or in the past or known to be downstream of a lead connector.
Tier 4	Representative sample where the plumbing is similar to that used at other sites served.	Collect samples from SFSs with copper pipes with lead solder installed before *the effective date of the state's lead ban*.	Representative sample where the plumbing is similar to that used at other sites served..	N/A.
Tier 5	N/A	Representative sample where the plumbing is similar to that used at other sites served.	N/A	Representative sample where the plumbing is similar to that used at other sites served.

Acronyms: CWS = community water system; LSL = lead service line; MFR = multi-family residence; N/A = not applicable; NTNCWS = non-transient non-community water system; SFS = single family structure.

In the final rule, EPA made significant changes to the tap sample collection protocol under § 141.86(b). For LSL sites, a first liter and a fifth liter must be collected and analyzed. The first liter analyzed for copper and the fifth liter for lead. Water systems without LSL sites must collect a first draw one-liter sample for analysis for lead and copper. The fifth liter protocol requirements are described in § 141.86(b). This change to the overall protocol from first draw to fifth liter sample will increase the likelihood that the highest levels of lead will be captured, and appropriately trigger systems into improved corrosion control treatment, LSLR and public education programs to reduce drinking water lead exposure. Only sites served by an LSL will collect a fifth liter for lead analysis. A first-draw sample will be retained for copper analysis at these sites. For sites not served by an LSL, a first-draw sample will be collected and analyzed for lead and/or copper depending on the water system's monitoring schedules for lead and copper.

EPA is finalizing the modifications to the tap sampling protocol regarding the removal and cleaning of aerators and pre-stagnation flushing in anticipations of sampling efforts. EPA is also promulgating the requirement that all tap samples be collected in wide-mouth sample bottles so that collection is occurring when the faucet is flowing at a high rate, typical of normal water use such as pouring a glass of water.

EPA added a requirement for tap sampling every six months following the addition of a new source water or a long-term change in treatment in the final rule unless the state determines that the addition of the new source or long term treatment change is not significant and therefore does not warrant more frequent monitoring. The new requirement is described in § 141.86(d)(2)(iv).

H. Water Quality Parameter Monitoring

1. Proposed Revisions

Under the current LCR, water systems that have CCT monitor water quality parameters (WQPs) to ensure effective CCT. WQP samples must be collected at taps every six months and at entry points to the distribution system every six months prior to CCT installation and every two weeks thereafter. EPA proposed several revisions to the WQP monitoring requirements. EPA proposed to eliminate calcium carbonate stabilization as a potential option for CCT and thus, to remove the WQPs associated directly with this CCT option (*e.g.,* all parameters related to calcium hardness (calcium, conductivity, and water temperature)).

EPA proposed additional WQP monitoring samples be collected by water systems that have CCT and that have any individual tap sample(s) with lead results exceeding 15 µg/L. The additional WQP monitoring is a part of proposed provisions for ''find-and-fix'' (see section III.K. of this preamble), which would require water systems to collect follow-up lead tap samples at every sampling site that has an individual lead sample greater than 15 µg/L within 30 days of obtaining results of the individual sample greater than 15 µg/L. EPA also proposed a WQP sample be collected at a location on the same size water main located within a half mile of the residence with the lead result greater than 15 µg/L. This WQP monitoring was proposed to be completed within five days of receiving results of the individual lead sample greater than 15 µg/L. Water systems with existing distribution system WQP monitoring sites that meet the main size/proximity requirements could conduct the sampling at that location. EPA proposed that any water system which adds sites for the purposes of

WQP monitoring specified in this paragraph include those additional sites in future WQP monitoring.

EPA also proposed that both CCT and WQPs be assessed during sanitary surveys for water systems with CCT. EPA proposed that states conduct a periodic review of WQP results and other data to ensure the water system is maintaining the optimal CCT and to assess if there should be modifications to the CCT to further reduce lead and copper levels in tap samples.

In addition to the updates for WQP requirements previously specified, EPA proposed several supplementary changes to the current rule. EPA also proposed revisions to the requirements for water systems to reduce the number of sites sampled and the frequency of WQP sampling. As a prerequisite to reducing the number of sites used in water quality parameter monitoring, the current rule requires the water system to maintain the range of water quality parameters for two 6-month monitoring periods. EPA proposed that water systems would also need to meet the lead 90th percentile trigger level for those two 6-month monitoring periods to be eligible for a reduction in the number of sites for WQP sampling. As a prerequisite to reducing the frequency of monitoring for water quality parameters, under the current rule, the water system must maintain the range of WQP values for three consecutive years to reduce to annual monitoring. Under the proposal, the water system would need to also meet the lead 90th percentile trigger level for those three consecutive years in order to be eligible for yearly monitoring. Under the current rule, if the water system meets the WQP requirements determined by the state and the lead 90th percentile trigger level for three additional annual monitoring periods, it may reduce its WQP monitoring frequency to once every three years. EPA also proposed that for every phase of potential reduced WQP monitoring (*i.e.,* semi-annual, annual and triennial), the water system would also be required to meet the lead trigger levels. This would ensure that the required WQP monitoring sites and frequency continue when water systems have high lead levels. For a water system on reduced monitoring, EPA proposed that grandfathered data may be used if collected in accordance with the proposed revisions and its 90th percentile in either grandfathered data or initial tap sampling is at or below the trigger level.

2. Public Comments and EPA Response

As noted in Section III.B, EPA received mixed comments on its proposal to delete calcium carbonate stabilization as a mandatory corrosion control treatment and the removal of calcium, temperature, and conductivity as mandatory water quality parameters when it was selected as the corrosion control treatment. EPA has removed calcium carbonate stabilization and its associated unique water quality parameters from the final rule as options for systems that are optimizing or re-optimizing CCT. However, for systems that have previously been deemed optimized using this treatment approach, the key water quality parameters of pH and alkalinity are being maintained in the final rule and states will be allowed to designate additional water quality parameters to reflect optimal corrosion control (provided the system does not exceed the trigger level or action level).

EPA received many comments about the number of water quality parameter sites that could be added as a result of the proposed find-and-fix requirements. Commenters expressed concern that added WQP sites could not be removed and could over time become too numerous. The systems that will be subject to optimal water quality parameter monitoring are all large systems, medium systems that continue to exceed an action level, and small systems that exceed an action level and have selected optimal corrosion control treatment under the small system flexibility. EPA agrees with commenters that suggested there should be a limit on the number of water quality parameter locations that may be added and has determined the maximum sites should be two times the standard number of water quality parameter sites. EPA determined that this is a sufficient number of sites to ensure water quality. When a system exceeds this upper threshold for the number of sites, the State has discretion to switch out sites that have been added if the newer site can better assess the effectiveness of the corrosion control treatment and to remove sites during sanitary survey evaluation of OCCT.

Several commenters stressed that the final rule should require all systems to conduct regular monitoring of the optimal water quality parameters. EPA agrees with these commenters that triennial monitoring does not provide enough data on water quality in the distribution system. Significant changes in distribution system water quality can occur over a three-year period and water systems need to conduct more frequent WQP sampling to assure CCT is being effectively maintained.

3. Final Rule Requirements

The final rule includes the proposed revision to the WQP monitoring requirements with two modifications. Section 141.82(j)(1)(vi) of the final rule limits the number of WQP sites that must be added through the find-and-fix process to two times the standard number of WQP sites. The final rule allows states to determine which sites will be retained if a system exceeds the find-and-fix threshold of two times the standard number of water quality parameter sites. This is summarized in the table below.

NUMBER OF WATER QUALITY PARAMETER SITES IN DISTRIBUTION SYSTEM

System size (number people served)	Standard monitoring (number WQP sites)	Reduced monitoring (number WQP sites)	Find-and-fix threshold (number WQP sites)
>100,000	25	10	50
10,001–100,000	10	7	20
3,301–10,000	3	3	6
501–3,300	2	2	4
101–500	1	1	2
≤100	1	1	2

As an example, if a system that serves more than 100,000 persons reached the find-and-fix threshold of 50 water quality parameter locations, the state has the discretion to determine which added find-and-fix sites to retain if new locations are needed to assess corrosion control treatment. States have the flexibility to decide that it is necessary

to retain all the WQP sites and exceed the find-and-fix maximum if it deems it necessary to demonstrate optimal corrosion control treatment.

Second, the final rule requires all WQP locations to be sampled at least annually and specifies that samples should be taken throughout the monitoring period to reflect seasonal variability and triennial monitoring does not provide sufficient data.

I. Source Water Monitoring

1. Proposed Revisions

The 1991 LCR required water systems to conduct source water monitoring following an action level exceedance. Based on the results of the source water monitoring, the state must decide whether it is necessary for the water system to install source water treatment to reduce lead and/or copper tap levels. Regardless of whether a state decides that treatment is needed or not, the water system is still required to conduct source water monitoring following the state decision. EPA proposed to discontinue additional source water monitoring requirements if (a) a water system has conducted source water monitoring for a prior lead and/or copper action level exceedance, (b) the state has determined that source water treatment is not required, and (c) a water system has not added any new water source(s).

EPA proposed these changes to eliminate monitoring requirements that are not necessary to protect public health. Lead and copper are rarely found in the source water in significant quantities (Chin, D., Karalekas, P.C.J., 1985; USEPA, 1988; USEPA, 1990b); thus, where the state has decided that source water treatment is not needed, EPA proposed to allow the state to waive source water monitoring for any subsequent action level exceedance under the conditions listed above and to eliminate the regular monitoring currently required for source water lead and copper.

2. Public Comment and EPA's Response

Several commenters expressed support for waiving source water monitoring as outlined in the proposed LCRR. One commenter specifically expressed support for source water monitoring waivers to be issued by the state in the case of subsequent action level exceedances as outlined in the proposed LCRR. Other commenters opposed the waiver, citing lack of public access to data that lead can occur naturally in source water in some geologic settings, and that they have ''more than a dozen public water systems that treat for naturally occurring, elemental lead found in their source water and even more systems with low levels of lead that do not require treatment.'' The Agency does not dispute that lead may be found in source water in certain geologic settings; however, the final LCRR requires that any system which adds a new source shall collect an additional source water sample from each entry point to the distribution system during two consecutive six-month monitoring periods until the system demonstrates that drinking water entering the distribution system has been maintained below the maximum permissible lead and copper concentrations specified by the state. EPA disagrees that source water monitoring results should be made publicly available because source water sampling results are not representative of water quality at the tap.

3. Final Rule Revisions

The final LCRR eliminates source water lead and copper monitoring that is not necessary to protect public health. Lead and copper are rarely found in the source water in significant quantities (Chin, D., Karalekas, P.C.J., 1985; USEPA, 1988; USEPA, 1990b); thus, where the state has decided that source water treatment is not needed, the state may waive source water monitoring for any subsequent action level exceedance under certain conditions. The final LCRR includes the provision for discontinued additional source water monitoring requirements if (a) a water system has conducted source water monitoring for a prior lead and/or copper action level exceedance, (b) the state has determined that source water treatment is not required, and (c) a water system has not added any new water source(s).

J. Public Education and Sampling at Schools and Child Care Facilities

1. Proposed Requirements

EPA proposed a new requirement for all CWSs to sample for lead at schools and child care facilities they serve and to provide public education for those facilities. The intent of the requirement is to inform and educate targeted CWS customers and users about risks for lead in premise plumbing at schools and child care facilities since large buildings, such as schools, can have higher potential for elevated lead levels due to complex premise plumbing and inconsistent water use patterns. While schools are not likely to be served by LSLs, they may have lead in premise plumbing; therefore, EPA proposed these requirements because public education and water system sampling would provide schools and child care facilities with assurance in the process and benefits of managing a drinking water testing program and the information necessary for them to take actions to reduce lead risk. While, prior to this rule, EPA did not require public water systems to conduct sampling in schools and child care facilities, the Agency had established a voluntary program: 3Ts for Reducing Lead in Drinking Water in Schools and Child Care Facilities—A Training, Testing and Taking Action Approach (3Ts) (EPA–815–B–18–007). The purpose of this program is to assist states, schools, and child care facilities with conducting their own testing programs, conducting outreach, and taking action to address elevated levels of lead. Some states and localities have established mandatory and voluntary programs to test for lead in schools and child care facilities. However, many schools and child care facilities have not been tested for lead. A 2018 survey by the Government Accountability Office (GAO) found that 41 percent of school districts had not tested for lead and an additional 16 percent did not know if they had been tested (GAO, 2018).

EPA proposed these requirements because students and young children are especially vulnerable to lead exposure and spend a large portion of their day in schools and child care facilities. Lead in drinking water can be a significant contributor to overall exposure to lead, particularly for infants whose diets often include foods or formula made with water from public water systems (*i.e.,* baby food, juice, or formula). Young children and infants are particularly vulnerable to lead because the physical and behavioral effects of lead occur at lower exposure levels in children than in adults. In children, low levels of exposure have been linked to damage to the central and peripheral nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells.

Children spend on average over six hours per day at school ((U.S. Department of Agriculture (USDA) National Center for Education Statistics), with many spending more time at on-site before- or after-school care or activities. Children consume water in these facilities through drinking and as part of food preparation. Across the country, about 100,000 schools participate in the national school lunch program, serving daily lunch to approximately 30 million students (USDA, National School Lunch

Program, 2019). Ninety thousand schools serve breakfast to 14.8 million students every day (USDA). The Healthy, Hunger-Free Kids Act of 2010 (HHFKA), which authorizes funding and sets policy for USDA's child nutrition programs, requires schools participating in federally funded meal programs to make water available during meal periods at no cost to students (section 202 of HHFKA (42 U.S.C. 1758(a)(2)(A))). The Act also mandates that child care facilities provide free drinking water throughout the day (section 221 of HHFKA (42 U.S.C. 1766 (u)(2))). The combination of potential higher lead levels in large buildings, vulnerability of children to lead, and the length of time spent at schools and child care facilities presents lead risks to children that can be mitigated through public education, sampling, and voluntary remediation actions.

Furthermore, the requirement for water systems to conduct sampling at schools and child care facilities provides an added measure of protection, above the other elements of the treatment technique rule, in light of the vulnerabilities of the population served and the potential variability of lead levels within the system and within a school or child care facility over time. Large buildings such as schools can have a higher potential for elevated lead levels because, even when served by a water system with well operated OCCT, there may be longer periods of stagnation due to complex premise plumbing systems and inconsistent water use patterns. In such situations, there may not be technical improvements that can be made to the OCCT. However, risk can be mitigated through public education and voluntary remediation actions such as replacement of premise plumbing. Water systems have developed the technical capacity to conduct sampling for lead in operating their system and complying with current drinking water standards.

EPA proposed that the CWS be required to provide information about the health risks and sources of lead in drinking water and collect samples from five drinking water outlets at each school and two drinking water outlets at each child care facility within its distribution system once every five years. It would share results with the facility, local and state health departments, and the state primacy agency. Samples would be first draw after at least 8-hours but not more than 18-hours stagnation in the building and be 250 ml in volume. EPA proposed this sampling protocol to be consistent with the recommended sampling protocols under the Agency's 3Ts Toolkit. The smaller sample size is more representative of the amount of water consumed per serving and the stagnation time is representative of daily water use within these facilities. These samples would serve as a preliminary screen for lead risks within the facility and are not necessarily representative of lead levels in other outlets.

EPA proposed that the CWS compile a list of schools and child care facilities served by the water system to conduct outreach and sampling, including distributing the 3Ts for Reducing Lead in Drinking Water Toolkit (EPA–815–B–18–007), or subsequent guidance issued by EPA that provides information on identifying lead risks, follow-up sampling procedures, stakeholder communication, and remediation options. A CWS's distribution of the 3Ts would initiate or contribute to active communication with schools and child care facilities, who are critical customers that serve a vulnerable population. EPA also proposed that the CWS provide results to schools and child care facilities, the drinking water primacy agency, and the local and state health department where the facility is located no more than 30 days after receipt of results. The results of the samples would not be used as part of the CWS's calculation of the 90th percentile value because these samples are being collected in a manner to inform whether action is needed at a specific school or child care facility and not whether corrosion control is effective system-wide. EPA did not propose requirements for CWSs to take remediation actions at facilities following the sampling and notification requirements. The managers of these facilities have established lines of communication with the occupants of these buildings (and their parents or guardians) and have control over routine maintenance and plumbing materials that may need to be addressed. The managers of the schools and child care centers can use the sampling results and the 3Ts to make decisions about additional voluntary actions to reduce lead risks in their facilities, including implementing their own 3Ts program.

EPA proposed a process for a water system to opt out of the sampling requirements. In the preamble, EPA described a process for a state or primacy agency to waive these requirements for individual CWSs to avoid duplication of effort with existing drinking water testing requirements in schools and child care facilities. EPA proposed that if a state has a program that requires schools and child care facilities to be sampled in a manner consistent with the proposed requirements, the state may use that program in lieu of the proposed requirements.

2. Public Comments and EPA's Response

EPA requested comment on an alternative to the proposed requirements for public education and sampling at schools and child care facilities described in this section. Under the proposed alternative, a CWS would be required to conduct annual outreach to school and child care facilities about the health risks and source of lead and drinking water, and would test at school and child care facilities as described in the proposal only when requested by a facility in their service area. Under this alternative, EPA assumed that 5 percent of schools and child care facilities in a water system service area would request testing per year (see Economic Analysis Chapter 5, section 5.3.2.5 for additional detail).

EPA received many comments on the proposed school and child care sampling requirements spanning a variety of topics. These included comments on the proposed and alternative options, requests for clarification on aspects of the requirements that relate to CWS compliance, the required number of samples, requests for exemptions, and comments on waivers for existing sampling programs.

EPA specifically asked for public comment on the proposed option that CWSs be required to sample for lead in school and child care facilities once every five years or if CWSs should be required to sample in facilities on request only. Some commenters supported the proposed requirements citing the importance of testing in these facilities, while others supported the alternative option citing the benefits of providing public education materials to interested schools and child care facilities and reduced burden to CWSs. Conversely, some commenters objected to the alternative proposal citing concerns that facilities may not request testing due to lack of knowledge about lead risks, the importance for testing for lead, or fear of testing results. Some commenters also argued that the requirements should be removed from the final rule stating that CWSs should not be the entity responsible for testing in schools and child care facilities and citing concerns about costs and resources, while others argued that the proposed requirements would not provide benefits to schools or child care

facilities. A few commenters also stated that sampling of school or child care facilities would be more effective if led by the Department of Education or the Department of Health and Human Services.

Based upon comments, EPA has decided to combine the proposed and alternative options by incorporating both mandatory and on request sampling into the final rule. CWSs must conduct sampling in elementary schools and child care facilities as described in the proposed requirements for one sampling cycle (5 years) and will offer sampling to secondary schools on request. After the first cycle is complete, CWSs must continue to conduct outreach to schools and child care facilities and must sample at the request of a facility. These requirements are intended to educate schools and child care facilities about the risks of lead in drinking water and inform them of ways to mitigate lead risks. The initial sampling accompanied by continued lead in drinking water outreach will provide elementary schools and child care facilities with an understanding of how to create and manage a drinking water testing program that is customizable to their needs and an appreciation of the benefits of such a program. The cycle of sampling is intended to reinforce the importance and benefits of lead testing in elementary schools and child care facilities. Children under the age of 7 are at the greatest risk of drinking water lead exposure, and prioritizing sampling in those facilities with the greatest risks will reduce burden on CWSs and will enable them to focus upon those schools and child care facilities with the most susceptible populations. This construct will also allow CWSs, following the initial cycle of sampling, to focus resources on sampling in schools and child care facilities that request assistance. EPA anticipates that after the first sampling cycle, elementary schools and child care facilities will better understand the process and benefits of lead testing and be more likely to implement their own 3Ts programs. However, facilities interested in further assistance will have the opportunity to be tested for lead by the CWS on request prompted through annual outreach. CWSs will not be required to sample more than 20 percent of the schools and child care facilities they serve in a given year.

EPA disagrees that the requirements for testing in schools and child care facilities should be removed from the final rule or that the requirements provide no benefits. Individual outlets, such as water fountains, can leach lead even when a water system has OCCT. The requirements are part of a targeted public education effort to educate schools and child care facilities and their users of the risks from lead in premise plumbing, the importance of testing for lead in drinking water, and to help them make decisions to mitigate lead risks. The requirement for CWSs to conduct sampling and public education for this vulnerable subset of consumers is within EPA's authority to promulgate a treatment technique rule to ''prevent known or anticipated adverse effects on the health of persons to the extent feasible'' (SDWA 1412(b)(7)(A)). School and child care facility sampling contributes to increased public awareness of the potential for elevated levels of lead in premise plumbing independent of a water system's 90th percentile value. EPA also anticipates that increased familiarity with the 3Ts will assist facilities in taking steps to reduce lead risks to vulnerable populations.

EPA also disagrees that the requirements would be more effective if led by another Federal agency. Few existing mandatory and voluntary programs are administered by state or local departments of education (Cradock et al., 2019). EPA notes that the Department of Education and the Department Health and Human Services are signatories to the 2019 *Memorandum of Understanding (MOU) on Reducing Lead Levels in Schools and Child Care Facilities* along with other Federal partners and organizations. The signatories to the MOU agree to work together to encourage schools and child care facilities to take actions to address lead in their facilities. This includes testing for lead in drinking water, disseminating results, and taking corrective actions. EPA intends for the requirements to complement these efforts and not replace ongoing initiatives to address lead risks in schools and child care facilities. EPA concluded that CWSs have the technical expertise to assist in schools and child care facilities in drinking water testing.

EPA also received many comments requesting clarification on achieving CWS compliance. Some commenters suggested that a CWS would be in violation of the proposed requirements if a school or child care facility did not respond to outreach for testing. Similarly, commenters suggested that meeting the requirement to sample in 20 percent of schools and 20 percent of child care facilities per year depended on facilities responding to CWS outreach. Some commenters cited these concerns as a rationale for supporting the alternative on request option. EPA notes that some schools and child care facilities may not respond to CWS outreach, meaning a CWS would not be able to obtain a refusal. EPA agrees that further clarification was needed and revised § 141.92(a)(3) to document a non-response after a CWS has made two separate good faith attempts to reach the facility. EPA also clarified in § 141.92(c) that non-responses and refusals may be accounted for in the annual 20 percent testing requirement for elementary schools and child care facilities during the mandatory sampling.

Some commenters suggested that the sampling requirements be expanded to include more samples per facility and more frequent sampling. Commenters argued that limited sampling may fail to detect elevated lead levels and some schools and child care facilities may infer from results that there is no lead risk. Other commenters noted that some schools and child care facilities do not follow the 3Ts and may not conduct follow-up sampling or take remediation actions. Some commenters further suggested that the 3Ts Toolkit is not sufficient for addressing lead issues. EPA disagrees that sampling requirements be expanded, as the intent is to provide a preliminary screen for lead in schools and child care facilities and an improved understanding of the importance of lead testing, and is not a replacement for comprehensive testing as detailed in the 3Ts. EPA further disagrees with comments regarding the effectiveness of the 3Ts. The GAO indicated in a 2018 report that 60 percent of school districts were not familiar with the 3Ts guidance, but for those that were, 68 percent reported finding the guidance helpful in reducing lead risks in their facilities (GAO, 2018). Requiring distribution of the 3Ts along with testing results is intended to both increase awareness of the need for lead testing and provide schools and child care facilities with information and tools they can use to reduce lead risks in their drinking water.

Conversely, some commenters suggested that facilities be exempted from testing based on construction dates (*e.g.,* 1986 ban on lead solder) or that repeat testing is not necessary if a facility is tested once, or all outlets are tested once, and results show no or low lead levels. The proposed requirements exempt CWSs from sampling in schools and child care facilities constructed after 2014 (consistent with Section 1417 of the SDWA), as these facilities will have been constructed with lead free plumbing components. Prior to the amendment of Section 1417 of the SDWA by the Reduction of Lead in Drinking Water Act, fixtures could

contain up to 8 percent of lead by weighted average and be classified as lead free. Changing the exemption date to 1986 would therefore be less protective of public health. EPA also disagrees with allowing exemptions based on previous low and non-detected lead levels. Lead levels at an outlet or within a building have been shown to vary over time, with lead levels at one outlet not necessarily characterizing lead levels at other others in the building. Therefore, exempting water systems from testing in facilities based on the previous results of samples taken at a limited number of outlets is not appropriate.

EPA received many comments on the alternative school and child care sampling programs in § 141.92(d). Commenters noted an inconsistency between the preamble in the November 2019 notice, which described the state providing waivers to CWSs where existing school and child care sampling requirements are at least as stringent as § 141.92, and the proposed requirement which stated ''the water system may execute that program [existing state or local regulations] to comply with the requirements of this section,'' implying a different mechanism. As noted above, EPA recognizes this inconsistency and has updated § 141.92(d) to describe the conditions by which a state may issue a full or partial waiver to CWSs. In addition, commenters encouraged EPA to accommodate sampling protocols of existing state and local programs, stating that programs using different stagnation times or sample volumes should not be excluded if they require more sampling more outlets more frequently and include remediation activities. EPA agrees that there are a variety of programs that may differ from the proposed requirements but may otherwise be sufficient or more comprehensive. In response, the final rule provides additional flexibility for existing programs to reduce duplicative testing by CWSs.

3. Final Rule Requirements

EPA is requiring CWSs to sample for lead in the elementary schools and child care facilities they serve once during the first five years after the compliance date for the final rule, and to sample for lead in the secondary schools they serve on request. After all elementary schools and child care facilities are tested once, the CWS will be required to conduct sampling at all the schools and child care facilities they serve when requested by a facility. EPA is retaining the exemption for schools and child care facilities constructed after January 1, 2014. However, in response to public comment, EPA has revised this exemption to include facilities built after the date of state adopted standards that meet the definition of lead free in accordance with Section 1417 of the SDWA, as amended by the Reduction of Lead in Drinking Water Act, to account for localities that adopted lead free standards earlier than 2014. These requirements apply to all CWSs regardless if they receive water from a wholesale system.

EPA is retaining the proposed requirement that all CWSs compile a list of schools and licensed child care facilities served by the system to conduct public education outreach and sampling. EPA notes that pursuant to § 141 90(i)(1)(i), the CWS shall use a good faith effort to identify facilities in their service area, such as reviewing water system billing and other records to identify service connections for schools and child care facilities and by requesting information from appropriate state agencies. During the first five years after the rule compliance date, the CWS is required to contact the elementary schools and child care facilities identified and provide them information about health risks of lead in drinking water at least annually, schedule sampling, and provide the 3Ts Toolkit (or subsequent EPA guidance). The CWS must also contact the secondary schools identified in the list at least annually and provide them with health information, and information on how to request sampling. As the list is updated, new schools and child care facilities will be identified and included in the annual outreach. In the first cycle of sampling, an elementary school or child care facility may decline or not respond to sampling. In response to comments, EPA has revised the requirement to allow the CWS to document non-responses in addition to refusals.

The CWS is required to contact 20 percent of elementary schools and 20 percent of child care facilities per year such that all facilities are sampled once (over the 5 years). In response to comments on flexibility, the final rule will allow an alternative schedule to be approved by the state, as long as all elementary schools and child care facilities are sampled once within a 5-year period. EPA has also clarified that non-responses and refusals may be accounted for in the 20 percent testing rate. CWSs are also required to sample secondary schools at the request of the facility during the 5-year period of mandatory sampling for elementary schools and child care facilities. If a CWS receives requests from more than 20 percent of the secondary schools it serves during a year, it may defer additional requests to the following year. A CWS is not required to conduct sampling in more than 20 percent of the secondary schools it serves in any year during the cycle of mandatory sampling for elementary schools and child care facilities.

Once the CWS has completed the requirements for all elementary schools and child care facilities once, EPA is requiring the CWS to sample both elementary and secondary schools and child care facilities on request. When offering sampling on request, the CWS shall continue to distribute annual information on the health risks of lead in drinking water and is required to provide annual information to schools and child care facilities about the opportunity to request sampling. At least 30 days prior to sampling, the CWS must provide instructions to facilities on how to identify outlets for sampling. If the CWS receives requests from more than 20 percent of the schools and 20 percent of the child care facilities it serves in a given year, the CWS may defer additional requests to the following year. The CWS is not required to complete sampling in more than 20 percent of the schools and 20 percent of the child care facilities it serves in a given year, and may sample the other facilities in the following year. The CWS is also not required to sample any individual school or child care facility more than once every five years. While not required, EPA recommends that CWSs consider factors such as age of students, building construction date, socioeconomic indicators, presence of LSLs, and Federal funding through Title 1 (20 U.S.C. 6301 *et seq.*) and Head Start (42 U.S.C. 9801 *et seq.*) to prioritize sampling in facilities that serve vulnerable or disadvantaged populations.

EPA is retaining the sampling protocol and the provisions to provide sample results to schools and child care facilities along with remediation information within 30 days of receipt of results. EPA has clarified that the remediation information is detailed in the 3Ts. Schools and child care facilities are encouraged to use the testing results and 3Ts Toolkit to inform follow-up activities and remediation actions. For consistency across other reporting requirements, the final rule includes provisions for CWSs to report all results to the primacy agency and local and state health departments as part of annual reporting.

EPA is retaining the proposed process for a state to waive school and child care facility sampling requirements for individual CWSs to avoid duplication of effort and has clarified this in the final

rule. During the cycle of mandatory sampling in elementary schools and child care facilities, a state may issue a CWS a written waiver if there is a state or local program to sample for lead in drinking water at schools or child care facilities that meets the requirements of this rule. This also may include schools or child care facilities that are sampling for lead through facility or district policy. If the sampling meets the final rule requirements, with the exception of stagnation time and sample volume, a waiver may be granted if remediation actions are required as part of the program. Likewise, programs with less frequent sampling (*e.g.,* every six years) that sample more outlets and require remediation, will meet the requirements for a waiver. A state may also issue waivers for voluntary sampling programs that meet the requirements for CWSs to offer sampling on request to secondary schools during the cycle of mandatory sampling in elementary schools and child care facilities, and to all schools and child care facilities thereafter. Some mandatory and voluntary programs are or have previously been funded, wholly or in part, under grant programs for school and child care testing established by the WIIN Act. Therefore, waivers may also be granted if sampling is conducted in accordance with a grant awarded under Section 1464(d) of the SDWA. A state may not issue a waiver to extend past the time period covered by the mandatory or voluntary program.

If a program is limited to a subset of schools and child care facilities defined in § 141.92(a)(1) of this final rule, a state may issue a partial waiver. For example, if a state has a required program for testing lead in drinking water in both elementary and secondary public schools but not in other types of schools or child care facilities, then a CWS serving only public schools can receive a full waiver. If a CWS serves both public and non-public schools and child care facilities, then the CWS would be required to notify and sample at the non-public schools and child care facilities and could receive a partial waiver to acknowledge that the CWS is not responsible for sampling in public schools. A state may issue full or partial waivers for existing voluntary programs. For example, if a state agency offers testing to all public schools when requested, the state could grant a partial waiver such that a CWS would not be required to offer sampling to public secondary schools in its service area during the time the CWS is conducting mandatory sampling in elementary schools and child care facilities. When the CWS is offering sampling on request to all schools and child care facilities, a state could then grant a waiver such that the CWS would not be required to offer sampling to the elementary and secondary public schools in its service area for the duration of the voluntary program.

K. Find-and-Fix

1. Proposed Revisions

EPA proposed a ''find-and-fix'' approach that would require water systems to perform additional actions when an individual tap sample exceeds 15 µg/L. Water systems would be required to collect a follow-up sample for each tap sample site that exceeded 15 µg/L within 30 days of receiving the tap sample result. The results of these ''find-and-fix'' follow-up samples would be submitted to the state but would not be included in the system's 90th percentile calculation because multiple investigatory samples at locations with high lead levels would bias results. If the water system is unable to collect a follow-up sample at a site, the water system would have to provide documentation to the state for why it was unable to collect a follow-up sample. The water system would be required to provide the follow-up tap sample results to consumers within 30 days of receiving the result (consistent with the current rule), unless that follow-up sample also exceeds 15 µg/L, in which case, EPA proposed the water system must notify the consumer within 24 hours of learning of the result. EPA proposed that water systems with CCT that have an individual tap sample that exceeds the lead action level, would be required to collect an additional WQP sample within five days of obtaining the lead tap sample result. For a CWS, this WQP sample must be collected from a site in the same water pressure zone, on the same size or smaller water main within 0.5 miles of the residence with the tap sample exceeding the lead action level. Water systems with an existing WQP site that meets these criteria would be able to sample at that location.

Any water system that is unable to regain access to the same site to collect a follow-up tap sample may decide to sample at another site within close proximity of the original site and with similar structural characteristics.

EPA proposed that WQP samples be collected within 5 days, since WQP sites are more accessible sites and do not require coordination with customers. The proposal included requirements to sample WQPs as close to the lead tap sample site as possible so that the water quality will more closely match the conditions at the site that exceeded 15 µg/L. The intent of the proposed requirements for a follow-up tap sample collected for lead was to help the water system determine the potential source of lead contamination (*e.g.,* premise plumbing, LSL) and the intent of the required WQP sample for water systems with CCT was to help determine if CCT is optimized, if additional WQP sites are needed, and/or if WQPs set by the state are being met. Such steps would help identify the source of the elevated lead to initiate appropriate mitigation. EPA proposed that when a water system is unable to identify and/or mitigate the risk, it must submit a justification to the state.

Under the proposal, the water system would be required to determine if problems with the CCT are leading to elevated levels of lead in the tap samples and then implement a mitigation strategy if necessary. In addition to the follow-up tap sample and the WQP sampling, the water system could review distribution system operations or other factors to determine the cause of the elevated lead level. CCT adjustment may not be necessary to address every exceedance. Water systems would note the cause of the elevated lead level if known in their recommendation to the state. Mitigation strategies could include a water system-wide adjustment to CCT, flushing portions of the distribution system, or other strategies to improve water quality management to reduce lead levels. Under this proposal, water systems would be required to confirm the find-and-fix steps were completed and recommend water system actions, such as spot flushing, to the state for approval within six months of the end of the monitoring period in which the site(s) first exceeded 15 µg/L and the state would have six months to approve the recommendation. EPA proposed implementation requirements for water systems that do not have CCT and recommends installation of it and for water systems with CCT that recommends re-optimization of CCT.

A water system may identify a fix that is out of its control. For example, if the source of lead in drinking water was an old faucet owned by the customer, and the customer did not wish to replace the faucet, the water system would provide documentation to the state under this proposal. All other fixes recommended by a water system would be implemented on a schedule specified by the state.

2. Public Comment and EPA's Response

EPA received a number of comments that expressed concerns that a single

elevated tap lead sample could trigger a system-wide corrosion control installation or re-optimization. One commenter stated that requiring the installation of corrosion control equipment for the entire utility if the cause of a sample exceedance is listed as corrosive water in one home, is excessive. Others commented that this provision is unwarranted, inappropriate, or a disproportionate response which could result in expensive and time-consuming distribution system evaluations. EPA disagrees that the find-and-fix provisions are unwarranted. These requirements initiate sampling and other activities that will assess the potential cause of the elevated levels of lead and will prompt additional feasible actions that will reduce the risks to persons at the locations where there may be elevated levels of lead. Many commented that corrosion control adjustments should only be made in response to data demonstrating that current corrosion control is deficient throughout the distribution system, and not in response to a small number of individual tap samples. Many commenters also interpreted the rule to require corrosion control treatment modifications to be the typical response to address a site that exceeded 15 µg/L. In response to these comments, the final rule emphasizes localized distribution system management as the likely fix. Mitigation strategies could include, flushing or other strategies to improve water quality management. However, in some instances where the find and fix corrosion control assessment monitoring finds that optimal water quality parameters are not being maintained in a portion of the distribution system, systems may need to implement localized or centralized adjustment of corrosion control treatment. A system that does not have existing corrosion control treatment is not required to conduct a corrosion control study or to install treatment as a result of find-and-fix unless the state determines it is necessary.

Some commenters noted that small water systems without corrosion control treatment may not be able to collect water quality parameter samples within five days as these systems may not have ready access to instruments and laboratories that can perform these analyses. EPA agrees and is allowing small water systems without corrosion control treatment up to 14 days to perform this monitoring. Many commenters also requested clarity on the purpose and location of the samples, with several interpreting the proposed rule as requiring the water quality parameter monitoring to be conducted at the site with the lead result above 15 µg/L. Many commenters also questioned the recommendation in the proposed rule to take a lead sample at a nearby site of similar plumbing characteristics, if the system was unable to take a follow-up sample at the site that was above 15 µg/L. EPA agrees that sampling at a different site in the vicinity will not help assess the lead source at the site that was above15 µg/L, so the final rule does not require systems to do this. If the water system is unable to collect a follow-up sample at a site, the water system must provide documentation to the State, explaining why it was unable to collect a follow-up sample. EPA also agrees that clarification is needed and has provide more details in the final rule of where and when follow up samples must be collected.

3. Final Rule Requirements

For the final rule, EPA is clarifying that the water quality parameter monitoring (Step 1) is intended to assess the corrosion control treatment at a nearby location in the distribution system and the follow-up sample at the tap sampling site above 15 µg/L (Step 2) is intended to identify the lead source at the site.

Step 1 of the process is the corrosion control assessment step in which water quality parameter sampling must be done within five days of the system receiving the tap sample results exceeding 15 µg/L, except for small water systems (serving 10,000 people or fewer persons) without corrosion control treatment that may perform the sampling within 14 days. The sampling is to replicate as closely as possible the water quality conditions at the time when the tap exceeded 15 µg/L. The water quality parameter sampling location is not at the tap that exceeded 15 µg/L but must be within the same pressure zone, on the same size main and within a half-mile from the tap sample site. Section 141.82(j)(1)(v) of this final rule allows systems with an existing WQP site that meets these criteria to sample at that site. Section 141.82.(j)(1)(vi) requires that a system that does not have an existing WQP site that meets the criteria to add the additional WQP site to its routine monitoring. Since the monthly total coliform sampling for large systems vastly exceeds the water quality parameter monitoring in the distribution system for the lead and copper rule, EPA expects coliform sampling locations should be available that are in the same pressure zone, on the same size main, and within a half mile of the site that exceeded 15 µg/L in many large systems. Medium-size systems may also find that total coliform sampling sites are available and can meet the criteria for sampling location when the existing water quality parameter sites are not located in that area of the distribution system. The maximum WQP sites that a system would have to sample are two times the standard number sites required. When a system exceeds this upper threshold for the number of sites, the state has discretion to determine if the newer sites can better assess the effectiveness of the corrosion control treatment and may remove existing WQP sites during sanitary survey evaluation of OCCT.

Step 2 is designated as site assessment in the final rule. In Step 2, water systems are required to conduct follow-up sampling at the tap sampling site above 15 µg/L. This is intended to help the system identify the source of the lead, such as the service line, brass faucet, lead solder, and/or gooseneck/pigtails, if possible. The final rule allows tap sample collection of a different volume or using a different protocol (if needed to better identify the source of lead) than samples collected under the tap monitoring and therefore the sample is not included in the 90th percentile calculation. If the water system is unable to carry out follow-up tap sampling (*i.e.,* the customer refuses a follow-up tap sample or there is a lack of response), the water system is responsible for documenting the reason for not carrying out the sampling. Water systems must note the cause of the elevated lead level, if known from the site assessment.

In Step 3, water systems evaluate the results of the monitoring from Steps 1 and 2 to determine if the cause of the lead tap sample above 15 µg/L is due to a source of lead at the sampling location, to corrosive water quality parameters or is unknown. If the water system determines the cause of the elevated level of lead is solely due to a source of lead at the sampling location, or is unknown, the system is not required to recommend an action to fix the cause of the elevated lead. If the water system finds that corrosive water quality parameters are the cause, the system must determine if distribution system management changes such as flushing to reduce water age or adjustment of the corrosion control treatment are necessary to restore optimal water quality parameters in that portion of the system. Adjustment of corrosion control treatment could include changing the feed rates for the corrosion inhibitor for a portion of the distribution system or for the entire

system to ensure that optimal water quality parameters are maintained for optimal corrosion control. The system must submit the recommendation to the state within six months after the end of the tap sampling period in which the site(s) exceeded 15 µg/L. Systems in the process of optimizing or re-optimizing optimal corrosion control treatment (§ 141.82(a)–(f)) do not need to submit a recommendation for find and fix as they are currently adjusting corrosion control treatment.

L. Water System Reporting Requirements

1. Proposed Revisions

EPA proposed changes to water system reporting requirements in conjunction with corresponding proposed changes to the regulatory requirements. These changes in reporting requirements were proposed to inform state decision-making and improve implementation and oversight.

In addition to the proposed tap sampling protocol revisions, EPA proposed that a water system would also be required to submit for state approval its tap sampling protocol that are provided to residents or individuals who are conducting tap sampling. The sampling protocol would be required to be written in accordance with new rule requirements. EPA proposed that the state would review the protocol to ensure that it does not include prohibited instructions for pre-stagnation flushing, and cleaning and/or removing the faucet aerator prior to sample collection and ensures the use of wide-mouth collection bottles. Under the proposal, water systems would also need to provide certification to the state that the approved sampling protocol has not been modified within 10 days of the end of the tap sampling monitoring period, and to submit an updated version if any modifications are made.

EPA also proposed to include new reporting requirements in conjunction with the revisions to the LSLR requirements in the final rule. By the rule's compliance date, the water system would be required to submit to the state an inventory of service lines. The water system would have to submit an updated inventory annually thereafter that reflects LSLs replaced and lead status unknown service lines that have been identified in the distribution system.

EPA also proposed that any water system with LSLs and 90th percentile tap sampling data that exceeds the lead trigger level would be required to annually certify to the state that it conducted notification in accordance with proposed LSL customer notification provisions. The notification would ensure customers were properly alerted about the trigger level exceedance, potential risks of lead in drinking water, and informed about the water system's goal based LSLR program.

In addition, under the proposal, a CWS must certify that it has completed the notification and sampling requirements at a minimum of 20 percent of schools and child care facilities served by the water system annually. The certification would include the number of schools and child care facilities served by the water system, the number of schools and child care facilities sampled in the calendar year, and the number of schools and child care facilities that have refused tap sampling. In addition, the proposal required that a CWS must certify that individual sampling results were shared with the respective school and child care facility, and with local or state health departments. If a CWS does not serve any school or licensed child care facilities, the water system would have to annually certify to the state that it made a good faith effort to identify schools and child care facilities and confirm that no schools or child care facilities are served by the water system. The good faith effort could include reviewing customer records and requesting lists of schools and child care facilities from the state or other licensing agency. Certification was to be sent to the state by July 1 of each year for the previous calendar year's activity.

EPA also proposed reporting requirements for small CWSs using the point-of-use compliance flexibility option. These systems would need to report their sampling results and corrective actions taken if a POU sample exceeded 10 µg occurred. In addition, they would certify the maintenance of the POUs if requested by the state.

Additionally, calcium results were no longer subject to reporting requirements under the proposed rule, because calcium was eliminated as a CCT option and thus not a regulated OWQP.

2. Public Comment and EPA's Response

EPA received many comments on the various reporting requirements. Many of the commenters expressed concern about the increased burden the proposed reporting requirements could impose and several offered suggestions such as an online tool, using existing opportunities such as sanitary surveys for reporting, or allowing the water system to self-certify instead of certifying that certain requirements are complete to the state. Commenters expressed that these burdens range from administrative to financial, and that small systems are likely to be impacted most. Some commenters argue against some of the reporting requirements to certify or re-submit material annually, stating that systems could track this on their own but provide to the state upon request. Many commenters were worried there would not be an adequate tracking tool or data system such as EPA's Safe Drinking Water Information System (SDWIS) to manage the reporting requirements of the proposal. Some commenters state that they would need to create tracking systems of their own and would need additional staff and data management systems. EPA agrees that new reporting requirements create a burden for water systems and states and has made changes to streamline reporting in the final rule as described below. EPA intends to support the data management needs of primacy agencies for the LCRR through the SDWIS Modernization development project, and to have a product available for state use by the compliance date of the LCRR. EPA will work closely with state program and information technology staff on LCRR database needs and on overall SDWIS modernization.

Regarding LSL reporting requirements, some commenters asked that reporting of updates to the service line inventory cease after all LSLs have been identified in the inventory as none would be installed in the future. EPA does not agree since updated inventories also reflect LSLR which include customer initiated and required LSLR following a trigger level and action level exceedance. The state needs to have this information to track compliance of LSLR requirements. Several commenters stated it is redundant to require water systems to submit a service line inventory and replacement plans after an action level exceedance because water systems are already submitting these. However, other commenters stated that LSLR plans should be submitted to the state regardless of the 90th percentile results. Based on commenter input, EPA has modified the requirement in the final rule; water systems will not be required to submit the inventory and replacement plans after an action level exceedance since they are submitted at the rule compliance date and updated inventories are submitted according to their tap sampling monitoring frequency (*i.e.,* annually or triennially) thereafter, thereby reducing the frequency of reporting inventory updates. In addition, there are off-ramps for

submitting inventory updates for those systems that can verify they no longer have LSLs, galvanized lines requiring replacement, or lead status unknown service lines in their distribution.

Some commenters requested that the final rule retain the reporting deadlines in the current rule. For instance, reporting lead and copper results within 10 days of the end of the tap sampling monitoring period instead of before the tap sampling period ends (for systems where the state calculates the 90th percentile) which was proposed. Many commenters had concern about the school and child care sampling and public education reporting requirements. Several commenters asked why after sampling results are reported, they also must be certified that they completed this requirement to the state. Several commenters offer suggestions on how to reduce the burden of these requirements or streamline them, such as submitting an annual report, or maintaining the records on hand and submitting upon request from the state. Many commenters had concerns about the number of attempts and documenting refusals when a facility simply does not respond. EPA has made changes to § 141.92(a)(3) regarding schools and child care facility refusals and nonresponse and the reporting § 141.90(i) so that CWSs certify once per year that they have met the schools and child care facility requirements for the previous calendar year. In addition, the annual certification is due July 1 of each year consistent with the timing for annual CCR certification.

Regarding the proposed reporting requirements for the ''find-and-fix'' provision, several commenters state it is impractical to maintain lists and tracking of all the ''fixes'' done by the water system and that this gives rise to privacy concerns for homeowners. Some commenters suggested a requirement for water systems to include ''find-and-fix'' activities in an annual or monthly report. Several commenters asked for guidance such as a template or checklist for the find-and-fix provisions states review. EPA evaluated public comments and agrees that clear steps, be included in the find-and-fix requirements and has made modifications to the final rule accordingly. This should also streamline find-and-fix reporting.

3. Final Rule Requirements

Many of the reporting requirements from the proposal have been retained in the final rule. However, EPA has taken into consideration all of the comments and has modified several sections to reduce burden, enhance efficiency of reporting and/or to include new necessary provisions. Many changes were made for clarification and organizational purposes in § 141.90, while others were made to reflect changes made to corresponding sections of the rule proposal.

The lead service line reporting requirements have been updated to allow systems to discontinue inventory updates when they no longer have service lines that need to be replaced or materials verified (*i.e.,* no remaining lead status unknown). In addition, the inventory requirements are now linked to the tap sampling monitoring schedules in § 141.86(d) to streamline dates for reporting. Also, systems must report annually that they completed any customer-initiated LSLR, in addition to requesting an extension to complete a customer-initiated LSLR.

The final rule clarifies that all water systems must report to the state an addition of a new source or long-term treatment change prior to adding the source or modifying treatment. In addition, this final rule includes a requirement for water systems to submit a tap site sample plan prior to the compliance date of the rule with tap sampling sites that meet the new site selection tiering criteria based on their LSL inventory to ensure states can verify the tap sampling sites comply with the requirements in the final rule and can track changes in the tap sampling pool.

Regarding reporting for small system compliance flexibility options, an additional reporting requirement was added for systems who have opted to remove lead-bearing plumbing from their distribution system; they must certify within one year that the material has been eliminated. Under reporting for schools and childcare facilities, EPA has made several changes, including reporting requirements for elementary and childcare facilities in the first five years of monitoring and reporting requirements for school and childcare sampling that is performed on-request.

IV. Other Revisions to 40 CFR Part 141

A. Consumer Confidence Report

In 1996, Congress amended the Safe Drinking Water Act (SDWA). Among other things, this amendment added a provision requiring that all CWSs deliver to their customers a water quality report annually called a Consumer Confidence Report (CCR). CCRs summarize information water systems collect to comply with regulations. The CCR includes information on source water, the levels of any detected contaminants, compliance with drinking water rules (including monitoring requirements), and some educational language, including a mandatory health effects statement regarding lead.

1. Proposed Revisions

As recommended by the NDWAC (see section VII.L.2 of this preamble), EPA consulted with risk communication experts to propose revised mandatory health effects language for the CCR. In addition, EPA proposed to use consistent mandatory lead health effects language in PE, CCR, and Public Notification materials. To improve clarity, EPA proposed to require CWSs to include a revised mandatory health effects statement that would inform consumers that lead is harmful for all age groups and to include a mandatory statement about LSLs (*e.g.,* their presence and how to replace them) for water systems with LSLs. The proposed statement is below.

Exposure to lead can cause serious health effects in all age groups. Infants and children who drink water containing lead could have decreases in IQ and attention span and increases in learning and behavior problems. Lead exposure among women who are pregnant increases prenatal risks. Lead exposure among women who later become pregnant has similar risks if lead stored in the mother's bones is released during pregnancy. Recent science suggests that adults who drink water containing lead have increased risks of heart disease, high blood pressure, kidney or nervous system problems. To increase transparency and improve public access to information, EPA also proposed to require CWSs to report the range of lead tap sample results in addition to the currently required 90th percentile and the number of samples that are greater than the lead action level for each monitoring period. Reporting the range of tap sample lead levels would allow consumers to understand how high tap sample levels were at individual sites.

2. Public Comment and EPA's Response

Several commenters suggested revisions to the informational health effects statement on lead in drinking water that would be required in the CCR to make the language more readable and useful to consumers. Some commenters recommended requiring the CCR to include information on LSLs and the LSL inventory, including the number of LSLs, the number of lead status unknown service lines, the total number of service lines in the water system, and a statement that a service line inventory has been prepared and is available for

review. They also recommended requiring the CCR to notify consumers that complete lead tap sampling data are available for review and how to access the data. EPA agrees this is important information to consumers and has incorporated these recommendations in the final rule requirements for the CCR.

A few commenters expressed concern that the CCR is no longer an effective method to communicate drinking water contaminant related issues and suggested use of other platforms such as social media. EPA supports using diverse methods of communication to reach consumers and provided recent guidance on electronic delivery of CCRs. In the final rule, EPA has increased the number and forms of public education materials. EPA has also worked to improve risk communication by consulting with risk communication experts, adopting clearer and more concise health effects language, and keeping the health effects language consistent across the CCR, 24 hour public notice for a lead action level exceedance, and all public education materials. In addition, the Agency has recommended that systems use social media to provide public education and outreach, for example to convey information about their LSLR program.

3. Final Revisions

EPA is finalizing the requirement for reporting tap sampling results in the CCR as proposed, while clarifying the meaning of ''round of sampling'' for systems on six-month monitoring given the new sampling requirements in the LCRR. The final rule requires water systems to include in the CCR the 90th percentile concentration of the most recent round(s) of sampling, the number of sampling sites exceeding the action level, and the range of tap sampling results for lead and copper. These results should be provided for each sampling event completed in the reporting period. This means that water systems on six-month monitoring will be required to include both rounds of lead and copper results. In response to comments, EPA added a new provision requiring water systems to include information in the CCR on how to access the service line inventory. EPA also added a new provision requiring water systems to include information in the CCR on how to access the results of all tap sampling. EPA incorporated some of the commenters' suggested revisions to increase the clarity and accuracy of both the lead informational statement and mandatory health effects statement required in the CCR. The mandatory health effects statement for the final rule reads as follows and is also required in the public notice of an action level exceedance and in public education materials:

Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to new learning and behavior problems or exacerbate existing learning and behavior problems. The children of women who are exposed to lead before or during pregnancy can have increased risk of these adverse health effects. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.

B. Public Notification

The current Public Notification Rule (PN) is part of the Safe Drinking Water Act 1996 Right To Know provisions. The rule is designed to ensure that consumers will know if there is a problem with their drinking water. These notices alert consumers if there is risk to public health. They also notify customers: If the water does not meet drinking water standards; if the water system fails to test its water; if the system has been granted a variance (use of less costly technology); or if the system has been granted an exemption (more time to comply with a new regulation). In 2000, EPA revised the existing Public Notification Rule. (40 CFR part 141, subpart Q) The revisions matched the form, manner, and timing of the notices to the relative risk to human health. The revised rule makes notification easier and more effective for both water systems and their customers.

In 2016, section 2106 of the WIIN Act amended section 1414(c)(1) of the SDWA to require water systems to provide to persons served by the system ''[n]otice that the public water system exceeded the lead action level under section 141.80(c) of title 40, Code of Federal Regulations (or a prescribed level of lead that the Administrator establishes for public education or notification in a successor regulation promulgated pursuant to section 1412).'' The WIIN Act also amended section 1414(c)(2) of the SDWA to require EPA's public notification regulations to require systems to notify the public no later than 24 hours after a system learns of an exceedance of the lead action level if it '' ''has the potential to have serious adverse effects on human health as a result of short-term exposure'' just as section 1414(c)(2) has applied to violations of drinking water standards that have the potential to have serious adverse effects on human health as a result of short-term exposure. These situations are currently categorized as ''Tier 1'' under the current public notification rules (see Table 2 to § 141.201). Tier 1 notices must ''be distributed as soon as practicable, but not later than 24 hours, after the public water system learns of the violation or exceedance'' pursuant to section 1414(c)(2)(C)(i) of the SDWA. The WIIN Act also amended section 1414(c)(2)(iii) to require that such notifications be provided to the Administrator in addition to the head of the state agency that has primary enforcement responsibility under section 1413 of the SDWA, as applicable, as soon as practicable, but not later than 24 hours after the public water system learns of the violation or exceedance.'' In a State with primacy, EPA interprets the notice to the Administrator ''as applicable'' only when there is an action level exceedance; it would not apply to other Tier 1 situations where a State has primacy. This notice allows EPA to identify whether it must provide notice as required in section 1414(c)(2)(D), which was added to Section 1414(c)(2) as part of the WIIN Act. It provides that if a State with primary enforcement responsibility or the water system has not issued a notice for an exceedance of a lead action level that has the potential to have serious adverse effects on human health as a result of short-term exposure, the Administrator is required to issue the required notice. Because EPA does not have any obligation to issue a Tier 1 notice for violations of drinking water standards in states with primacy, there is no need for EPA to be notified of those Tier 1 situations.

1. Proposed Revisions

EPA proposed to incorporate these requirements for CWSs and NTNCWSs with a lead ALE as part of proposed revisions to the Lead and Copper Rule (LCR). Specifically, the proposed rule incorporated the amendments to section 1414 of the SDWA in 40 CFR part 141, subpart Q-Public Notification of Drinking Water Violations (and as necessary into any provisions cross-referenced therein), and added exceedances of the lead AL under § 141.80(c) to the list of Tier 1 violations subject to the new 24-hour notice requirements discussed above. EPA proposed to categorize a lead AL exceedance as Tier 1 based on the conclusion that such exceedances ''have the potential to have serious adverse health effects on human health as a result of short-term exposure.'' Since exposure to lead can result in serious health effects as a result of short-term exposure in some circumstances, EPA proposed that any lead AL exceedance result in Tier 1 public notification. In

addition, EPA proposed to update the mandatory health effects statement for PN to be consistent with the proposed CCR revisions.

2. Public Comment and EPA's Response

EPA received many comments expressing concerns about the ability of water systems to meet the proposed 24-hour distribution requirement for notification of an AL exceedance. Many commenters requested that water systems be allowed at least two business days to deliver the public notice. EPA acknowledges commenters' concerns; however, the Agency disagrees that systems would not be able to provide the notice within 24 hours. For several years, water systems have been required to provide Tier 1 notification for certain violations of drinking water standards within 24 hours of learning of the violation. Systems can prepare to provide the notice by creating a notification template in advance and may choose from several options for distribution of a public notification that make it feasible to provide the notice to all persons served by the system within 24 hours of learning of the exceedance. These options are specified in § 141.202(c) of the rule and include broadcast media such as radio and television, posting the notice in conspicuous locations throughout the area served by the water system, hand delivery of the notice to persons served by the water system, or another delivery method approved by the primacy agency.

Many commenters questioned the categorization of a lead AL exceedance as a Tier 1 violation, particularly given it is not a health-based value. Some suggested that it be categorized as a Tier 2 violation. However, as described above, Section 2106 of the 2016 WIIN Act amended section 1414(c)(2) of the SDWA to require EPA's public notification regulations to require systems to notify the public no later than 24 hours after a system learns of an exceedance of the lead AL if it ''has the potential to have serious adverse effects on human health as a result of the customer did not wish to replace the faucet exposure.'' The scientific evidence demonstrates that exposure to lead is associated with increased risk of serious adverse health effects. The strongest evidence is for cognitive effects from prenatal and childhood exposure. Also of concern are studies showing increases in risk of cancer and cardiovascular, renal, reproductive, immunological, and neurological effects in adults (USEPA, 2013; National Toxicology Program, 2012; USEPA, 2004a). Given there is no safe level of lead, and there are life stages (*e.g.,* early childhood) where any lead exposure is especially problematic, lead AL exceedances could have serious adverse health consequences. Accordingly, to avoid these impacts, consumers must be notified as soon as possible as required under the SDWA.

3. Final Revisions

The final rule adds exceedances of the lead AL of 15 μg/L to the list of Tier 1 violations subject to the new 24-hour distribution requirement for notification of an AL exceedance. This is based on the conclusion that such exceedances have the potential to have serious adverse health effects on human health as a result of short-term exposure. Therefore, the final rule requires CWSs and NTNCWSs with a lead ALE to provide public notice to persons served by the system within 24 hours of learning of the ALE; that is, within 24 hours of the system receiving and calculating the 90th percentile value. A copy of the notice must also be sent to both the primacy agency and the Administrator in accordance with the requirements of §§ 141.4(c)(2)(iii) and 141.31(d). EPA has also updated the mandatory health effects language required in the public notice of a lead ALE as well as the CCR and public education materials to enhance clarity and accuracy. The mandatory health effects language in the final rule reads as follows:

Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to new learning and behavior problems or exacerbate existing learning and behavior problems. The children of women who are exposed to lead before or during pregnancy can have increased risk of these adverse health effects. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.

C. Definitions

1. Proposed Revisions

Under the Proposed Lead and Copper Rule Revisions, EPA proposed new and revised definitions under § 141.2. Definitions for ''aerator,'' ''pre-stagnation flushing,'' ''wide-mouth bottle,'' and ''tap sampling protocol,'' were added to correspond with proposed rule changes regarding tap sampling methods. In addition, EPA proposed changes to population size criteria for small and medium-size water systems to reflect the 1996 changes to SDWA for small-system flexibility, where small water systems serve 10,000 or fewer customers.

Definitions were added in the proposal to ensure readers understood the criteria for identifying a ''child care facility,'' and a ''school,'' in relation to new sampling requirements for these facilities. In addition, definitions for ''trigger level,'' ''find-and-fix,'' ''customer,'' and ''consumer'' were included in the proposal because ''trigger level'' and ''find-and-fix'' were new requirements under the proposal, while ''customer'' and ''consumer'' referred to defined groups impacted by aspects of the proposal such as public education under § 141.85. Further, in the proposal, terms related to LSLs, such as ''galvanized service line,'' ''trenching,'' ''potholing,'' ''hydrovacing,'' and ''gooseneck, pigtail, or connector,'' were defined because these are processes or materials associated with the LSLR requirements of the proposal. EPA also modified the definition of a ''lead service line'' to better fit the rule requirements in the proposal. These changes included removing lead goosenecks, pigtails, and connectors from the definition and specifying when galvanized lines are considered an LSL for purposes of conducting LSLR. EPA made these modifications to align with rule requirements which prioritize the identification, replacement, and tap sampling at sites with LSLs, as they are the primary source of lead in drinking water when present. The definition of a lead service line does not include lead goosenecks, pigtails or connectors to avoid water systems replacing only lead connectors to meet goal rate and mandatory LSLR requirements.

''Sampling period'' was also added in reference to the months of the year that sampling is permitted under § 141.86, while ''monitoring period'' was added and defined, to refer to the tap sampling frequency the water system is required to conduct. To ensure appropriate implementation of rule requirements, definitions for ''pitcher filter'' and ''point-of-use'' (POU) device were also included in the proposal. Definitions for a ''method detection limit'' (MDL) and a ''practical quantitation level'' (PQL) were provided in the proposed rule to better explain analytical methods in the current and proposed rules.

2. Public Comment and EPA Response

Many commenters were concerned about the new definitions of ''consumer'' and ''customer'' and explained that they were misused or used interchangeably throughout the rule. For instance, in the proposal, ''customer'' was defined as paying users

of the water system, whereas ''consumer'' included all users, including those paying the water bill. Commenters noted there was confusion about their use for LSL notification and public education purposes and interpreted a requirement to notify ''consumers'' to mean any person who may have used the water and questioned how a water system can notify transient populations. Commenters also noted that owners of the service line were not explicitly included in either definition and that they are an important group that should be contacted under certain circumstances. EPA agrees that the proposed definitions may be confusing and has not included them in § 141.2 of the final rule. EPA instead modified the regulatory text to specify the group of people affected in each section of the rule in lieu of using ''consumer'' and ''customer'' (*e.g.,* ''persons served water by a lead service line'') throughout this final rule.

Many comments suggested modifications to the proposed definitions for ''pitcher filter'' such as specifying if EPA intends only the filter or the pitcher and the filter. Other suggestions included requiring pitcher filters to meet a standard by a certifying body that the device reduces lead. EPA agreed with some of the commenters' concerns and has included in the definition that a pitcher filter must be certified by an American National Standards Institute (ANSI) certifying body to reduce lead.

Many commenters requested clarification on definitions for ''child care facility'' and ''school''. Several were opposed to including ''licensed'' with respect to child care facilities while others stated they should be limited to state-licensed child care sites. Some commenters asked EPA to remove ''or other location'' from the definition of ''school''. Some commenters asked if higher education centers like universities and technical schools are included in the school definition and therefore in school sampling requirements. EPA modified the proposed school testing requirements to distinguish testing required at child care facilities and elementary schools versus those for secondary schools. In response to this, EPA has added new definitions for ''elementary school'' and ''secondary school'', so that it is clear which facilities are referred to in the requirements under § 141.92. These definitions are consistent with the National Center for Education Statistics Glossary (*https://nces.ed.gov/programs/coe/glossary.asp*).

After evaluations of public comments, EPA agrees and has modified the definitions of ''school'' and ''child care facility'' in the final rule to reduce any ambiguity as it was not EPA's intent to include locations such as museums or athletic facilities in the definition of ''school'' while EPA has maintained that licensed facilities are included in the ''child care facility'' definition. Commenters asked for more detail on ''wide-mouth bottle'' and EPA has included a specific diameter to define a wide mouth bottle in the final rule.

Many commenters disagreed with how EPA defined ''sampling period'' and ''monitoring period'' stating that EPA did not use these terms consistently throughout the rule. They also note these definitions may conflict with other NPDWRs. In the final LCRR, EPA has uniquely defined these in regard to tap sampling for purposes of the LCRR. The LCRR includes definitions for ''tap sampling monitoring period'' to describe frequency and ''tap sampling period'' to describe the time period in which samples must be collected.

Some of the comments requested clarification on ''unknown'' service lines, which prompted EPA to create new definitions such as ''lead status unknown service line'' to clearly delineate a category for unknown service lines. EPA agrees that clarification is needed and has included descriptions both in the LSL inventory requirements and as a new definition in § 141.2. EPA received significant comment on the definition of an LSL, specifically, whether it is appropriate for a galvanized service line to be considered an LSL if it ever was or is currently downstream of an LSL. Many of these commenters expressed that water systems will not have records to demonstrate if a galvanized service line ''ever was or is currently downstream of any lead service line or service line of unknown material,'' some stating that galvanized service lines should be included regardless of what is upstream. Other commenters stated that galvanized service lines should not be included to reduce burden to the water system. As proposed, most galvanized service lines would be deemed an LSL because of lack of information about upstream LSLs. In addition, commenters questioned why the proposal requires replacement of galvanized lines, but they cannot be used for tap sampling sites. EPA determined that a galvanized service line that is or ever was downstream from an LSL requires replacement but is not included in the LSL definition to reduce confusion and because it has its own definition. In addition, EPA included sites served by a galvanized requiring replacement in the tap sample site selection criteria (tier 3) in the final rule. This also helps clarify that while galvanized service lines that were or are upstream of an LSL require replacement, they are not appropriate sites for tap sampling.

Many commenters were opposed to the exclusion of lead connectors (goosenecks, pigtails, etc.) from the proposed definition of an LSL, some stating this was violating SDWA's anti-backsliding provision under Section 1412(b)(9). Some commenters reference the SDWA definition of an LSL as well as an LSL as defined by the California and Michigan regulations. Commenters provided input about what should and should not be included in the LSL definition and noted where there were contradictions in the rule between tap sampling, LSL inventory and replacement requirements regarding an LSL. EPA agreed that clarity was needed in the definition of an LSL due to its importance related to LSL inventory, LSLR outreach, and selection of tap sample sites and has clarified this in section III.C of this preamble. EPA has modified the definition to simplify it and to specify that it is for the purposes of the LCRR only, to prioritize tap sampling sites and replacement of full LSLs. EPA excluded the lead connector portion of the LSL definition and has clarified the lead connector definition itself. For purposes of this rule, lead connectors are not a part of the service line and are required to be replaced only when identified while conducting other maintenance and replacement activities. EPA has kept these connectors out of the LSL definition to ensure water systems are conducting LSLR on service lines and not counting replacement of connectors as a replaced LSL. A commenter noted that the definition for ''service line sample'' should be removed since the LCRR no longer allows test out of LSLs.

3. Final Rule Requirements

As stated above, EPA has made many changes to the definitions in the Proposed Lead and Copper Rule Revisions, including modifying the proposed definitions, removing some additional terms and defining other additional terms. Definitions that were modified in the final rule include: ''action level,'' ''find-and-fix,'' ''first draw sample,'' ''galvanized service line,'' ''gooseneck, pigtail or connector,'' ''lead service line,'' ''pitcher filter,'' ''point-of-use device,'' ''pre-stagnation flushing,'' ''school,'' ''child care facility,'' ''tap sampling protocol,'' ''wide-mouth bottle,'' and changing

''trigger level'' to ''lead trigger level.'' EPA revised definitions for ''monitoring period'' and ''sampling period'' to ''tap sampling monitoring period'' and ''tap sampling period.''

In addition, EPA has added the following definitions to improve the final rule: ''Full lead service line replacement,'' ''lead status unknown service line,'' ''partial lead service line replacement,'' ''elementary school,'' ''secondary school'' and ''system without corrosion control treatment.'' These were added to ensure consistent implementation for LCRR requirements for preparing a service line inventory, LSLR, carrying out school sampling and conducting CCT studies. In addition, ''hydrovacing,'' ''trenching,'' and ''potholing'' have been removed because of their minimal use in the rule.

EPA has also no longer included the terms ''consumer'' and ''customer'' in the definitions and has instead been more specific in each part of the rule about the impacted person or group. EPA removed the definition for ''service line sample'' because test outs of LSLs are not allowed in the LCRR. EPA has maintained the current definitions of ''small water system'' and ''medium-size water system'' in § 141.2 consistent with the proposal.

V. Rule Implementation and Enforcement

A. What are the state recordkeeping and reporting requirements?

1. Proposed Revisions

EPA proposed requirements that would improve oversight and enforcement of the LCRR by the state. The proposal was consistent with a recommendation from GAO which recommended in its report ''Drinking Water: Additional Data and Statistical Analysis May Enhance EPA's Oversight of the Lead and Copper Rule,'' that EPA require states to report available information about lead pipes to EPA's SDWIS (or a future redesign) database and should require states to report all 90th percentile sample results for small water systems (GAO–17–424, 2017).

2. Public Comment and EPA's Response

Commenters noted the burdensome reporting and recordkeeping requirements of the proposed rule. The many proposed transactions between water systems and states, and between states and the EPA, would cause significant costs for primacy agencies. Many commenters noted that data management is critical for the final LCRR and inquired about the development of SDWIS Prime.

EPA has accounted for the costs to states to implement and enforce the rule requirements in the proposed and final rules. While the costs to states have increased in the final rule relative to the previous rule, public health is better protected under the revised LCRR. The increased costs result from several improvements in the final rule that will benefit public health, such as additional LSLR and better implementation of CCT. These benefits are monetized and presented in the final rule's economic analysis.

EPA is intending to provide states with LCRR data management capabilities through the SDWIS Modernization system development project. EPA worked with states to form the SDWIS Modernization Board in January 2020. The Board is not an advisory group reaching consensus, the Board provided input into the third party-led SDWIS Modernization Alternatives Analysis through the end of June 2020. State members of the Board are expected to convey option recommendations to EPA by the end of July 2020, with EPA expected to select an option in August 2020.

Following option selection, EPA is intending to engage with states in the development and testing of the SDWIS Modernization data system through Spring 2022. EPA will then provide assistance to states in their adoption of the new system. The system will include functions for ensuring data quality as well as for primacy agencies to be able to connect the system to locally run applications, such as the Drinking Water Application running on a state server.

EPA is intending to provide LCRR Data Entry Instructions (DEIs) by Fall 2021. The LCRR DEIs will provide detailed guidance to Primacy Agencies regarding the LCRR monitoring, record keeping, and reporting requirements.

3. Final Rule Requirements

EPA is requiring that the state retain all record keeping requirements from the current LCR. In addition, EPA is requiring the state to maintain a record of all public water system's LSL inventories and annual updates. This information is necessary for the state to calculate goal and mandatory LSLR rates, as well as verify correct tap sample site selection tiering. EPA is also requiring the state to maintain a record of the state's decision and approval related to water system changes to source water or treatment. The state is required to maintain records regarding the required steps water systems must complete as required under the final ''find-and-fix'' requirements.

Finally, the state is also required to maintain records of the small system flexibility compliance alternative the state approved for non-transient non-CWS s and small CWSs. This information allows the state to track water systems' progress with corrosion control treatment, complete LSLR, use of POU devices, and replacement of leaded premise plumbing, as appropriate.

EPA is requiring states to report additional data elements to EPA. The state is required to report the OCCT status of all water systems, including the parameters that define the optimization (for example, orthophosphate residual or target pH and alkalinity values). EPA is requiring that all 90th percentile value be reported for all size systems. EPA has found that many states already voluntarily report 90th percentile lead values for all systems to the SDWIS.

EPA also requires that states report the current number of LSLs at every water system. National information about the numbers of LSLs in public water systems will support EPA oversight of the LCR as well as EPA and other Federal agencies in targeting programs to reduce lead exposure, such programs established by the WIIN Act (WIINA, 2016) and America's Water Infrastructure Act (AWIA, 2018).

B. What are the special primacy requirements?

1. Proposed Revisions

The proposed revision added new primacy requirements to match new requirements in other rule sections, such as state designation of a goal LSLR rate. The proposed rule also included a provision that would give EPA the authority to set an alternative goal rate where it determines an alternative rate is feasible. The new school sampling requirement for water systems resulted in a proposed state requirement to define a school or child care facility and determine if any existing testing program is at least as stringent as the Federal requirements. States must also verify compliance with find-and-fix requirements.

2. Public Comment and EPA's Response

Many commenters noted the increased data management demands of the proposed rule. Some commenters noted that the state flexibilities could create additional work for the states. For example, some commenters preferred EPA to set a national goal-based LSLR rates instead of the state. Some commenters disagreed that EPA should have authority to supersede a state-

approved LSLR goal rate. See section III.D.2. of this document for EPA's response to these comments. States had many other comments about the level of burden on the states required by the rule. EPA acknowledges the increased burden for states but notes that the additional requirements are feasible and will improve implementation and enforcement of the LCRR. EPA received several comments requesting Agency guidance on implementation of the revised rule. EPA understands this is a critical component to ensure the rule's effectiveness in protecting public health. The Agency intends to develop implementation guidance targeting the areas of the rule that are most likely to support compliance. In addition to guidance, EPA will also provide training and other supporting materials that will help states and water systems implement the revised rule, reduce state transaction costs, and promote greater national consistency.

3. Final Rule Requirements

For the final rule EPA clarified that because water systems that serve 10,000 or fewer people do not need to recommend a goal LSLR rate to the state, states do not need to approve a goal LSLR rate for these systems. Water systems below this threshold will follow the small system flexibility and will not engage in a goal-based LSLR program after exceeding the lead trigger level. In response to comments, the final rule does not include provisions for the Regional Administrator to establish an LSLR goal rate that would supersede a state decision. EPA also included a special primacy requirement that states must establish a higher mandatory LSLR rate where feasible for all water systems.

VI. Economic Analysis

This section summarizes the final rule Economic Analysis (EA) supporting document (USEPA, 2020a) for the Lead and Copper Rule (LCR) revisions, which is prepared in compliance with section 1412(b)(3)(C)(ii) of SDWA and under Executive Order 12866. Section 1412(b)(3)(C)(ii) of SDWA states that when proposing a national primary drinking water regulation (NPDWR) that includes a treatment technique, the Administrator shall publish and seek comment on an analysis of the health risk reduction benefits and costs likely to be experienced as the result of compliance with the treatment technique and the alternative treatment techniques that are being considered, taking into account, as appropriate, the factors required under section 1412(b)(3)(C)(i). EPA is also using the health risk reduction cost analysis (HRRCA) in the development of this final rule for purposes of Section 1412(b)(4), (5), and (7) of the SDWA (*i.e.,* to determine the feasibility of the treatment techniques). Clause (i) lists the following analytical elements: (1) Quantifiable and non-quantifiable health risk reduction benefits; (2) quantifiable and non-quantifiable health risk reduction benefits from reductions in co-occurring contaminants; (3) quantifiable and non-quantifiable costs that are likely to occur solely as a result of compliance; (4) incremental costs and benefits of rule options; (5) effects of the contaminant on the general population and sensitive subpopulations including infants, children, pregnant women, the elderly, and individuals with a history of serious illness; (6) any increased health risks that may occur as a result of compliance, including risks associated with co-occurring contaminants; and (7) other relevant factors such as uncertainties in the analysis and factors with respect to the degree and nature of the risk.

Costs discussed in this section are presented as annualized present values in 2016 dollars, which is consistent with the timeframe for EPA's water system characteristic data used in the analysis. EPA estimated the year or years in which all costs occur over a 35-year time period. Thirty-five years was selected to capture costs associated with rule implementation as well as water systems installing and operating corrosion control treatment and implementing LSLR programs. EPA then determined the present value of these costs using discount rates of 3 and 7 percent. Benefits, in terms of health risk reduction from the LCR revisions, result from the activities performed by water systems, which are expected to reduce risk to the public from exposure to lead and copper in drinking water at the tap. EPA quantifies and monetizes some of this health risk reduction from lead exposure by estimating the decrease in lead exposure accruing to children from 0 to 7 years of age from the installation and re-optimization of corrosion control treatment (CCT), LSLRs, and the implementation of point-of-use (POU) filter devices and by quantifying and monetizing the resulting change in intelligence quotient (IQ) in children.

A. Public Comments on the Economic Analysis of the Proposed Rule and EPA Response

EPA published an economic analysis for the proposed rule in accordance with SDWA section 1412(b)(3)(C) (USEPA, 2019f and 2019g). The proposed rule EA and the appendices to the proposed rule EA can be found in the rule docket, under the docket ID numbers EPA–HQ–OW–2017–0300–0003 and EPA–HQ–OW–2017–0300–0002 respectively). EPA solicited comment on all aspects of the economic analysis for the proposed LCRR. In particular, the Agency requested comment on the five drivers of costs identified in its economic analysis: (1) The existing number of LSLs in PWSs; (2) the number of PWS above the AL or TL under the previous rule and proposed rule monitoring requirements; (3) the cost of installing and optimizing corrosion control treatment; (4) the effectiveness of CCT in mitigating lead concentrations; and (5) the cost of LSLR. EPA received a number of comments and data submissions associated with these five topics that the Agency has considered to reevaluate and refine the cost estimates. As a result of the new information submitted by commenters and additional data obtained by EPA in response to comments, the Agency has improved the estimates of costs and benefits for the final rule.

EPA received a number of comments regarding the estimates of the existing number of LSLs in PWSs. Commenters provided state level summary data on the specific systems with LSLs from Indiana, Wisconsin, and Nevada. EPA has evaluated these comments and is using this data in combination with new data collected from states that have LSL inventory requirements (*e.g.,* Michigan, Maryland, Ohio), to update the dataset of systems with LSLs. With this updated data, EPA has significantly expanded, from proposal, the number of systems with known LSL status to determine the baseline proportion of systems below or equal to the TL, above the TL and below or equal to the AL, and above the AL for both the low and high cost scenarios evaluated in the economic analysis. The impact of the expanded dataset of systems with known LSL status was found to have a small impact on the low and high scenario baseline proportion of systems that exceeded the TL or AL between the proposed and final rule analyses.

EPA also received comments on the estimates of the number of water systems that would exceed the TL and AL in the economic analysis for the proposal. EPA received information from the states of Wisconsin, Indiana, Ohio, Connecticut, North Dakota and Nevada about the expected number of water systems that would exceed the TL and AL in those states given a first liter sampling protocol. EPA revised the estimates of systems without LSLs that would exceed the TL and AL based upon first liter sample results and used data provided by these states to assess

the representativeness of the revised estimates for the final economic analysis. After considering the comments on the alternative fifth liter sampling technique for systems with LSLs described in section III.G of this document, EPA prepared revised estimates of the number of systems with LSLs that would exceed the AL and TL as a result of the fifth liter sample requirements in the final rule. EPA used the revised data set of systems with known LSLs to estimate the number of systems that will be required to collect fifth liter samples. In addition, EPA obtained more detailed data from the State of Michigan. The Michigan data represents 2019 lead tap sample compliance data that includes both first and fifth liter lead tap samples from homes with LSLs. EPA estimated the number of systems that would exceed the TL and the AL using the ratio between the first liter and fifth liter 90th percentile values from 133 Michigan systems. This new data from Michigan, along with the expansion of the number of systems with known LSL status, resulted in a larger proportion of systems with ALEs under the low cost scenario and a smaller proportion of systems with ALEs in the high cost scenario in the final rule analysis than was estimated in the proposed rule. This would tend to increase the estimated cost of the final rule low cost scenario compared to the proposal analysis and lower the cost for the final rule high cost scenario compared to the proposal. See Chapter 4, section 4.3.5 of the final rule EA for additional detail (USEPA, 2020a).

EPA received comments on the proposed rule's cost estimates for the installation and operation and maintenance of CCT. The Nevada Division of Environmental Protection provided cost estimates representing four of the state's water systems. Based on the reported information EPA was able to compare the capital and operations and maintenance (O&M) costs of one of the small groundwater systems that had installed a zinc orthophosphate feed system with the EPA Work Breakdown Structure Zinc Orthophosphate Model and the cost curves used in the LCR analysis. Capital cost of the Nevada system fell close to the mid-point of the range between the low and high estimated cost curves used in the proposed regulatory analysis, and the system's O&M costs fell well below the costs estimated by the EPA cost curves. After considering the comments, the Agency has determined that cost estimates for installing and operating CCT in the proposal are accurate for purposes of a national cost estimate and is retaining the methodology for the final rule.

In response to EPA's request for comment about the effectiveness of CCT, the Agency received general comments that CCT is very effective with caveats such as: The water in the distribution system must be used on a regular basis, and sampling should be required to check on proper operation of CCT. The Agency agrees with commenters that CCT can be effective in reducing drinking water lead levels if carefully operated and monitored. The Agency did not receive any comments on how to improve the estimates of the effectiveness of CCT from the proposed economic analysis and is therefore maintaining the same assumptions used in the proposed rule analysis.

EPA received comments on the cost of LSLR, primarily dealing with the need for more current data. EPA agrees with the commenters that new information has become available since the time of proposal that would provide better estimates of LSLR unit costs for the final rule analysis. In the analysis of the proposed rule EPA had developed a dataset of 24 utility reported estimates of LSLR costs. EPA evaluated this dataset along the other replacement cost survey information and selected the American Water Works Association (AWWA) 2011 survey (Cornwell et al., 2016) as the primary source of data for LSLR unit cost estimates for the proposed rule. Since proposal, EPA has identified cost data in news reports, press releases, and utility websites that has allowed the Agency to expand the utility data collected during the proposed rule analysis. The Agency's search found additional cost estimates from 63 utilities. EPA then selected only the subset of data values that represent reported actual replacement costs from pilot studies and/or recent or on-going LSLR projects. This resultant dataset provides costs estimates across full, customer-side, and system-side replacements from 38 systems, which represent costs and practices from 2016 to 2020 (only two cost values from the proposal dataset remain in the revised dataset). The cost information in the updated dataset are variable in the reported replacement costs covered by the various programs, but a number of the data sources specifically indicate they include surface restoration cost. Therefore, the cost analysis for the final rule includes surface restoration. The estimated mean costs for utility-side, customer-side, and full LSLR have increased by 122, 26, and 13 percent, respectively, using the newly developed data as compared with the AWWA 2011 values used for proposal. For the final rule, EPA used the 25th and 75th percentile values from the new dataset in the low and high cost scenarios, respectively. All utility-side, customer-side, and full LSLR unit costs under both the low and high cost scenarios are larger than those used in the proposed rule analysis except for full replacement in the high cost scenario.

In addition to the more specific comments received on the cost of LSLR, public commenters raised concerns about the proposed rule requirement that systems would have to replace, within 45 days, the utility-owned portion of an LSL if they become aware that a customer has replaced their portion of the line. Commenters indicated concern that the number of ''customer initiated'' LSLR might at times become too numerous for systems to complete the replacement within the 45 days allowed. In response to these comments, EPA conducted a search for new data on the number of customer initiated LSLR occurring at water systems. EPA found data from DC Water (2016) that could be used to determine a rate of customer initiated replacements. This new data allowed the Agency to provide quantified costs for customer initiated LSLR in the final rule analysis which were not available at the time of proposal. See Chapter 5, section 5.3.4 of the final rule EA for additional detail (USEPA, 2020a). The inclusion of these new quantified cost categories increases final rule estimated total cost compared to the proposed rule's total cost.

EPA asked for comment on the assumptions regarding labor required to comply with the proposed rule. The Association of State Drinking Water Administrators (ASDWA) provided EPA with a version of their Costs of States Transactions Study (CoSTS) model which estimated the first five years of total and incremental burden to states for implementing the proposed LCRR (a number of individual States and some PWSs also indicated in comments that EPA review the ASDWA CoSTS model). Burden totals from this model were significantly higher for some state oversight activities than those estimated by EPA for the proposed LCRR. EPA carefully evaluated the information and assumptions in the CoSTS model and used them to develop revised state burden estimates for the cost analysis of the final rule. EPA revised cost estimates for a number of state activities including: Administrative activities, technical assistance, review of LSLR plans and LSL inventories, approval of systems' LSLR goals, review and approval of tap sampling site plans,

review of school and child care testing programs, review of annual reports on school and child care testing programs, and review and approval of small system flexibility recommendations. EPA also added a new one-time cost element for both states and PWSs to initially confer on the system's 90th percentile status and new requirements under the LCRR based on the system's first two 6-month monitoring periods under the revised tap sampling requirements of the LCRR. These increases in burden to states will result in higher estimated total costs for the final rule when compared to the burden estimates used in the analysis of the proposed rule.

EPA solicited peer reviewed information on the evidence relevant to quantifying the incremental contribution of blood lead concentrations (especially at blood lead level (BLL) less than 5 µg/dL) to cardiovascular disease (and associated mortality) relative to other predictors such as diet, exercise, and genetics that may be useful in a future benefits analysis. EPA received a number of comments that cited studies which EPA had identified in the proposed rule analysis, as well as one additional study by Chowdhury et al. (2018). Chowdhury et al. is a systematic review on cardiovascular morbidity endpoints that concludes that lead is associated with an increased risk of cardiovascular disease. EPA has added this reference to its qualitative discussions on the health impacts of lead in Appendix J of the final rule EA.

Although the EPA did not quantify or monetize changes in adult health benefits for the proposed LCRR, the Agency estimated the potential changes in adult drinking water exposures and thus blood lead levels to illustrate the extent of lead reduction to the adult population as a result of the proposed LCRR. Commenters indicated that the Agency should include quantification and monetization of the adult cardiovascular disease (CVD) benefits associated with reductions in water lead concentrations in the health risk reduction and cost analysis (HRRCA referred to in this notice as the final rule economic analysis or final rule EA) for the LCRR. Some of the commenters have indicated that EPA has a legal obligation to include this benefit in the HRRCA under section 1412(b)(3) of SDWA. EPA does not agree with these commenters that a quantified assessment of CVD benefits is necessary in this HRRCA. EPA conducts a HRRCA when proposing any NPDWR, as required in section 1412(b)(3)(C)(i) and (ii) of the SDWA. SDWA Section 1412(b)(3)(C)(i)(I) requires the inclusion of quantifiable and nonquantifiable health risk reduction benefits for which there is a factual basis in the rulemaking record to conclude such benefits are likely to occur as a result of the rule. SDWA section 1412(b)(3)(C)(iii) provides that ''[t]he Administrator may identify valid approaches for the measurement and valuation of benefits'' for the HRRCA. EPA exercised its discretion to identify the validity of the approaches used to measure and value CVD benefits and determined not to quantify CVD benefits for this rulemaking because the methodology which links changes in adult blood lead levels to CVD health endpoints, including mortality, has not yet undergone the necessary panel peer review. There remains uncertainty about the best quantitative relationship to describe the impacts of changes in current adult blood lead levels on the risk of CVD mortality. The studies currently available to the Agency which quantitatively describe the risk relationship attempt to control for a variety of potential confounders that may affect CVD risk as well as exposure to lead. EPA needs additional scientific guidance on which studies sufficiently control for potential confounding factors that might introduce bias into the estimated lead CVD risk relationship. The Agency will also seek input from an expert peer review panel on the modeling of the lead cessation lag (*i.e.,* the time between the lead exposure reduction and the reduction in CVD risk). For additional information on the uncertainties associated with the assessment of the CVD mortality health endpoint which need to be clarified through the panel peer review process see Appendix J of the final rule EA. However, EPA has considered the substantial unquantified benefits to the rule, including those associated with reductions in adverse cardiovascular effects that are described in the HRRCA.

Some commenters asserted that if the Agency monetized the benefits of CVD, the Agency would have proposed more stringent requirements because greater quantified benefits would justify more burdensome regulation. EPA disagrees. The Agency considered information from the HRRCA at proposal to determine, as required by SDWA section 1412(b)(4)(C) ''whether the benefits . . . justify, or do not justify, the costs.'' The Agency found that the quantified and non-quantified benefits justified the cost of the proposed rule requirements. EPA considered costs and benefits in its rulemaking process, as required by SDWA. The Agency established the treatment technique requirements in the rule to ''prevent known or anticipated adverse effects on the health of persons to the extent feasible'' consistent with section 1412(b)(7)(A) of the SDWA, while also ensuring that ''[a]ny revision of a national primary drinking water regulation shall . . . maintain, or provide for greater, protection of the health of persons'' as required in section 1412(b)(9) of the SDWA. EPA is not employing the discretionary provision of SDWA section 1412(b)(6) that allows the Agency to promulgate an NPDWR that ''maximizes health risk reduction benefits at a cost that is justified by the benefits.'' Therefore, the Agency's decision to not monetize CVD benefits did not affect the stringency of the final rule. EPA conducted an analysis of quantifiable and non-quantifiable benefits that meets the statutory requirements and EPA considered both quantified and non-quantified benefits in the rulemaking.

EPA received a number of comments that encouraged the Agency to obtain more data to better estimate the costs and benefits of the proposed rule. EPA engaged in additional data collection in response to comments improving upon the analysis conducted for the proposed rule. The Agency collected information post proposal from state and Federal websites, new reports, independent and drinking water system developed reports, and vendor information resulting in updates to: The number of systems with known LSL status; the unit cost of LSLR; the rate of customer initiated LSLR; the cost of scavenged pipe-loop and coupon CCT studies; the number of schools and child cares; and the current amount of state required school and child care testing.

EPA reexamined the profile data set that was used by the Agency to estimate the reductions of lead levels as a result of CCT and LSLR. EPA reviewed the CCT designations made in the profile dataset and changed the designations based on new information. Re-running the model that simulates the water lead concentrations for various combinations of CCT and LSL presence for the final rule analysis resulted in increased lead concentrations for the no-LSL present scenarios and lower lead concentrations for the cases where full and partial LSLs are present and there is no or partial CCT present as compared to the estimated values used in the proposed rule analysis (see Exhibit 6–15 for the complete list of estimated concentrations used in the final rule analysis). The new estimates for lead concentration result in smaller changes in exposure as compared with the proposed rule. So, relative to the

proposed rule a unit improvement in CCT or LSLR will result in smaller changes in lead concentration reductions, BLL reductions, and monetized IQ benefits.

Exhibit 6–1 summarizes the data improvements made in response to comments received on the proposed rule analysis that have an impact of the estimated costs and benefits for the final rule. These impacts are separate from and irrespective of changes to the regulatory requirements. The exhibit indicates the impact the data change had on estimated costs.

EXHIBIT 6–1—DATA IMPROVEMENTS MADE IN RESPONSE TO COMMENTS RECEIVED ON THE PROPOSED LCRR ANALYSIS

Data	Impact on cost/benefit estimate from proposal
Expanded dataset of systems with known LSL status	• Small impact on estimated cost for previous rule (baseline).
2019 State of Michigan lead compliance data used in conjunction with expanded dataset of systems with known LSL status.	• Increase low cost scenario estimated cost. • Decrease high cost scenario estimated cost.
Lead Service Line Replacement unit costs	• Increase estimated costs.
Estimate for customer initiated LSLR	• Increase estimated cost (only qualitatively considered in the proposal).
Updated state burden estimates based on ASDWA CoSTS model	• Increase estimated costs.
Revised tap water lead concentration values	• Decrease estimated benefit.

B. Affected Entities and Major Data Sources Used To Characterize the Sample Universe

The entities potentially affected by the LCR revisions are public water systems (PWSs) that are classified as either CWSs or NTNCWSs. These water systems can be publicly or privately owned. In the economic analysis modeling performed in support of this rulemaking, EPA began with the 50,067 CWSs and 17,589 NTNCWSs in the Safe Drinking Water Information System Fed Data Warehouse (SDWIS/Fed) as its foundational data set.

EPA used a variety of data sources to develop the drinking water industry characterization for the regulatory analysis. Exhibit 6–2 lists the major data sources, describes the data used from each source, and explains how it was used in the final rule EA. Additional detailed descriptions of these data sources and how they were used in the characterization of baseline industry conditions can be found in Chapter 4 of the final rule EA (USEPA, 2020a).

EXHIBIT 6–2—MAJOR DATA SOURCES USED TO DEVELOP THE BASELINE INDUSTRY CHARACTERIZATION

Data source	Baseline data derived from the source
SDWIS/Fed third quarter 2016 "frozen" dataset [1]	• Public water system inventory, including population served, number of service connections, source water type, and water system type. Also used to identify NTNCWSs that are schools and child care facilities. • Status of CCT, including identification of water systems with CCT and the proportion of water systems serving ≤ 50,000 people that installed CCT in response to the previous LCR. • Analysis of lead 90th percentile concentrations to identify water systems at or below the TL of 10 μg/L, above the TL, and above the AL of 15 μg/L at the start of rule implementation by LSL status, *i.e.,* presence or absence of LSLs for the previous rule and LCRR. Used in concert with data from Michigan described below for the LCRR.[2 3] • The proportion of water systems that are on various reduced monitoring schedules for lead and copper tap and WQP monitoring. • The frequency of source and treatment changes and those source changes that can result in additional source water monitoring. • Length of time that water systems replace LSLs if required under the previous LCR.
2006 CWSS (USEPA, 2009)	• Number of distribution system entry points per system. • PWS labor rates.
Geometries and Characteristics of Public Water Systems (USEPA, 2000a).	• Design and average daily flow per water system.
1988 AWWA Lead Information Survey	• LSL inventory, including the number of water systems with LSLs, and the average number of LSLs per water system, as reported in the 1991 LCR RIA (Weston and EES, 1990).
2011 and 2013 AWWA Surveys of Lead Service Line Occurrence (as summarized in Cornwell et al., 2016).	• LSL inventory, including the number of water systems with LSLs and the average number of LSLs per water system.
Six-Year Review 3 of Drinking Water Standards (2006–2011)	• Baseline distribution of pH for various CCT conditions. • Baseline orthophosphate dose for CCT.

EXHIBIT 6–2—MAJOR DATA SOURCES USED TO DEVELOP THE BASELINE INDUSTRY CHARACTERIZATION—Continued

Data source	Baseline data derived from the source
2019 State of Michigan Lead and Copper Compliance Monitoring Data (Michigan EGLE, 2019).	• Analysis of the ratio of fifth to first liter lead tap samples to estimate the increase in lead 90th percentile levels based on the use of fifth liter samples. Ratios are applied to SDWIS/Fed lead 90th percentile data to identify systems at or below the TL of 10 μg/L, above the TL, and above the AL of 15 μg/L under the final LCRR by LSL status. • Percent of individual samples exceeding 15 μg/L for the final LCRR.

Acronyms: AL = action level; AWWA = American Water Works Association; CCT = corrosion control treatment; CWSS = Community Water System Survey; LCR = Lead and Copper Rule; LCRR = Lead and Copper Rule revisions; LSL = lead service line; Michigan EGLE = Michigan Department of Environment, Great Lakes, and Energy; NTNCWS = non-transient non-community water system; public water system; RIA = regulatory impact assessment; SDWIS/Fed: Safe Drinking Water Information System/Federal Version; TL = trigger level; WQP = water quality parameter; USEPA = United States Environmental Protection Agency.

NOTE:

[1] Contains information reported through June 30, 2016.

[2] As detailed in Chapter 3 of the Economic Analysis for the Lead and Copper Rule Revisions (USEPA, 2020a), a system's lead 90th percentile level is a key factor in determining a system's requirements under the previous rule and final LCRR.

[3] In the analysis of lead 90th percentile concentrations at PWSs EPA used SDWIS/Fed data for systems with known LSL status. This sub-set of systems with known LSL status was identified using data from 12 states (including data received in public comments from Indiana, Wisconsin, and Nevada), Region 9 tribal systems, and web searches identifying individual systems including the systems serving greater than 1,000,000 persons. See Chapter 4, section 4.3.5 of the Economic Analysis for the Lead and Copper Rule Revisions (USEPA, 2020a) for additional detail.

C. Overview of the Cost-Benefit Model

Under the regulatory provisions of the final rule, PWSs will face different compliance scenarios depending on the size and type of water system, the presence of LSLs, and existing corrosion controls. In addition, PWSs will also face different unit costs based on water system size, type, and number of entry points (*e.g.,* labor rates and CCT capital, and O&M unit costs). PWSs have a great deal of inherent variability across the water system characteristics that dictate both compliance activities and cost.

Because of this variability, to accurately estimate the national level compliance costs (and benefits) of the final LCR revisions, as well as describe how compliance costs are expected to vary across types of PWSs, the cost-benefit model creates a sample of representative ''model PWSs'' by combining the PWS-specific data available in SDWIS/Fed with data on baseline and compliance characteristics available at the PWS category level. In some cases, the categorical data are simple point estimates. In this case, every model PWS in a category is assigned the same value. In other cases, where more robust data representing system variability are available the category-level data includes a distribution of potential values. In the case of distributional information, the model assigns each model PWS a value sampled from the distribution, in order to characterize the variability in this input across PWSs. The model follows each model PWS in the sample through each year of analysis—determining how the PWS will comply with each requirement of the final rule, estimating the yearly compliance cost, and tracking the impact of the compliance actions on drinking water lead concentrations. It also tracks how other events, such as changing a water source or treatment affect the water system's compliance requirements for the next year.

The model's detailed output provides results for 36 PWS categories, or strata. Each PWS reporting category is defined by the water system type (CWS and NTNCWS), primary source water (ground and surface), and size category (there are nine). The following sub-sections present summarized national cost and benefit totals by regulatory categories. The detailed output across the 36 PWS categories can be found in Appendix C of the final rule EA (USEPA, 2020a).

In constructing the initial model PWS sample for the cost-benefit analysis, EPA began with the 50,067 CWSs and 17,589 NTNCWS in SDWIS/Fed. Also, from SDWIS/Fed, EPA knows each water system's type (CWS or NTNCWS); primary water source (surface water or groundwater); population served; CCT status (yes/no); ownership (public or private); and number of connections.

The available LCR data limited EPA's ability to quantify uncertainty in the cost-benefit model. During the development of the model, it became clear that not only were many of the inputs uncertain, but for many LCR specific inputs, EPA only has limited midpoint, high, and low estimates available and does not have information on the relative likelihood of the available estimates. This includes major drivers of the cost of compliance including: The baseline number of systems with LSLs and the percent of connections in those system that are LSLs; the number of PWSs that will exceed the AL and/or TL under the revised tap sampling requirements; the cost of LSL replacement; the cost of CCT; and the effectiveness of CCT in PWSs with LSLs. Therefore, EPA estimated final LCRR compliance costs under low and high bracketing scenarios. These low and high cost scenarios are defined by the assignment of low and high values for the set of uncertain cost drivers listed above. Detailed descriptions of these five uncertain variables and the derivation of their values under the low and high cost scenarios can be found in Chapter 5, Section 5.2.4.2 of the final rule EA (USEPA, 2020a). With the exception of the five uncertain variables which define the difference between the low and high cost scenarios the remaining baseline water system and compliance characteristics are assigned to model PWSs, as described above, and remain constant across the scenarios. This allows EPA to define the uncertainty characterized in the cost range provided by the low and high scenarios and maintains consistency between the estimation of costs for the previous and final rules (*e.g.,* percentage of lead tap water samples that will be invalidated). Chapters 4 and 5 of the final rule EA describe in greater detail the baseline and major cost driving data elements, their derivation, and the inherent sources of uncertainty in the developed data elements. Section 5.3 and 5.4 of the final rule EA discuss how each data element is used in the estimation of costs and provides examples and references to how these data were developed.

Because PWS baseline characteristics are being assigned from distributional source data to capture the variability across PWS characteristics, EPA needed to ensure that its sample size was large enough that the results of the cost-benefit model were stable for each of the

36 PWS categories. To ensure stability in modeled results, EPA oversampled the SDWIS/Fed inventory to increase the number of water systems in each PWS category. For every PWS category, EPA set the target minimum number of model PWSs to 5,000. To calculate the total estimated costs for each PWS category, the model weights the estimated per water system costs so that when summed the total cost is appropriate for the actual number of water systems known to be in the category.

The exception to the assignment of water system characteristics discussed above are the 21 very large water systems serving more than one million people. Because of the small number of water systems in this size category, the uniqueness of their system characteristics, and the potential large cost for these systems to comply with the regulatory requirements, using the methods described above to assign system attributes could result in substantial error in the estimation of the national costs. Therefore, EPA attempted to collect information on very large water systems' CCT practices and chemical doses, pH measurements and pH adjustment practices, number of LSLs, service populations, and average annual flow rates for each entry point to the distribution system. EPA gathered this information from publicly available data such as SDWIS/Fed facility-level data, Consumer Confidence Reports, and water system websites. In addition, the AWWA provided additional data from member water systems to fill in gaps. When facility-specific data was available, EPA used it to estimate compliance costs for the very large water systems. If data was not available, EPA assigned baseline characteristics using the same process as previously described. See Chapter 5, Section 5.2.4.3 of the final rule EA for a summary of the data EPA collected on these very large systems (USEPA, 2020a).

The cost model estimates the incremental cost of the LCR revisions over a 35-year period. In accordance with EPA's policy, and based on guidance from the Office of Management and Budget (OMB), when calculating social costs and benefits, EPA discounted future costs (and benefits) under two alternative social discount rates, 3 percent and 7 percent.

When evaluating the economic impacts on PWSs and households, EPA uses the estimated PWS cost of capital to discount future costs, as this best represents the actual costs of compliance that water systems would incur over time. EPA used data from the 2006 Community Water System Survey (CWSS) to estimate the PWS cost of capital. EPA calculated the overall weighted average cost of capital (across all funding sources and loan periods) for each size/ownership category, weighted by the percentage of funding from each source. The cost of capital for each CWS size category and ownership type is shown in Exhibit B–3 in Appendix B of the final rule EA. Since similar cost of capital information is not available for NTNCWSs, EPA used the CWS cost of capital when calculating the annualized cost per NTNCWS. Total capital investment may be greater than costs water systems bear when complying with future regulatory revisions because financing support for lead reduction efforts is available from State and local governments, EPA programs, and other Federal agencies. The availability of funds from government sources, while potentially reducing the cost to individual PWSs, does not reduce the social cost of capital to society. See Chapters 4 and 5 of the final rule EA for a discussion of uncertainties in the cost estimates.

EPA projects that rule implementation activities will begin immediately after rule promulgation. These activities will include one-time PWS and State costs for staff to read the revised rule, become familiar with its provisions, and develop training materials and train employees on the revised rule. States will also incur burden hours associated with adopting the rule into state requirements, updating their LCR program policies and practices, and modifying data management systems. PWSs will incur costs to comply with the LSL materials inventory requirements and develop an initial LSLR plan in years one through three of the 35-year analysis period. EPA expects that water systems will begin complying with all other LCRR rule requirements three years after promulgation, or in year four of the analysis.

Some requirements of the final rule must be implemented by water systems regardless of their water quality and tap sampling results (*e.g.,* CWS school and child care facilities sampling programs), however, most of the major cost drivers are a function of a water systems 90th percentile lead tap sample value. The 90th percentile value, if it exceeds the lead trigger level or action level, dictates: The tap sampling and water quality parameter (WQP) monitoring schedules, the installation/re-optimization of CCT, ''find-and-fix'' adjustments (triggered when a single lead tap sample exceeds 15 μg/L, which has an increasing likelihood in the model as 90th percentile tap sample results increase) which include potential changes to CCT, the installation of point-of-use filters at water systems selecting this treatment option as part of the small water system flexibilities under the final rule, the goal-based or mandatory removal of LSLs and water system and state administrative costs. Because of uncertainty in the estimation of the 90th percentile lead values the Agency developed low and high estimates for this cost driving variable. EPA used both the minimum and maximum 90th percentile tap sample values from SDWIS/Fed over the period from 2007 to 2015, to assign a percentage of PWSs by size, and CCT and LSL status to each of three groups, those at the trigger level (TL) or below, those above the lead trigger but at or below the action level (AL), and those above the lead AL. These assignments represent the status of systems under the previous rule. See Chapters 4 and 5 of the final rule EA for additional information (USEPA, 2020a).

Because the tap sampling requirements for LSL water systems under the final LCR revisions call for 100 percent of lead tap samples to be taken from sites with LSLs and for those samples to be fifth liter samples, representing the lead concentration from the LSL, the likelihood that a PWS would have a lead 90th percentile greater than the TL or AL is higher under the final rule compared to the previous LCR. In order to assess this higher likelihood of TL or AL exceedances under the LCRR tap sampling requirements EPA used information from Slabaugh et al. (2015) to develop adjustment factors to capture the impact of taking 100 percent of lead tap samples from sites with LSLs. To account for the fifth liter sampling requirement at LSL sites EPA used 2019 State of Michigan compliance sampling data that was received as part of the public comment process on the proposed rule. This dataset had paired first and fifth liter sampling data for 133 LSL systems (Michigan state law requires that both first and fifth liter samples be taken at LSL sites) that allowed the Agency to calculate a set of ratios representing the relationship between first and fifth liter lead 90th percentile values. EPA assigned the LSL systems to the three 90th percentile value groups, those without a TL or AL exceedance, those with a TL but not an AL exceedance, and those with an AL exceedance utilizing the adjustment factors derived from the Slabaugh et al. (2015) data and the calculated ratios from the Michigan dataset. The use of the Michigan data results in large numbers of systems being assigned to

the AL exceedance category for the low cost scenario and fewer systems being assigned to the AL exceedance category in the high cost scenario that would have occurred using the proposed rule assignment methodology. A detailed discussion of the development of the 90th percentile value initial group placement, the adjustments made for the LSL water systems given the tap sampling requirements, and the percentages of systems assigned to the 90th percentile value groups under both the previous and final LCRR for the low and high cost scenarios are found in Chapters 4 and 5 of the EA. Once water systems are assigned to the groupings based on their CCT and LSL status, individual 90th percentile lead tap sample values are assigned from the distribution of 90th percentile values within each grouping.

Several regulatory compliance activities are assumed to not affect a water system's 90th percentile value. These include, for example, developing an inventory of LSLs, CWS sampling at schools and child care facilities, and public education. In the model, the only compliance activities that will change a water system's 90th percentile lead tap sample are installation of CCT; re-optimization of existing CCT; removal of LSLs; and a water system-wide ''find-and-fix'' activity (assumed to be equivalent to a system-wide increase in pH). In addition to these rule compliance activities, changing a water source or treatment technology can also result in a change in a water system's 90th percentile tap sample value.

Because a water system's 90th percentile lead value is so important to determining regulatory requirements and cost under the rule revisions, the cost model, under both the low and high cost scenarios, tracks each water system's 90th percentile lead value over each annual time step in the model. Based on the initial 90th percentile lead values, a number of rule compliance actions are triggered. With the implementation of CCT, LSLR, and ''find-and-fix'' corrections, 90th percentile lead tap sample values are expected to decrease. The model allows for future increases in 90th percentile lead values as a result of changes in source water and treatment. The likelihood of these events occurring have been derived from SDWIS/Fed data (see Chapter 4, Section 4.3.8 of the final rule EA). When a change in source or treatment occurs in a modeled year, a new 90th percentile value is assigned to the water system. This value may be higher or lower than the current value thus potentially triggering new corrective actions. In the model, if a water system already has ''optimized'' CCT in place, it is assumed that no additional action is needed and that the current treatment is adequate, therefore the 90th percentile will not change.

D. Cost Analysis

This section summarizes the cost elements and estimates total cost of compliance for the previous LCR, the final LCR revisions and the incremental cost of the final rule, under both the low and high cost scenarios, by the major regulatory components and discounted at 3 and 7 percent. These components include implementation and administrative costs, sampling costs, CCT costs, LSL inventory and replacement costs, POU costs, and public education and outreach costs for water systems and states. Note that reporting costs are represented in the cost totals provided in the estimates below, but a separate summary of the reporting costs, as required by the Paperwork Reduction Act, can be found in section VII.C of this preamble. This section also quantifies the potential increase in phosphates that would result from the increased use of corrosion inhibitors under the rule, the resulting cost for treating to remove the additional phosphates at downstream waste water treatment plants that may be constrained by nutrient discharge limits, and discusses the ecological impacts that may result from increased phosphorus loads to surface waters.

1. Drinking Water System Implementation and Administrative Costs

All water systems will have one-time start-up activities associated with the implementation of the LCRR. These compliance costs include water system burden to read and understand the revised rule; water systems assigning personnel and resources for rule implementation; water system personnel time for attending trainings provided by the state; and clarifying regulatory requirements with the state during rule implementation. This category of cost is not impacted by the variables that define the low and high cost scenarios, therefore only one set of estimated costs exist in the category. The estimated annualized national PWS implementation and administrative costs for the LCR revisions are $2,576,000 at a 3 percent discount rate and $4,147,000 at a 7 percent discount rate. Since there are no costs in this category under the previous LCR, the PWS implementation and administrative incremental costs are also $2,576,000 at a 3 percent discount rate and $4,147,000 at a 7 percent discount rate. Additional information on the estimation of water system implementation and administrative costs can be found in Chapter 5, section 5.3.1 of the final rule EA (USEPA, 2020a).

2. Sampling Costs

The final LCR revisions affect most of the LCR's sampling requirements, including lead tap sample monitoring, lead WQP monitoring, copper WQP monitoring, and source water monitoring. The revised rule also includes new requirements for CWSs to sample at schools and child care facilities within their distribution systems. The copper tap sampling requirements of the previous rule are not impacted by the regulatory revisions and therefore do not appear in the summarized sampling costs. Additional lead WQP monitoring and lead tap sampling that is specifically required by the previous rule and the LCRR after the installation or re-optimization of corrosion control treatment is accounted for in the CCT costs and not in the WQP monitoring or tap sampling costs.

Lead tap sampling site selection tiering requirements have been strengthened under the revised rule, increasing the cost to water systems with LSLs for the development of a tap sampling pool that consists of all LSL sites. Also, the sampling protocol requiring fifth liter samples from LSL sites will impact the cost of materials used to collect the tap sample at each LSL location. The other cost components of lead tap sampling remain generally unchanged and include sample collection (apart from fifth liter testing kit costs), analysis, and reporting cost. The frequency of required lead tap sampling will also increase based on lead tap sample 90th percentile values calculated with fifth liter tap samples.

Both the lead and copper WQP monitoring cost totals represent collection and lab analysis cost of samples both at entry points to and taps within the distribution system, as well as PWS reporting costs. The schedules for conducting these activities at modeled water systems are dependent on a water system's projected lead 90th percentile value, the presence of CCT, and past tap sampling results.

The final rule requires source water monitoring the first time a PWS has an action level exceedance. This monitoring is not required again unless the water system has a change in source water.

Sampling at schools and child care facilities represents new requirements for CWSs under the LCR revisions.

Unlike the other sampling requirements of the rule, school and child care facility sampling is not affected by a water system's 90th percentile lead tap sample value. The final rule requires that all schools and child care facilities (constructed prior to January 1, 2014 or the date the state adopted standards that meet the definition of lead free in accordance with Section 1417 of the Safe Drinking Water Act, as amended by the Reduction of Lead in Drinking Water Act, whichever is earlier) must be sampled once every five years (schools and child care facilities may refuse the sampling or be non-responsive, but the water system must document this refusal or non-response to the state) for two consecutive rounds of sampling. After the initial sampling at all elementary school and child care facilities in their service area (over a five year period) CWSs are only required to provide sampling upon request from the school or child care facility. CWSs must conduct sampling at secondary schools at any time on request. This program's costs are presented with sampling cost, but they also represent public education costs of the LCRR. The costs of complying with the rule include water systems: (1) Identifying schools and child care facilities in their service area and preparing and distributing an initial letter explaining the sampling program and the 3Ts Toolkit, (2) coordinating with the school or child care facility to determine the sampling schedule and the logistics of collecting the samples, (3) conducting a walkthrough at the school or child care facility before the start of sampling, (4) sample collection from the school or child care facility, (5) sample analysis, and (6) providing sampling results to the school or child care facility, the state, and the local and/or state health department.

Exhibit 6–3 and 6–4 show the national annualized sampling costs for both the low and high estimate scenarios, under the previous LCR, the final LCRR, and the incremental cost, discounted at 3 and 7 percent, respectively. Additional information on the estimation of sampling cost can be found in the Chapter 5, section 5.3.2 of the final rule EA (USEPA, 2020a).

EXHIBIT 6–3—NATIONAL ANNUALIZED SAMPLING COSTS—ALL PWS AT 3% DISCOUNT RATE

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Lead Tap Sampling Monitoring	$34,536,000	$46,775,000	$12,239,000	$36,604,000	$55,386,000	$18,782,000
Lead Water Quality Parameters Monitoring	7,265,000	8,225,000	959,000	8,311,000	10,211,000	1,900,000
Copper Water Quality Parameters Monitoring	140,000	152,000	13,000	134,000	150,000	16,000
Source Water Monitoring	20,000	9,419	−11,000	50,000	31,000	−18,000
School Sampling	0	12,582,000	12,582,000	0	12,960,000	12,960,000
Total Annual Sampling Costs	41,962,000	67,744,000	25,782,000	45,099,000	78,739,000	33,641,000

EXHIBIT 6–4—NATIONAL ANNUALIZED SAMPLING COSTS—ALL PWS AT 7% DISCOUNT RATE

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Lead Tap Sampling Monitoring	$33,746,000	$47,597,000	$13,851,000	$36,573,000	$58,566,000	$21,993,000
Lead Water Quality Parameters Monitoring	6,986,000	7,980,000	995,000	8,397,000	10,683,000	2,286,000
Copper Water Quality Parameters Monitoring	133,000	145,000	12,000	128,000	143,000	15,000
Source Water Monitoring	25,000	13,000	−12,000	66,000	45,000	−20,000
School Sampling	0	14,461,000	14,461,000	0	14,969,000	14,969,000
Total Annual Sampling Costs	40,890,000	70,197,000	29,307,000	45,164,000	84,407,000	39,243,000

3. Corrosion Control Treatment Costs

Under the LCRR, drinking water systems are required to install CCT or re-optimize their existing CCT if their lead tap sample 90th percentile exceeds the trigger level or action level. A system may be required to perform a ''find-and-fix'' adjustment to their CCT based on their current level of CCT in place if an individual lead tap samples exceed 15 μg/L. In the cost model, 90th percentile lead tap sample exceedances are initially determined using SDWIS/Fed historic data which is adjusted to account for sampling at 100 percent LSL sites in LSL systems and the fifth liter sampling methodology changes. In subsequent model periods a 90th percentile lead tap sample exceedance can be triggered by a change in water system source water or treatment. Small CWSs serving 10,000 or fewer people and all NTNCWSs may also elect to conduct LSLR or implement a POU program as part of the regulatory flexibilities in the LCRR. See section III.E of this preamble for additional information on the compliance alternatives available to small CWSs and NTNCWSs, and section VI.D.5 for a discussion of the modeling and a summary of the number of systems estimated to select each alternative compliance option.

The capital and O&M costs for water systems installing or optimizing CCT are based on the assumption that water systems will install and operate CCT that achieves finished water characteristics of 3.2 mg/L of orthophosphate and pH at or above 7.2 (for water systems with starting pH values less than 8.4). For those water systems assigned higher initial pH values in the model, between 8.4 and 9.2, EPA assumed the CCT optimization would require adjusting pH to meet or exceed 9.2 (no orthophosphate addition would be needed). The distributions of water system starting values for orthophosphate and pH, used in the cost model, are both drawn from SDWIS/Fed and Six-Year Review Information Collection Request (ICR) dataset (see Chapter 4, section 4.3.6 of the final rule EA).

All capital cost equations are a function of design flow, and all O&M costs are a function of average daily flow. Since CCT is conducted at the

water system's entry points (EPs), the cost model calculates the design flow and average daily flow of each EP. The cost model uses two different sets of unit cost functions representing the low and high capital cost scenarios developed in the engineering Work Breakdown Structure models for CCT (see EPA's report: Technologies and Costs for Corrosion Control to Reduce Lead in Drinking Water (USEPA, 2020b)). Using these bracketing capital cost values is designed to characterize uncertainty in the cost model estimates and when combined with O&M costs and EP flow values, are used to calculate the low and high CCT cost estimates per model PWS. Note that optimization O&M costs are obtained through an incremental cost assessment. The cost model calculated the O&M existing cost and subtracts them from the optimized O&M cost to obtain the incremental re-optimization costs.

In the cost model, water systems are assumed to always install and optimize their CCT, to the standards described above, before making any adjustment to CCT as a result of being triggered into the ''find-and-fix'' requirements of the rule. Each time a model PWS has individual lead tap samples exceeding 15 µg/L in a monitoring period, costs for follow-up lead tap and WQP sampling are applied. In the case of corrective actions, there are four stages implemented with each successive ''find-and-fix'' trigger. In the first period, where a tap sample is above 15 µg/L, the model assumes there was a site specific sample issue and no water quality adjustments are needed. The second period having an exceedance results in the implementation of a spot flushing program to reduce water age in affected areas of the distribution system. With the third ''find-and-fix'' trigger, one of two things are assumed to occur at a single-entry point: A water system that has orthophosphate dosing and the pH target of 7.2 or greater will increase pH to 7.5, or a water system that previously optimized to a pH value of 9.2 will increase pH to 9.4. If ''find-and-fix'' is triggered for a fourth time, a water system is assumed to adjust all EPs to the new target pHs of 7.5 or 9.4, depending on the current treatment in place.

Using O&M cost functions estimated for ''find-and-fix'' (see the Technologies and Costs for Corrosion Control to Reduce Lead in Drinking Water (USEPA, 2020b)), the cost model, when triggered into stage 3 and 4 CCT adjustment, first calculates the total annual O&M cost for treating to the ''find-and-fix'' standards previously listed as if no CCT was installed, then subtracts the PWS's current CCT annual O&M cost from the new ''find-and-fix'' annual O&M cost, to derive the share of the PWS's annual CCT O&M costs attributable to ''find-and-fix'' actions. The model also calculates the capital cost to retrofit the CCT water system for additional pH adjustment under both the low and high cost model scenarios. If a water system is triggered into a fourth round of ''find-and-fix'' CCT adjustment, the 7.5 or 9.4 pH requirements will be applied to all entry points. Individual entry point costs are summed to obtain total water system costs under the low and high model runs.

In addition to the capital and O&M cost of CCT installation, re-optimization, or ''find-and-fix,'' water systems will also face several ancillary costs associated with changes in CCT status. Before the installation or re-optimization of CCT at a water system, a CCT study may need to be conducted or revised and the water system would need to consult with the state on the proposed changes to CCT (these costs also apply to water systems undergoing source water or treatment changes). After the change in CCT, a water system would conduct follow-up tap sampling and WQP monitoring at entry points and at taps in the distribution system, report the results of the initial post-CCT adjustment findings to the state, and review WQP data with the state on an ongoing basis as part of the water system's sanitary surveys. See the final rule EA Chapter 5, Section 5.3.3.3 for additional detail on these requirements (USEPA, 2020a).

Exhibits 6–5 and 6–6 show the range of estimated national costs for CCT under the previous LCR, the LCR revisions, and the incremental cost, discounted at 3 and 7 percent, respectively. Note that a range of CCT capital costs are used in this assessment, but the total range in Exhibits 6–5 and 6–6 is impacted by all five of the uncertain variables which enter the model as low and high estimates. See Section VI.C of this preamble and Chapter 5, Section 5.2.4.2 of the final rule EA, for additional information on the variables that define the low and high cost scenarios. The CCT Operation and Maintenance (Existing) category in these exhibits are EPA's estimate of the ongoing cost of operating corrosion control at PWS where CCT was in place at the beginning of the period of analysis. Additional information on the estimation of CCT costs can be found in Chapter 5, section 5.3.3 of the final rule EA (USEPA, 2020a).

EXHIBIT 6–5—NATIONAL ANNUALIZED CORROSION CONTROL TECHNOLOGY COSTS—ALL PWS AT 3% DISCOUNT RATE

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
CCT Operations and Maintenance (Existing)	$327,171,000	$327,171,000	$0	$327,490,000	$327,490,000	$0
CCT Related Sanitary Survey and Source or Treatment Change Notification Activities	1,356,000	1,735,000	379,000	1,355,000	1,719,000	363,000
CCT Installation	13,424,000	7,138,000	−6,286,000	41,261,000	19,392,000	−21,869,000
CCT Installation Ancillary Activities	43,000	122,000	80,000	119,000	754,000	635,000
CCT Re-Optimization (Due to ALE)	2,479,000	6,575,000	4,096,000	15,374,000	33,425,000	18,051,000
CCT Re-Optimization Ancillary Activities (Due to ALE)	11,000	1,449,000	1,438,000	81,000	27,261,000	27,180,000
CCT Re-Optimization (Due to TLE)	0	5,452,000	5,452,000	0	20,724,000	20,724,000
CCT Re-Optimization Ancillary Activities (Due to TLE)	0	98,000	98,000	0	444,000	444,000
Find and Fix Installation	0	8,271,000	8,271,000	0	31,688,000	31,688,000
Find and Fix Ancillary Activities	0	5,884,000	5,884,000	0	8,190,000	8,190,000
Total Annual Corrosion Control Technology Costs	344,483,000	363,894,000	19,412,000	385,681,000	471,087,000	85,407,000

EXHIBIT 6–6—NATIONAL ANNUALIZED CORROSION CONTROL TECHNOLOGY COSTS—ALL PWS AT 7% DISCOUNT RATE
[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
CCT Operations and Maintenance (Existing)	$306,521,000	$306,521,000	$0	$306,822,000	$306,822,000	$0
CCT Related Sanitary Survey and Source or Treatment Change Notification Activities	1,293,000	1,662,000	368,000	1,293,000	1,641,000	348,000
CCT Installation	12,499,000	6,623,000	−5,876,000	40,703,000	18,919,000	−21,783,000
CCT Installation Ancillary Activities	57,000	168,000	111,000	160,000	1,034,000	875,000
CCT Re-Optimization (Due to ALE)	2,299,000	5,664,000	3,365,000	15,724,000	33,041,000	17,317,000
CCT Re-Optimization Ancillary Activities (Due to ALE)	15,000	1,913,000	1,898,000	107,000	35,996,000	35,888,000
CCT Re-Optimization (Due to TLE)	0	4,784,000	4,784,000	0	20,888,000	20,888,000
CCT Re-Optimization Ancillary Activities (Due to TLE)	0	140,000	140,000	0	633,000	633,000
Find and Fix Installation	0	6,986,000	6,986,000	0	29,911,000	29,911,000
Find and Fix Ancillary Activities	0	5,848,000	5,848,000	0	8,668,000	8,668,000
Total Annual Corrosion Control Technology Costs	322,684,000	340,307,000	17,623,000	364,809,000	457,554,000	92,745,000

4. Lead Service Line Inventory and Replacement Costs

The LCR revisions require all water systems to create an LSL materials inventory during the first three years after rule promulgation or demonstrate to the state and make publicly available the information that the water system does not have LSLs. Because many water systems have already complied with state inventory requirements (*e.g.,* Michigan, see *https://www.michigan.gov/documents/egle/egle-dwehd-PDSMISummaryData_682673_7.pdf*) that are at least as stringent as those required under the LCRR, EPA adjusted the likelihood of conducting a new inventory to reflect state requirements. Water system inventory costs also reflect the development, by all water systems with LSLs, of an initial LSLR plan. The LSLR plan would include a strategy for determining the composition of ''lead status unknown'' service lines in its inventory, procedures to conduct full LSLR, a strategy for informing customers before a full or partial LSLR, a LSLR goal rate in the event of a lead trigger level exceedance for systems serving more than 10,000 persons, a procedure for customers to flush service lines and premise plumbing of particulate lead, a LSLR prioritization strategy, and a funding strategy for conducting LSLR.

Depending on a water system's 90th percentile lead tap sample value, it may be required to initiate an LSLR program. Small CWSs, serving 10,000 or fewer persons, and NTNCWSs have flexibility in the selection of a compliance option if the trigger or action levels are exceeded. These water systems may elect to implement either the LSLR, CCT, or POU compliance options. See section III.E of this preamble for additional information on the compliance alternatives available to small CWSs and NTNCWSs. Under both the low and high cost scenarios, the model estimates the cost for implementing LSLR, CCT, and POU for each water system that meets the small water system flexibility criteria and maintains only the cost associated with the least costly option for each system. The cost model under both the low and high cost scenarios applies the estimated LSLR costs to those CWSs serving 10,000 or fewer persons and any NTNCWSs for which the LSLR option is determined to be the least cost compliance alternative. Systems where CCT or POU are found to be less costly compliance alternatives than LSLR do not receive LSLR costs in the model. See section VI.D.5 of this preamble for a discussion of the modeling and a summary of the number of systems selecting each alternative compliance option.

Prompted by public comment on the proposed rule indicating that the Agency should utilize new LSLR unit cost data that has recently become available, EPA collected information from state and system websites, and media reports. The dataset provides costs estimates across full, customer-side, and system-side replacements from 38 systems that have publicly reported actual replacement costs from pilot studies and recent or on-going LSLR projects. This dataset, though more representative of current unit costs than the survey data used for the proposed rule analysis, still has a small number of observations and is an opportunity sample based on public availability of the information and was not collected using a systematic sampling technique that would allow for a statistical assessment of representativeness. The resultant estimates of replacement costs based on these data are uncertain. Therefore, EPA developed low- and high-end LSLR cost values that are used in the cost model to provide a low/high cost range to inform the understanding of uncertainty (*note:* Four other factors used to produce the low and high cost estimates also influence the LSLR total cost estimates). EPA uses the 25th and 75th percentile values from the new dataset to develop the low/high unit costs for utility-side, customer-side, and full LSLR. These values are larger than those used in the proposed rule analysis except for full replacement in the high cost scenario. See Chapter 5, Section 5.3.4.3 and Appendix A, Section 2 of the final rule EA (USEPA, 2020a) for more information on the development of the LSLR unit cost range.

LSLR cost includes not only the physical replacement of the service line but also the development and distribution of LSLR program outreach materials; contacting customers and site visits to confirm service line material and site conditions before replacement; providing customers with flushing procedures following a replacement; delivering pitcher filters and cartridges concurrent with the LSLR, and maintenance for six months; collecting and analyzing a tap sample three to six months after the replacement of an LSL and informing the customer of the results; and, reporting program results to the state.

Under the final rule, water systems with a 90th percentile lead tap sample value greater than 10 µg/L and less than or equal to 15 µg/L are considered to have a trigger level exceedance. These water systems are required to develop and implement a ''goal-based'' LSLR program where the annual replacement goal is set locally through a water system and state determination process. This program is required to operate for at least two annual monitoring periods after the system's lead 90th percentile tap sample has returned to levels at or below the trigger level. Ancillary costs

incurred by these water systems include the development and delivery of outreach materials to known and potential LSL households and submitting annual reports to the state on program activities. For water systems that do not meet the annual ''goal-based'' replacement rate, the final rule requires that additional outreach to LSL customers and other consumers be conducted. The additional outreach conducted is determined in conjunction with the state and is progressive, increasing when a water system misses an additional annual goal.

The Final LCRR provides compliance flexibility to water systems with 90th percentile tap sample data that exceeds 15 µg/L (the lead action level). These systems are required to implement a mandatory LSLR program replacing a rolling 2 year average of 3% per year using a baseline number of LSLs equal to the number of LSLs and galvanized requiring replacement service lines at the time the system first exceeds the lead trigger or action level plus the number of unknowns at the beginning of each year of the system's LSLR program. This rolling average allows systems that experience LSLR rate fluctuation to still meet a 3% replacement rate on average for the prior two year period every year the water system is required to implement the LSLR program. The regulation also requires that a cumulative number of replacements be reached equal to 3% of the sum of known lead, galvanized requiring replacement, and lead status unknown service lines in the initial inventory, times the number of years that elapsed between the system's first ALE and the date on which the system's 90th percentile lead levels are at or below the action level for 2 years (four consecutive 6-month monitoring periods). EPA does not have information on the annual variation in replacement rates which systems may experience when required to conduct mandatory replacement, therefore, the Agency has assumed an annual replacement rate of 3% (which equals a 3% rolling average value across all two year time periods). EPA's costs capture all estimated replacements required under the rule, but because the assumed 3% annual rate may not capture the year to year variation in LSL replacement rate. EPA's estimated discounted costs may be under or over estimated.

The LCRR also requires that CWSs replace the water system-owned portion of an LSL in response to receiving notification that a customer-owned portion of an LSL was replaced at the customer's initiative. The Agency developed new data in response to comments received on the proposed rule which allowed for the estimation of this category of LSLR costs for the final rule. The inclusion of this new cost category will increase the estimated LSLR costs in the final rule analysis relative to the methodology used in the proposed rule analysis. EPA assumes that all customer initiated LSLRs that occur in systems with trigger level or action level exceedances count toward the goal-based and mandatory removal targets and costs for those programs. EPA estimated costs for customer initiated LSLR are based on only those replacements estimated to occur at systems that are at or below the trigger level.

Exhibits 6–7 and 6–8 show the estimated annualized national cost for both the low and high cost scenarios, discounted at 3 and 7 percent, respectively, of water systems developing the LSL inventory, water systems conducting the goal-based and mandatory LSLR programs, costs to CWSs for removing their portion of an LSL after receiving notification that a customer-owned portion of an LSL was replaced outside of a water system replacement program and household removal costs for the customer-owned portion of the LSL under the previous LCR, the final LCRR, and the incremental cost. EPA did not estimate costs to households of replacing the customer-owned portion of an LSL outside of a goal-based or mandatory program because these replacements do not occur in response to these LCR revisions. Detailed information on the estimation of LSLR costs can be found in Chapter 5, section 5.3.4 of the final rule EA (USEPA, 2020a).

EXHIBIT 6–7—NATIONAL ANNUALIZED LEAD SERVICE LINE REPLACEMENT COSTS—ALL PWS AT 3% DISCOUNT RATE

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Lead Service Line Inventory	$0	$6,318,000	$6,318,000	$0	$10,109,000	$10,109,000
System Lead Service Line Replacement Plan	0	304,000	304,000	0	395,000	395,000
System Lead Service Line Replacement (Mandatory)	600,000	15,550,000	14,950,000	26,777,000	62,417,000	35,641,000
Lead Service Line Replacement Ancillary Activities (Mandatory)	27,000	1,087,000	1,060,000	500,000	3,383,000	2,882,000
System Lead Service Line Replacement (Goal Based)	0	6,298,000	6,298,000	0	22,580,000	22,580,000
Lead Service Line Replacement Ancillary Activities (Goal Based)	0	755,000	755,000	0	1,524,000	1,524,000
Activities Triggered by Not Meeting Goal	0	6,087,000	6,087,000	0	19,663,000	19,663,000
System Lead Service Line Replacement (Customer-initiated)	0	6,943,000	6,943,000	0	18,946,000	18,946,000
System Lead Service Line Replacement Ancillary Activities (Customer-initiated)	0	1,030,000	1,030,000	0	1,224,000	1,224,000
Total Annual PWS Lead Service Replacement Costs	628,000	44,372,000	43,744,000	27,277,000	140,242,000	112,965,000
Household Lead Service Line Replacement (Mandatory)	182,000	0	−182,000	5,466,000	0	−5,466,000
Household Lead Service Line Replacement (Goal based)	0	8,100,000	8,100,000	0	19,542,000	19,542,000
Total Annual Lead Service Replacement Costs	810,000	52,472,000	51,662,000	32,743,000	159,784,000	127,041,000

EXHIBIT 6–8—NATIONAL ANNUALIZED LEAD SERVICE LINE REPLACEMENT COSTS—ALL PWS AT 7% DISCOUNT RATE
[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Lead Service Line Inventory	$0	$6,863,000	$6,863,000	$0	$10,593,000	$10,593,000
System Lead Service Line Replacement Plan	0	467,000	467,000	0	607,000	607,000
System Lead Service Line Replacement (Mandatory)	638,000	16,681,000	16,044,000	37,623,000	79,869,000	42,246,000
Lead Service Line Replacement Ancillary Activities (Mandatory)	29,000	1,249,000	1,220,000	704,000	4,438,000	3,734,000
System Lead Service Line Replacement (Goal Based)	0	6,676,000	6,676,000	0	28,204,000	28,204,000
Lead Service Line Replacement Ancillary Activities (Goal Based)	0	824,000	824,000	0	1,956,000	1,956,000
Activities Triggered by Not Meeting Goal	0	6,636,000	6,636,000	0	25,589,000	25,589,000
System Lead Service Line Replacement (Customer-initiated)	0	6,442,000	6,442,000	0	17,189,000	17,189,000
System Lead Service Line Replacement Ancillary Activities (Customer-initiated)	0	965,000	965,000	0	1,118,000	1,118,000
Total Annual PWS Lead Service Replacement Costs	667,000	46,803,000	46,136,000	38,327,000	169,562,000	131,235,000
Household Lead Service Line Replacement (Mandatory)	193,000	0	−193,000	7,681,000	0	−7,681,000
Household Lead Service Line Replacement (Goal based)	0	8,587,000	8,587,000	0	24,409,000	24,409,000
Total Annual Lead Service Replacement Costs	860,000	55,389,000	54,529,000	46,008,000	193,971,000	147,963,000

5. Point-of-Use Costs

Under the final rule requirements, small CWSs, serving 10,000 or fewer persons, and NTNCWSs with a 90th percentile lead value above the action level of 15 µg/L may choose between LSLR, CCT installation, or POU device installation and maintenance. See section III.E of this preamble for additional information on the compliance alternatives available to small CWSs and NTNCWSs. In addition to the cost to provide and maintain POU devices, water systems selecting the POU compliance option face additional ancillary costs in the form of: (1) POU implementation planning for installation, maintenance, and monitoring of the devices, (2) educating customers on the proper use of the POU device, (3) sampling POU devices to insure the device is working correctly, and (4) coordination with, obtaining approvals from, and annual reporting to the state.

The cost model applies these POU costs to those CWS serving 10,000 or fewer persons and any NTNCWSs for which the POU option is estimated to be the least cost compliance alternative. The determination of the least cost compliance alternative is computed across each representative model PWS in the cost model based on its assigned characteristics including: The number of LSLs, cost of LSLR, the presence of corrosion control, the cost and effectiveness of CCT, the starting of WQP monitoring, the number of entry points, the unit cost of POU, and the number of households. For a more complete discussion on the assignment of system characteristics, see section VI.C of this preamble and Chapters 4 and 5 of the final rule EA. These characteristics are the primary drivers in determining the costs once a water system has been triggered into CCT installation or re-optimization, LSLR, or POU provisions. The model estimates the net present value for implementing each compliance alternative and selects the least cost alternative to retain in the summarized national rule costs.

EPA estimated low and high cost scenarios, to characterize uncertainty in the cost model results. These scenarios are functions of assigning different low and high input values to a number of the variables that affect the relative cost of the small system compliance choices (see Chapter 5 section 5.2.4.2 of the final rule EA for additional information on uncertain variable value assignment). Therefore, as the model output shows, the choice of compliance technology is different across the low and high cost scenarios.

Exhibits 6–9 and 6–10 show the total number of CWSs serving 10,000 or fewer persons and NTNCWSs, the total number of systems by type and population size that would select one of the small system compliance options, the number of NTNCWSs selecting each compliance alternative in the model, and the number of CWSs by population size selecting each compliance alternative in the model, under both the low and high cost scenarios. The POU device implementation seems to be the least cost alternative when the number of households in the system is low as demonstrated by the decrease in the selection of the POU option as CWS population size increases in the model. Given the centralized nature of CCT, requiring installation and maintenance only at the drinking water treatment plant, this compliance technology can benefit from economies of scale. Therefore, the installation of CCT becomes more cost effective as system population size increases. The pattern seen in the selection of LSLR between the low and high cost scenarios demonstrates that the choice of compliance by small systems is driven by relative costs. Under the low cost scenario larger percentages of systems select LSLR given the assumed lower numbers of LSLs per system and lower cost of replacement under this scenario.

EXHIBIT 6–9—NTNCWS AND SMALL CWS COUNTS IMPACTED UNDER FLEXIBILITY OPTION—LOW COST SCENARIO
[Over 35 year period of analysis]

	NTNCWS	CWS				
	All systems	≤100	101–500	501–1,000	1,001–3,300	3,301–10,000
Total PWS Count in System Size Category	17,589	12,046	15,307	5,396	8,035	4,974
Total PWS Count of Systems with LSLR, POU, or CCT activity	714	641	910	314	418	257

EXHIBIT 6–9—NTNCWS AND SMALL CWS COUNTS IMPACTED UNDER FLEXIBILITY OPTION—LOW COST SCENARIO—Continued

[Over 35 year period of analysis]

	NTNCWS	CWS				
	All systems	≤100	101–500	501–1,000	1,001–3,300	3,301–10,000
Number of PWSs with Lead Service Line Removals	48	274	330	74	29	2
Number of PWSs that Install CCT	4	4.33	232	134	155	82
Number of PWSs that Re-optimize CCT	25	2	144	101	234	173
Number of PWSs that Install POU	637	361	205	4	1	

EXHIBIT 6–10—NTNCWS AND SMALL CWS COUNTS IMPACTED UNDER FLEXIBILITY OPTION—HIGH COST SCENARIO

[Over 35 year period of analysis]

	NTNCWS	CWS				
	All systems	≤100	101–500	501–1,000	1,001–3,300	3,301–10,000
Total PWS Count in System Size Category	17,589	12,046	15,307	5,396	8,035	4,974
Total PWS Count of Systems with LSLR, POU, or CCT activity	1,407	1,362	2,029	877	1,475	894
Number of PWSs with Lead Service Line Removals	56	59	40	8	50	10
Number of PWSs that Install CCT	7	1	346	284	349	178
Number of PWSs that Re-optimize CCT	21	20	381	542	1,072	704
Number of PWSs that Install POU	1,322	1,283	1,261	42	4	2

The estimated national annualized point-of-use device installation and maintenance costs for the final rule, under the low cost scenario, are $3,418,000 at a 3 percent discount rate and $3,308,000 at a 7 percent discount rate. The POU costs of the LCRR for the high cost scenario are $20,238,000 discounted at 3 percent and $19,928,000 discounted at 7 percent. Since POU costs are zero under the previous LCR, the incremental costs range from $3,418,000 to $20,238,000 at a 3 percent discount rate and from $3,308,000 to $19,928,000 at a 7 percent discount rate, under the low and high cost scenarios respectively. Additional information on the estimation of POU costs can be found in Chapter 5, section 5.3.5 of the final rule EA (USEPA, 2020a).

6. Public Education and Outreach Costs

In addition to the previous LCR public education requirements for water systems with a lead action level exceedance, the cost model includes final rule requirements for ongoing lead education that apply to all water systems and actions specifically for systems with LSLs, regardless of the 90th percentile level, and requirements in response to a single lead tap sample exceeding 15 µg/L.

The rule requires a number of updates to existing public education and additional outreach activities associated with LSLs. The public education requirements costed for all water systems, regardless of their lead 90th percentile tap sample levels, include: (1) Updating Consumer Confidence Report language, (2) developing a lead outreach plan and materials for new customers, (3) developing an approach for improved public access to lead information, (4) providing increased information on lead in drinking water to state and local health departments, and (5) providing annual documentation and certification to the state that public outreach on lead has been completed. The cost of LCR public education requirements applying to all water systems with LSLs are: (1) The planning, initially implementing and maintaining customer and public access to LSL location and tap sampling data information, and (2) the development of lead educational materials for water-related utility work and delivery of those materials to affected households during water-related work that could result in service line disturbance.

The LCRR public education costs that are applied to water systems that exceed the 15 µg/L action level include: (1) The development of lead language for public education in response to a lead action level exceedance, (2) delivery of education materials to customers for CWSs and posting of lead information for NTNCWSs, (3) water systems contacting public health agencies to obtain a list of additional community organizations that should receive public education materials, (4) water systems notifying public health agencies and other community organizations, (5) large water systems posting a lead notice on their website, (6) water system issuing a press release, (7) community water systems consulting with the state on the materials development and appropriate activities while the action level is exceeded, and (8) annually certifying public education activities have been completed.

The rule also includes a requirement for water systems to notify affected customers as soon as practicable but no later than 3 days of becoming aware of an individual lead tap sample exceeding the 15 µg/L. The model includes the development cost of the notification and education materials to be delivered to affected households and the incremental cost of expedited delivery of the notification. In developing this cost, EPA assumed systems would contact customers by phone and NTNCWSs would email and post sample results. Note that materials costs related to follow-up testing when a sample exceeds 15 µg/L are included in the tap sampling costs in section VI.D.2 of this preamble. The estimated annualized national water system public education and outreach costs for the previous LCR range from $345,000 to $1,467,000 at a 3 percent discount rate under the low and high cost scenarios respectively. At a 7 percent discount rate, the annualized estimated previous rule PE cost range is from $471,000 to $2,016,000. Under the LCRR low cost scenario, the estimated impacts are $37,207,000 at a 3 percent discount rate and $36,555,000 at a 7 percent discount rate. Under the high scenario the estimated annualized costs are $45,461,000 at a 3 percent discount rate and $45,628,000 at a 7 percent discount rate. Therefore, the incremental estimated public education and outreach costs for water systems range from $36,861,000 to $43,994,000 at a 3 percent discount rate and $36,084,000 to $43,612,000 at a 7 percent discount

rate. See Chapter 5, section 5.3.6 of the final rule EA for additional detailed information on the estimation of public education and outreach costs (USEPA, 2020a).

7. Annualized per Household Costs

The cost model calculates the annualized cost per household, by first calculating the cost per gallon of water produced by the CWS. This cost per gallon represents the cost incurred by the system to comply with the requirements of the LCRR. This includes CCT cost, LSL inventory creation, system funded LSLR, tap sampling, public education, and administrative costs. Because of uncertainty in five important LCRR cost driver input variables, discussed in section VI.A. of this preamble, the Agency developed low and high cost scenarios. These scenarios produce a range in the estimated cost per gallon and two estimates for annualized per household costs.

The model multiplies this low and high scenario costs per gallon by the average annual household consumption (in gallons) to determine the cost per household per year associated with increased costs borne by the CWS. EPA then adds to both these values the low and high total consumer-side LSLR cost borne by households in the system, divided by the number of households served by the system, to derive the CWS's average annual household low and high scenario cost estimates. Exhibits 6–11 and 6–12 show the distributions of incremental annualized costs for CWS households by primary water source and size category. (Note that the percentiles represent the distribution of average household costs across CWSs in a category, not the distribution of costs across all households in a CWS category.) Some households that pay for a customer-side LSLR will bear a much greater annual household burden. EPA estimates the cost of removing the customer-owned side of a service line range from $2,514 to $3,929, with a central tendency of $3,559. The percentage of customers in each water system paying the higher customer-side LSL costs depends on the number of LSL in the water system, the rate of replacement, and the details of the water systems LSLR program.

EXHIBIT 6–11—ANNUALIZED INCREMENTAL COST PER HOUSEHOLD BY COMMUNITY WATER SYSTEM CATEGORY—LOW COST SCENARIO

[2016$]

Funding	Source water	Size	10th Percentile	25th Percentile	50th Percentile	75th Percentile	90th Percentile
Private	Ground	Less than 100	$5.36	$7.00	$11.32	$18.48	$26.40
Private	Ground	100 to 500	1.45	2.32	4.03	5.85	9.92
Private	Ground	500 to 1,000	0.44	0.54	0.68	0.95	2.18
Private	Ground	1,000 to 3,300	0.16	0.22	0.32	0.42	0.98
Private	Ground	3,300 to 10,000	0.25	0.31	0.45	0.64	1.96
Private	Ground	10,000 to 50,000	0.04	0.06	0.09	0.34	0.72
Private	Ground	50,000 to 100,000	0.05	0.06	0.10	0.31	0.34
Private	Ground	100,000 to 1,000,000	0.03	0.04	0.10	0.26	0.31
Private	Surface	Less than 100	4.96	7.39	12.05	19.57	34.61
Private	Surface	100 to 500	1.43	2.26	4.08	6.92	13.97
Private	Surface	500 to 1,000	0.40	0.51	0.78	1.68	3.49
Private	Surface	1,000 to 3,300	0.16	0.21	0.35	0.77	1.16
Private	Surface	3,300 to 10,000	0.23	0.31	0.49	1.57	2.45
Private	Surface	10,000 to 50,000	0.04	0.06	0.36	0.64	2.23
Private	Surface	50,000 to 100,000	0.03	0.05	0.19	0.30	1.26
Private	Surface	100,000 to 1,000,000	0.02	0.05	0.19	0.27	0.97
Private	Surface	Greater than 1,000,000	0.13	0.13	0.14	0.14	0.14
Public	Ground	Less than 100	3.83	4.95	8.27	14.29	21.12
Public	Ground	100 to 500	1.00	1.37	2.36	3.89	7.28
Public	Ground	500 to 1,000	0.32	0.39	0.51	0.93	1.95
Public	Ground	1,000 to 3,300	0.12	0.16	0.24	0.37	0.86
Public	Ground	3,300 to 10,000	0.20	0.26	0.36	0.52	1.63
Public	Ground	10,000 to 50,000	0.03	0.05	0.07	0.42	0.57
Public	Ground	50,000 to 100,000	0.04	0.05	0.21	0.26	0.28
Public	Ground	100,000 to 1,000,000	0.03	0.05	0.09	0.22	0.27
Public	Ground	Greater than 1,000,000	0.06	0.06	0.09	0.10	0.10
Public	Surface	Less than 100	3.48	6.44	12.26	22.00	29.05
Public	Surface	100 to 500	0.92	1.45	2.71	4.75	8.36
Public	Surface	500 to 1,000	0.31	0.39	0.60	1.28	2.65
Public	Surface	1,000 to 3,300	0.12	0.16	0.26	0.57	0.97
Public	Surface	3,300 to 10,000	0.21	0.27	0.40	1.32	1.94
Public	Surface	10,000 to 50,000	0.04	0.06	0.14	0.57	2.22
Public	Surface	50,000 to 100,000	0.03	0.06	0.24	0.31	1.10
Public	Surface	100,000 to 1,000,000	0.03	0.06	0.18	0.28	0.40
Public	Surface	Greater than 1,000,000	0.04	0.07	0.09	0.10	0.34

EXHIBIT 6–12—ANNUALIZED INCREMENTAL COST PER HOUSEHOLD BY COMMUNITY WATER SYSTEM CATEGORY—HIGH COST SCENARIO

[2016$]

Funding	Source water	Size	10th Percentile	25th Percentile	50th Percentile	75th Percentile	90th Percentile
Private	Ground	Less than 100	$ – 10.82	$6.65	$10.86	$18.53	$30.58
Private	Ground	100 to 500	1.28	2.31	4.31	6.81	17.50
Private	Ground	500 to 1,000	0.44	0.56	0.78	3.71	7.09
Private	Ground	1,000 to 3,300	0.17	0.25	0.36	1.15	2.66
Private	Ground	3,300 to 10,000	0.24	0.33	0.52	2.44	5.85
Private	Ground	10,000 to 50,000	0.05	0.07	0.10	0.49	1.45
Private	Ground	50,000 to 100,000	0.05	0.06	0.08	0.35	1.42

EXHIBIT 6–12—ANNUALIZED INCREMENTAL COST PER HOUSEHOLD BY COMMUNITY WATER SYSTEM CATEGORY—HIGH COST SCENARIO—Continued

[2016$]

Funding	Source water	Size	10th Percentile	25th Percentile	50th Percentile	75th Percentile	90th Percentile
Private	Ground	100,000 to 1,000,000	0.04	0.08	0.36	0.64	4.51
Private	Surface	Less than 100	3.72	6.49	15.93	30.31	69.90
Private	Surface	100 to 500	1.17	2.25	6.70	13.09	44.49
Private	Surface	500 to 1,000	0.37	0.61	3.15	4.78	19.00
Private	Surface	1,000 to 3,300	0.15	0.26	1.01	2.38	7.74
Private	Surface	3,300 to 10,000	0.17	0.37	1.96	3.35	9.98
Private	Surface	10,000 to 50,000	0.05	0.08	0.40	1.13	5.70
Private	Surface	50,000 to 100,000	0.03	0.05	0.13	0.39	2.54
Private	Surface	100,000 to 1,000,000	0.03	0.09	0.36	0.95	4.36
Private	Surface	Greater than 1,000,000	0.16	0.16	0.16	0.16	0.17
Public	Ground	Less than 100	−5.87	4.63	7.76	15.88	27.31
Public	Ground	100 to 500	0.96	1.41	2.65	6.26	14.49
Public	Ground	500 to 1,000	0.32	0.41	0.62	3.17	7.14
Public	Ground	1,000 to 3,300	0.12	0.17	0.29	1.04	3.33
Public	Ground	3,300 to 10,000	0.20	0.27	0.41	1.88	4.83
Public	Ground	10,000 to 50,000	0.04	0.06	0.08	0.40	1.60
Public	Ground	50,000 to 100,000	0.04	0.05	0.19	0.30	2.24
Public	Ground	100,000 to 1,000,000	0.04	0.06	0.30	0.44	3.97
Public	Ground	Greater than 1,000,000	0.08	0.08	0.10	0.10	0.10
Public	Surface	Less than 100	3.30	5.45	13.70	29.79	62.64
Public	Surface	100 to 500	0.90	1.47	4.85	10.08	34.08
Public	Surface	500 to 1,000	0.30	0.44	2.61	3.98	13.98
Public	Surface	1,000 to 3,300	0.12	0.20	0.83	1.63	5.51
Public	Surface	3,300 to 10,000	0.21	0.33	1.66	2.64	8.76
Public	Surface	10,000 to 50,000	0.05	0.07	0.38	1.08	5.11
Public	Surface	50,000 to 100,000	0.04	0.06	0.25	0.37	2.85
Public	Surface	100,000 to 1,000,000	0.04	0.08	0.37	0.97	4.42
Public	Surface	Greater than 1,000,000	0.04	0.08	0.09	0.12	0.61

8. Primacy Agency Costs

For each of the drinking water cost sections previously described, primacy agencies (*i.e.,* states) have associated costs. The first of these groupings is implementation and administrative costs which are associated with rule adoption, program development, coordinating with the EPA, modification of data systems and data entry, training for both state and PWS employees, and on-going technical assistance to systems. The next burden category specifically for states is the sampling related costs resulting from the review of sampling plans, communications materials, collected lead tap, water quality parameter, source water, and school and child care monitoring data/reports, and waiver and sample invalidation requests. CCT costs accruing to states come from consultations on and review of the selection process (including CCT studies) and installation or re-optimization of corrosion control technologies, the setting of optimal water quality parameters, and the consultation and review of actions taken in response to source water, treatment changes, and ''find-and-fix'' sample results. Other major drivers of state cost are the LSLR inventory and replacement activities. States assist systems in the development of their LSL inventories, review the completed inventories, LSLR plans and outreach materials, approve the goal-based replacement rate for a trigger level exceedance and determine additional activities for PWSs not meeting this goal-based rate, and annually review LSLR program reports and updates to the inventory. States review, consult, and approve CCT re-optimization when a PWS with CCT in place has a trigger level exceedance. States also review, consult, and approve the action level exceedance compliance approach that small CWSs serving 10,000 or fewer persons and NTNCWSs submit when the system exceeds the trigger level. The compliance choice set for these systems includes CCT installation or re-optimization, LSLR, or POU device installation. Costs incurred by states for CCT and LSLR are discussed above. For POU programs, state burden results from reviewing the POU implementation plan, outreach materials, annual tap site sampling plans, results, and certifications for customer notification, and annual required program reports. The final category of state costs assessed in the EPA model are those associated with the final rule's public education requirements. States must review new required CCR changes, outreach material to health departments, and PE materials for disturbances of lead service lines for CWSs with LSLs, galvanized requiring replacement, and service lines of unknown material. In the case of systems that exceed the lead action level the state must also review revisions to lead language in the tier-one public notification and consult on the other PE activities a system must conduct in response to the exceedance. States will also review the annual public education certification submissions from systems.

In EPA's cost model, the majority of the costs associated with states are determined on a per water system basis. State actions and costs are largely driven by the rule required actions that are triggered for the individual water systems. The exception to this rule is the implementation and administrative costs which are tallied on a per primacy agency basis. Unit cost values for the final LCRR were updated based on burden information from the Association of State Drinking Water Administrators' Costs of States Transactions Study (CoSTS) model (ASDWA, 2020). These updated unit cost values are substantially higher that those used in the proposed rule analysis. The per water system costs and per primacy agency costs are summed to obtain aggregate costs for this category.

The cost model estimates that primacy agencies will incur incremental estimated annualized costs, under the low cost scenario, totaling $19,707,000 at a 3 percent discount rate and $20,876,000 at a 7 percent discount rate. For the high cost scenario total estimated incremental cost is

$20,756,000 at a 3 percent discount rate and $22,216,000 at a 7 percent discount rate. Additional information on the estimation of primacy agency costs can be found in Chapter 5, section 5.4 of the final rule EA (USEPA, 2020a).

9. Costs and Ecological Impacts Associated With Additional Phosphate Usage

Adding orthophosphate creates a protective inner coating on pipes that can inhibit lead leaching. However, once phosphate is added to the public water system (PWS), some of this incremental loading remains in the water stream as it flows into wastewater treatment plants (WWTPs) downstream. This generates treatment costs for certain WWTPs. In addition, at those locations where treatment does not occur, water with elevated phosphorus concentrations may discharge to water bodies and induce certain ecological impacts.

To estimate the potential fate of the orthophosphate added at PWSs, EPA developed a conceptual mass balance model. EPA applied this conceptual model to estimate the increase in loading at WWTPs, given an initial loading from corrosion control at water treatment plants. WWTPs could incur costs because of upstream orthophosphate addition if they have permit discharge limits for phosphorus parameters. The percentage of WWTPs with phosphorus limits has increased over time. From 2007 to 2016, in annual percentage rate terms, the growth rate in the percentage of WWTPs with phosphorus limits is 3.3 percent (see Chapter 5, Section 5.5.1 of the Final Rule EA).

EPA assumed this increase would continue as states transition from narrative to numerical nutrient criteria and set numeric permits limits, especially for impaired waters. EPA applied the growth rate observed from 2007 to 2016 to estimate the anticipated percentage of WWTPs with phosphorus limits in future years. This growth rate results in an estimated 41 percent of WWTPs with phosphorus discharge limits after 35 years. Applied as the percentage of WWTPs that need to take treatment actions, this estimate is likely conservative, particularly given the potential availability of alternative compliance mechanisms, such as, individual facility variance and nutrient trading programs.

The specific actions a WWTP might need to take, if any, to maintain compliance with a National Pollution Discharge Elimination System (NPDES) phosphorus limit will depend on the type of treatment present at the WWTP and the corresponding phosphorus removal provided. Based on a review of NPDES data, it is likely that most of the WWTPs that already have phosphorus limits have some type of treatment to achieve the limit.

Some treatment processes can accommodate incremental increases in influent loading and still maintain their removal efficiency. Such processes might not need significant adjustment to maintain their existing phosphorus removal efficiency, given an incremental increase. Other treatment processes may need modifications to their design or operation to maintain their removal efficiency in the face of an influent loading increase.

EPA derived a unit cost of $4.59 per pound for removing incremental phosphorus (see Chapter 5, section 5.5.1 of the final rule EA for additional information). This unit cost includes the cost of additional chemical consumption and the operating cost of additional sludge processing and disposal. The costs a WWTP could incur depend on the magnitude of the loading increase relative to the specific WWTP's effluent permit limit. WWTPs, whose current discharge concentrations are closer to their limit, are more likely to have to act. WWTPs whose current concentrations are well below their limit may not incur costs but might, under certain conditions, incur costs (for example, when phosphorus removal achieved by technology is sensitive to incremental phosphorus loading increases). Furthermore, future phosphorus limits could be more stringent than existing limits in certain watersheds.

Therefore, EPA conservatively assumed that any WWTP with a discharge limit for phosphorus parameters could incur costs. Accordingly, in calculating costs, EPA used the anticipated percentage of WWTPs with phosphorus discharge limits as the likelihood that incremental orthophosphate loading from a drinking water system would reach a WWTP with a limit. EPA combined this likelihood and the unit cost (previously estimated) with incremental phosphorus loading to calculate incremental costs to WWTPs for each year of the analysis period. The incremental annualized cost that WWTPs would incur to remove additional phosphorous associated with the LCRR, under the low cost scenario, ranges from $1,152,000 to $1,458,000 at a 3 and 7 percent discount rate, respectively. The high cost scenario produced an incremental estimated impact of $1,828,000 using a 3 percent discount rate, and $2,607,000 at a 7 percent discount rate.

EPA estimates that WWTP treatment reduces phosphorus loads reaching water bodies by 59 percent but they are not eliminated. The rule's national-level total incremental phosphorus loads reaching water bodies are projected to grow over the period of analysis from the low/high scenario range of 161,000 to 548,000 pounds fifteen years after promulgation to the low/high scenario range of 355,000 to 722,000 pounds at year 35. See Chapter 5, section 5.5.2 of the final rule EA for information on how loading estimates are calculated. The ecological impacts of these increased phosphorous loadings are highly localized: Total incremental phosphorus loadings will depend on the amount and timing of the releases, characteristics of the receiving water body, effluent discharge rate, existing total phosphorus levels, and weather and climate conditions. Detailed spatially explicit information on effluents and on receiving water bodies does not exist in a form suitable for this analysis. Rather, to evaluate the potential ecological impacts of the rule, EPA evaluated the significance of the national-level phosphorus loadings compared to other phosphorous sources in the terrestrial ecosystem.

To put these phosphorus loadings in context, estimates from the U.S. Geological Survey (USGS) Spatially Referenced Regression On Watershed Attributes (SPARROW) model suggest that anthropogenic sources deposit roughly 750 million pounds of total phosphorus per year (USEPA, 2019b). The total phosphorus loadings from the LCRR high cost scenario would contribute about 1 percent (7 million/750 million) of total phosphorus entering receiving waterbodies in a given year, and the incremental amount of total phosphorus associated with the LCRR relative to the previous LCR grows only 0.1 percent (722,000/750 million). At the national level, EPA expects total phosphorus entering waterbodies as a result of the final LCR revisions to be small, relative to the total phosphorus load deposited annually from all other sources. National average load impacts may obscure localized ecological impacts in some circumstances, but the existing data do not allow an assessment as to whether this incremental load will induce ecological impacts in particular areas. It is possible, however, that localized impacts may occur in certain water bodies without restrictions on phosphate influents, or in locations with existing elevated phosphate levels.

An increase in phosphorus loadings can lead to economic impacts and undesirable aesthetic impacts. Excess

nutrient pollution can cause eutrophication—excessive plant and algae growth—in lakes, reservoirs, streams, and estuaries throughout the United States. Eutrophication, by inducing primary production, leads to seasonal decomposition of additional biomass, consuming oxygen and creating a state of hypoxia, or low oxygen, within the water body. In extreme cases, the low to no oxygen states can create dead zones, or areas in the water where aquatic life cannot survive. Studies indicate that eutrophication can decrease aquatic diversity for this reason (*e.g.,* Dodds et al. 2009). Eutrophication may also stimulate the growth of harmful algal blooms (HABs), or over-abundant algae populations. Algal blooms can harm the aquatic ecosystem by blocking sunlight and creating diurnal swings in oxygen levels because of overnight respiration. Such conditions can starve and deplete aquatic species.

10. Summary of Rule Costs

The estimated annualized low and high scenario costs, discounted at 3 percent and 7 percent, that PWSs, households, and primacy agencies will incur in complying with the previous LCR, the LCRR, and incrementally are summarized in Exhibits 6–13 and 6–14. The total estimated incremental annualized cost of the LCRR range from $161 to $335 million at a 3 percent discount rate, and $167 to $372 million at a 7 percent discount rate in 2016 dollars. The exhibits also detail the proportion of the annualized costs attributable to each rule component.

EXHIBIT 6–13—NATIONAL ANNUALIZED RULE COSTS—ALL PWS AT 3% DISCOUNT RATE

[2016$]

PWS annual costs	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Sampling	$41,962,000	$67,744,000	$25,782,000	$45,099,000	$78,739,000	$33,641,000
PWS Lead Service Line Replacement	628,000	44,372,000	43,744,000	27,277,000	140,242,000	112,965,000
Corrosion Control Technology	344,483,000	363,894,000	19,412,000	385,681,000	471,087,000	85,407,000
Point-of Use Installation and Maintenance	0	3,418,000	3,418,000	0	20,238,000	20,238,000
Public Education and Outreach	345,000	37,207,000	36,861,000	1,467,000	45,461,000	43,994,000
Rule Implementation and Administration	0	2,576,000	2,576,000	0	2,576,000	2,576,000
Total Annual PWS Costs	387,417,000	519,210,000	131,792,000	459,523,000	758,343,000	298,820,000
State Rule Implementation and Administration	6,145,000	25,852,000	19,707,000	7,137,000	27,893,000	20,756,000
Household Lead Service Line Replacement	182,000	8,100,000	7,918,000	5,466,000	19,542,000	14,076,000
Wastewater Treatment Plant Costs	161,000	1,313,000	1,152,000	695,000	2,523,000	1,828,000
Total Annual Rule Costs	393,904,000	554,475,000	160,571,000	472,821,000	808,301,000	335,481,000

EXHIBIT 6–14—NATIONAL ANNUALIZED RULE COSTS—ALL PWS AT 7% DISCOUNT RATE

[2016$]

PWS annual costs	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Sampling	$40,890,000	$70,197,000	$29,307,000	$45,164,000	$84,407,000	$39,243,000
PWS Lead Service Line Replacement	667,000	46,803,000	46,136,000	38,327,000	169,562,000	131,235,000
Corrosion Control Technology	322,684,000	340,307,000	17,623,000	364,809,000	457,554,000	92,745,000
Point-of Use Installation and Maintenance	0	3,308,000	3,308,000	0	19,928,000	19,928,000
Public Education and Outreach	471,000	36,555,000	36,084,000	2,016,000	45,628,000	43,612,000
Rule Implementation and Administration	0	4,147,000	4,147,000	0	4,147,000	4,147,000
Total Annual PWS Costs	364,711,000	501,316,000	136,605,000	450,316,000	781,224,000	330,908,000
State Rule Implementation and Administration	6,073,000	26,949,000	20,876,000	7,429,000	29,645,000	22,216,000
Household Lead Service Line Replacement	193,000	8,587,000	8,393,000	7,681,000	24,409,000	16,728,000
Wastewater Treatment Plant Costs	211,000	1,669,000	1,458,000	1,097,000	3,705,000	2,607,000
Total Annual Rule Costs	371,188,000	538,521,000	167,333,000	466,523,000	838,983,000	372,460,000

E. Benefits Analysis

The final LCRR is expected to result in significant health benefits, since both lead and copper are associated with adverse health effects. Lead is a highly toxic pollutant that can damage neurological, cardiovascular, immunological, developmental, and other major body systems. EPA is particularly concerned about ongoing exposure experienced by children because lead can affect brain development. Additionally, children through their physiology and water ingestion requirements may be at higher risk. Research shows that, on average, formula-fed infants and young children consume more drinking water per day on a body weight basis than adolescents. Using the USDA Continuing Survey of Food Intakes by Individuals (CSFII) data, Kahn and Stralka (2009) demonstrated this trend, is most pronounced in children under 1 year of age who drink more than double older children and adults per kg of body weight. Additionally, children absorb 2–4 times more lead than adults through the gastrointestinal tract ((Mushak, 1991, WHO, 2011, and Ziegler et al., 1978). No safe level of lead exposure has been identified (USEPA, 2013). EPA's health risk reduction and benefits assessment of the LCR revisions concentrates on quantification and monetization of the estimated impact of reductions in lead exposure on childhood IQ. As explained in Appendix D of the final rule Economic

Analysis (USEPA 2020a), there are additional non-quantified lead health impacts to both children and adults that will be realized as a result of this rulemaking.

Although copper is an essential element for health, excess intake of copper has been associated with several adverse health effects. Most commonly, excess exposure to copper results in gastrointestinal symptoms such as nausea, vomiting, and diarrhea (National Research Council, 2000). In susceptible populations, such as children with genetic disorders or predispositions to accumulate copper, chronic exposure to excess copper can result in liver toxicity. Because household level data on the change in copper concentrations that result from changes in CCT are not available, this analysis does not quantify any potential benefits from reduced copper exposure that may result from the rule. See Appendix E in the final rule EA for additional copper health impact information.

To quantify the potential impact to exposed populations of changes in lead tap water concentrations as a result of the LCR revisions, EPA:

- Utilized sample data from 15 cities representing 14 water systems from across the United States and Canada to estimate potential household lead tap water concentrations under various levels of corrosion control treatment, LSLR, and implementation of POU devices;
- Modeled exposure using the lead tap water concentration data estimated from the 15 city sampling data, information on peoples' water consumption activities, and background lead levels from other potential pathways;
- Derived the potential change in BLLs that result from the changes in drinking water lead exposure;
- Used concentration response functions, from the scientific literature, to quantify estimated changes in IQ for children given shifts in BLLs;
- Estimated the unit value of a change in childhood IQ; and
- Applied the unit values to the appropriate demographic groups experiencing changes in lead tap water concentrations as a result of the regulatory changes across the period of analysis.

Subsections VI.E.1 through 4 of this preamble outline the estimation of lead concentration values in drinking water used to estimate before and after rule revision implementation concentration scenarios, the corresponding estimated avoided IQ loss in children, and a summary of the monetized benefits of the LCRR.

1. Modeled Drinking Water Lead Concentrations

EPA determined the lead concentrations in drinking water at residential locations through the collection and analysis of consecutive sampling data representing homes pre and post removal of LSLs, including partial removal of LSLs, under differing levels of water system corrosion control treatment. The data was collected from multiple sources including water systems, EPA Regional Offices and the Office of Research and Development, and authors of published journal articles (Deshommes et al., 2016). This data includes lead concentrations and information regarding LSL status, location, and date of sample collection, representing 18,039 samples collected from 1,638 homes in 15 cities representing 14 city water systems across the United States and Canada. EPA grouped the samples into LSL status categories (''LSL,'' ''Partial,'' ''No LSL''). Samples were also grouped by CCT treatment, assigning status as having ''None,'' ''Partial,'' or ''Representative.'' ''Partial'' includes those water systems with some pH adjustment and lower doses of a phosphate corrosion inhibitor, but this treatment is not optimized. ''Representative'' are those water systems in the dataset that have higher doses of phosphate inhibitors, which in the model are considered optimized (see the final rule EA Chapter 6, section 6.2.1 for additional detail and docket number EPA–HQ–OW–2017–0300 for the data).

In response to comments received by the Agency, the city assignments to CCT groupings were updated between the proposed and final rules. EPA reviewed the CCT designations made in the dataset and changed the designations for Halifax, Cincinnati before 2006, and Providence/Cranston.

EPA fit several regression models (see the final rule EA Chapter 6, section 6.2.2 for additional detail) of tap water lead concentration as predicted by LSL presence (''LSL'' or ''No LSL''), LSL extent (''Partial''), CCT status, and ''profile liter.'' Profile liter is the cumulative volume a sample represented within a consecutive sampling series at a single location and time. Models to describe the profile liter accounted for the variation among sampling events, sampling sites, and city. The water lead concentrations exhibited a right-skewed distribution; therefore, the variable was log-transformed to provide a better modeled fit of the data. EPA selected one of the regression models based on its fit and parsimony and used it to produce simulated lead concentrations for use in the benefits analysis (Exhibit 6–8, in Chapter 6 of the final rule EA). The selected model suggests that besides water system, residence, and sampling event, the largest effects on lead concentration in tap water come from the presence of LSLs and the number of liters drawn since the last stagnation period. CCT produces smaller effects on lead concentration than LSLs, and these effects are larger in homes with LSLs.

To statistically control for some sources of variability in the input data, EPA did not use summary statistics from the original data directly in estimating the effects of LSL and CCT status. Instead, EPA produced simulated mean lead concentrations for 500,000 samples, summarized in Exhibit 6–15, based on the selected regression model. The simulations were performed on the log-scale to conform to the fitted model (which used a log-transformed water lead concentration variable) and converted to the original scale to produce geometric means and geometric standard-deviations. Geometric means are more representative of the central tendency of a right-skewed distribution than are arithmetic means and prevent overestimation of the impact of water lead levels on estimated blood lead levels and resulting IQ and benefits values. The simulated sample concentrations represent estimates for new cities, sites, and sampling events not included in the original dataset. These simulations rely on estimates of variability and uncertainty from the regression model and given information on LSL and CCT status. Individual estimates are best thought of as the central tendency for a lead tap sample concentration given regression model parameters and estimated variance. The simulated samples represent, on average, the lead concentrations taken after a short flushing period of roughly 30 seconds for all combinations of LSL and CCT status. This represents a point near the average peak lead concentration for homes with full or partial LSLs, and a point slightly below the peak lead concentration for homes with no LSLs, regardless of CCT status.

EPA estimates that improving CCT will produce significant reductions in lead tap water concentration overall. However, for full LSLRs, the final model produced predictions of drinking water concentrations that overlapped almost completely for all CCT conditions. Therefore, EPA used the pooled estimate of predicted drinking water concentrations for all CCT conditions in residences with no LSL in place for the

main analysis in Chapter 6 of the final rule EA.

Because small CWSs, that serve 10,000 or fewer persons, have flexibility in the compliance option they select in response to a lead action level exceedance, some CWSs are modeled as installing POU devices at all residences. See section III.E of this preamble for additional information on the compliance alternatives available to small CWSs. For individuals in these systems, EPA assumed, in the analysis, that consumers in households with POU devices are exposed to the same lead concentration as residents with ''No LSL'' and ''Representative'' CCT in place.

Note that the simulated concentrations for the final rule analysis, in Exhibit 6–15, have increased lead concentrations for the ''no-LSL'' scenarios and lower lead concentrations for the cases where full and partial LSLs are present and there is no or partial CCT present as compared to the estimated values used in the proposed rule analysis. These changes from the proposal will result in lower estimated changes in BLLs for both children and adults as a result of LSLR and improvements in CCT. Estimated IQ benefit for children will also decrease for a change in treatment of LSLR as compared to the proposed rule values.

EXHIBIT 6–15—LSL AND CCT SCENARIOS AND SIMULATED GEOMETRIC MEAN TAP WATER LEAD CONCENTRATIONS AND STANDARD DEVIATIONS AT THE FIFTH LITER DRAWN AFTER STAGNATION FOR EACH COMBINATION OF LSL AND CCT STATUS

LSL status	CCT status	Simulated mean of log lead (µg/L)	Simulated SD [a] of log lead (µg/L)	Simulated geometric mean lead (µg/L)	Simulated geometric SD [a] of lead
LSL	None	2.89	1.33	18.08	3.78
Partial	None	2.13	1.33	8.43	3.77
No LSL	None	[b] **−0.19**	[b] **1.35**	[b] **0.82**	[b] **3.86**
LSL	Partial	2.29	1.33	9.92	3.78
Partial	Partial	1.55	1.32	4.72	3.75
No LSL	Partial	[b] **−0.19**	[b] **1.35**	[b] **0.82**	[b] **3.86**
LSL	Representative	1.70	1.33	5.48	3.77
Partial	Representative	0.97	1.32	2.64	3.76
No LSL	Representative	[b] **−0.19**	[b] **1.35**	[b] **0.82**	[b] **3.86**

[a] Standard deviations reflect ''among-sampling event'' variability.
[b] Bolded values show how simulated results were pooled to produce a common estimate for homes with no LSL across CCT conditions.

In the estimation of the costs and benefits of the LCR revisions, each modeled person within a water system is assigned to one of the estimated drinking water concentrations in Exhibit 6–15, depending on CCT, POU, and LSL status. EPA estimated benefits under both the low cost and high cost scenarios used in the LCRR analysis to characterize uncertainty in the cost estimates.The low cost scenario and high cost scenario differ in their assumptions made about: (1) The existing number of LSLs in PWSs; (2) the number of PWS above the AL or TL under the previous and final rule monitoring requirements; (3) the cost of installing and/or re-optimizing corrosion control treatment (CCT);(4) the effectiveness of CCT in mitigating lead concentrations; and (5) the cost of LSLR (Section VI.C above and Chapter 5, section 5.2.4.2 of the final rule EA (USEPA, 2020a)). EPA predicted the status of each system under the low and high scenarios at baseline (prior to rule implementation) and in each year of rule implementation. Depending on the timing of required actions that can change CCT, POU, and LSL status under both the baseline and LCRR low and high scenario model runs, changes in lead concentration and resultant blood lead are predicted every year for the total population served by the systems for the 35-year period of analysis. In the primary benefits analysis for the final rule, improvements to CCT and the use of installed POU devices are only predicted for individuals in households with LSLs prior to implementation of the LCRR requirements (consistent with discussion above about the limits of the data for predicting the impact of CCT when LSL are not present). In the model, LSL removals are predicted by water system, by year, and multiplied by the average number of persons per household (across demographic categories) to determine the number of people shifting from one LSL status to another. To predict the changes in exposure that result from an improvement in CCT, EPA predicts the entire LSL population of a water system will move to the new CCT status at the same time. EPA also assumes that the entire water system moves to the drinking water lead concentration, assigned to POU when this option is implemented, which implies that everyone in households in a distribution system with LSLs is properly using the POU. See Chapter 6, section 6.3 of the final rule EA (USEPA, 2020a) for more detailed information on the number of people switching lead concentration categories under the low and high cost scenarios.

2. Impacts on Childhood IQ

The 2013 *Integrated Science Assessment for Lead* (USEPA, 2013) states that there is a causal relationship between lead exposure and cognitive function decrements in children based on several lines of evidence, including findings from prospective studies in diverse populations supported by evidence in animals, and evidence identifying potential modes of action. The evidence from multiple high-quality studies using large cohorts of children shows an association between blood lead levels and decreased intelligence quotient (IQ). The 2012 National Toxicology Program Monograph concluded that there is sufficient evidence of association between blood lead levels less than 5 µg/dL and decreases in various general and specific measures of cognitive function in children from three months to 16 years of age. This conclusion is based on prospective and cross-sectional studies using a wide range of tests to assess cognitive function (National Toxicology Program, 2012).

EPA quantitatively assessed and monetized the benefits of avoided losses in IQ as a result of the LCR revisions. Modeled lead tap water concentrations (previously discussed in this notice) are used to estimate the extent to which the LCRR would reduce avoidable loss of IQ

among children. The first step in the quantification and monetization of avoided IQ loss is to estimate the likely decrease in blood lead levels in children based on the reductions in lead in their drinking water as a result of the rulemaking.

EPA estimated the distribution of current blood lead levels in children, age 0 to 7, using EPA's Stochastic Human Exposure and Dose Simulation Multimedia (SHEDS-Multimedia) model coupled with its Integrated Exposure and Uptake Biokinetic (IEUBK) model. The coupled SHEDS–IEUBK model framework was peer reviewed by EPA in June of 2017 as part of exploratory work into developing a health-based benchmark for lead in drinking water (ERG, 2017). For further information on SHEDS–IEUBK model development and evaluation, refer to Zartarian et al. (2017). As a first step in estimating the blood lead levels, EPA utilized the SHEDS-Multimedia model, which can estimate distributions of lead exposure, using a two-stage Monte Carlo sampling process, given input lead concentrations in various media and human behavior data from EPA's Consolidated Human Activity Database (CHAD) and the Centers for Disease Control and Prevention's (CDC) National Health and Nutrition Examination Survey (NHANES). SHEDS-Multimedia, in this case, uses individual time-activity diaries from CDC's NHANES and EPA's CHAD for children aged 0 to 7 to simulate longitudinal activity diaries. Information from these diaries is then combined with relevant lead input distributions (*e.g.,* outdoor air lead concentrations) to estimate exposure. Drinking water tap concentrations for each of the modeled LSL and CCT scenarios, above, were used as the drinking water inputs to SHEDS-Multimedia. For more detail on the other lead exposure pathways that are held constant as background in the model, see Chapter 6, section 6.4, of the final rule EA.

In the SHEDS–IEUBK coupled methodology, the SHEDS model takes the place of the exposure and variability components of the IEUBK model by generating a probability distribution of lead intakes across media. These intakes are multiplied by route-specific (*e.g.,* inhalation, ingestion) absorption fractions to obtain a distribution of lead uptakes (see Exhibit 6–21 in the final rule EA Chapter 6, section 6.4). This step is consistent with the uptake estimation that would normally occur within the IEUBK model. The media specific uptakes can be summed across exposure routes to give total lead uptake per day. Next, EPA used age-based relationships derived from IEUBK, through the use of a polynomial regression analysis, to relate these total lead uptakes to blood lead levels. Exhibit 6–16 presents modeled SHEDS–IEUBK blood lead levels in children by year of life and LSL, CCT status, and POU. The blood lead levels in this exhibit represent what children's blood lead level would be if they lived under the corresponding LSL, POU, and CCT status combination for their entire lives. Note that when ''No LSL'' is the beginning or post-rule state, 0.82 μg/L is the assumed concentration across all levels of CCT status (none, partial, representative). The extent to which changes in CCT status make meaningful differences in lead concentrations for those without LSLs cannot be determined from this exhibit.

EXHIBIT 6–16—MODELED SHEDS-IEUBK GEOMETRIC MEAN BLOOD LEAD LEVELS IN CHILDREN FOR EACH POSSIBLE DRINKING WATER LEAD EXPOSURE SCENARIO FOR EACH YEAR OF LIFE

Lead service line status	Corrosion control treatment status	GM blood lead level (μg/dL) [b] for specified year of life							
		0–1 [a]	1–2	2–3	3–4	4–5	5–6	6–7	Avg.[c]
LSL	None	3.61	2.47	2.65	2.47	2.48	2.66	2.34	2.67
Partial	None	2.35	1.83	1.88	1.81	1.81	1.88	1.65	1.89
No LSL	None	0.97	1.14	1.18	1.15	1.14	1.19	0.98	1.11
LSL	Partial	2.57	1.93	2.05	1.95	1.94	2.03	1.76	2.03
Partial	Partial	1.72	1.52	1.57	1.54	1.51	1.58	1.37	1.54
No LSL	Partial	0.97	1.14	1.18	1.15	1.14	1.19	0.98	1.11
LSL	Representative	1.85	1.57	1.64	1.60	1.57	1.63	1.43	1.62
Partial	Representative	1.36	1.33	1.36	1.34	1.32	1.37	1.19	1.32
No LSL	Representative	0.97	1.14	1.18	1.15	1.14	1.19	0.98	1.11
POU		0.97	1.14	1.18	1.15	1.14	1.19	0.98	1.11

[a] Due to lack of available data, blood lead levels for the first year of life are based on regression from IEUBK for 0.5- to 1-year-olds only.
[b] These represent the blood lead for a child living with the LSL/CCT status in the columns to the left. Each year blood lead corresponding to actual modeled child is summed and divided by 7 in the model to estimate lifetime average blood lead.
[c] This column contains calculated average lifetime blood lead levels assuming a child lived in the corresponding LSL/CCT scenario for their entire life. Lifetime average blood lead levels above 5 μg/dL are in bold lettering.
This table presents modeled SHEDS–IEUBK blood lead levels in children by year of life.

The blood lead levels presented in Exhibit 6–16, are used as inputs for the benefits modeling. The EPA benefits analysis uses lifetime average blood lead values to determine estimates of avoided IQ loss that correspond to reductions in water lead concentrations resulting from changes in LSL, POU and CCT status at some point in a representative child's life (between ages 0 and 7), and those made prior to the child's birth for those born 7 years after the rule is implemented. Therefore, the EPA cost-benefit model, in each year of the analysis, calculates IQ benefits based on the cohort, or percent of the modeled population, that turns 7 years of age in the year being analyzed. The EPA model, for both the baseline and LCRR, tracks PWS implementation over the period of analysis. This data allows the model to determine the number of children that fall within each of the 10 possible LSL/CCT/POU lead exposure scenarios for each of the seven years prior to the year being modeled. The model then calculates a set of average lifetime blood lead levels for the possible LSL/CCT/POU exposure scenarios (the set of scenarios includes not only the change in LSL, CCT, and POU status but also the years, 0–7, in which the status changes occur) and applies these values to the appropriate percent of the 7 year old cohort (the percent of 7 year olds that are estimated to experience the scenarios represented by the average lifetime BLLs) for that analysis year under both the baseline and LCRR requirements. The change in average lifetime BLLs for the 7 year old cohort is then used to determine the incremental benefit of avoided IQ losses.

In order to relate the child's estimated average lifetime blood lead level to an estimate of avoided IQ loss, EPA selected a concentration-response function based on lifetime blood lead from the independent analysis by Crump et al. (2013). This study used data from a 2005 paper by Lanphear et al., which has formed the basis of concentration-response functions used

in several EPA regulations (National Ambient Air Quality Standard (USEPA, 2008a); the Toxic Substances Control Act (TSCA) Lead Repair and Renovation Rule (USEPA, 2008b); and Steam Electric Effluent Limitation Guidelines Rule (USEPA, 2015). The Crump et al. (2013) function was selected over Lanphear et al. (2005) to minimize issues with overestimating predicted IQ loss at the lowest levels of lead exposure (less than 1 μg/dL BLL), which is a result of the use of the log-linear function. The Crump et al. (2013) function avoids this issue by adding one to the estimated blood lead levels prior to log-transformation in the analysis. Since the revisions to the LCR are expected to reduce chronic exposures to lead, EPA selected lifetime blood lead as the most appropriate measure with which to evaluate benefits. No threshold has been identified for the neurological effects of lead (Budtz-Jørgensen et al., 2013; Crump et al., 2013; Schwartz et al., 1991; USEPA, 2013). Therefore, EPA assumes that there is no threshold for this endpoint and quantified avoided IQ loss associated with all blood lead levels. EPA, as part of its sensitivity analysis, estimated the BLL to IQ relationship using Lanphear et al. (2019) and Kirrane and Patel (2014).[1] See Chapter 6, section 6.4.3 and Appendix G of the final rule EA for a more detailed discussion (USEPA, 2020a).

The estimated value of an IQ point decrement is derived from EPA's reanalysis of Salkever (1995), which estimates that a one-point increase in IQ results in a 1.871 percent increase in lifetime earnings for males and a 3.409 percent change in lifetime earnings for females. Lifetime earnings are estimated using the average of 10 American Community Survey (ACS) single-year samples (2008 to 2017) and projected cohort life tables from the Social Security Administration. Projected increases in lifetime earnings are then adjusted for the direct costs of additional years of education and forgone earnings while in school. The reanalysis of Salkever (1995) estimates a change of 0.0812 years of schooling per change in IQ point resulting from a reduction in lead exposure for males and a change of 0.0917 years of schooling for females.

To estimate the uncertainty underlying the model parameters of the Salkever (1995) reanalysis, EPA used a bootstrap approach to estimate a distribution of model parameters over 10,000 replicates (using random sampling with replacement). For each replicate, the net monetized value of a one-point decrease in IQ is subsequently estimated as the gross value of an IQ point, less the value of additional education costs and lost earnings while in school. EPA uses an IQ point value discounted to age 7. Based on EPA's reanalysis of Salkever (1995), the mean value of an IQ point in 2016 dollars, discounted to age 7, is $5,708 using a 7 percent discount rate and $22,503 using a 3 percent discount rate.[2] See Appendix G, of the final rule EA (USEPA, 2020a) for a sensitivity analysis of avoided IQ loss benefits based on Lin et al. (2018).

EPA used the estimated changes in lifetime (age 0 to 7) average blood lead levels that result from changes in LSL, CCT, or POU status as inputs to the concentration response function from the independent analysis by Crump et al. (2013). The resultant annual avoided IQ decrements per change in LSL, CCT, and/or POU status change are then summed and multiplied by the EPA reanalyzed Salkever (1995) value per IQ point, which represent a weighted average for males and females (3 or 7 percent depending on the discount rate being used to annualize the stream of benefits across the period of analysis). This annual stream of benefits was annualized at 3 and 7 percent over the 35-year period of analysis, and further discounted to year one of the period of analysis. See Exhibit 6–19 (discounted at 3 percent) and Exhibit 6–20 (discounted at 7 percent) for the estimated benefit from avoided IQ losses from both LSL removals and improvements to CCT at public water system as a result of the previous rule, the LCR revisions, and the incremental difference between the previous and final rule estimates under both the low and high cost scenarios.

3. Impacts on Adult Blood Lead Levels

EPA identified the potential adverse adult health effects associated with lead utilizing information from the 2013 Integrated Science Assessment for Lead or EPA ISA (USEPA, 2013) and the HHS National Toxicology Program Monograph on Health Effects of Low-Level Lead (National Toxicology Program, 2012). The EPA ISA uses a five-level hierarchy to classify the weight of evidence for causation based on epidemiologic and toxicological studies, and the NTP Monograph conducted a review of the epidemiological literature for the association between low-level lead exposure (defined by blood lead levels <10 μg/dL) and select health endpoints, and categorized their conclusions using a four-level hierarchy. Constraining the assessment to the highest/most robust two levels from each of the documents finds that the EPA ISA reports ''causal'' and ''likely to be causal'', and the NTP Monograph indicates ''sufficient'' and ''limited'' evidence of association between lead and adult adverse cardiovascular effects (both morbidity and mortality effects), renal effects, reproductive effects, immunological effects, neurological effects, and cancer. (See Appendix D of the final rule EA).

Although EPA did not quantify or monetize the reduction in risk associated with adult health effects for the LCRR, the Agency has estimated the potential changes in adult drinking water exposures and thus blood lead levels to illustrate the extent of the lead reduction to the adult population estimated as a result of the LCRR. EPA estimated blood lead levels in adults for each year of life, beginning at age 20 and ending with age 80. Males and females are assessed separately because data from the CDC's National Health and Nutrition Examination Survey (NHANES) indicate that men have higher average blood lead levels than women, thus the baseline from which the changes are estimated. To estimate the changes in blood lead levels in adults associated with the rule, EPA selected from a number of available models a modified version of its Adult Lead Methodology (ALM). The ALM ''uses a simplified representation of lead biokinetics to predict quasi-steady state blood lead concentrations among adults who have relatively steady patterns of site exposures'' (USEPA, 2003). The model assumes a linear slope between lead uptake and blood lead levels, which is termed the ''biokinetic slope factor'' and is described in more detail in Chapter 6 section 6.5 of the final rule EA. Although the model was originally developed to estimate blood lead level impacts from lead in soil, based on the record, EPA finds the ALM can be tailored for use in estimating blood lead concentrations in any adult exposed population and is able to consider other

[1] Lanphear et al., (2005) published a correction in 2019 that revised the results to be consistent with the Kirrane and Patel (2014) corrections.

[2] It should be noted that these values are slightly different than those used in other recent rulemaking (*e.g.,* the Lead Dust Standard and the proposed Perchlorate rule). This is simply due to the differences in the age of the child when the benefits are accrued in the analysis. Benefits for the LCRR are accrued at age seven and therefore the value of an IQ point is discounted back to age 7 in the LCRR analysis. This results in a slightly higher estimate than the values used for the Perchlorate Rule and the Lead Dust Standard, which are discounted to age zero and age three, respectively. It should also be noted, and is described in Section 6.4.5, that the benefits in the LCRR are further discounted back to year one of the analysis and annualized within the EPA LCRR cost-benefit model.

sources of lead exposure, such as contaminated drinking water. The biokinetic slope factor of 0.4 µg/dL per µg/day is valid for use in the case of drinking water since it is in part derived from studies that measure both adult blood lead levels and concentrations of lead in drinking water (Pocock et al., 1983; Sherlock et al., 1982).

EPA estimated expected BLLs for adults with the ALM using the lead tap water concentration data by LSL, CCT, and POU status derived from the profile dataset, discussed in section VI.E.1 and shown in Exhibit 6–15 of this preamble. For the background blood lead levels in the model, EPA used geometric mean blood lead levels for males and females for each year of life between ages 20 and 80 from NHANES 2011–2016, which may result in some minor double counting of exposure from drinking water. Exhibit 6–17 displays the estimated blood lead levels for adults by each LSL, POU or CCT combination summarized by age groups (blood lead values for each year of age are used to determine average BLL). EPA also estimated BLLs using output for other exposure pathways from SHEDS in the ALM and the All Ages Lead Model, these results are shown in Appendix G of the final rule EA (USEPA, 2020a). The All Ages Lead Model results are not used in the primary analysis because updates to the model from a recent peer review have not been completed.

EXHIBIT 6–17—ESTIMATES OF BLOOD LEAD LEVELS IN ADULTS ASSOCIATED WITH DRINKING WATER LEAD EXPOSURES FROM LSL/CCT OR POU STATUS COMBINATIONS

Lead service line status	Corrosion control treatment status	Sex	Geometric mean blood lead level (µg/dL) for specified age group in years from the ALM					
			20–29	30–39	40–49	50–59	60–69	70–80
LSL	None	Males	1.87	2.02	2.22	2.42	2.63	2.89
		Females	1.57	1.69	1.89	2.22	2.35	2.52
Partial	None	Males	1.31	1.44	1.64	1.84	2.03	2.25
		Females	1.01	1.11	1.31	1.64	1.75	1.88
No LSL	None	Males	0.87	0.99	1.19	1.39	1.55	1.75
		Females	0.57	0.66	0.86	1.19	1.27	1.38
LSL	Partial	Males	1.40	1.53	1.73	1.93	2.12	2.35
		Females	1.10	1.20	1.40	1.73	1.84	1.98
Partial	Partial	Males	1.09	1.22	1.42	1.62	1.80	2.01
		Females	0.79	0.89	1.09	1.42	1.52	1.64
No LSL	Partial	Males	0.87	0.99	1.19	1.39	1.55	1.75
		Females	0.57	0.66	0.86	1.19	1.27	1.38
LSL	Representative	Males	1.14	1.27	1.47	1.67	1.84	2.06
		Females	0.84	0.94	1.14	1.47	1.56	1.69
Partial	Representative	Males	0.97	1.10	1.30	1.50	1.67	1.87
		Females	0.67	0.77	0.97	1.30	1.39	1.50
No LSL	Representative	Males	0.87	0.99	1.19	1.39	1.55	1.75
		Females	0.57	0.66	0.86	1.19	1.27	1.38
POU		Males	0.87	0.99	1.19	1.39	1.55	1.75
		Females	0.57	0.66	0.86	1.19	1.27	1.38

As discussed in the analysis of childhood IQ impacts section VI.E.2 of this preamble, the estimated BLLs in Exhibit 6–17 are average adult annual blood lead levels given the corresponding estimated lead tap water concentrations resulting from LSL, CCT, and POU status. The LCRR cost-benefit model, tracks the changes in LSL, CCT and POU status over time and the percentage of males and females in LSL households for each water system that are impacted by the changes in LSL, CCT, or POU status. These exposure histories and the corresponding BLL from the ALM model are then averaged across adult life spans to obtain a set of potential average lifetime blood lead levels for representative adults (average lifetime BLLs for potential exposure scenarios). Exhibit 6–18 shows the estimated changes in average lifetime blood lead levels for adults that move from the set of initial LSL, CCT, and POU status combinations to a new status as a result of LSL removal, and/or installation of CCT or POU. Note that when ''No LSL'' is the beginning or post-rule state, 0.82 µg/L is the assumed concentration across all levels of CCT status (none, partial, representative). The extent to which changes in CCT status make meaningful differences in lead concentrations for those without LSLs cannot be determined from this exhibit.

EXHIBIT 6–18—ESTIMATED LIFETIME AVERAGE BLOOD LEAD CHANGE FOR ADULTS MOVING BETWEEN LSL, CCT, AND POU STATUS COMBINATIONS

Pre-rule drinking water			Post-rule drinking water			Estimated change in the geometric means of blood lead change
Lead conc. (µg/L)	LSL status	CCT status	Lead conc. (µg/L)	LSL status	CCT status	Ages 20–80 (µg/dL)
18.08	LSL	None	0.82	No LSL	None	1.03
18.08	LSL	None	5.48	LSL	Representative	0.75
18.08	LSL	None	0.82	No LSL	Representative	1.03
18.08	LSL	None	0.82	POU		1.03
8.43	Partial	None	0.82	No LSL	None	0.46
8.43	Partial	None	2.64	Partial	Representative	0.35

EXHIBIT 6–18—ESTIMATED LIFETIME AVERAGE BLOOD LEAD CHANGE FOR ADULTS MOVING BETWEEN LSL, CCT, AND POU STATUS COMBINATIONS—Continued

Pre-rule drinking water			Post-rule drinking water			Estimated change in the geometric means of blood lead change
Lead conc. (µg/L)	LSL status	CCT status	Lead conc. (µg/L)	LSL status	CCT status	Ages 20–80 (µg/dL)
8.43	Partial	None	0.82	No LSL	Representative	0.46
8.43	Partial	None	0.82	POU		0.46
0.82	No LSL	None	0.82	No LSL	Representative	0.00
0.82	No LSL	None	0.82	POU		0.00
9.92	LSL	Partial	0.82	No LSL	Partial	0.54
9.92	LSL	Partial	5.48	LSL	Representative	0.27
9.92	LSL	Partial	0.82	No LSL	Representative	0.54
9.92	LSL	Partial	0.82	POU		0.54
4.72	Partial	Partial	0.82	No LSL	Partial	0.23
4.72	Partial	Partial	2.64	Partial	Representative	0.12
4.72	Partial	Partial	0.82	No LSL	Representative	0.23
4.72	Partial	Partial	0.82	POU		0.23
0.82	No LSL	Partial	0.82	No LSL	Representative	0.00
0.82	No LSL	Partial	0.82	POU		0.00
5.48	LSL	Representative	0.82	No LSL	Representative	0.28
5.48	LSL	Representative	0.82	POU		0.28
2.64	Partial	Representative	0.82	No LSL	Representative	0.11
2.64	Partial	Representative	0.82	POU		0.11
0.82	No LSL	Representative	0.82	POU		0.00

4. Total Monetized Benefits

Exhibits 6–19 and 6–20 show the estimated, monetized national annualized total benefits, under the low and high cost scenarios, from avoided child IQ decrements associated with the previous LCR, the LCRR, and the increment of change between the two, for CCT improvements, LSLR, and POU device implementation discounted at 3 and 7 percent, respectively. The potential changes in adult blood lead levels estimated from changing LSL and CCT status under the LCRR can be found in section VI.E.3 of this preamble and Chapter 6, section 6.5, of the final rule EA (USEPA, 2020a). The impact of lead on the risk of attention-deficit/hyperactivity disorder and reductions in birth weight are discussed in Appendix J of the final rule EA. It should also be noted that because of the lack of granularity in the assembled lead concentration profile data, with regard to CCT status when samples were collected (see section VI.E.1 of this preamble), the benefits of small improvements in CCT, like those resulting from the ''find-and-fix'' rule requirements, cannot be quantified in the model. For additional information on non-quantified benefits see section VI.F.2 of this preamble.

EXHIBIT 6–19—SUMMARY OF ESTIMATED NATIONAL ANNUAL MONETIZED BENEFITS—ALL PWS AT 3% DISCOUNT RATE

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Number of Children Impacted (over 35 years)	29,000	928,000	900,000	704,000	3,210,000	2,506,000
Annual IQ Point Decrement Avoided (CCT Due to ALE)	190	3,225	3,035	5,228	17,583	12,355
Annual Value of IQ Impacts Avoided (CCT Due to ALE)	$3,344,000	$56,083,000	$52,739,000	$96,449,000	$318,322,000	$221,873,000
Annual IQ Point Decrement Avoided (CCT Due to TLE)	0	3,680	3,680	0	10,463	10,463
Annual Value of IQ Impacts Avoided (CCT Due to TLE)	$0	$64,736,000	$64,736,000	$0	$190,822,000	$190,822,000
Annual IQ Point Decrement Avoided (LSLR—Mandatory)	128	2,620	2,492	3,106	8,204	5,097
Annual Value of IQ Impacts Avoided (LSLR—Mandatory)	$2,375,000	$47,525,000	$45,150,000	$61,497,000	$156,772,000	$95,275,000
Annual IQ Point Decrement Avoided (LSLR—Goal Based)	0	1,807	1,807	0	3,337	3,337
Annual Value of IQ Impacts Avoided (LSLR—Goal Based)	$0	$32,855,000	$32,855,000	$0	$63,610,000	$63,610,000
Annual IQ Point Decrement Avoided (LSLR—Customer Initiated)	0	1,572	1,572	0	1,677	1,677
Annual Value of IQ Impacts Avoided (LSLR—Customer Initiated)	$0	$27,540,000	$27,540,000	$0	$29,198,000	$29,198,000
Annual IQ Point Decrement Avoided (POU)	0	17	17	0	2,214	2,214

EXHIBIT 6–19—SUMMARY OF ESTIMATED NATIONAL ANNUAL MONETIZED BENEFITS—ALL PWS AT 3% DISCOUNT RATE—Continued

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Annual Value of IQ Impacts Avoided (POU)	$0	$324,000	$324,000	$0	$44,498,000	$44,498,000
Total Annual Value of IQ Benefits	$5,719,000	$229,062,000	$223,344,000	$157,946,000	$803,222,000	$645,276,000

EXHIBIT 6–20—SUMMARY OF ESTIMATED NATIONAL ANNUAL MONETIZED BENEFITS—ALL PWS AT 7% DISCOUNT RATE

[2016$]

	Low cost estimate			High cost estimate		
	Previous LCR	Final LCRR	Incremental	Previous LCR	Final LCRR	Incremental
Number of Children Impacted (over 35 years)	29,000	928,000	900,000	704,000	3,210,000	2,506,000
Annual IQ Point Decrement Avoided (CCT Due to ALE)	190	3,225	3,035	5,228	17,583	12,355
Annual Value of IQ Impacts Avoided (CCT Due to ALE)	$581,000	$9,551,000	$8,971,000	$17,790,000	$57,148,000	$39,358,000
Annual IQ Point Decrement Avoided (CCT Due to TLE)	0	3,680	3,680	0	10,463	10,463
Annual Value of IQ Impacts Avoided (CCT Due to TLE)	$0	$11,232,000	$11,232,000	$0	$34,750,000	$34,750,000
Annual IQ Point Decrement Avoided (LSLR—Mandatory)	128	2,620	2,492	3,106	8,204	5,097
Annual Value of IQ Impacts Avoided (LSLR—Mandatory)	$451,000	$8,703,000	$8,252,000	$12,707,000	$30,776,000	$18,069,000
Annual IQ Point Decrement Avoided (LSLR—Goal Based)	0	1,807	1,807	0	3,337	3,337
Annual Value of IQ Impacts Avoided (LSLR—Goal Based)	$0	$6,039,000	$6,039,000	$0	$12,469,000	$12,469,000
Annual IQ Point Decrement Avoided (LSLR—Customer Initiated)	0	1,572	1,572	0	1,677	1,677
Annual Value of IQ Impacts Avoided (LSLR—Customer Initiated)	$0	$4,797,000	$4,797,000	$0	$5,038,000	$5,038,000
Annual IQ Point Decrement Avoided (POU)	0	17	17	0	2,214	2,214
Annual Value of IQ Impacts Avoided (POU)	$0	$62,000	$62,000	$0	$9,417,000	$9,417,000
Total Annual Value of IQ Benefits	$1,032,000	$40,385,000	$39,353,000	$30,497,000	$149,599,000	$119,102,000

F. Cost-Benefit Comparison

This section summarizes and describes the numeric relationship between the monetized incremental costs and benefits of the final LCR revisions. The section also discusses both the non-monetized costs and benefits of the rulemaking. Exhibits 6–21 and 6–22 compare the annualized monetized incremental costs and benefits of the LCRR for the low and high cost scenarios. Under a 3 percent discount rate, the net annualized incremental monetized benefits, under the low and high cost scenarios, range from $49 to $296 million. Under the low and high cost scenarios and a 7 percent discount rate, the net annualized incremental monetized benefits range from a negative $148 to negative $273 million.

EXHIBIT 6–21—COMPARISON OF ESTIMATED MONETIZED NATIONAL ANNUALIZED INCREMENTAL COSTS TO BENEFITS OF THE LCRR AT 3% DISCOUNT RATE

[2016$]

PWS annual costs	Low cost scenario	High cost scenario
Annualized Incremental Costs	$160,571,000	$335,481,000
Annualized Incremental Benefits	223,344,000	645,276,000
Annual Net Benefits	62,773,000	309,795,000

EXHIBIT 6–22—COMPARISON OF ESTIMATED MONETIZED NATIONAL ANNUALIZED INCREMENTAL COSTS TO BENEFITS OF THE LCRR AT 7% DISCOUNT RATE

[2016$]

PWS annual costs	Low cost scenario	High cost scenario
Annualized Incremental Costs	$167,333,000	$372,460,000
Annualized Incremental Benefits	39,353,000	119,102,000
Annual Net Benefits	−127,980,000	−253,358,000

1. Non-Monetized Costs

The LCRR is expected to result in additional phosphate being added to drinking water to reduce the amount of lead leaching into water in the distribution system. EPA's cost model estimated that, nationwide, the LCRR will result in post WWTP total incremental phosphorus loads to receiving waterbodies increasing over the period of analysis, under the low cost and high cost scenarios, by a range of 161,000 to 548,000 pounds fifteen years after promulgation, and increasing under the low cost and high cost scenarios by a range of 355,000 to 722,000 pounds at year 35. At the national level, under the high cost scenario, this additional phosphorous loading to waterbodies is small, less than 0.1 percent of the total phosphorous load deposited annually from all other anthropogenic sources. However, national average receiving waterbody load impacts may obscure significant localized ecological impacts. Impacts, such as eutrophication, may occur in water bodies without restrictions on phosphate deposits, or in locations with existing elevated phosphate levels. See Chapter 5, section 5.5 of the final rule EA (USEPA, 2020a) for additional information.

2. Non-Quantified Non-Monetized Benefits

In addition to the benefits monetized in the final rule analysis for reductions in lead exposure, there are several other benefits that are not quantified. The risk of adverse health effects due to lead that are expected to decrease as a result of the LCRR are summarized in Appendix D of the final rule EA and are expected to affect both children and adults. EPA focused its non-quantified impacts assessment on the endpoints identified using two comprehensive U.S. Government documents summarizing the recent literature on lead exposure health impacts. These documents are EPA's Integrated Science Assessment for Lead (ISA) (USEPA, 2013); and the HHS National Toxicology Program Monograph on Health Effects of Low-Level Lead (National Toxicology Program (NTP), 2012). Both of these sources present comprehensive reviews of the literature on the risk of adverse health effects associated with lead exposure. EPA summarized those endpoints to which either EPA ISA or the NTP Lead Monograph assigned one of the top two tiers of confidence in the relationship between lead exposure and the risk of adverse health effects. These endpoints include cardiovascular effects, renal effects, reproductive and developmental effects, immunological effects, neurological effects, and cancer.

There are a number of final rule requirements that reduce lead exposure to both children and adults that EPA could not quantify. The final rule will require additional lead public education requirements that target consumers directly, schools and child care facilities, health agencies, and specifically people living in homes with LSLs. Increased education will lead to additional averting behavior on the part of the exposed public, resulting in reductions in the negative impacts of lead. The rule also will require the development of LSL inventories and making the location of LSLs publicly accessible. This will give exposed consumers more information and will provide potential home buyers this information as well, possibly resulting in additional LSL removals initiated by homeowners before, during, or following home sale transactions. The benefits of these additional removals are not quantified in the analysis of the LCRR. As indicated in section VI.E.4 of this preamble, because of the lack of granularity in the lead tap water concentration data available to EPA for the regulatory analysis, the benefits of small improvements in CCT to individuals residing in homes with LSLs, like those modeled under the ''find-and-fix,'' are not quantified.

EPA also did not quantify the benefits of reduced lead exposure to individuals who reside in homes that do not have LSLs. EPA has determined that the revised LCR requirements may result in reduced lead exposure to the occupants of these buildings as a result of improved monitoring and additional actions to optimize CCT. In the analysis of the LCRR, the number of non-LSL homes potentially affected by water systems increasing their corrosion control during the 35-year period of analysis is 8 million in the low cost scenario and 17 million in the high cost scenario. These households, while not having an LSL in place, may still contain leaded plumbing materials, including leaded brass fixtures, and lead solder. These households could potentially see reductions in tap water lead concentrations. EPA has assessed the potential benefits to children of reducing lead water concentrations in these homes (see Appendix F of the final rule EA) but has determined that the data are too limited and the uncertainties too significant to include in the quantified and monetized benefit estimates of this regulation.

Additionally, the risk of adverse health effects associated with copper that are expected to be reduced by the LCRR are summarized in Appendix E of the final rule EA. These risks include acute gastrointestinal symptoms, which are the most common adverse effect observed among adults and children. In sensitive groups, there may be reductions in chronic hepatic effects, particularly for those with rare conditions such as Wilson's disease and children pre-disposed to genetic cirrhosis syndromes. These diseases disrupt copper homeostasis, leading to excessive accumulation that can be worsened by excessive copper ingestion (National Research Council, 2000).

G. Other Regulatory Options Considered

The Office of Management and Budget recommends careful consideration ''of all appropriate alternatives for the key attributes or provisions of a rule (Office of Management and Budget, 2003). Pursuant to this guidance, EPA considered other regulatory options when developing the final LCRR related to:

- The lead in drinking water sampling program at schools and licensed child care facilities,
- the lead tap sampling protocol requirements for water systems with LSLs,
- LSL locational information to be made publicly available, and
- providing small system flexibility to CWSs that serve a population of 3,300 or fewer persons.

Exhibit 6–23 provides a summary of the final LCRR requirements and other option considered for these four areas.

EXHIBIT 6–23—SUMMARY OF OTHER OPTIONS CONSIDERED FOR THE FINAL LCRR

Area	Final LCRR	Other option considered
Lead in Drinking Water Sampling Program at Schools and Licensed Child Care Facilities.	*Mandatory program is, one five-year round of lead sampling:* • 20% of elementary schools and licensed child care facilities tested *annually.* • 5 samples per school. • 2 samples per licensed child care facility. On request program is implemented for secondary schools, and in elementary schools and child cares following the one cycle of mandatory sampling: • Maximum required sampling under on request program: *20 percent of* schools and licensed child cares *tested annually.* • 5 samples per elementary and secondary school. • 2 samples per licensed child care facility.	*Mandatory program:* • 20% of schools and licensed child care facilities tested *annually.* • 5 samples per school. 2 samples per licensed child care facility. On request program: • Schools and licensed child care facilities would be tested *on request.* • 5 samples per school. • 2 samples per licensed child care facility.
Lead Tap Sampling Requirements for Systems with Lead Service Lines (LSLs).	• Systems with LSLs collect 100% of their samples from LSLs sites, if available. • Samples are *fifth* liter, collected after 6-hour minimum stagnation time.	• Systems with LSLs collect 100% of their samples from LSLs sites, if available. • Samples are *first* liter, collected after 6-hour minimum stagnation time.
Publicly Available LSL Locational Information ...	Systems report a location identifier (*e.g.,* street, intersection, landmark) for LSLs.	Systems report the exact street address of LSLs.
Small System Flexibility	CWSs that serve 10,000 or fewer persons, and all NTNCWSs, are provided compliance flexibility when they exceed the AL.	CWSs that serve 3,300 or fewer persons, and all NTNCWSs, are provided compliance flexibility when they exceed the AL.

1. Lead Public Education and Sampling at Schools and Child Care Facilities

The final LCRR requires that all elementary schools and child care facilities must be sampled by CWSs once during an initial five year mandatory sampling period (schools and child care facilities may refuse the sampling, but the water system must document this refusal or non-response to the state). The CWS must also provide the facility with the 3Ts Toolkit. After this one cycle, or five years, of mandatory sampling, CWSs must provide sampling and public education though the 3Ts, on request, to all elementary school and child care facilities in their service area into the future. The final LCRR also requires CWSs to provide on request sampling to all secondary schools receiving water from their distribution system. EPA assumed that 5 percent of elementary and secondary schools, and child care facilities would request sampling per year under the on request sampling program. In developing the final rule requirements, EPA assessed two other alternatives. The first was requiring that all CWSs conduct a mandatory sampling and public education program for schools and licensed child care facilities that they serve. The attributes of the mandatory program are consistent with the final LCRR's requirements for the five-year round of monitoring at elementary schools and child care facilities, except this program continues with consecutive five-year monitoring rounds in perpetuity at all schools and child care facilities. The second alternative EPA considered was a purely on request program. This program would limit sampling to K–12 schools or child care facilities served by the water system that request sampling. The on request program is representative of the final rule sampling and public education requirements for secondary schools, and elementary schools and child care facilities after the cycle of mandatory testing. This alternative program, however, would begin on request sampling as part of the initial implementation of the school and child care testing program at all schools and child care facilities. In assessing the costs for the program, EPA maintained the assumption that five percent of schools and licensed child care facilities per year would elect to participate in the sampling program and that CWSs would contact each facility annually to determine its interest in the program in lieu of developing a sampling schedule for each facility. Exhibit 6–24 shows that the estimated costs of the final rule requirements are between those of the perpetual mandatory program and the on request program. Note that the costs of the final LCRR and on request option are highly dependent on the percentage of facilities that request to participate in the sampling program. There is a great degree of uncertainty regarding the percentage of facilities that will request this sampling and how this interest may fluctuate over time, indicating a higher degree of uncertainty in the estimated costs from the final LCRR and the on request program. The same is true for the unquantified benefits estimated to result from each alternative.

EXHIBIT 6–24—NATIONAL ANNUALIZED COSTS FOR SCHOOL SAMPLING ALTERNATIVES CONSIDERED IN THE RULEMAKING

[2016$]

Option	Annualized cost at 3% discount rate		Annualized cost at 7% discount rate	
	Low cost scenario	High cost scenario	Low cost scenario	High cost scenario
Final Rule:				
• Elementary Schools/Licensed Child Cares: Mandatory Program for one round of monitoring followed by On Request Program	$12,582,000	$12,960,000	$14,461,000	$14,969,000
• Secondary Schools: On Request Program.				
Proposed LCRR: Mandatory Program	27,751,000	28,268,000	27,221,000	27,875,000
Other Option Considered: On Request Program	9,501,000	9,729,000	9,279,000	9,567,000

2. Lead Tap Sampling Requirements for Water Systems With Lead Service Lines

The final LCRR requires that water systems with LSLs collect all compliance tap samples from sites served by LSLs as opposed to a minimum of 50 percent as required by the previous rule. As noted in section III.G of this preamble, tap sample sites served by an LSL are at the highest risk for elevated lead levels in drinking water, therefore, EPA revised the tap sample site selection criteria to ensure water systems with LSLs use those sites for lead tap sampling. The final rule requires that fifth liter sample be collected and analyzed at LSL tap sampling sites. EPA determined that a fifth liter tap sample better captures water that has been in contact with the LSL, and sample results would result in more protective measures. The sampling methodology associated with collecting a fifth liter sample (using five one-liter bottles returning the first, for copper analysis, and the fifth, for lead analysis) is more complicated and may introduce error, such as misidentifying the correct liter to be analyzed. Thus, EPA also considered requiring the collection of a first liter sample, essentially retaining the sampling procedure from the 1991 LCR because the first draw approach has been effectively implemented by water systems.

Exhibits 6–25 and 6–26 provide the national annualized rule costs and benefits, under the low cost scenario, discounted at 3 and 7 percent, for the previous rule, the final LCRR, and the first liter option. Exhibits 6–27 and 6–28 provide the high cost scenario national annualized rule costs and benefits at the 3 and 7 percent discount rates. At a 3 percent discount rate, EPA estimates lower total benefits, based on estimated avoided IQ point decrements, under the first liter option ($121 to $699 million) compared to the final LCRR ($229 to $803 million). The first liter option provides greater benefits than the previous rule ($6 to $158 million). EPA estimates that the total cost of the rule will be lower under the first liter option ($521 to $756 million) compared to the final LCRR ($554 to $808 million) but still greater than the previous rule ($394 to 473 million). The lower cost and benefit of the first liter option, compared to the fifth liter final rule requirement, is primarily the result of fewer water systems with LSLs exceeding the trigger and action levels and being required to conduct additional tap sampling and treatment requirements in the EPA cost-benefit model. In addition to lower quantified benefits, the first liter option is expected to result in lower unquantified benefits than the fifth liter option as the overall expected reductions in exposure to lead in drinking water would be less.

At a 7 percent discount rate, EPA estimates lower total benefits, based on estimated IQ point decrements, under the first liter option ($21 to $131 million) compared to the final LCRR ($40 to $150 million). Benefits of the first liter option are higher than the previous rule ($1 to $30 million). EPA estimates that the total cost of the rule will be lower under the first liter option ($502 to $780 million) compared to the final LCRR ($539 to $839 million) but greater than the previous rule ($371 to $467 million). Again, fewer water systems under the first liter option are required to conduct additional tap sampling and treatment requirements in response to trigger and action level exceedances producing lower costs and benefits as compared to the fifth liter requirement. And, the fifth liter option is expected to result in higher unquantified benefits resulting from greater reductions exposure to lead in drinking water.

EXHIBIT 6–25—ESTIMATED NATIONAL ANNUALIZED RULE COSTS AND BENEFITS FOR THE LOW COST SCENARIO AT 3% DISCOUNT RATE PREVIOUS RULE, FINAL LCRR, AND FIRST LITER OPTION

[2016$]

Benefit/cost category	Previous LCR total	Final LCRR		First liter option	
		Total	Incremental	Total	Incremental
Total Annual Rule Costs	$393,904,000	$554,475,000	$160,571,000	$520,724,000	$126,819,000
Total Annual PWS Costs	387,417,000	519,210,000	131,792,000	489,058,000	101,641,000
Total Annual Benefits	5,719,000	229,062,000	223,344,000	120,792,000	116,828,000

EXHIBIT 6–26—ESTIMATED NATIONAL ANNUALIZED RULE COSTS AND BENEFITS FOR THE LOW COST SCENARIO AT 7% DISCOUNT RATE PREVIOUS RULE, LCRR, AND FIRST LITER OPTION

[2016$]

Benefit/cost category	Previous LCR total	Final LCRR		First liter option	
		Total	Incremental	Total	Incremental
Total Annual Rule Costs	$371,188,000	$538,521,000	$167,333,000	$502,337,000	$131,149,000
Total Annual PWS Costs	364,711,000	501,316,000	136,605,000	469,123,000	104,412,000
Total Annual Benefits	1,032,000	40,385,000	39,353,000	21,059,000	20,353,000

EXHIBIT 6–27—ESTIMATED NATIONAL ANNUALIZED RULE COSTS AND BENEFITS FOR THE HIGH COST SCENARIO AT 3% DISCOUNT RATE PREVIOUS RULE, FINAL LCRR, AND FIRST LITER OPTION

[2016$]

Benefit/cost category	Previous LCR total	Final LCRR		First liter option	
		Total	Incremental	Total	Incremental
Total Annual Rule Costs	$472,821,000	$808,301,000	$335,481,000	$756,384,000	$283,609,000
Total Annual PWS Costs	459,523,000	758,343,000	298,820,000	699,766,000	241,286,000
Total Annual Benefits	157,946,000	803,222,000	645,276,000	699,463,000	566,338,000

EXHIBIT 6–28—ESTIMATED NATIONAL ANNUALIZED RULE COSTS AND BENEFITS FOR THE HIGH COST SCENARIO AT 7% DISCOUNT RATE PREVIOUS RULE, FINAL LCRR, AND FIRST LITER OPTION

[2016$]

Benefit/cost category	Previous LCR total	Final LCRR		First liter option	
		Total	Incremental	Total	Incremental
Total Annual Rule Costs	$466,523,000	$838,983,000	$372,460,000	$780,202,000	$313,725,000
Total Annual PWS Costs	450,316,000	781,224,000	330,908,000	713,442,000	261,177,000
Total Annual Benefits	30,497,000	149,599,000	119,102,000	131,155,000	105,772,000

3. Reporting of LSL-Related Information

EPA is requiring in the final LCRR that water systems make their inventory publicly available and systems with LSLs must include a locational identifier associated with each LSL. EPA is not requiring that address-level information be provided (see section III.C.3 of this preamble). Public disclosure of the LSL inventory would increase transparency and consumer awareness of the extent of LSLs in the distribution system. EPA, during the development of the final rule, considered an additional option in which systems with LSLs would be required to make the address associated with each LSL publicly available. Available information indicates that prospective buyers and renters value reductions in risks associated with LSLs. Public disclosure of LSL locations can create an incentive, through increased property values or home sale incentives, to replace LSLs.

EPA anticipates that the costs between the final rule requirement and this option would be similar because the system would use the same method for publicly providing and maintaining information regarding its LSL information and LSL locational information, *e.g.,* posting information to the water system's website. EPA anticipates the benefits between the address-level option and location identifier rule requirement would be similar. EPA expects that unquantified benefits of the address-level option may be higher due to the potential impacts on real estate transactions, although this is uncertain.

4. Small System Flexibility

As discussed in section III.E of this preamble, the final LCRR includes significant flexibility for CWSs that serve 10,000 or fewer persons, and all NTNCWSs. If these PWSs have an action level exceedance, they can choose from four options to reduce the concentration of lead in their water. The first three options which are modeled in the cost-benefit analysis are: (1) Replace seven percent of their baseline number of LSLs per year until all LSLs are replaced; (2) optimize existing CCT or install new CCT; (3) Provide POU devices to all customers. The LCRR provides a fourth option (not modeled), for CWSs and NTNCWSs that do not have LSLs and have control of all of the plumbing materials in their system. PWSs meeting these criteria may choose to replace all lead bearing plumbing on a schedule specified by the state and not to exceed one year. This additional option will give small entities more flexibility but because of the requirement that a system must have control of all plumbing materials it is unlikely large numbers of PWSs would select this compliance alternative. EPA, therefore, does not model this option in the cost analysis.

As part of the development of the final rule EPA also considered limiting small system flexibility to CWSs that serve 3,300 or fewer people and all NTNCWSs. Exhibits 6–29 and 6–30 provide the range of the estimated incremental annualized rule costs and benefits, under both the low and high cost scenarios, for the final LCRR and the alternative small system flexibility threshold option at a 3 percent and 7 percent discount rate, respectively.

EXHIBIT 6–29—ESTIMATED NATIONAL ANNUALIZED INCREMENTAL RULE COSTS AND BENEFITS AT 3% DISCOUNT RATE FOR THE FINAL LCRR AND THE ALTERNATIVE SMALL SYSTEM FLEXIBILITY THRESHOLD CONSIDERED IN THE RULEMAKING

[2016$]

Benefit/cost category	Final LCRR: Small system flexibility for CWSs serving <= 10,000 people and all NTNCWSs		Small system flexibility: CWSs serving <= 3,300 people and all NTNCWSs	
	Low cost scenario	High cost scenario	Low cost scenario	High cost scenario
Total Annual Rule Costs	$160,571,000	$335,481,000	$163,460,000	$363,607,000
Total Annual PWS Costs	131,792,000	298,820,000	134,013,000	322,711,000
Total Annual Benefits	223,344,000	645,276,000	226,970,000	675,533,000

EXHIBIT 6–30—NATIONAL ANNUALIZED INCREMENTAL RULE COSTS AND BENEFITS AT 7% DISCOUNT RATE FOR THE FINAL LCRR AND THE ALTERNATIVE SMALL SYSTEM FLEXIBILITY THRESHOLD CONSIDERED IN THE RULEMAKING

[2016$]

Benefit/cost category	Final LCRR: Small system flexibility for CWSs serving <= 10,000 people and all NTNCWSs		Small system flexibility: CWSs serving <= 3,300 people and all NTNCWSs	
	Low cost scenario	High cost scenario	Low cost scenario	High cost scenario
Total Annual Rule Costs	$167,333,000	$372,460,000	$170,418,000	$408,500,000
Total Annual PWS Costs	136,605,000	330,908,000	138,993,000	361,732,000
Total Annual Benefits	39,353,000	119,102,000	40,038,000	125,285,000

VII. Administrative Requirements

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

This action is an economically significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made during interagency review in response to OMB recommendations have been documented in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, the *Economic Analysis of the Final Lead and Copper Rule Revisions* (USEPA, 2020a), is available in the docket and is summarized in section VI of this preamble.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Cost

This action is an Executive Order 13771 regulatory action. Details on the estimated costs of this final rule can be found in EPA's analysis of the potential costs and benefits associated with this action summarized in section VI.

C. Paperwork Reduction Act (From the Office of Mission Support's Information Collection Request Center) (PRA)

The information collection activities in this rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned the control number 2040–0297. You can find a copy of the ICR in the docket for this rule (EPA–HQ–OW–2017–0300), and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The burden reflects the time needed to conduct state and public water system information collections and recordkeeping during the first three years after promulgation, as described in Chapter 8 from the Economic Analysis of the Final Lead and Copper Rule Revisions (USEPA, 2020a).

Burden means the total time, effort, or financial resources expended by people to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology, and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The PRA requires EPA to estimate the burden for public water systems and primacy agencies to comply with the final rule. EPA assumes there is one response per respondent per requirement. EPA anticipates public water systems will be involved in several implementation activities for the first three years after publication of the final LCRR. During the implementation period, one of the burdens that public water systems will incur is the burden to read and understand the LCRR. EPA estimates the average burden hours per response per respondent to read and understand the LCRR to be 4 hours. Another burden public water systems will incur is the burden of assigning personnel and devoting resources necessary to carry out the implementation of the final rule. EPA estimates the average burden hours per response per respondent to assign personnel and devote resources to be 8 hours. In addition, public water systems will need to participate in training sessions and receive technical assistance from their state during implementation of the LCRR. EPA estimates the average burden hours per response per respondent to conduct training and receive technical assistance to be 8 hours. Furthermore, public water systems will have to develop an LSL inventory or submit a demonstration to

the state that they do not have LSLs. EPA estimates the average burden hours per response per respondent to develop an LSL inventory to be 20 to 400 hours. EPA estimates the average burden hours per response per respondent to submit a demonstration of no LSLs to be 5 to 40 hours. Public water system systems will also have to confer with their primacy agency on initial planning for LSLR and prepare a LSLR plan. EPA estimates the average burden hours per response per respondent for initial planning and preparing a LSLR plan to be 12 to 52 hours.

Likewise, primacy agencies will face burdens due to the promulgation of the final rule. Primacy agencies will have to adopt the more stringent portions of the rule and develop programs to implement the LCRR. Primacy agencies are allowed to implement and develop more stringent requirements than the LCRR. EPA estimates the average burden hours per response per respondent to adopt the rule and develop a program for LCRR to be 1,920 hours. While primacy agencies are implementing the LCRR, there may be a need to modify their data system. EPA estimates the average burden hours per response per respondent to modify the data system to implement the LCRR to be 2,220 hours. Also, primacy agencies will need to provide training and technical assistance for their internal staff as well as for the staff of public water systems. EPA estimates the average burden hours per response per respondent to provide internal primacy agency staff with training for implementation of the LCRR to be 588 hours. EPA estimates the average burden hours per response per respondent to train and provide technical assistance to the staff of public water systems to be 2,400 hours. The primacy agencies are also responsible for assisting public water systems in developing an LSL inventory and reviewing submissions. EPA estimates the average burden hours per response per respondent to assist with developing a LSL inventory and review submissions to be 4 to 8 hours. In addition, primacy agencies will also have to review demonstrations of no LSLs from public water systems. EPA estimates the average burden hours per response per respondent to review demonstrations to be 2 hours. Primacy agencies will also have to confer on and review the initial LSLR plan from public water systems. EPA estimates the average burden hours per response per respondent to review demonstrations to be 6 to 26 hours.

The information collected under the ICR is critical to states and other authorized entities that have been granted primacy (*i.e.,* primary enforcement authority) for the Lead and Copper Rule (LCR). These authorized entities are responsible for overseeing the LCR implementation by certain public water systems within their jurisdiction. Primacy agencies would utilize these data to determine compliance, designate additional treatment controls to be installed, and establish enforceable operating parameters. The collected information is also necessary for public water systems. Public water systems would use these data to demonstrate compliance, assess treatment options, operate and maintain installed treatment equipment, and communicate water quality information to consumers served by the water system. Primacy agencies would also be required to report a subset of these data to EPA. EPA would utilize the information to protect public health by ensuring compliance with the LCR, measuring progress toward meeting the LCR's goals, and evaluating the appropriateness of state implementation activities. No confidential information would be collected as a result of this ICR.

Respondents/affected entities: Data associated with this final ICR would be collected and maintained at the public water system, and by Federal and state governments. Respondents would include owners and operators of public water systems, who must report to their primacy agency(s).

Respondent's obligation to respond: Under this rule the respondent's obligation to respond is mandatory. Section 1401(1)(D) of the Safe Drinking Water Act (SDWA) requires that ''criteria and procedures to assure a supply of drinking water which dependably complies with such maximum contaminant levels [or treatment techniques promulgated in lieu of a maximum contaminant level]; including accepted methods for quality control and testing procedures to insure compliance with such levels and to insure proper operation and maintenance of the system . . .'' Furthermore, section 1445(a)(1)(A) of the SDWA requires that ''[e]very person who is subject to any requirement of this subchapter or who is a grantee, shall establish and maintain such records, make such reports, conduct such monitoring, and provide such information as the Administrator may reasonably require by regulation to assist the Administrator in establishing regulations under this subchapter, in determining whether such person has acted or is acting in compliance with this subchapter . . .'' In addition, section 1413(a)(3) of the SDWA requires states to ''keep such records and make such reports . . . as the Administrator may require by regulation.''

Estimated number of respondents: The total number of respondents for the ICR would be 67,712. The total reflects 56 primacy agencies and 67,656 public water systems.

Frequency of Response: During the initial three year period, public water systems will conduct one-time startup activities. The one-time burden associated with reading and understanding the rule, assigning personnel and resources, and attending training is estimated to be an average of 20 hours per system. These activities will be undertaken by all 67,656 CWSs and NTNCWSs that must comply with the LCRR. The total burden for these activities, for the three year period, for all systems is estimated to be 1,353,120 hours. During the initial three year period, primacy agencies will incur burdens associated with one-time startup activities. The burden associated with adopting the rule, modifying data systems, and providing training for internal staff and the staff of public water systems during the first three years is estimated at an average of 7,128 hours per primacy agency. The total burden for these activities, for the three year period, for the 56 primacy agencies is estimated to be 399,168 hours.

Average estimated burden: The average burden per response (*i.e.,* the amount of time needed for each activity that requires a collection of information) is estimated to be 9.16 to 9.63 hours; the average cost per response is $333–351.

Total estimated burden: For the first three years after the final rule is published, water systems and primacy agencies will implement several requirements. Since the first three years of the rule focuses on the creation of inventories for LSLs, households are not faced with costs. The public water systems burden will include the following activities: Reading and understanding the revised rule, personnel time for attending trainings, clarifying regulatory requirements with the primacy agency during rule implementation. Public water systems will also be required to create an LSL materials inventory and develop an initial LSLR plan. The total burden hours for public water systems ranges from 2.51 to 2.69 million hours. The total cost for public water systems ranges from $77.5 to $83.4 million. For additional information on the public water systems activity burden see sections VI.D of this preamble.

The state burden for the first three years of rule implementation would include the following: Adopting the rule

and developing an implementation program; modifying data recording systems; training staff; providing water system staff with initial and on-going technical assistance and training; coordinating annual administration tasks with EPA; reporting data to SDWIS/Fed; reviewing public water system (PWS) inventory data; and conferring with LSL water systems on initial planning for LSLR program activities. The total burden hours for primacy agencies is 657,034 to 698,096 hours. The total cost for primacy agencies is $37.6 to $40.0 million. See section VI.D.8 of this preamble for additional discussion on burden and cost to the primacy agency.

The net change burden associated with moving from the information requirements of the previous rule to those in the final LCRR over the three years covered by the ICR is 3.17 to 3.4 million hours, for an average of 1.06 to 1.13 million hours per year. The range reflects the upper- and lower-bound estimates of the number of systems that need to develop LSL inventories. The total net change in costs over the three-year clearance period are $115.2 to $123.3 million, for an average of $38.4 to $41.1 million per year (simple average over three years).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act as Amended by the Small Business Regulatory Fairness Act (RFA)

Pursuant to sections 603 and 609(b) of the RFA, EPA prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule and convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from small entity representatives that potentially would be subject to the rule's requirements. Summaries of the IFRA and Panel recommendations are presented in the proposed rule at 84 FR 61684, November 13, 2019. As required by section 604 of the RFA, EPA prepared a final regulatory flexibility analysis (FRFA) for this action. The FRFA addresses the issues raised by public comments on the IRFA for the proposed rule. The complete FRFA is available for review in Chapter 8, section 8.4 of the final rule EA and is summarized here.

For purposes of assessing the impacts of this final rule on small entities, EPA considered small entities to be water systems serving 10,000 people or fewer. This is the threshold specified by Congress in the 1996 Amendments to the SDWA for small water system flexibility provisions. As required by the RFA, EPA proposed using this alternative definition in the **Federal Register** (FR) (US EPA, 1998b, 63 FR 7620, February 13, 1998), sought public comment, consulted with the Small Business Administration, and finalized the small water system threshold in the Agency's Consumer Confidence Report regulation (USEPA, 1998a, 63 FR 44524, August 19, 1998). As stated in that document, the alternative definition would apply to this regulation.

Under the SDWA, EPA sets public health goals and enforceable standards for drinking water quality. As previously described, the LCR requires water systems to take actions to address lead and copper contamination in drinking water, including corrosion control treatment, public education, and LSLR. EPA regulatory revisions in the final rule strengthen public health protection and improve implementation in the following areas: Tap sampling, corrosion control treatment, LSLR, public notification and public education.

EPA took a number of steps to solicit small entity stakeholder input during the development of the final LCRR. Chapter 2, Section 2.2 of the final rule EA contains detailed information on stakeholder outreach during the rulemaking process, including material on the Federalism and Tribal consultation processes (also outlined in Sections VII.F and VII.G of this preamble). EPA also specifically sought input from small entity stakeholders through the Small Business Advocacy Review Panel (SBAR) process under Section 609(b) of the RFA, as amended by the SBREFA. On August 14, 2012, the EPA's Small Business Advocacy Chairperson convened an SBAR Panel. In addition to its chairperson, the SBAR Panel consisted of the Director of the Standards and Risk Management Division within the EPA's Office of Ground Water and Drinking Water, the Administrator of the Office of Information and Regulatory Affairs within the OMB, and the Chief Counsel for Advocacy of the SBA. Detailed information on the overall panel process can be found in the panel report titled, *The Small Business Advocacy Review Panel on EPA's Planned Proposed Rule to Public Water System Requirements* available in the LCRR docket (EPA–HQ–OW–2017–0300). The Agency also received comment on the proposed rule revisions that provided small CWSs, serving 10,000 or fewer persons, and all NTNCWSs greater flexibility to comply with the requirements of the LCRR. The detailed public comment summaries including EPA's detailed responses are provided in Section III.E.2 of this preamble.

EPA identified over 63,324 small public water systems that may be impacted by the final LCR revisions. A small public water system serves between 25 and 10,000 people. These water systems include over 45,758 CWSs that serve year-round residents and more than 17,566 NTNCWSs that serve the same persons over six months per year (*e.g.,* a public water system that is an office park or church). The final rule revisions to the LCR include requirements for: Conducting an LSL inventory that is updated annually; installing or re-optimizing corrosion control treatment when water quality declines; enhanced water quality parameter monitoring; establishment of a ''find-and-fix'' provision to evaluate and remediate elevated lead at a site where the tap sample exceeds the lead action level; and improved customer outreach. These final rule revisions also include reporting and recordkeeping requirements. States are required to implement operator certification (and recertification) programs under SDWA section 1419 to ensure operators of CWSs and NTNCWSs, including small water system operators, have the appropriate level of certification.

As a mechanism to reduce the burden of the final rule requirements on small entities EPA has promulgated compliance flexibilities for small CWSs serving 10,000 or fewer persons, and all NTNCWS with a 90th percentile lead value above the lead trigger level or action level. These systems may choose between LSLR; CCT installation; POU device installation and maintenance; and replacement of lead-bearing materials as the compliance option. As part of the FRFA analysis, EPA is estimating low and high cost scenarios to characterize uncertainty in the cost model results. These scenarios are functions of assigning different, low and high, input values to a number of variables that affect the relative cost of the small system compliance options. As indicated in Exhibit 7–1, under the previous LCR, EPA estimates that, under the low cost scenario, 26,013 small CWSs will have annual total LCR related costs of more than one percent of revenues, and that 13,339 of these

small CWSs will have annual total costs of three percent or greater of revenue. Under the final LCRR, the number of small CWSs that will experience annual total costs of more than one percent of revenues increases by 11,873 to 37,885 and the number of small CWSs that will have annual total costs exceeding three percent of revenues increases by 8,521 to 21,860. Under the high cost scenario, EPA estimates that under the previous LCR, 27,719 small CWSs will have annual total costs of more than one percent of revenues, and that 15,472 of these small CWSs will have annual total costs of three percent or greater of revenue. Under the final LCRR, the number of small CWSs that will experience annual total costs of more than one percent of revenues increases by 13,221 to 40,940 and the number of small CWSs that will have annual total costs of more than three percent of revenues increases by 9,994 to 25,466.

EXHIBIT 7–1—NUMBER OF SMALL COMMUNITY WATER SYSTEMS WITH ANNUAL LCR-RELATED COSTS OF ABOVE 1 PERCENT OR 3 PERCENT OF ANNUAL REVENUE FOR THE PREVIOUS RULE AND FINAL LCRR UNDER THE LOW COST AND HIGH COST SCENARIOS

Number of small CWSs with:	Previous rule	Final LCRR
Low Cost Scenario		
Annual LCR-related costs >1 percent of revenue	26,013	37,885
Annual LCR-related costs >3 percent of revenue	13,339	21,860
High Cost Scenario		
Annual LCR-related costs >1 percent of revenue	27,719	40,940
Annual LCR-related costs >3 percent of revenue	15,472	25,466

EPA also assessed the degree to which the final LCRR small system flexibilities would mitigate compliance costs. The Agency estimated the cost of the LCRR if no compliance alternatives were available to small systems. The annual incremental cost of the LCRR without the small system compliance alternatives ranges from $174 to $419 million at a 3 percent discount rate, and from $180 to $474 million at a 7 percent discount rate in 2016 dollars. This demonstrates a cost savings, from allowing CWSs that serve 10,000 or fewer persons, and all NTNCWSs compliance flexibilities, of between $13 million and $101 million across discount rates and low/high cost scenarios.

See Chapter 8, section 8.4 of the final LCRR Economic Analysis (USEPA, 2020a) for more information on the characterization of the impacts under the final rule. EPA has considered an alternative approach to provide regulatory flexibility to small water systems. Section 8.4 of the final LCRR Economic Analysis contains an assessment of impacts for an alternative option that sets the threshold for system compliance flexibility at systems serving 3,300 or fewer persons. See section III.E of this preamble for the detailed explanation of the rationale for EPA's selection of systems serving 10,000 or fewer persons for the CWS small systems flexibilities threshold.

In addition, EPA is preparing a Small Entity Compliance Guide to help small entities comply with this rule. The Small System Compliance Guide would be developed the first 3 years after promulgation.

E. The Unfunded Mandates Reform Act (UMRA)

This action contains a Federal mandate under UMRA, 2 U.S.C. 1531–1538, that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. Accordingly, EPA has prepared a written statement required under section 202 of UMRA. The statement is included in the docket for this action (see Chapter 8 in the Economic Analysis of the Final Lead and Copper Rule Revisions (USEPA, 2020a)) and is briefly summarized here.

Consistent with the intergovernmental consultation provisions of UMRA section 204, EPA consulted with governmental entities affected by this rule. EPA describes the government-to-government dialogue and comments from state, local, and tribal governments in section VII.F Executive Order 13132: Federalism and section VII.G Executive Order 13175: Consultation and Coordination with Indian Tribal Governments of this preamble.

Consistent with UMRA section 205, EPA identified and analyzed a reasonable number of regulatory alternatives to determine the treatment technique requirements in the final LCR revisions. Sections III, IV, and V of this preamble describe the final options. See section VI.F of this preamble and Chapter 9 in the Economic Analysis of the Final Lead and Copper Rule Revisions (USEPA, 2020a) for alternative options that were considered.

This action may significantly or uniquely affect small governments. EPA consulted with small governments concerning the regulatory requirements that might significantly or uniquely affect them. EPA describes this consultation above in the Regulatory Flexibility Act (RFA), section VIII.D of this preamble.

F. Executive Order 13132: Federalism

EPA has concluded that this action has Federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it imposes substantial direct compliance costs on state or local governments. EPA provides the following federalism summary impact statement. EPA consulted with state and local officials early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. EPA held federalism consultations on November 15, 2011, and on January 8, 2018. EPA invited the following national organizations representing state and local elected officials to a meeting on January 8, 2018, in Washington DC: The National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the International City/County Management Association, the National Association of Towns and Townships, the County Executives of America, and the Environmental Council of the States. Additionally, EPA invited the Association of State Drinking Water Administrators, the Association of Metropolitan Water Agencies, the

National Rural Water Association, the American Water Works Association, the American Public Works Association, the National School Board Association, the American Association of School Administrators, and the Western Governors' Association to participate in the meeting. EPA also provided the associations' membership an opportunity to provide input during follow-up meetings. EPA held five follow up meetings between January 8, 2018, and March 8, 2018. In addition to input received during the meetings, EPA provided an opportunity to receive written input within 60 days after the initial meeting. A summary report of the views expressed during Federalism consultations is available in the Docket (EPA–HQ–OW–2017–0300).

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

This action has tribal implications, since it may impose substantial direct compliance costs on tribal governments, and the Federal Government will not provide the funds necessary to pay those costs. There are 996 public water systems serving tribal communities, 87 of which are federally owned. The economic analysis of the final LCRR requirements estimated that the total annualized incremental costs placed on all systems serving tribal communities ranges from $1–$2.4 million. While the average annual incremental cost increase per tribal system is estimated to range from $1,027 to $2,362, EPA notes that these estimated impacts will not fall evenly across all tribal systems. The final LCRR does offer regulatory relief by providing flexibility for CWSs serving 10,000 or fewer people and all NTNCWSs to choose CCT, LSLR, POU devices, and replacement of lead-bearing materials to address lead in drinking water. This flexibility may result in LCR implementation cost savings for many tribal systems since 98 percent of tribal CWSs serve 10,000 or fewer people and 17 percent of all tribal systems are NTNCWSs. EPA consulted with tribal officials under EPA's Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that consultation is provided in the Docket (EPA–HQ–OW–2017–0300). EPA held consultations with federally-recognized Indian Tribes in 2011 and 2018. The 2018 consultations with federally-recognized Indian Tribes began on January 16, 2018 and ended March 16, 2018. The first national webinar was held January 31, 2018, while the second national webinar was held February 15, 2018. A total of 48 tribal representatives participated in the two webinars. Updates on the consultation process were provided to the National Tribal Water Council upon request at regularly scheduled monthly meetings during the consultation process. Also, upon request, informational webinars were provided to the National Tribal Toxics Council's Lead Subcommittee on January 30, 2018, and EPA Region 9's Regional Tribal Operations Committee (RTOC) on February 8, 2018. Additionally, EPA received written comments from the following Tribes and tribal organizations: The Navajo Tribal Utility Authority, the National Tribal Water Council, the United South and Eastern Tribes Sovereignty Protection Fund, and the Yukon River Inter-Tribal Watershed Council.

EPA has reviewed the estimated cost data, the comments received from tribal groups, and the quantified and non-quantified benefits associated with the revision to the LCR and determined that the regulatory burden placed on tribes is outweighed by the positive benefits. Given that the majority of tribal systems serve fewer than 10,000 persons, EPA has provided regulatory relief in the form of small system compliance flexibilities. For additional information on these compliance flexibilities and their estimated impacts see sections III.E and VII.D of this preamble and Chapter 8, section 8.4 of the final LCRR Economic Analysis (USEPA, 2020a).

As required by section 7(a) of the Executive order, EPA's Tribal Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is subject to Executive Order 13045 because it is an economically significant regulatory action as defined by Executive Order 12866, and, based on the record, EPA finds that the environmental health or safety risk addressed by this action has a disproportionate effect on children. Accordingly, EPA has evaluated the environmental health and safety effects of lead found in drinking water on children and estimated the exposure reduction, risk reduction and health endpoint impacts to children associated with the adoption and optimization of corrosion control treatment technologies and the replacement of LSLs. There are non-quantified lead health benefits to children that will be realized as a result of this rulemaking, including from testing in schools and child care facilities. EPA assessed benefits of the LCRR in terms of avoided losses in the intelligence quotient (IQ) in children that result from the additional actions required under the LCRR. The results of these evaluations are contained in the *Economic Analysis of the Final Lead and Copper Rule Revisions* (USEPA, 2020a) and described in section VI.D.2 of this preamble. Copies of the *Economic Analysis of the Final Lead and Copper Rule Revisions* and supporting information are available in the Docket (EPA–HQ–OW–2017–0300).

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. The public and private water systems affected by this action do not, as a rule, generate power. This action does not regulate any aspect of energy distribution as the water systems that are regulated by the LCR already have electrical service. Finally, EPA has determined that the incremental energy used to implement corrosion control treatment at drinking water systems in response to the final regulatory requirements is minimal. As such, EPA does not anticipate that this rule will have a significant adverse effect on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act of 1995

This action involves technical standards. EPA may use existing voluntary consensus standards as it relates to additional monitoring for lead and copper, since monitoring and sample analysis methodologies are often based on voluntary consensus standards. However, the final LCRR does not change any methodological requirements for monitoring or sample analysis. EPA's approved monitoring and sampling protocols generally include voluntary consensus standards that are in accordance with applicable standards established by an organization accredited for that purpose such as the American National Standards Institute (ANSI), and other such accrediting bodies deemed appropriate for compliance monitoring by the Administrator. EPA notes that in some cases, this rule revises the required frequency and number of lead tap samples.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Environmental Justice Analysis for the Final Lead and Copper Revision Rule Report, which can be found in the docket ID EPA–HQ–OW–2017–0300. Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission. Agencies must do this by identifying and addressing as appropriate any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

In evaluating baseline exposure to lead in drinking water, data indicate that the possibility of a disproportionately high and adverse human health risk among minority populations and low-income populations exist. Higher than expected proportions of children in minority households and/or low-income households live in housing built during decades of higher LSL usage. The final rule seeks to reduce the health risks of exposure to lead in drinking water provided by CWSs and NTNCWSs. Since water systems with LSLs are more likely to have an action level exceedance or a trigger level exceedance and, therefore, engage in actions to reduce lead concentrations, the final rule should help improve the baseline environmental justice concerns. The final rule is not expected to have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. The final rule should result in CCT and LSLR changes at water systems with higher baseline lead concentrations. It increases the level of health protection for all affected populations. The LSLR provision may be less likely than the CCT provision to address baseline health risk disparity among low-income populations because LSLR may not be affordable for low-income households.

However, there are Federal and state programs that may be used to fund LSLR programs including the cost of LSLR for customer-owned LSLs. These include but are not limited to the Drinking Water State Revolving Fund (DWSRF), Water Infrastructure Finance and Innovation Act (WIFIA) Program, Water Infrastructure Improvements for the Nation (WIIN) Act of 2016 grant programs, and U.S. Department of Housing and Urban Development's (HUD) Community Development Block Grant (CDBG) Program. The benefit-cost analysis of the final rule indicates that CCT changes will account for most of the benefits. Therefore, health risk reduction benefits will be more uniformly distributed among populations with high baseline health risks including minority and low-income households. Also, given the availability of Federal and state funding sources to support full LSLR, the final rule meets the intent of the Federal policy requiring incorporation of environmental justice into Federal agency missions.

L. Consultations With the Science Advisory Board and the National Drinking Water Advisory Council

1. Consultation With the Science Advisory Board (SAB) Under SDWA Section 1412(e)

As required by section 1412(e) of the SDWA, in 2011, EPA sought an evaluation of current scientific data to determine whether partial LSLR effectively reduce water lead levels. When the LCR was promulgated in 1991, large water systems, serving greater than 50,000 people, were required to install CCT and small and medium water systems, serving 50,000 or fewer people if samples exceeded the action level for lead. If the action level was not met after installing CCT, water systems are required to replace 7 percent of its LSLs annually. However, in 2000, revisions to the LCR allowed water systems, if they exceeded the action level, to replace only the portion of the LSL that the water system owned and to replace the customer's portion of the LSL at the customer's expense. This practice is known as a partial LSLR.

EPA asked the SAB to evaluate the current scientific data on the following five partial LSLR issues: (1) Associations between partial LSLR and blood lead levels in children; (2) lead tap water sampling data before and after partial LSLR; (3) comparisons between partial and full LSLR; (4) partial LSLR techniques; and (5) the impact of galvanic corrosion. EPA identified several studies for the SAB to review while the SAB selected additional studies for their evaluation. The SAB deliberated and sought input from public meetings held on March 30 and 31, 2011, and during a public conference call on May 16, 2011. The SAB's final report, titled ''SAB Evaluation of the Effectiveness of Partial Lead Service Line Replacements'' was approved by the SAB on July 19, 2011, and transmitted to the EPA Administrator on September 28, 2011.

The SAB determined that the quality and quantity of data was inadequate to fully evaluate the effectiveness of partial LSLR in reducing drinking water lead concentrations. Both the small number of studies and the limitations within these studies (*i.e.,* lack of comparability between studies, small sample size) barred a comprehensive assessment of partial LSLR efficacy. However, despite the limitations, the SAB concluded that partial LSLR's have not been shown to reliably reduce drinking water lead levels in the short-term of days to months, and potentially even longer. Additionally, partial LSLR is often associated with elevated drinking water lead levels in the short-term. The available data suggested that the elevated drinking water lead levels after the partial LSLR tend to stabilize over time to lower than or to levels similar to before the partial LSLR. Therefore, the SAB concluded that available data suggest that partial LSLR's may pose a risk to the population due to short-term elevations in drinking water lead concentrations after a partial LSLR, which last for an unknown period. Considering the SAB's findings on partial LSLR, EPA determined that partial replacements should no longer be required when water systems exceed the action level for lead, but EPA still considers full replacement of the LSL as beneficial (USEPA, 2011b).

Following the proposal, the SAB elected to review the scientific and technical basis of the proposed rule, on March 30, 2020. A work group took the lead in SAB deliberations on this topic at a public teleconference held on May 11, 2020. The SAB provided advice and comments in its June 12, 2020 report. Similar comments that were raised by the SAB were also raised by public commenters. As a result, the comments have been addressed by EPA in the final rule, supporting documents and throughout this notice.

2. Consultation With National Drinking Water Advisory Council Under SDWA Section 1412(d)

The National Drinking Water Advisory Council (NDWAC) is a Federal Advisory Committee that supports EPA

in performing its duties and responsibilities related to the national drinking water program and was created as a part of SDWA in 1974. EPA sought advice from the NDWAC as required under Section 1446 of the SDWA. EPA consulted with NDWAC on July 21–22, 2011, to provide updates on the proposed LCR revisions and solicit feedback on potential regulatory options under consideration. In November 2011, NDWAC held deliberations on LSLR requirements after they received the SAB's final report on the effectiveness of partial LSLR. In December 2011, a public meeting was held where NDWAC provided EPA with major recommendations on the potential LCR regulatory revisions, which are outlined in a letter dated December 23, 2011.

In 2014, the NDWAC formed the Lead and Copper Rule Working Group (LCRWG) to provide additional advice to EPA on potential options for long-term regulatory revisions. EPA held meetings from March of 2014 until June 2015 where NDWAC LCRWG members discussed components of the rule and provided EPA with advice for addressing the following issues: Sample site collection criteria, lead sampling protocols, public education for copper, and measures to ensure optimal CCT and LSLR. NDWAC provided the Agency with their final recommendations and findings in a report submitted to the Administrator in December 2015. In the report, NDWAC acknowledged that reducing lead exposure is a shared responsibility between consumers, the government, public water systems, building owners, and public health officials. In addition, they recognized that creative financing is necessary to reach the LSL removal goals, especially for disparate and vulnerable communities. The NDWAC advised EPA to maintain the LCR as a treatment technique rule but with enhanced improvements. NDWAC qualitatively considered costs before finalizing its recommendations, emphasizing that public water systems and states should focus efforts where the greatest public health protection can be achieved, incorporating their anticipated costs in their capital improvement program or the requests for Drinking Water State Revolving Funds. The LCRWG outlined an extensive list of recommendations for the LCR revisions, including establishing a goal-based LSLR program, strengthening CCT requirements, and tailoring water quality parameters to the specific CCT plan for each water system.

The report NDWAC provided for EPA also included recommendations for renewed collaborative commitments between government and all levels of the public from state and local agencies, to other stakeholders and consumers while recognizing EPA's leadership role in this area. These complementary actions as well as a detailed description of the provisions for NDWAC's recommendations for the long-term revisions to the LCR can be found in the ''Report of the Lead and Copper Rule Working Group to the National Drinking Water Advisory Council'' (NDWAC, 2015). EPA took into consideration NDWAC's recommendations when developing these revisions to the LCR.

On December 4–5, 2019, EPA held a NDWAC meeting in Washington, DC where EPA presented the proposed Lead and Copper Rule Revisions (LCRR). In the presentation, the major LCRR revisions were highlighted such as the LSL inventory, the new trigger level of 10 ppb, and new sampling protocols. The presentation focused on six key areas: Identifying areas most impacted, strengthening treatment requirements, replacing LSLs, increasing sampling reliability, improving risk communication, and protecting children in schools. EPA reiterated that the LCRR was developed with extensive consultation from state, local and tribal partners to identify avenues that would reduce elevated levels of lead in drinking water. EPA reaffirmed its commitment to transparency and improved communication to the public.

M. Consultation With the Department of Health and Human Services Under SDWA Section 1412(d)

On June 12, 2019, EPA consulted with the Department of Health and Human Services (HHS) on the proposed LCRR. On July 22, 2020, EPA consulted with the Department of Health and Human Services (HHS) on the final rule. EPA received and considered comments from the HHS for both the proposal and final rules through the inter-agency review process described in section VII.A of this preamble.

N. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a ''major rule'' as defined by 5 U.S.C. 804(2).

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List of Subjects

40 CFR Part 141

Environmental protection, Copper, Indians—lands, Intergovernmental relations, Lead, Lead service line, National Primary Drinking Water Regulation, Reporting and recordkeeping requirements, Water supply.

40 CFR Part 142

Environmental protection, Administrative practice and procedure, Copper, Indians—lands, Intergovernmental relations, Lead, Lead service line, National Primary Drinking Water Regulation, Reporting and recordkeeping requirements, Water supply.

Andrew Wheeler,
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR parts 141 and 142 as follows:

PART 141—NATIONAL PRIMARY DRINKING WATER REGULATIONS

■ 1. The authority citation for part 141 continues to read as follows:

Authority: 42 U.S.C. 300f, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4, 300j–9, and 300j–11.

■ 2. Amend § 141.2 by:

■ a. Revising the definition of ''Action level'';

■ b. Adding in alphabetical order the definitions of ''Aerator'', ''Child care facility'', ''Elementary schools'', ''Fifth liter sample'', and ''Find-and-fix'';

■ c. Revising the definition for ''First draw sample'';

■ d. Adding in alphabetical order the definitions of ''Full lead service line replacement,'' ''Galvanized service line'', and ''Gooseneck, pigtail, or connector'';

■ e. Revising the definition of ''Lead service line'';

■ f. Adding in alphabetical order the definitions of ''Lead status unknown service line'' and ''Lead trigger level'';

■ g. Revising the definition of ''Medium-size water system'';

■ h. Adding in alphabetical order the definitions of ''Method detection limit (MDL)'', ''Partial lead service line replacement'', and ''Pitcher filter'';

■ i. Removing the definition of ''Point-of-use treatment device (POU)'';

■ j. Adding in alphabetical order the definitions ''Point-of-use treatment device or point of use device (POU),'' ''Practical quantitation limit (PQL)'', ''Pre-stagnation flushing'', ''School'', and ''Secondary school''.

■ k. Removing the definition ''Service line sample''.

l. Adding in alphabetical order the definitions ''System without corrosion control treatment'', ''Tap sampling monitoring period'', ''Tap sampling period'', ''Tap sampling protocol'', and ''Wide-mouth bottles''.

The revisions and additions read as follows:

§ 141.2 Definitions.

* * * * *

Action level means the concentrations of lead or copper in water as specified in § 141.80(c) which determines requirements under subpart I of this part. The action level for lead is 0.015 mg/L and the action level for copper is 1.3 mg/L.

Aerator means the device embedded in the water faucet to enhance air flow with the water stream and to prevent splashing.

* * * * *

Child care facility means a location that houses a licensed provider of child care, day care, or early learning services to children, as determined by the State, local, or tribal licensing agency.

* * * * *

Elementary school, for the purposes of subpart I of this part only, means a *school* classified as elementary by state and local practice and composed of any span of grades (including pre-school) not above grade 8.

* * * * *

Fifth liter sample, for purposes of subpart I of this part, means a one-liter sample of tap water collected in accordance with § 141.86(b).

* * * * *

Find-and-fix means the requirements under subpart I of this part that water systems must perform at every tap sampling site that yielded a lead result above 15 µg/L.

* * * * *

First draw sample means the first one-liter sample of tap water collected in accordance with § 141.86(b)(2).

* * * * *

Full lead service line replacement means the replacement of a *lead service line* (as well as galvanized service lines requiring replacement), as defined in this section, that results in the entire length of the service line, regardless of service line ownership, meeting the Safe Drinking Water Act (SDWA) Section 1417 definition of lead free applicable at the time of the replacement. A *full lead service line replacement* includes a replacement where only one portion of the service line is lead, such as where a partial lead service line was previously conducted, as long as, upon completion of the replacement, the entire service line meets the SDWA Section 1417 definition of lead-free applicable at the time of the replacement. Galvanized service lines that are or were downstream of a lead service line must also be replaced for a service line to be a *full lead service line replacement.* A lead service line that is left in place in the ground but remains out-of-service may be *full lead service line replacement* where a new non-lead service line is installed for use instead of the out-of-service lead service line.

* * * * *

Galvanized service line means iron or steel piping that has been dipped in zinc to prevent corrosion and rusting.

Gooseneck, pigtail, or connector is a short section of piping, typically not exceeding two feet, which can be bent and used for connections between rigid service piping. For purposes of this subpart, lead goosenecks, pigtails, and connectors are not considered to be part of the lead service line but may be required to be replaced pursuant to § 141.84(c).

* * * * *

Lead service line means a portion of pipe that is made of lead, which connects the water main to the building inlet. A lead service line may be owned by the water system, owned by the property owner, or both. For the purposes of this subpart, a galvanized service line is considered a lead service line if it ever was or is currently downstream of any lead service line or service line of unknown material. If the only lead piping serving the home is a lead gooseneck, pigtail, or connector, and it is not a galvanized service line that is considered a lead service line the service line is not a lead service line. For purposes of § 141.86(a) only, a galvanized service line is not considered a lead service line.

Lead status unknown service line means a service line that has not been demonstrated to meet or not meet the SDWA Section 1417 definition of lead free. It is not necessary to physically verify the material composition (for example, copper or plastic) of a service line for its lead status to be identified (*e.g.,* records demonstrating the service line was installed after a municipal, State, or Federal lead ban).

Lead trigger level means a particular concentration of lead in water that prompts certain activities under subpart I of this part. The trigger level for lead is a concentration of 10 µg/L.

* * * * *

Medium-size water system, for the purpose of subpart I of this part only, means a water system that serves greater than 10,000 persons and less than or equal to 50,000 persons.

* * * * *

Method detection limit (MDL) means the minimum concentration of a substance that can be measured and reported with 99 percent confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte.

* * * * *

Partial lead service line replacement means replacement of any portion of a lead service line or galvanized service line requiring replacement, as defined in this section, that leaves in service any length of lead service line or galvanized service line requiring replacement upon completion of the work. Partial lead service line replacements are permitted under limited circumstances under § 141.84(d) but do not count towards the mandatory or goal-based lead service line replacement rate.

* * * * *

Pitcher filter means a non-plumbed water filtration device which consists of a gravity fed water filtration cartridge and a filtered drinking water reservoir that is certified by an American National Standards Institute accredited certifier to reduce lead in drinking water.

* * * * *

Point-of-use treatment device or point of use device (POU) is a water treatment device physically installed or connected to a single fixture, outlet, or tap to reduce or remove contaminants in drinking water. For the purposes of subpart I of this part, it must be certified by an American National Standards Institute accredited certifier to reduce lead in drinking water.

Practical quantitation limit (PQL) means the minimum concentration of an analyte (substance) that can be

measured with a high degree of confidence that the analyte is present at or above that concentration.

* * * * *

Pre-stagnation flushing is the opening of tap(s) to flush standing water from plumbing prior to the minimum 6-hour stagnation period in anticipation of lead and copper tap sampling under subpart I of this part.

* * * * *

School, for the purpose of subpart I of this part only, means any building(s) associated with public, private, or charter institutions that primarily provides teaching and learning for elementary or secondary students.

* * * * *

Secondary school, for the purpose of subpart I of this part only, means a *school* comprising any span of grades beginning with the next grade following an elementary or middle school (usually 7, 8, or 9) and ending with or below grade 12. Both junior high schools and senior high schools are included.

* * * * *

System without corrosion control treatment means a public water system that does not have or purchases all of its water from a system that does not have:

(1) An optimal corrosion control treatment approved by the State; or

(2) Any pH adjustment, alkalinity adjustment, and/or corrosion inhibitor addition resulting from other water quality adjustments as part of its treatment train infrastructure.

Tap sampling monitoring period, for the purposes of subpart I of this part, means the period of time during which each water system must conduct tap sampling for lead and copper analysis. A tap sampling monitoring period is determined by lead and copper concentrations in tap samples and the frequency can range from every six months (*i.e.,* semi-annual) up to once every nine years. Water systems on semi-annual tap sampling monitoring must collect samples no less frequently than every six months while those on annual monitoring must sample no less frequently than every year. Water systems on triennial monitoring must collect samples no less frequently than every three years; and those on monitoring waivers must sample no less frequently than every nine years. The start of each new tap sampling monitoring period, with the exception of semi-annual monitoring, must begin on January 1.

Tap sampling period, for the purpose of subpart I of this part only, means the time period, within a tap sampling monitoring period, during which the water system is required to collect samples for lead and copper analysis. For systems monitoring at a reduced frequency, the tap sampling period must be between the months of June and September, unless a different 4-month period of time is approved in writing to be more appropriate by the State.

Tap sampling protocol means the instructions given to residents or those sampling on behalf of the water system to conduct tap sampling under subpart I of this part.

* * * * *

Wide-mouth bottles, for the purpose of subpart I of this part only, means bottles configured with a mouth that is at least 55 mm wide that are one liter in size.

■ 3. Amend § 141.28 by revising paragraph (a) to read as follows:

§ 141.28 Certified laboratories.

(a) For the purpose of determining compliance with § 141.21 through 141.27, 141.30, 141.40, 141.74, 141.89 and 141.402, samples may be considered only if they have been analyzed by a laboratory certified by the State except that measurements of alkalinity, disinfectant residual, orthophosphate, pH, silica, temperature, and turbidity may be performed by any person acceptable to the State.

* * * * *

■ 4. Amend § 141.31 by revising paragraph (d) to read as follows:

§ 141.31 Reporting requirements.

* * * * *

(d)(1) The public water system, within 10 days of completing the public notification requirements under subpart Q of this part for the initial public notice and any repeat notices, must submit to the primary agency a certification that it has fully complied with the public notification regulations. For Tier 2 and 3 notices, the public water system must include with this certification a representative copy of each type of notice distributed, published, posted, and made available to the persons served by the system and to the media.

(2) For Tier 1 notices for a lead action level exceedance, public water systems must provide a copy of any Tier 1 notice to the Administrator and the head of the primacy agency as soon as practicable, but not later than 24 hours after the public water system learns of the violation or exceedance.

* * * * *

■ 5. Amend § 141.80 by:

■ a. Revising paragraphs (a), (b), (c), and (d)(1);

■ b. Adding paragraphs (d)(3) and (4);

■ c. Revising paragraphs (e), (f), (g), and (k); and

■ d. Adding paragraph (l).

The revisions and additions read as follows:

§ 141.80 General requirements.

(a) *Applicability, effective date, and compliance deadlines.* The requirements of this subpart constitute the national primary drinking water regulations for lead and copper.

(1) The provisions of this subpart apply to community water systems and non-transient, non-community water systems (in this subpart referred to as ''water systems'' or ''systems'') as defined at § 141.2.

(2) The requirements of this subpart are effective as of March 16, 2021.

(3) Community water systems and non-transient, non-community water systems must comply with the requirements of this subpart no later than January 16, 2024, except where otherwise specified at §§ 141.81, 141.84, 141.85, 141.86, and 141.90, or where an exemption in accordance with 40 CFR part 142, subpart C or F, has been established by the Administrator.

(4)(i) Between March 16, 2021 and January 16, 2024, community water systems and non-transient, non-community water systems must comply with 40 CFR 141.80 through 141.91, as codified on July 1, 2020.

(ii) If an exemption from subpart I of this part has been issued in accordance with 40 CFR part 142, subpart C or F, prior to March 16, 2021, then the water systems must comply with 40 CFR 141.80 through 141.91, as codified on July 1, 2020, until the expiration of that exemption.

(b) *Scope.* The regulations in this subpart establish a treatment technique that includes requirements for corrosion control treatment, source water treatment, lead service line inventory, lead service line replacement, public notice, monitoring for lead in schools and child care facilities, and public education. Several of the requirements in this subpart are prompted by the lead and copper action levels or the lead trigger level, specified in paragraph (c) of this section, as measured in samples collected at consumers' taps. The requirements for sampling for lead in schools and child care facilities and public education requirements in this subpart apply to all community water systems regardless of the results of the compliance tap sampling.

(c) *Lead trigger level, lead action level, and copper action level.* Trigger levels and action levels must be determined based on tap water samples collected in accordance with the tap sampling

monitoring requirements of § 141.86 for the purpose of calculating the 90th percentile and tested using the analytical methods specified in § 141.89. The trigger level and action levels described in this paragraph (c) are applicable to all sections of subpart I of this part. Trigger level and action levels for lead and copper are as follows:

(1) The *lead trigger level* is exceeded if the 90th percentile concentration of lead as specified in paragraph (c)(4) of this section is greater than 10 µg/L.

(2) The *lead action level* is exceeded if the 90th percentile concentration of lead as specified in paragraph (c)(4) of this section is greater than 15 µg/L.

(3) The *copper action level* is exceeded if the 90th percentile concentration of copper as specified in paragraph (c)(4) of this section is greater than 1.3 mg/L.

(4) For purposes of this subpart, the *90th percentile concentration* shall be computed as follows:

(i) For systems that do not have lead service line sites and only have sites identified as Tier 3, 4, or 5 under § 141.86(a).

(A) The results of all lead or copper samples taken during a tap sampling period shall be placed in ascending order from the sample with the lowest concentration to the sample with the highest concentration. Each sampling result shall be assigned a number, ascending by single integers beginning with the number 1 for the sample with the lowest contaminant level. The number assigned to the sample with the highest contaminant level shall be equal to the total number of samples taken.

(B) The number of samples taken during the tap sampling period shall be multiplied by 0.9.

(C) The contaminant concentration in the numbered sample yielded by the calculation in paragraph (c)(4)(i)(B) of this section is the 90th percentile concentration.

(D) For water systems serving fewer than 100 people that collect 5 samples per tap sampling period, the 90th percentile concentration is the average of the highest and second highest concentration.

(E) For a public water system that has been allowed by the State to collect fewer than five samples in accordance with § 141.86(c), or has failed to collect five samples, the sample result with the highest concentration is considered the 90th percentile value.

(ii) For public water systems with lead service lines with sites identified as Tier 1 or 2 under § 141.86(a) with enough Tier 1 or 2 sites to meet the minimum number of sites listed in § 141.86(c):

(A) The results of all lead or copper samples taken at Tier 1 or Tier 2 sites during a tap sampling period shall be placed in ascending order from the sample with the lowest concentration to the sample with the highest concentration. Sample results from Tier 3, 4, or 5 sites shall not be included in this calculation. Each sampling result shall be assigned a number, ascending by single integers beginning with the number 1 for the sample with the lowest contaminant level. The number assigned to the sample with the highest contaminant level shall be equal to the total number of samples taken.

(B) The number of samples taken at Tier 1 or Tier 2 sites during the tap sampling period shall be multiplied by 0.9.

(C) The contaminant concentration in the numbered sample yielded by the calculation in paragraph (c)(4)(ii)(B) of this section is the 90th percentile concentration.

(D) For water systems serving fewer than 100 people that collect 5 samples per tap sampling period, the 90th percentile concentration is the average of the highest and second highest concentration.

(E) For a public water system that has been allowed by the State to collect fewer than five samples in accordance with § 141.86(c), or has failed to collect five samples, the sample result with the highest concentration is considered the 90th percentile value.

(iii) For systems with lead service lines with sites identified as Tier 1 or 2 under § 141.86(a) with insufficient number of Tier 1 or 2 sites to meet the minimum number of sites listed in § 141.86(c):

(A) The results of all lead or copper samples taken at Tier 1 or Tier 2 sites along with the highest results from Tier 3, 4, or 5 sites sufficient to meet the minimum number of sites shall be placed in ascending order from the sample with the lowest concentration to the sample with the highest concentration. Sample results from any remaining Tier 3, 4, and 5 sites shall not be included in this calculation. Each sampling result shall be assigned a number, ascending by single integers beginning with the number 1 for the sample with the lowest contaminant level. The number assigned to the sample with the highest contaminant level shall be equal to the total minimum number of sites listed in § 141.86(c).

(B) The required minimum number of sites listed in § 141.86(c) shall be multiplied by 0.9.

(C) The contaminant concentration in the numbered sample yielded by the calculation in paragraph (c)(4)(iii)(B) is the 90th percentile concentration.

(D) For water systems serving fewer than 100 people that collect 5 samples per tap sampling period, the 90th percentile concentration is the average of the highest and second highest concentration.

(E) For a public water system that has been allowed by the State to collect fewer than five samples in accordance with § 141.86(c), or has failed to collect five samples, the sample result with the highest concentration is considered the 90th percentile value.

(d) *Corrosion control requirements.* (1) All water systems shall install and operate corrosion control treatment in accordance with §§ 141.81 and 141.82, and that meets the definition of *optimal corrosion control treatment* at § 141.2.

* * * * *

(3) Any small or non-transient non-community water system that complies with the applicable small system compliance flexibility requirements specified by the State under §§ 141.81(a)(3) and 141.93 is deemed to be in compliance with the treatment requirement in paragraph (d)(1) of this section.

(4) Any water system shall notify the State in writing pursuant to § 141.90(a)(3) of any upcoming long-term change in treatment or addition of a new source as described in § 141.90(a)(3). The State must review and approve the addition of a new source or long-term change in water treatment before it is implemented by the water system. The State may require any such water system to conduct additional monitoring or to take other action the State deems appropriate to ensure that such water system maintains minimal levels of corrosion control in its distribution system.

(e) *Source water requirements.* (1) Any system exceeding the lead or copper action level shall implement all applicable source water treatment requirements specified by the State under § 141.83.

(2) Any system that changes their source water or makes long-term treatment changes shall submit written documentation to the State describing the change in accordance with §§ 141.81(a)(3), 141.86(d)(2)(iv), and 141.90(a)(3). The State must review and approve the change before it is implemented by the water system.

(f) *Lead service line replacements and inventory.* Lead service line replacements must be conducted as follows:

(1) Any water system exceeding the lead action level specified at paragraph

(c) of this section must complete mandatory lead service line replacement. Lead service line replacement must be conducted in accordance with § 141.84(g) and must include public education pursuant to § 141.85(a) and (b).

(2) Any water system exceeding the lead trigger level specified at paragraph (c) of this section must complete goal-based lead service line replacement pursuant to § 141.84(f) and public education pursuant to § 141.85(g) and (h).

(3) All water systems must prepare an inventory of service lines connected to its distribution system, whether or not they are owned or controlled by the water system, to identify those service lines that are made of lead or of unknown material. The inventory must be prepared in accordance with § 141.84(a).

(g) *Public education and notification requirements.* Pursuant to § 141.85(d), all water systems must provide notification of lead tap water monitoring results to persons served at the sites (taps) that are tested. All community water systems must conduct annual outreach to local and State health agencies pursuant to § 141.85(i). In addition:

(1) Any water system exceeding the lead action level specified at paragraph (c) of this section shall implement the public education requirements in accordance with § 141.85(a) and (b).

(2) Any water system exceeding the lead trigger level specified at paragraph (c) of this section shall provide notification to all customers with a lead service line in accordance with § 141.85(g).

(3) Any water system exceeding the lead action level specified at paragraph (c) of this section shall notify the public in accordance with the public notification requirements in subpart Q of this part.

(4) Any water system with lead service lines, galvanized requiring replacement or lead status unknown service lines in their inventory as specified in § 141.84(a) shall inform all consumers with a lead service line, galvanized requiring replacement, or a lead status unknown service line in accordance with § 141.85(e).

(5) Any water system that fails to reach its goal lead service line replacement rate as required under § 141.84(f) shall conduct outreach activities in accordance with § 141.85(h).

* * * * *

(k) *Violation of national primary drinking water regulations.* Failure to comply with the applicable requirements of this section and §§ 141.81 through 141.93, including requirements established by the State pursuant to the provisions in this subpart, is a violation of the national primary drinking water regulations for lead and copper.

(l) *Testing in schools and child care facilities.* All community water systems must collect samples from all schools and child care facilities within its distribution system in accordance with § 141.92.

■ 6. Revise § 141.81 to read as follows:

§ 141.81 Applicability of corrosion control treatment steps to small, medium, and large water systems.

(a) *Corrosion control treatment.* This section sets forth when a system must complete the corrosion control treatment steps for systems in paragraph (d) or (e) of this section to optimize or re-optimize corrosion control treatment based on size, whether the system has corrosion control treatment, and whether it has exceeded the lead trigger and/or action level and/or the copper action level.

(1) *Large water system (serving >50,000 people).* (i) Large water systems with corrosion control treatment that exceed either the lead trigger level or copper action level shall complete the corrosion control treatment steps specified in paragraph (d) of this section.

(ii) Large water *systems without corrosion control treatment* with 90th percentile results as calculated in accordance with § 141.80(c)(4) that exceed either the lead practical quantitation level of 0.005 mg/L or the copper action level shall complete the corrosion control treatment steps specified in paragraph (e) of this section.

(iii) Large water systems with corrosion control treatment with 90th percentile results as calculated in accordance with § 141.80(c)(4) that exceed the lead practical quantitation level but do not exceed lead trigger level or the copper action level may be required by the State to complete the corrosion control treatment steps in paragraph (d) of this section.

(2) *Medium-size water systems (serving >10,000 and ≤50,000 people).* (i) Medium-size water systems with corrosion control treatment that exceed either the lead trigger level or copper action level shall complete the corrosion control treatment steps specified in paragraph (d) of this section.

(ii) Medium-size water *systems without corrosion control treatment* that exceed either the lead or copper action level shall complete the corrosion control treatment steps specified in paragraph (e) of this section.

(iii) Medium-size water *systems without corrosion control treatment* that exceed the lead trigger level but do not exceed the lead or copper action levels shall complete the treatment recommendation step specified in paragraph (e)(1) of this section (Step 1). The water system shall complete the remaining steps in paragraph (e) of this section if it subsequently exceeds either the lead or copper action level.

(3) *Small water systems (serving ≤10,000 people) and non-transient, non-community water systems.* (i) Small and non-transient non-community water systems with corrosion control treatment that exceed the lead trigger level or the lead action level but do not exceed the copper action level, shall complete the corrosion control treatment steps specified in paragraph (d) of this section, if corrosion control treatment is approved by the State as a compliance option under § 141.93(a).

(ii) Small and non-transient, non-community water systems with corrosion control treatment that exceed the copper action level shall complete the corrosion control treatment steps specified in paragraph (d) of this section.

(iii) Small and non-transient, non-community water *systems without corrosion control treatment* that exceed the lead action level shall complete the corrosion control treatment steps specified in paragraph (e) of this section if corrosion control treatment is approved by the State as a compliance option under § 141.93.

(iv) Small and non-transient, non-community water *systems without corrosion control treatment* that exceed the copper action level shall complete the corrosion control treatment steps specified in paragraph (e) of this section.

(b) *Systems deemed to have optimized corrosion control.* A system is deemed to have optimal corrosion control treatment (*OCCT*) or re-optimized *OCCT* if the system satisfies one of the criteria specified in paragraphs (b)(1) through (3) of this section. Any such system deemed to have *OCCT* under this paragraph and which has corrosion control treatment in place shall continue to operate and maintain that treatment and meet any additional requirements that the State determines to be appropriate to ensure *optimal corrosion control treatment* is maintained.

(1) A small or medium-size water system without corrosion control treatment is deemed to have optimal

corrosion control if the water system does not exceed the lead action level and copper action level during two consecutive 6-month tap sampling monitoring periods and thereafter remains at or below the lead trigger level and copper action level in all tap sampling periods conducted in accordance with § 141.86.

(2) A small or medium-size water system with corrosion control treatment is deemed to have optimal corrosion control treatment if the water system does not exceed the lead trigger level and copper action level during two consecutive 6-month monitoring periods conducted in accordance with § 141.86 and thereafter remains at or below the lead trigger level and copper action level in all tap sampling periods conducted in accordance with § 141.86. Small or medium-size systems with corrosion control treatment that exceed the lead trigger level but do not exceed the lead and copper action levels during two consecutive 6-month monitoring periods and thereafter remains at or below the lead and copper action levels in all tap sampling periods conducted in accordance with § 141.86 are deemed to have re-optimized *optimal corrosion control treatment* if the system meets the requirements of this section. Where the State has set optimal water quality parameters (OWQPs) under paragraph (d) or (e) of this section a system will not be eligible to be deemed to have optimized or re-optimized *OCCT* pursuant to paragraph (b) of this section.

(3) Any water system is deemed to have optimized or re-optimized corrosion control if it submits results of tap water monitoring in accordance with § 141.86 demonstrating that the 90th percentile tap water lead level is less than or equal to the lead practical quantitation level of 0.005 mg/L and does not exceed the copper action level for two consecutive 6-month tap sampling monitoring periods, and does not have optimal water quality parameters that were set by the State under paragraph (d) or (e) of this section. Any such system with 90th percentile tap sample results that thereafter exceeds the lead practical quantitation level or copper action level during any tap sampling period shall not be eligible to be deemed to have optimized *OCCT* in accordance with this paragraph (b)(3) without first completing the treatment steps specified in paragraph (d) or (e) of this section

(i) [Reserved]

(ii) Any water system deemed to have optimized corrosion control in accordance with this paragraph (b)(3) shall continue monitoring for lead and copper at the tap no less frequently than once every three calendar years using the reduced number of sites specified in § 141.86(c) and collecting samples at times and locations specified in § 141.86(d)(4)(v).

(iii) through (v) [Reserved]

(c) *Corrosion control steps completion for small and medium-size water systems without corrosion control treatment.* Any small or medium-sized system without corrosion control treatment required to complete the corrosion control steps in paragraph (e) of this section due to its exceedance of the lead or copper action level that does not exceed either the lead or copper action levels during each of two consecutive 6-month tap sample monitoring periods pursuant to § 141.86 prior to the start of Step 3 in paragraph (e)(3) of this section or Step 5 in paragraph (e)(5) of this section may cease completing the steps and is not required to complete Step 3 or Step 5, respectively, except that medium-sized systems with lead service lines and small systems with lead service lines that choose the corrosion control option pursuant to § 141.93 must complete a corrosion control treatment study under paragraph (e)(3)(i) of this section. Any system that initiates Step 5 must complete all remaining steps in paragraphs (e)(6) through (8) of this section and is not permitted to cease the steps. Any system that ceases the steps either prior to Step 3 or Step 5 and thereafter exceeds either the lead or copper action level shall not be permitted to cease the steps a second time and shall complete the applicable treatment steps beginning with the first treatment step which was not previously completed in its entirety. The State may require a water system to repeat treatment steps previously completed by the water system when the State determines that this is necessary to implement the treatment requirements of this section. The State must notify the system in writing of such a determination and explain the basis for its decision.

(d) *Treatment steps and deadlines for water systems re-optimizing corrosion control treatment.* Except as provided in paragraph (b) of this section or § 141.93, water systems with corrosion control treatment shall complete the following corrosion control treatment steps (described in the referenced portions of §§ 141.82, 141.86, and 141.87) by the indicated time periods.

(1) *Step 1.* (i) A water system other than those covered in paragraph (d)(1)(ii) of this section shall recommend re-optimized optimal corrosion control treatment (§ 141.82(c)) within six months after the end of the tap sampling period during which it exceeds either the lead trigger level or copper action level. States may approve modifications of the existing corrosion control treatment without a study for systems that exceed the lead trigger level, but do not exceed the lead or copper action level. The State shall specify re-optimized corrosion control treatment within six months of receiving the treatment recommendation. The system shall complete modifications to corrosion control treatment to have re-optimized corrosion control treatment installed within six months of the State specifying re-optimized corrosion control treatment.

(ii) A water system with lead service lines that exceeds the lead action level must harvest lead pipes from the distribution system and construct flow-through pipe loops and operate the loops with finished water within one year after the end of the tap sampling period during which it exceeds the lead action level. These water systems must proceed to Step 3 in paragraph (d)(3) of this section and conduct the corrosion control studies for re-optimization under paragraph (d)(3)(i) of this section using the pipe loops.

(2) *Step 2.* (i) Large water systems shall conduct the corrosion control studies for re-optimization under paragraph (d)(3) of this section (Step 3) unless the system is at or below the lead action level and the State has approved the modification of the existing corrosion control treatment made under paragraph (d)(3)(i) of this section (Step 1).

(ii) Within 12 months after the end of the tap sampling period during which a small or medium-size water system with corrosion control treatment exceeds the lead trigger level or copper action level, the State may require the water system to perform corrosion control studies for re-optimization (§ 141.82(c)(2) or (3)). If the State does not require the system to perform such studies, the State must specify re-optimized corrosion control treatment (§ 141.82(d)(2)) within the timeframes specified in paragraphs (d)(2)(ii)(A) and (B) of this section. The State must provide its determination to the system in writing.

(A) For medium-size water systems, within 12 months after the end of the tap sampling period during which such water system exceeds the lead trigger level or copper action level.

(B) For small water systems, within 18 months after the end of the tap sampling period during which such water system exceeds the lead trigger level or copper action level.

(3) *Step 3.* (i) Any water system with lead service lines that exceeded the lead action level shall complete the corrosion control treatment studies for re-optimization within 30 months after the end of the tap sampling period during which it exceeds the lead action level.

(ii) If the water system is required to perform corrosion control studies under paragraph (d)(2) of this section (Step 2), the water system shall complete the studies (§ 141.82(c)(2)) within 18 months after the State requires that such studies be conducted.

(4) *Step 4.* (i) The State shall designate re-optimized corrosion control treatment (§ 141.82(d)(3)) within six months after completion of paragraph (d)(3)(i) of this section (Step 3).

(ii) If the water system has performed corrosion control studies under paragraph (d)(2) of this section (Step 2), the State shall designate re-optimized corrosion control treatment (§ 141.82(d)(2) or (4)) within six months after completion of paragraph (d)(3)(ii) of this section (Step 3).

(5) *Step 5.* (i) Large water systems shall complete modifications to corrosion control treatment to have re-optimized corrosion control treatment installed within 12 months after completion of paragraph (d)(4)(i) of this section (Step 4).

(ii) Small or medium-size water systems shall install re-optimized corrosion control treatment (§ 141.82(e)(1)) within 12 months after completion of paragraph (d)(4)(ii) of this section (Step 4).

(6) *Step 6.* Water systems must complete follow-up sampling (§§ 141.86(d)(2) and 141.87(c)) within 12 months after completion of paragraph (d)(5)(i) or (ii) of this section (Step 5).

(7) *Step 7.* The State must review the water system's installation of treatment and designate optimal water quality control parameters (§ 141.82(f)(1)) within six months of completion of paragraph (d)(6) of this section (Step 6).

(8) *Step 8.* The water system must operate in compliance with the State-designated optimal water quality control parameters (§ 141.82(g)) and continue to conduct tap sampling (§ 141.86(d)(3) and water quality parameter monitoring under § 141.87(d)).

(e) *Treatment steps and deadlines for systems without corrosion control treatment.* Except as provided in paragraph (b) of this section or § 141.93, water systems without corrosion control treatment must complete the following corrosion control treatment steps (described in the referenced portions of §§ 141.82, 141.86, and 141.87) by the indicated time periods.

(1) *Step 1.* (i) A water system other than those covered in paragraph (e)(1)(ii) or (iii) of this section must recommend optimal corrosion control treatment (§ 141.82(a)(1), (2), (3), or (4)) within six months after the end of the tap sampling period during which it exceeds either the lead trigger level or copper action level.

(ii) A water system with lead service lines that exceeds the lead action level must harvest lead pipes from the distribution system and construct flow-through pipe loops and operate the loops with finished water within one year after the end of the tap sampling period during which it exceeds the lead action level. These water systems must proceed to Step 3 in paragraph (e)(3) of this section and conduct the corrosion control studies for optimization under paragraph (e)(3)(i) of this section using the pipe loops.

(iii) Large water systems under paragraph (a)(1)(ii) of this section must conduct the corrosion control studies for optimization under paragraph (e)(3) of this section (Step 3).

(2) *Step 2.* Within 12 months after the end of the tap sampling period during which a water system exceeds the lead or copper action level, if not otherwise required by this rule, the State may require the water system to perform corrosion control studies (§ 141.82(b)(1)). The State must notify the system in writing of this requirement. If the State does not require the system to perform such studies, the State must specify optimal corrosion control treatment (§ 141.82(d)(1) or (2)) within the timeframes established in paragraphs (e)(2)(i) and (ii) of this section. The State must provide its determination to the system in writing.

(i) For medium-size water systems, within 18 months after the end of the tap sampling monitoring period during which such water system exceeds the lead trigger level or copper action level.

(ii) For small water systems, within 24 months after the end of the tap sampling monitoring period during which such water system exceeds the lead trigger level or copper action level.

(3) *Step 3.* (i) Large water systems with or without lead service line and medium or small systems with lead service lines that exceed the lead action level shall complete the corrosion control treatment studies for optimization within 30 months after the end of the tap sampling period during which it exceeds the lead action level.

(ii) If the State requires a water system to perform corrosion control studies under paragraph (e)(2) of this section (Step 2), the water system must complete the studies (§ 141.82(c)(1)) within 18 months after the State notifies the system in writing that such studies must be conducted.

(4) *Step 4.* (i) The State shall designate re-optimized corrosion control treatment (§ 141.82(d)(3)) within six months after completion of paragraph (d)(3)(i) of this section (Step 3).

(ii) If the water system has performed corrosion control studies under paragraph (e)(2) of this section (Step 2), the State must designate *optimal corrosion control treatment* (§ 141.82(d)(1)) within six months after completion of paragraph (e)(3) of this section (Step 3).

(5) *Step 5.* The water system must install *optimal corrosion control treatment* (§ 141.82(e)(1)) within 24 months after the State designates *optimal corrosion control treatment* under paragraph (e)(2) or (4) of this section (Step 2 or Step 4).

(6) *Step 6.* The water system shall complete follow-up sampling (§§ 141.86(d)(2)(i) and 141.87(c)) within 12 months after completion of paragraph (e)(5) of this section (Step 5).

(7) *Step 7.* The State must review the water system's installation of treatment and designate optimal water quality control parameters (§ 141.82(f)(1)) within six months of completion of paragraph (e)(6) of this section (Step 6).

(8) *Step 8.* The water system must operate in compliance with the State-designated optimal water quality control parameters (§ 141.82(g)(1)) and continue to conduct tap sampling (§ 141.86(d)(3) and water quality parameter monitoring under § 141.87(d)).

(f) *Treatment steps and deadlines for small community water systems and non-transient non-community water systems electing corrosion control treatment (CCT) as a compliance option under § 141.93, or as required by the State.* Water systems selecting the corrosion control small system compliance flexibility option must complete the following steps by the indicated time periods.

(1) *Step 1.* A water system recommends corrosion control treatment as a small system compliance flexibility option under § 141.93(a)(2) within six months after the end of the tap sampling period during which it exceeds either the lead trigger level or the lead action level.

(2) *Step 2.* The State approves in writing the recommendation of corrosion control treatment as a small system compliance flexibility option or designates an alternative option in accordance with § 141.93(a) within six months of the recommendation by the water system in paragraph (f)(1) of this

section (Step 1). Water systems required by the State to optimize or re-optimize corrosion control treatment must follow the schedules in paragraph (d) or (e) of this section, beginning with Step 3 in paragraph (d)(3) or (e)(3) of this section unless the State specifies optimal corrosion control treatment pursuant to either paragraph (d)(2)(ii) or (e)(2)(ii) of this section, as applicable.

■ 7. Revise § 141.82 to read as follows:

§ 141.82 Description of corrosion control treatment requirements.

This section sets forth the requirements applicable to systems and states in the designation of optimal corrosion control treatment for a system that is optimizing or reoptimizing corrosion control treatment. Each system must complete the corrosion control treatment requirements in this section as applicable to such system under § 141.81.

(a) *System recommendation regarding corrosion control treatment for systems that do not contain lead service lines and systems with lead service lines that do not exceed the lead action level.* (1) Any system under this paragraph (a) without corrosion control treatment that is required to recommend a treatment option in accordance with § 141.81(e) must, based on the results of lead and copper tap sampling and water quality parameter monitoring, recommend designation of one or more of the corrosion control treatments listed in paragraph (c)(1)(i) of this section. Small community water systems and non-transient non-community water systems that exceed the copper action level must comply with this paragraph (a)(1). The State may require the system to conduct additional water quality parameter monitoring to assist the State in reviewing the system's recommendation.

(2) Any small community water system or non-transient non-community water system in this paragraph (a) without corrosion control treatment that chooses to pursue a small water system compliance flexibility option and is required to recommend an option in accordance with § 141.81(f) must, based on the results of lead tap sampling and water quality parameter monitoring, recommend designation of one of the options listed in § 141.93. Systems with no lead service lines that exceed the lead action level and select corrosion control under § 141.93(a)(2) must recommend designation of one or more of the corrosion control treatments listed in paragraph (c)(1) of this section as the optimal corrosion control treatment for that system.

(3) Any system under this paragraph (a) that exceeds the lead action level and selects corrosion control under § 141.93(a)(2) must recommend designation of one or more of the corrosion control treatments listed in paragraph (c)(1)(i) of this section as the optimal corrosion control treatment for that system. A corrosion control study under paragraph (c) of this section is not required for medium and small systems that exceed the lead trigger level but do not exceed the lead and copper action levels, unless required by the state.

(4) Any small community water system or non-transient, non-community water system with corrosion control treatment that that exceeds the lead action level and selects corrosion control under § 141.93(a)(2) must recommend designation of one or more of the corrosion control treatments listed in paragraph (c)(2) of this section as the optimal corrosion control treatment for that system.

(5) States may waive the requirement for a system to recommend OCCT if the State requires the system, in writing, to complete a corrosion control study within 3 months after the end of the tap sampling period during which the exceedance occurred. Such systems shall proceed directly to paragraph (c) of this section and complete a corrosion control study.

(b) *State decision to require studies to identify initial optimal corrosion control treatment and re-optimized optimal corrosion control treatment except for large systems and small and medium systems with lead service lines that exceed the lead action level.* Corrosion control treatment studies are always required for large systems that exceed the lead action level, large water *systems without corrosion control treatment* with 90th percentile results that exceed either the lead practical quantitation level of 0.005 mg/L or the copper action level, medium sized systems with lead service lines that exceed the lead action level, and small systems with lead service lines that exceed the lead action level and select the corrosion control treatment option under § 141.93(a).

(1) The State may require any small or medium-size system without corrosion control that exceeds either the lead or copper action level to perform corrosion control treatment studies under paragraph (c)(1) of this section to identify *optimal corrosion control treatment* for the system.

(2) The State may require any small or medium-size system without corrosion control that exceeds the lead trigger level but not the lead or copper action level to perform corrosion control treatment studies under paragraph (c)(1) of this section to identify *optimal corrosion control treatment* for the system. This corrosion control treatment shall be installed if the lead or copper action level is subsequently exceeded.

(3) The State may require any small or medium-size water systems with corrosion control treatment exceeding either the lead trigger level or copper action level to perform corrosion control treatment studies under paragraph (c)(2) of this section to identify re-optimized optimal corrosion control treatment for the system (*i.e.,* optimal corrosion control treatment after a re-optimization evaluation).

(c) *Performance of corrosion control studies.* (1) Water systems without corrosion control treatment that are required to conduct corrosion control studies must complete the following:

(i) Any water system without corrosion control treatment must evaluate the effectiveness of each of the following treatments, and if appropriate, combinations of the following treatments to identify the optimal corrosion control treatment for the system:

(A) Alkalinity and pH adjustment;

(B) The addition of an orthophosphate- or silicate-based corrosion inhibitor at a concentration sufficient to maintain an effective corrosion inhibitor residual concentration in all test samples;

(C) The addition of an orthophosphate-based corrosion inhibitor at a concentration sufficient to maintain an orthophosphate residual concentration of 1 mg/L (as PO4) in all test samples; and

(D) The addition of an orthophosphate-based corrosion inhibitor at a concentration sufficient to maintain an orthophosphate residual concentration of 3 mg/L (as PO_4) in all test samples.

(ii) The water system must evaluate each of the corrosion control treatments using either pipe rig/loop tests, metal coupon tests, partial-system tests, or analyses based on documented analogous treatments with other systems of similar size, water chemistry, and distribution system configurations. Large and medium systems and small community water systems and non-transient non-community water systems that select the corrosion control treatment option under § 141.93 with lead service lines that exceed the lead action level must conduct pipe rig/loop studies using harvested lead service lines from their distribution systems to assess the effectiveness of corrosion control treatment options on the existing pipe scale. For these systems,

metal coupon tests can be used as a screen to reduce the number of options that are evaluated using pipe rig/loops to the current conditions and two options.

(iii) The water system must measure the following water quality parameters in any tests conducted under this paragraph (c)(1)(iii) before and after evaluating the corrosion control treatments listed in paragraphs (c)(1)(i) and (ii) of this section:

(A) Lead;

(B) Copper;

(C) pH;

(D) Alkalinity;

(E) Orthophosphate as PO_4 (when an orthophosphate-based inhibitor is used); and

(F) Silicate (when a silicate-based inhibitor is used).

(iv) The water system must identify all chemical or physical constraints that limit or prohibit the use of a particular corrosion control treatment and document such constraints with one of the following:

(A) Data and documentation showing that a particular corrosion control treatment has adversely affected other drinking water treatment processes when used by another water system with comparable water quality characteristics. Systems using coupon studies to screen and/or pipe loop/rig studies to evaluate treatment options must not exclude treatment strategies from the studies based on the constraints identified in this section.

(B) Data and documentation demonstrating that the water system has previously attempted to evaluate a particular corrosion control treatment and has found that the treatment is ineffective or adversely affects other drinking water quality treatment processes. Systems using coupon studies to screen and/or pipe loop/rig studies to evaluate treatment options must not exclude treatment strategies from the studies based on the constraints identified in this section unless the treatment was found to be ineffective in a previous pipe loop/rig study.

(v) The water system must evaluate the effect of the chemicals used for corrosion control treatment on other drinking water quality treatment processes. Systems using coupon studies to screen and/or pipe loop/rig studies to evaluate treatment options shall not exclude treatment strategies from the studies based on the effects identified in this section.

(vi) On the basis of an analysis of the data generated during each evaluation, the water system must recommend to the State in writing the treatment option that the corrosion control studies indicate constitutes *optimal corrosion control treatment* for that system as defined in § 141.2. The water system must provide a rationale for its recommendation along with all supporting documentation specified in paragraphs (c)(2)(i) through (v) of this section.

(2) Systems with corrosion control treatment that are required to conduct corrosion control studies to determine re-optimized *OCCT* must complete the following:

(i) The water system must evaluate the effectiveness of the following treatments, and if appropriate, combinations of the following treatments to identify the re-optimized *optimal corrosion control treatment* for the system:

(A) Alkalinity and/or pH adjustment, or re-adjustment;

(B) The addition of an orthophosphate- or silicate-based corrosion inhibitor at a concentration sufficient to maintain an effective corrosion inhibitor residual concentration in all test samples if no such inhibitor is utilized;

(C) The addition of an orthophosphate-based corrosion inhibitor at a concentration sufficient to maintain an orthophosphate residual concentration of 1 mg/L (PO_4) in all test samples unless the current inhibitor process already meets this residual; and

(D) The addition of an orthophosphate-based corrosion inhibitor at a concentration sufficient to maintain an orthophosphate residual concentration of 3 mg/L (PO_4) in all test samples unless the current inhibitor process already meets this residual.

(ii) The water system must evaluate each of the corrosion control treatments using either pipe rig/loop tests, metal coupon tests, partial-system tests, or analyses based on documented analogous treatments with other systems of similar size, water chemistry, and distribution system configurations. If the water system has lead service lines and exceeds the lead action level, it must conduct pipe rig/loop studies using harvested lead service lines from their distribution systems to assess the effectiveness of corrosion control treatment options on the existing pipe scale. For these systems, metal coupon tests can be used as a screen to reduce the number of options that are evaluated using pipe rig/loops to the current conditions and two options.

(iii) The water system must measure the following water quality parameters in any tests conducted under this paragraph (c)(2)(iii) before and after evaluating the corrosion control treatments listed in paragraphs (c)(2)(i) and (ii) of this section:

(A) Lead;

(B) Copper;

(C) pH;

(D) Alkalinity;

(E) Orthophosphate as PO_4 (when an orthophosphate-based inhibitor is used); and

(F) Silicate (when a silicate-based inhibitor is used).

(iv) The water system must identify all chemical or physical constraints that limit or prohibit the use of a particular corrosion control treatment and document such constraints with one of the following:

(A) Data and documentation showing that a particular corrosion control treatment has adversely affected other drinking water treatment processes when used by another water system with comparable water quality characteristics. Systems using coupon studies to screen and/or pipe loop/rig studies to evaluate treatment options must not exclude treatment strategies from the studies based on the constraints identified in this section.

(B) Data and documentation demonstrating that the water system has previously attempted to evaluate a particular corrosion control treatment and has found that the treatment is ineffective or adversely affects other drinking water quality treatment processes. Systems using coupon studies to screen and/or pipe loop/rig studies to evaluate treatment options shall not exclude treatment strategies from the studies based on the constraints identified in this section unless the treatment was found to be ineffective in a previous pipe loop/rig study.

(v) The water system must evaluate the effect of the chemicals used for corrosion control treatment on other drinking water quality treatment processes. Systems using coupon studies to screen and/or pipe loop/rig studies to evaluate treatment options shall not exclude treatment strategies from the studies based on the effects identified in this section.

(vi) On the basis of an analysis of the data generated during each evaluation, the water system must recommend to the State in writing the treatment option that the corrosion control studies indicate constitutes *optimal corrosion control treatment* for that system as defined in § 141.2. The water system must provide a rationale for its recommendation along with all supporting documentation specified in paragraph (c)(1)(i) through (v) of this section.

(d) *State designation of optimized optimal corrosion control treatment and re-optimized optimal corrosion control treatment.* When designating optimal corrosion control treatment, the State must consider the effects that additional corrosion control treatment will have on water quality parameters and on other drinking water quality treatment processes. The State must notify the water system of its designation of *optimal corrosion control treatment* in writing and explain the basis for this determination. If the State requests additional information to aid its review, the water system must provide the information.

(1) *Designation of OCCT for systems without corrosion control treatment.* Based upon considerations of available information including, where applicable, studies conducted under paragraph (c)(1) of this section and/or a system's recommended corrosion control treatment option, the State must either approve the corrosion control treatment option recommended by the system or designate alternative corrosion control treatment(s) from among those listed in paragraph (c)(1)(i) of this section or, where applicable, an alternate *small water system compliance flexibility* option under § 141.93(a).

(2) *Designation of re-optimized OCCT for systems with corrosion control treatment.* Based upon considerations of available information including, where applicable, studies conducted under paragraph (c)(2) of this section and/or a system's recommended treatment alternative, the State must either approve the corrosion control treatment option recommended by the water system or designate alternative corrosion control treatment(s) from among those listed in paragraph (c)(2)(i) of this section or, where applicable, an alternate *small water system compliance flexibility* option under § 141.93.

(e) *Installation of optimal corrosion control treatment and re-optimization of corrosion control treatment.* Each system must properly install and operate throughout its distribution system the *optimal corrosion control treatment* designated by the State under paragraph (d) of this section.

(f) *State review of treatment and specification of optimal water quality control parameters for optimal corrosion control treatment and re-optimized corrosion control treatment.* The State must evaluate the results of all lead and copper tap sampling and water quality parameter sampling submitted by the water system and determine whether the water system has properly installed and operated the optimal corrosion control treatment designated by the State in paragraph (d)(1) or (2) of this section, respectively. Upon reviewing the results of tap water and water quality parameter monitoring by the water system, both before and after the water system installs optimal corrosion control treatment, the State must designate:

(1) A minimum value or a range of values for pH measured at each entry point to the distribution system.

(2) A minimum pH value measured in all tap samples. Such a value shall be equal to or greater than 7.0, unless the State determines that meeting a pH level of 7.0 is not technologically feasible or is not necessary for the system to optimize corrosion control.

(3) If a corrosion inhibitor is used, a minimum concentration or a range of concentrations for orthophosphate (as PO_4) or silicate measured at each entry point to the distribution system.

(4) If a corrosion inhibitor is used, a minimum orthophosphate or silicate concentration measured in all tap samples that the State determines is necessary to form a passivating film on the interior walls of the pipes of the distribution system. When orthophosphate is used, such an orthophosphate concentration shall be equal to or greater than 0.5 mg/L (asPO_4) for *OCCT* designations under paragraph (d)(1) of this section and 1.0 mg/L for *OCCT* designations under paragraph (d)(2) of this section, unless the State determines that meeting the applicable minimum orthophosphate residual is not technologically feasible or is not necessary for *optimal corrosion control treatment.*

(5) If alkalinity is adjusted as part of optimal corrosion control treatment, a minimum concentration or a range of concentrations for alkalinity, measured at each entry point to the distribution system and in all tap samples.

(6) The values for the applicable water quality control parameters, previously listed in this section, shall be those that the State determines to reflect *optimal corrosion control treatment* for the water system. The State may designate values for additional water quality control parameters determined by the State to reflect *optimal corrosion control treatment* for the water system. The State must notify the system in writing of these determinations and explain the basis for its decisions.

(g) *Continued operation and monitoring for optimal corrosion control treatment and re-optimized optimal corrosion control treatment.* All systems optimizing or re-optimizing corrosion control must continue to operate and maintain *optimal corrosion control treatment,* including maintaining water quality parameters at or above minimum values or within ranges designated by the State under paragraph (f) of this section, in accordance with this paragraph (g) for all samples collected under § 141.87(d) through (f). The requirements of this paragraph (g) apply to all systems, including consecutive systems that distribute water that has been treated to control corrosion by another system, and any water system with corrosion control treatment, *optimal corrosion control treatment,* or re-optimized *OCCT* that is not required to monitor water quality parameters under § 141.87. Compliance with the requirements of this paragraph (g) shall be determined every six months, as specified under § 141.87(d). A water system is out of compliance with the requirements of this paragraph (g) for a six-month period if it has excursions for any State-specified parameter on more than nine days, cumulatively, during the period. An excursion occurs whenever the daily value for one or more of the water quality parameters measured at a sampling location is below the minimum value or outside the range designated by the State. Daily values are calculated as set out in paragraphs (g)(1) through (3) of this section. States have discretion to not include results of obvious sampling errors from this calculation. Sampling errors must still be recorded even when not included in calculations.

(1) On days when more than one measurement for the water quality parameter is collected at the sampling location, the daily value must be the average of all results collected during the day regardless of whether they are collected through continuous monitoring, grab sampling, or a combination of both. If EPA has approved an alternative formula under § 142.16(d)(1)(ii) of this chapter in the State's application for a program revision submitted pursuant to § 142.12 of this chapter, the State's formula shall be used to aggregate multiple measurements taken at a sampling point for the water quality parameters in lieu of the formula in this paragraph (g)(1).

(2) On days when only one measurement for the water quality parameter is collected at the sampling location, the daily value shall be the result of that measurement.

(3) On days when no measurement is collected for the water quality parameter at the sampling location, the daily value shall be the daily value calculated on the most recent day on which the water quality parameter was measured at the sampling location.

(h) *Modification of State treatment decisions for optimal corrosion control*

and re-optimized corrosion control. Upon its own initiative or in response to a request by a water system or other interested party, a State may modify its determination of the optimal corrosion control treatment under paragraph (d) of this section, or optimal water quality control parameters under paragraph (f) of this section. A request for modification by a system or other interested party shall be in writing, explaining why the modification is appropriate, and providing supporting documentation. The State may modify its determination where it concludes that such change is necessary to ensure that the water system continues to optimize corrosion control treatment. A revised determination must be made in writing, set forth the new treatment requirements and/or water quality parameters, explain the basis for the State's decision, and provide an implementation schedule for completing the treatment modifications for re-optimized corrosion control treatment.

(i) *Treatment decisions by EPA in lieu of the State on optimal corrosion control treatment and re-optimized corrosion control treatment.* Pursuant to the procedures in § 142.19 of this chapter, EPA Regional Administrator may review optimal corrosion control treatment determinations made by a State under paragraph (d)(1) or (2), (f), or (h) of this section and issue Federal treatment determinations consistent with the requirements of paragraph (d)(1) or (2), (f), or (h) of this section where the Regional Administrator finds that:

(1) A State has failed to issue a treatment determination by the applicable deadlines contained in § 141.81;

(2) A State has abused its discretion in a substantial number of cases or in cases affecting a substantial population; or

(3) The technical aspects of a State's determination would be indefensible in a Federal enforcement action taken against a water system.

(j) *Find-and-fix assessment for tap sample sites that exceed the lead action level.* The water system shall conduct the following steps, when a tap sample site exceeds the lead action level under monitoring conducted under § 141.86.

(1) *Step 1: corrosion control treatment assessment.* The water system must sample at a new water quality parameter site that is on the same size water main in the same pressure zone and located within a half mile of the location with the action level exceedance within 5 days of receiving the sample results. Small water *systems without corrosion control treatment* may have up to 14 days to collect the samples. The water system must measure the following parameters:

(i) pH;

(ii) Alkalinity;

(iii) Orthophosphate (as PO_4), when an inhibitor containing an orthophosphate compound is used;

(iv) Silica, when an inhibitor containing a silicate compound is used; and

(v) Water systems with an existing water quality parameter location that meets the requirements of this section can conduct this sampling at that location.

(vi) All water systems required to meet optimal water quality control parameters but that do not have an existing water quality parameter location that meets the requirement of this section must add new sites to the minimum number of sites as described in § 141.87(g). Sites must be added until a system has twice the minimum number of sites listed in Table 1 to § 141.87(a)(2). When a system exceeds this upper threshold for the number of sites, the State has discretion to determine if the newer site can better assess the effectiveness of the corrosion control treatment and to remove existing sites during sanitary survey evaluation of OCCT.

(2) *Step 2: Site assessment.* Water systems shall collect a follow-up sample at any tap sample site that exceeds the action level within 30 days of receiving the sample results. These follow-up samples may use different sample volumes or different sample collection procedures to assess the source of elevated lead levels. Samples collected under this section must be submitted to the State but shall not be included in the 90th percentile calculation for compliance monitoring under § 141.86. If the water system is unable to collect a follow-up sample at a site, the water system must provide documentation to the State, explaining why it was unable to collect a follow-up sample.

(3) *Step 3.* Water systems shall evaluate the results of the monitoring conducted under this paragraph (j)(3) to determine if either localized or centralized adjustment of the *optimal corrosion control treatment* or other distribution system actions are necessary and submit the recommendation to the State within six months after the end of the tap sampling period in which the site(s) exceeded the lead action level. Corrosion control treatment modification may not be necessary to address every exceedance. Other distribution system actions may include flushing to reduce water age. Water systems must note the cause of the elevated lead level, if known from the site assessment, in their recommendation to the State as site-specific issues can be an important factor in why the system is not recommending any adjustment of corrosion control treatment or other distribution system actions. Systems in the process of optimizing or re-optimizing optimal corrosion control treatment under paragraphs (a) through (f) of this section do not need to submit a treatment recommendation for find-and-fix.

(4) *Step 4.* The State shall approve the treatment recommendation or specify a different approach within six months of completion of Step 3 as described in paragraph (j)(3) of this section.

(5) *Step 5.* If the State-approved treatment recommendation requires the water system to adjust the *optimal corrosion control treatment* process, the water system must complete modifications to its corrosion control treatment within 12 months after completion of Step 4 as described in paragraph (j)(4) of this section. Systems without corrosion control treatment required to install *optimal corrosion control treatment* must follow the schedule in § 141.81(e).

(6) *Step 6.* Water systems adjusting its *optimal corrosion control treatment* must complete follow-up sampling (§§ 141.86(d)(2) and 141.87(c)) within 12 months after completion of Step 5 as described in paragraph (j)(5) of this section.

(7) *Step 7.* For water systems adjusting its *optimal corrosion control treatment,* the State must review the water system's modification of corrosion control treatment and designate optimal water quality control parameters (§ 141.82(f)(1)) within six months of completion of Step 6 as described in paragraph (j)(6) of this section.

(8) *Step 8.* For a water system adjusting its *optimal corrosion control treatment,* the water system must operate in compliance with the State-designated optimal water quality control parameters (§ 141.82(g)) and continue to conduct tap sampling (§§ 141.86(d)(3) and 141.87(d)).

■ 8. Revise § 141.84 to read as follows:

§ 141.84 Lead service line inventory and replacement requirements.

(a) *Lead service line inventory.* All water systems must develop an inventory to identify the materials of service lines connected to the public water distribution system. The inventory must meet the following requirements:

(1) All water systems must develop an initial inventory by January 16, 2024,

and submit it to the primacy agency in accordance with § 141.90.

(2) The inventory must include all service lines connected to the public water distribution system regardless of ownership status (*e.g.,* where service line ownership is shared, the inventory would include both the portion of the service line owned by the water system and the customer-owned portion of the service line).

(3) A water system must use any information on lead and galvanized iron or steel that it has identified pursuant to § 141.42(d) when conducting the inventory of service lines in its distribution system for the initial inventory under paragraph (a)(1) of this section. The water system must also review the sources of information listed in paragraphs (a)(3)(i) through (iv) of this section to identify service line materials for the initial inventory. The water system may use other sources of information not listed in paragraphs (a)(3)(i) through (iv) of this section if approved by the State.

(i) All construction and plumbing codes, permits, and existing records or other documentation which indicates the service line materials used to connect structures to the distribution system.

(ii) All water system records, including distribution system maps and drawings, historical records on each service connection, meter installation records, historical capital improvement or master plans, and standard operating procedures.

(iii) All inspections and records of the distribution system that indicate the material composition of the service connections that connect a structure to the distribution system.

(iv) Any resource, information, or identification method provided or required by the State to assess service line materials.

(4) Each service line, or portion of the service line where ownership is split, must be categorized in the following manner:

(i) ''Lead'' where the service line is made of lead.

(ii) ''Galvanized Requiring Replacement'' where a galvanized service line is or was at any time downstream of a lead service line or is currently downstream of a ''Lead Status Unknown'' service line. If the water system is unable to demonstrate that the galvanized service line was never downstream of a lead service line, it must presume there was an upstream lead service line.

(iii) ''Non-lead'' where the service line is determined through an evidence-based record, method, or technique not to be lead or galvanized requiring replacement. The water system may classify the actual material of the service line (*i.e.,* plastic or copper) as an alternative to classifying it as ''Non-lead.''

(iv) ''Lead Status Unknown'' where the service line material is not known to be lead, galvanized requiring replacement, or a non-lead service line, such as where there is no documented evidence supporting material classification. The water system may classify the line as ''Unknown'' as an alternative to classifying it as ''Lead Status Unknown,'' however, all requirements that apply to ''Lead Status Unknown'' service lines must also apply to those classified as ''Unknown.'' Water systems may elect to provide more information regarding their unknown lines as long as the inventory clearly distinguishes unknown service lines from those where the material has been verified through records or inspection.

(5) Water systems shall identify and track service line materials in the inventory as they are encountered in the course of its normal operations (*e.g.,* checking service line materials when reading water meters or performing maintenance activities).

(6) Water systems must update the inventory based on all applicable sources described in paragraphs (a)(3) and (5) of this section and any lead service line replacements or service line material inspections that may have been conducted. The water system may use other sources of information if approved by the State and must use other sources of information provided or required by the State. Water systems must submit the updated inventory to the State in accordance with § 141.90(e). The inventory updates must be reflected in the publicly accessible inventory no less frequently than when required to be submitted to the State.

(i) Water systems whose inventories contain only non-lead service lines are not required to provide inventory updates to the State or to the public. If, in the future, such a water system finds a lead service line within its system, it must prepare an updated inventory in accordance with paragraph (a) of this section on a schedule established by the State.

(ii) [Reserved]

(7) To calculate the number of service line replacements applicable to paragraphs (f) and (g) of this section, the replacement rate must be applied to the sum of known lead and galvanized requiring replacement service lines when the system first exceeds the trigger or action level plus the number of lead status unknown service lines in the beginning of each year of a system's annual goal or mandatory lead service line replacement program.

(i) Each service line shall count only once for purposes of calculating the required number of service line replacements, even where the ownership of the service line is split and both the customer-owned and system-owned portions require replacement.

(ii) The number of service lines requiring replacement must be updated annually to subtract the number of lead status unknown service lines that were discovered to be non-lead and to add the number of non-lead service lines that were discovered to be a lead or galvanized requiring replacement service line.

(iii) Verification of a lead status unknown service line as non-lead in the inventory does not count as a service line replacement.

(8) The service line materials inventory must be publicly accessible.

(i) The inventory must include a location identifier, such as a street address, block, intersection, or landmark, associated with each lead service line and galvanized requiring replacement service line. Water systems may, but are not required to, include a locational identifier for lead status unknown service lines or list the exact address of each service line.

(ii) Water systems serving greater than 50,000 persons must make the publicly accessible inventory available online.

(9) When a water system has no lead, galvanized requiring replacement, or lead status unknown service lines (regardless of ownership) in its inventory, it may comply with the requirements in paragraph (a)(8) of this section using a written statement, in lieu of the inventory, declaring that the distribution system has no lead service lines or galvanized requiring replacement service lines. The statement must include a general description of all applicable sources described in paragraphs (a)(3), (5), and (6) of this section used to make this determination.

(10) Instructions to access the service line inventory (including inventories consisting only of a statement in accordance with paragraph (a)(9) of this section) must be included in Consumer Confidence Report in accordance with § 141.153(d)(4)(xi).

(b) *Lead service line replacement plan.* All water systems with one or more lead, galvanized requiring replacement, or lead status unknown service lines in their distribution system must, by January 16, 2024, submit a lead service line replacement plan to the

State in accordance with § 141.90(e). The lead service line replacement plan must be sufficiently detailed to ensure a system is able to comply with the lead service line replacement requirements in accordance with this section. The plan must include a description of:

(1) A strategy for determining the composition of lead status unknown service lines in its inventory;

(2) A procedure for conducting full lead service line replacement;

(3) A strategy for informing customers before a full or partial lead service line replacement;

(4) For systems that serve more than 10,000 persons, a lead service line replacement goal rate recommended by the system in the event of a lead trigger level exceedance;

(5) A procedure for customers to flush service lines and premise plumbing of particulate lead;

(6) A lead service line replacement prioritization strategy based on factors including but not limited to the targeting of known lead service lines, lead service line replacement for disadvantaged consumers and populations most sensitive to the effects of lead; and

(7) A funding strategy for conducting lead service line replacements which considers ways to accommodate customers that are unable to pay to replace the portion they own.

(c) *Operating procedures for replacing lead goosenecks, pigtails, or connectors.* (1) The water system must replace any lead gooseneck, pigtail, or connector it owns when encountered during planned or unplanned water system infrastructure work.

(2) The water system must offer to replace a customer-owned lead gooseneck, pigtail, or connector; however, the water system is not required to bear the cost of replacement of the customer-owned parts.

(3) The water system is not required to replace a customer-owned lead gooseneck, pigtail, or connector if the customer objects to its replacement.

(4) The replacement of a lead gooseneck, pigtail, or connector does not count for the purposes of meeting the requirements for goal-based or mandatory lead service line replacements, in accordance with paragraphs (f) and (g) of this section, respectively.

(5) Upon replacement of any gooseneck, pigtail, or connector that is attached to a lead service line, the water system must follow risk mitigation procedures specified in § 141.85(f)(2).

(6) The requirements of paragraphs (c)(1), (2), (3), and (5) of this section do not apply if state law includes lead connectors in the definition of lead service lines, prohibits partial lead service line replacements, and requires systems to remove all lead service lines irrespective of a system's 90th percentile lead level.

(d) *Requirements for conducting lead service line replacement that may result in partial replacement.* (1) Any water system that plans to partially replace a lead service line (*e.g.,* replace only the portion of a lead service line that it owns) in coordination with planned infrastructure work must provide notice to the owner of the affected service line, or the owner's authorized agent, as well as non-owner resident(s) served by the affected service line at least 45 days prior to the replacement. The notice must explain that the system will replace the portion of the line it owns and offer to replace the portion of the service line not owned by the water system. The water system is not required to bear the cost of replacement of the portion of the affected service line not owned by the water system.

(i) Before the affected service line is returned to service, the water system must provide notification meeting the content requirements of § 141.85(a) explaining that consumers may experience a temporary increase of lead levels in their drinking water due to the replacement, information about the health effects of lead, and actions consumers can take to minimize their exposure to lead in drinking water. In instances where multi-family dwellings are served by the affected service line to be partially replaced, the water system may elect to post the information at a conspicuous location instead of providing individual notification to all residents.

(ii) The water system must provide information about service line flushing in accordance with the procedure developed in paragraph (b)(5) of this section before the affected service line is returned to service.

(iii) The water system must provide the consumer with a pitcher filter or point-of-use device certified by an American National Standards Institute accredited certifier to reduce lead, six months of replacement cartridges, and instructions for use before the affected service line is returned to service. If the affected service line serves more than one residence or non-residential unit (*e.g.,* a multi-unit building), the water system must provide a filter, six months of replacement cartridges and use instructions to every residence in the building.

(iv) The water system must offer to collect a follow up tap sample between three months and six months after completion of any partial replacement of a lead service line. The water system must provide the results of the sample in accordance with § 141.85(d).

(2) Any water system that replaces the portion of the lead service line it owns due to an emergency repair, must provide notice and risk mitigation measures to the persons served by the affected service line in accordance with paragraphs (d)(1)(i) through (iii) of this section before the affected service line is returned to service.

(3) When a water system is notified by the customer that the customer's portion of the lead service line will be replaced, the water system must make a good faith effort to coordinate simultaneous replacement of its portion of the service line. If simultaneous replacement cannot be conducted, the water system must replace its portion as soon as practicable but no later than 45 days from the date the customer replaces its portion of the lead service line. The water system must provide notification and risk mitigation measure in accordance with paragraphs (d)(1)(i) through (iii) of this section. If the water system fails to replace its portion of the lead service line within 45 days from the date the customer replaces the customer's portion of the lead service line, the water system must notify the State within 30 days of failing to meet the deadline in accordance with § 141.90(e) and complete the replacement no later than 180 days of the date the customer replaces its portion.

(4) When a water system is notified or otherwise learns that replacement of a customer-owned lead service line has occurred within the previous six months and left in place a system-owned lead service line, the water system must replace its portion within 45 days from the day of becoming aware of the customer replacement. The water system must provide notification and risk mitigation measures in accordance with paragraphs (d)(1)(i) through (iii) of this section within 24 hours of becoming aware of the customer replacement. If the water system fails to replace its portion of the affected service line within 45 days of becoming aware of the customer replacement, it must notify the State within 30 days of failing to meet the deadline in accordance with § 141.90(e). The water system must complete the replacement no later than 180 days after the date the customer replaces its portion.

(5) When a water system is notified or otherwise learns of a replacement of a customer-owned lead service line which has occurred more than six months in the past, the water system is not

required to complete the lead service line replacement of the system-owned portion under this paragraph (d)(5), however the system-owned portion must still be included in the calculation of a lead service line replacement rate under paragraph (a)(7) of this section.

(e) *Requirements for conducting full lead service line replacement.* Any water system that conducts a full lead service line replacement must provide notice to the owner of the affected service line, or the owner's authorized agent, as well as non-owner resident(s) served by the affected service line within 24 hours of completion of the replacement. The water system is not required to bear the cost of replacement of the portion of the lead service line not owned by the water system.

(1) The notification must meet the content requirements of § 141.85(a) explaining that consumers may experience a temporary increase of lead levels in their drinking water due to the replacement, information about the health effects of lead, and actions consumers can take to minimize their exposure to lead in drinking water. In instances where multi-family dwellings are served by the lead service line to be replaced, the water system may elect to post the information at a conspicuous location instead of providing individual notification to all residents.

(2) The water system must provide information about service line flushing in accordance with the procedure developed under paragraph (b)(5) of this section before the replaced service line is returned to service.

(3) The water system must provide the consumer with a pitcher filter or point-of-use device certified by an American National Standards Institute accredited certifier to reduce lead, six months of replacement cartridges, and instructions for use before the replaced service line is returned to service. If the lead service line serves more than one residence or non-residential unit (*e.g.,* a multi-unit building), the water system must provide a filter and six months of replacement cartridges and use instructions to every residence in the building.

(4) The water system must offer to the consumer to take a follow up tap sample between three months and six months after completion of any full replacement of a lead service line. The water system must provide the results of the sample to the consumer in accordance with paragraph (d) of this section.

(f) *Goal-based full lead service line replacement for water systems whose 90th percentile lead level is above the trigger level but at or below the lead action level.* Water systems that serve more than 10,000 persons whose 90th percentile lead level from tap samples taken pursuant to § 141.86 is above the lead trigger level but at or below the lead action level must conduct goal-based full lead service line replacement at a rate approved by the state.

(1) The water system must calculate the number of full lead service line replacements it must conduct annually in accordance with paragraph (a)(7) of this section.

(2) Replacement of lead service lines must be conducted in accordance with the requirements of paragraph (d) or (e) of this section.

(3) Only full lead service line replacements count towards a water system's annual replacement goal. Partial lead service line replacements do not count towards the goal.

(4) The water system must provide information to customers with lead, galvanized requiring replacement, or lead status unknown service lines as required in § 141.85(g).

(5) Any water system that fails to meet its lead service line replacement goal must:

(i) Conduct public outreach activities pursuant to § 141.85(h) until either the water system meets its replacement goal, or tap sampling shows the 90th percentile of lead is at or below the trigger level for two consecutive one-year monitoring periods.

(ii) Recommence its goal-based lead service line replacement program pursuant to this paragraph (f)(5)(ii) if the 90th percentile lead level anytime thereafter exceeds the lead trigger level but is at or below the lead action level.

(6) The first year of lead service line replacement shall begin on the first day following the end of the tap sampling period in which the lead trigger level was exceeded. If sampling is required annually or less frequently, the end of the tap sampling monitoring period is September 30 of the calendar year in which the sampling occurs. If the State has established an alternate monitoring period, then the end of the monitoring period will be the last day of that period.

(g) *Mandatory full lead service line replacement for water systems whose 90th percentile lead level exceeds the lead action level.* Water systems serving more than 10,000 persons that exceed the lead action level in tap samples taken pursuant to § 141.86 must conduct mandatory full lead service line replacement at an average annual rate of at least three percent, calculated on a two-year rolling basis.

(1) The average annual number of full lead service line replacements must be calculated in accordance with paragraph (a)(7) of this section.

(2) Lead service line replacement must be conducted in accordance with the requirements of paragraphs (d) and (e) of this section.

(3) Only full lead service line replacement count towards a water system's mandatory replacement rate of at least three percent annually. Partial lead service line replacements do not count towards the mandatory replacement rate.

(4) Water systems must provide information to customers with lead, galvanized requiring replacement, or lead status unknown service lines consistent with § 141.85(g).

(5) Community water systems serving 10,000 or fewer persons and Non-transient non-community water systems for which the state has approved or designated lead service line replacement as a compliance option must conduct lead service line replacement as described in § 141.93(a)(1). Replacement of lead service lines must be conducted in accordance with the requirements of paragraphs (d) and (e) of this section.

(6) A water system may cease mandatory lead service line replacement when it has conducted a cumulative percentage of replacements greater than or equal to 3%, or other percentage specified in paragraph (g)(9) of this section, of the service lines specified in paragraph (a)(7) of this section multiplied by the number of years that elapsed from when the system most recently began mandatory lead service line replacement and the date on which the system's 90th percentile lead level, in accordance with § 141.80(c)(4), has been calculated to be at or below the lead action level during each of four consecutive six-month tap sampling monitoring periods. If tap samples collected in any such system thereafter exceed the lead action level, the system shall recommence mandatory lead service line replacement at the same two-year rolling average rate, unless the State has designated an alternate replacement rate under paragraph (g)(9) of this section.

(7) The water system may also cease mandatory lead service line replacement if the system has no remaining lead status unknown service lines in its inventory and obtains refusals to conduct full lead service line replacement or non-responses from every remaining customer in its distribution system served by either a full or partial lead service line, or a galvanized requiring replacement service line. For purposes of this paragraph (g)(7) and in accordance with § 141.90(e), a water system must provide

documentation to the State of customer refusals including a refusal signed by the customer, documentation of a verbal statement made by the customer refusing replacement, or documentation of no response from the customer after the water system made a minimum of two good faith attempts to reach the customer regarding full lead service line replacement. If the water system's 90th percentile exceeds the lead action level again, it must contact all customers served by a full or partial lead service line or a galvanized requiring replacement service line with an offer to replace the customer-owned portion. Nothing in this paragraph (g)(7) requires the water system to bear the cost of replacement of the customer-owned lead service line.

(8) The first year of lead service line replacement shall begin on the first day following the end of the tap sampling period in which lead action level was exceeded.

(9) The State shall require a system to replace lead service lines on a shorter schedule than that required by this section, taking into account the number of lead service lines in the system, where the State determines a shorter replacement schedule is feasible. The State shall make this determination in writing and notify the system of its finding within six months after the system is required to begin lead service line replacement under paragraph (g) of this section.

(h) *Reporting to demonstrate compliance to State.* To demonstrate compliance with paragraphs (a) through (g) of this section, a system shall report to the State the information specified in § 141.90(e).

■ 9. Amend § 141.85 by:
■ a. Revising the section heading, introductory text, and paragraphs (a)(1) introductory text and (a)(1)(ii);
■ b. Adding paragraph (a)(1)(vii);
■ c. Revising paragraphs (b)(2) introductory text, (b)(2)(ii)(B) introductory text, and (b)(2)(ii)(B)(*1*);
■ c. Adding paragraph (b)(2)(ii)(B)(*7*);
■ d. Removing paragraph (b)(2)(ii)(C);
■ e. Revising paragraphs (b)(2)(vii), (b)(4) introductory text, (b)(4)(iii), (b)(6), and (d)(1), (2), and (4); and
■ f. Adding paragraphs (e) through (j).

The revisions and additions read as follows:

§ 141.85 Public education and supplemental monitoring and mitigation requirements.

All water systems must deliver a consumer notice of lead tap water monitoring results to persons served by the water system at sites that are sampled, as specified in paragraph (d) of this section. A water system with lead, galvanized requiring replacement, or lead status unknown service lines must deliver public education materials to persons with a lead, galvanized requiring replacement, or lead status unknown service line as specified in paragraphs (e) through (g) of this section. All community water systems must conduct annual outreach to local and State health agencies as outlined in paragraph (i) of this section. A community water system serving more than 10,000 persons that fails to meet its annual lead service line replacement goal as required under § 141.84(f) shall conduct outreach activities as specified in paragraph (h) of this section. A water system that exceeds the lead action level based on tap water samples collected in accordance with § 141.86 shall deliver the public education materials contained in paragraph (a) of this section and in accordance with the requirements in paragraph (b) of this section. Water systems that exceed the lead action level shall offer to sample the tap water of any customer who requests it in accordance with paragraph (c) of this section. All small community water systems and non-transient non-community water systems that elect to implement POU devices under § 141.93 must provide public education materials to inform users how to properly use POU devices in accordance with paragraph (j) of this section.

(a) * * *

(1) *Community water systems and non-transient non-community water systems.* Water systems must include the following elements in printed materials (*e.g.,* brochures and pamphlets) in the same order as listed in paragraphs (a)(1)(i) through (vii) of this section. In addition, language in paragraphs (a)(1)(i), (ii), and (vi) of this section must be included in the materials, exactly as written, except for the text in brackets in paragraphs (a)(1)(i), (ii), and (vi) of this section for which the water system must include system-specific information. Any additional information presented by a water system must be consistent with the information in paragraphs (a)(1) through (vii) of this section and be in plain language that can be understood by the general public. Water systems must submit all written public education materials to the State prior to delivery. The State may require the system to obtain approval of the content of written public materials prior to delivery. Water systems may change the mandatory language in paragraphs (a)(1)(i) and (ii) of this section only with State approval.

* * * * *

(ii) *Health effects of lead.* Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to new learning and behavior problems or exacerbate existing learning and behavior problems. The children of women who are exposed to lead before or during pregnancy can have increased risk of these adverse health effects. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.

* * * * *

(vii) *Information on lead service lines.* For systems with lead service lines, discuss opportunities to replace lead service lines and explain how to access the service line inventory so the consumer can find out if they have a lead service line. Include information on programs that provide financing solutions to assist property owners with replacement of their portion of a lead service line, and a statement that the water system is required to replace its portion of a lead service line when the property owner notifies them they are replacing their portion of the lead service line.

* * * * *

(b) * * *

(2) A community water system that exceeds the lead action level on the basis of tap water samples collected in accordance with § 141.86, and that is not already conducting public education tasks under this section, must conduct the public education tasks under this section within 60 days after the end of the tap sampling period in which the exceedance occurred:

* * * * *

(ii) * * *

(B) Contact customers who are most at risk by delivering materials that meet the content requirements of paragraph (a) of this section to the following organizations listed in paragraphs (b)(2)(ii)(B)(*1*) through (*7*) of this section that are located within the water system's service area, along with an informational notice that encourages distribution to all the organization's potentially affected customers or community water system's users:

(*1*) Schools, child care facilities, and school boards.

* * * * *

(*7*) Obstetricians-Gynecologists and Midwives.

* * * * *

(vii) For systems that are required to conduct monitoring annually or less

frequently, the end of the tap sampling period is September 30 of the calendar year in which the sampling occurs, or, if the State has established an alternate tap sampling period, the last day of that period.

* * * * *

(4) Within 60 days after the end of the tap sampling period in which the exceedance occurred (unless it already is repeating public education tasks pursuant to paragraph (b)(5) of this section), a non-transient non-community water system shall deliver the public education materials specified by paragraph (a) of this section as follows:

* * * * *

(iii) For systems that are required to conduct monitoring annually or less frequently, the end of the tap sampling period is September 30 of the calendar year in which the sampling occurs, or, if the State has established an alternate tap sampling period, the last day of that period.

* * * * *

(6) A water system may discontinue delivery of public education materials if the system is at or below the lead action level during the most recent six-month tap sampling monitoring period conducted pursuant to § 141.86. Such a system shall recommence public education in accordance with this section if it subsequently exceeds the lead action level during any tap sampling period.

* * * * *

(d) * * *

(1) *Reporting requirement.* All water systems must provide a notice of the individual tap results from lead tap water monitoring carried out under the requirements of § 141.86 to the persons served by the water system at the specific sampling site from which the sample was taken (*e.g.,* the occupants of the building where the tap was sampled).

(2) *Timing of notification.* A water system must provide the consumer notice as soon as practicable but no later than the following timeframes:

(i) For individual samples that do not exceed 15 μg/L of lead, no later than 30 days after the water system learns of the tap monitoring results.

(ii) For individual samples that exceed 15 μg/L of lead, as soon as practicable but no later than 3 calendar days after the water system learns of the tap monitoring results. Water systems that choose to mail the notification must assure those letters are postmarked within three days.

* * * * *

(4) *Delivery.* (i) For lead tap sample results that do not exceed 15 μg/L, the water systems must provide consumer notice to persons served at the tap that was sampled, by mail or by another method approved by the State. For example, upon approval by the State, a non-transient non-community water system could post the results on a bulletin board in the facility to allow users to review the information.

(ii) For lead tap sample results that exceed 15 μg/L, the water systems must provide consumer notice to persons served by the tap that was sampled; such notice must be provided electronically or by phone, hand delivery, by mail, or another method approved by the State.

(e) *Notification of known or potential service line containing lead*—(1) *Notification requirements.* All water systems with lead, galvanized requiring replacement, or lead status unknown service lines in their inventory pursuant to § 141.84(a) must inform all persons served by the water system at the service connection with a lead, galvanized requiring replacement, or lead status unknown service line.

(2) *Timing of notification.* A water system must provide the initial notification within 30 days of completion of the lead service line inventory required under § 141.84 and repeat the notification on an annual basis until the entire service connection is no longer a lead, galvanized requiring replacement, or lead status unknown service line. For new customers, water systems shall also provide the notice at the time of service initiation.

(3) *Content*—(i) *Persons served by a confirmed lead service line.* The notice must include a statement that the person's service line is lead, an explanation of the health effects of lead that meets the requirements of paragraph (a)(1)(ii) of this section, steps persons at the service connection can take to reduce exposure to lead in drinking water, information about opportunities to replace lead service lines as well as programs that provide financing solutions to assist property owners with replacement of their portion of a lead service line, and a statement that the water system is required to replace its portion of a lead service line when the property owner notifies them they are replacing their portion of the lead service line.

(ii) *Persons served by a galvanized requiring replacement service line.* The notice must include a statement that the person's service line is galvanized requiring replacement, an explanation of the health effects of lead, steps persons at the service connection can take to reduce exposure to lead in drinking water, and information about opportunities for replacement of the service line.

(iii) *Persons served by a lead status unknown service line.* The notice must include a statement that the person's service line material is unknown but may be lead, an explanation of the health effects of lead that meets the requirements of paragraph (a)(1)(ii) of this section, steps persons at the service connection can take to reduce exposure to lead in drinking water, and information about opportunities to verify the material of the service line.

(4) *Delivery.* The notice must be provided to persons served by the water system at the service connection with a lead, galvanized requiring replacement, or lead status unknown service line, by mail or by another method approved by the State.

(f) *Notification due to a disturbance to a known or potential service line containing lead.* (1) Water systems that cause disturbance to a lead, galvanized requiring replacement, or lead status unknown service line that results in the water to an individual service line being shut off or bypassed, such as operating a valve on a service line or meter setter, and without conducting a partial or full lead service line replacement, must provide the persons served by the water system at the service connection with information about the potential for elevated lead levels in drinking water as a result of the disturbance as well as instructions for a flushing procedure to remove particulate lead. The water system must comply with the requirements in this paragraph (f)(1) before the affected service line is returned to service.

(2) If the disturbance of a lead, galvanized requiring replacement, or lead status unknown service line results from the replacement of an inline water meter, a water meter setter, or gooseneck, pigtail, or connector, the water system must provide the person served by the water system at the service connection with information about the potential for elevated lead levels in drinking water as a result of the disturbance, public education materials that meet the content requirements in paragraph (a) of this section, a pitcher filter or point-of-use device certified by an American National Standards Institute accredited certifier to reduce lead, instructions to use the filter, and six months of filter replacement cartridges. The water system must comply with the requirements of this paragraph (f)(2) before the affected service line is returned to service.

(3) A water system that conducts a partial or full lead service line replacement must follow procedures in accordance with the requirements in § 141.84(d)(1)(i) through (iv) and (e)(1)(i) through (iv), respectively.

(g) *Information for persons served by known or potential service lines containing lead when a system exceeds the lead trigger level*—(1) *Content.* All water systems with lead service lines that exceed the lead trigger level of 10 µg/L must provide persons served by the water system at the service connection with a lead, galvanized requiring replacement, or lead status unknown service line information regarding the water system's lead service line replacement program and opportunities for replacement of the lead service line.

(2) *Timing.* Waters systems must send notification within 30 days of the end of the tap sampling period in which the trigger level exceedance occurred. Water systems must repeat the notification annually until the results of sampling conducted under § 141.86 are at or below the lead trigger level.

(3) *Delivery.* The notice must be provided to persons served at the service connection with a lead, galvanized requiring replacement, or lead status unknown service line, by mail or by another method approved by the State.

(h) *Outreach activities for failure to meet the lead service line replacement goal.* (1) In the first year after a community water system that serves more than 10,000 persons does not meet its annual lead service line replacement goal as required under § 141.84(f), it must conduct one outreach activity from the following list in the following year until the water system meets its replacement goal or until tap sampling shows that the 90th percentile for lead is at or below the trigger level of 10 µg/L for two consecutive tap sampling monitoring periods:

(i) Send certified mail to customers with a lead or galvanized requiring replacement service line to inform them about the water system's goal-based lead service line replacement program and opportunities for replacement of the service line.

(ii) Conduct a townhall meeting.

(iii) Participate in a community event to provide information about its lead service line replacement program and distribute public education materials that meet the content requirements in paragraph (a) of this section.

(iv) Contact customers by phone, text message, email, or door hanger.

(v) Use another method approved by the State to discuss the lead service line replacement program and opportunities for lead service line replacement.

(2) After the first year following a trigger level exceedance, any water system that thereafter continues to fail to meet its lead service line replacement goal must conduct one activity from paragraph (h)(1) of this section and two additional outreach activities per year from the following list:

(i) Conduct social media campaign.

(ii) Conduct outreach via newspaper, television, or radio.

(iii) Contact organizations representing plumbers and contractors by mail to provide information about lead in drinking water including health effects, sources of lead, and the importance of using lead free plumbing materials.

(iv) Visit targeted customers to discuss the lead service line replacement program and opportunities for replacement.

(3) The water system may cease outreach activities when tap sampling shows that the 90th percentile for lead is at or below the trigger level of 10 µg/L for two consecutive tap sampling monitoring periods or when all customer-side lead or galvanized requiring replacement service line owners refuse to participate in the lead service line replacement program. For purposes of this paragraph (h)(3), a refusal includes a signed statement by the customer refusing lead service line replacement, or documentation by the water system of a verbal refusal or of no response after two good faith attempts to reach the customer.

(i) *Public education to local and State health agencies*—(1) *Find-and-fix results.* All community water systems must provide information to local and State health agencies about find-and-fix activities conducted in accordance with § 141.82(j) including the location of the tap sample site that exceeded 15 µg/L, the result of the initial tap sample, the result of the follow up tap sample, the result of water quality parameter monitoring, and any distribution system management actions or corrosion control treatment adjustments made.

(2) *Timing and content.* Community water systems must annually send copies of the public education materials provided under paragraph (a) of this section, and of paragraph (h)(1) of this section for actions conducted in the previous calendar year no later than July 1 of the following year.

(3) *Delivery.* Community water systems shall send public education materials and find-and-fix information to local and State health agencies by mail or by another method approved by the State.

(j) *Public education requirements for small water system compliance flexibility POU devices*—(1) *Content.* All small community water systems and non-transient non-community water systems that elect to implement POU devices under § 141.93 must provide public education materials to inform users how to properly use POU devices to maximize the units' effectiveness in reducing lead levels in drinking water.

(2) *Timing.* Water systems shall provide the public education materials at the time of POU device delivery.

(3) *Delivery.* Water systems shall provide the public education materials in person, by mail, or by another method approved by the State, to persons at locations where the system has delivered POU devices.

■ 10. Amend § 141.86 by revising paragraphs (a), (b), (d), (e), (f) introductory text, and (g) introductory text and adding paragraphs (h) and (i) to read as follows:

§ 141.86 Monitoring requirements for lead and copper in tap water.

(a) *Sample site location.* (1) By the applicable date for commencement of monitoring under paragraph (d)(1) of this section, each water system shall identify a pool of targeted sampling sites based on the service line inventory conducted in accordance with § 141.84(a), that meet the requirements of this section, and which is sufficiently large enough to ensure that the water system can collect the number of lead and copper tap samples required in paragraph (c) of this section. Sampling sites may not include sites with installed point-of-entry (POE) treatment devices and taps used at sampling sites may not have point-of-use (POU) devices designed to remove inorganic contaminants, except for water systems monitoring under § 141.93(a)(3)(iv) and water systems using these devices for the primary drinking water tap to meet other primary and secondary drinking water standards and all service connections have POEs or POUs to provide localized treatment for compliance with the other drinking water standards. Lead and copper sampling results for systems monitoring under § 141.93(a)(3)(iv) may not be used for the purposes of meeting the criteria for reduced monitoring specified in paragraph (d)(4) of this section.

(2) A water system must use the information on lead, copper, and galvanized iron or steel that is required to be identified under § 141.42(d) when conducting a materials evaluation and the information on lead service lines that is required to be collected under

§ 141.84(a) to identify potential lead service line sampling sites.

(3) The sampling sites for a community water system's sampling pool must consist of single-family structures that are served by a lead service line (''Tier 1 sampling sites''). When multiple-family residences comprise at least 20 percent of the structures served by the water system, the system may include these types of structures in its Tier 1 sampling pool, if served by a lead service line. Sites with lead status unknown service lines must not be used as Tier 1 sampling sites.

(4) A community water system with insufficient Tier 1 sampling sites must complete its sampling pool with ''Tier 2 sampling sites,'' consisting of buildings, including multiple-family residences that are served by a lead service line. Sites with lead status unknown service lines must not be used as Tier 2 sampling sites.

(5) A community water system with insufficient Tier 1 and Tier 2 sampling sites must complete its sampling pool with ''Tier 3 sampling sites,'' consisting of single-family structures that contain galvanized lines identified as being downstream of a lead service line (LSL) currently or in the past, or known to be downstream of a lead gooseneck, pigtail or connector. Sites with lead status unknown service lines must not be used as Tier 3 sampling sites.

(6) A community water system with insufficient Tier 1, Tier 2, and Tier 3 sampling sites must complete its sampling pool with ''Tier 4 sampling sites,'' consisting of single-family structures that contain copper pipes with lead solder installed before the effective date of the State's applicable lead ban. Sites with lead status unknown service lines must not be used as Tier 4 sampling sites.

(7) A community water system with insufficient Tier 1, Tier 2, Tier 3, and Tier 4 sampling sites must complete its sampling pool with ''Tier 5 sampling sites,'' consisting of single-family structures or buildings, including multiple family residences that are representative of sites throughout the distribution system. For the purpose of this paragraph (a)(7), a representative site is a site in which the plumbing materials used at that site would be commonly found at other sites served by the water system. Water systems may use non-residential buildings that are representative of sites throughout the distribution system if and only if there are an insufficient number of single-family or multiple family residential Tier 5 sites available.

(8) The sampling sites selected for a non-transient non-community water system must consist of sites that are served by a lead service line (''Tier 1 sampling sites''). Sites with lead status unknown service lines must not be used as Tier 1 sampling sites.

(9) A non-transient non-community water system with insufficient Tier 1 sites complete its sampling pool with ''Tier 3 sampling sites,'' consisting of sampling sites that contain galvanized lines identified as being downstream of an LSL currently or in the past, or known to be downstream of a lead gooseneck, pigtail, or connector. Sites with lead status unknown service lines must not be used as Tier 3 sampling sites.

(10) A non-transient non-community water system with insufficient Tier 1 and Tier 3 sampling sites must complete its sampling pool with ''Tier 5 sampling sites,'' consisting of sampling sites that are representative of sites throughout the distribution system. For the purpose of this paragraph (a)(10), a representative site is a site in which the plumbing materials used at that site would be commonly found at other sites served by the water system.

(11) A water system whose distribution system contains lead service lines must collect all samples for monitoring under this section from sites served by a lead service line. A water system that cannot identify a sufficient number of sampling sites served by lead service lines must still collect samples from every site served by a lead service line, and collect the remaining samples in accordance with tiering requirements under paragraphs (a)(5) through (7) or paragraphs (a)(9) through (10) of this section.

(b) *Sample collection methods.* (1) All tap samples for lead and copper collected in accordance with this subpart, with the exception of fifth liter samples collected under paragraph (b)(3) of this section, and samples collected under paragraphs (b)(5) and (h) of this section, must be first draw samples. The first draw sample shall be analyzed for lead and copper in tap sampling periods where both contaminants are required to be monitored. In tap sampling periods where only lead is required to be monitored, the first draw sample may be analyzed for lead only.

(2) Each first draw tap sample for lead and copper must be one liter in volume and have stood motionless in the plumbing system of each sampling site for at least six hours. Bottles used to collect first draw samples must be wide-mouth one-liter sample bottles. First draw samples from residential housing must be collected from the cold-water kitchen or bathroom sink tap. First draw samples from a nonresidential building must be one liter in volume and collected at a tap from which water is typically drawn for consumption. State-approved non-first-draw samples collected in lieu of first draw samples pursuant to paragraph (b)(5) of this section must be one liter in volume and shall be collected at an interior tap from which water is typically drawn for First draw samples may be collected by the system or the system may allow residents to collect first draw samples after instructing the residents of the sampling procedures specified in this paragraph (b)(2). Sampling instructions provided to residents must not include instructions for aerator removal and cleaning or flushing of taps prior to the start of the minimum six-hour stagnation period. To avoid problems of residents handling nitric acid, acidification of first draw samples may be done up to 14 days after the sample is collected. After acidification to resolubilize the metals, the sample must stand in the original container for the time specified in the approved EPA method before the sample can be analyzed. If a system allows residents to perform sampling, the system may not challenge, based on alleged errors in sample collection, the accuracy of sampling results.

(3)(i) All tap samples for copper collected in at sites with a lead service line shall be the first draw sample collected using the procedure listed in this paragraph (b)(3). Tap samples for copper are required to be collected and analyzed only in monitoring periods for which copper monitoring is required.

(ii) Systems must collect tap water in five consecutively numbered one-liter sample bottles after the water has stood motionless in the plumbing of each sampling site for at least six hours without flushing the tap prior to sample collection. Systems must analyze first draw samples for copper, when applicable, and fifth liter samples for lead. Bottles used to collect these samples must be wide-mouth one-liter sample bottles. Systems must collect first draw samples in the first sample bottle with each subsequently numbered bottle being filled until the final bottle is filled with the water running constantly during sample collection. Fifth liter sample is the final sample collected in this sequence. System must collect first draw and fifth liter samples from residential housing from the cold-water kitchen or bathroom sink tap First draw and fifth liter samples from a nonresidential building must be one liter in volume and collected at an interior cold water tap from which water is typically drawn for

consumption. First draw and fifth liter samples may be collected by the system or the system may allow residents to collect first draw samples and fifth liter samples after instructing the residents on the sampling procedures specified in this paragraph (b)(3)(ii). Sampling instructions provided to customers must not direct the customer to remove the aerator or clean or flush the taps prior to the start of the minimum six-hour stagnation period. To avoid problems of residents handling nitric acid, the system may acidify first draw samples up to 14 days after the sample is collected. After acidification to resolubilize the metals, the sample must stand in the original container for the time specified in the approved EPA method before the sample can be analyzed. If a system allows residents to perform sampling, the system may not challenge, based on alleged errors in sample collection, the accuracy of sampling results.

(4) A water system must collect each first draw tap sample from the same sampling site from which it collected the previous sample. A water system must collect each fifth liter sample from the same sampling site from which it collected the previous sample. If, for reasons beyond the control of the water system, the water system cannot gain entry to a sampling site in order to collect a follow-up tap sample, the system may collect the follow-up tap sample from another sampling site in its sampling pool as long as the new site meets the same targeting criteria, and is within reasonable proximity of the original site.

(5) A non-transient, non-community water system, or a community water system that meets the criteria of § 141.85(b)(7), that does not have enough taps that can supply first draw samples or fifth liter samples meeting the six-hour minimum stagnation time, as defined in § 141.2, may apply to the State in writing to substitute non-first draw, first-draw, or fifth liter samples that do not meet the six-hour minimum stagnation time. Such systems must collect as many first draw or fifth liter samples from interior taps typically used for consumption, as possible and must identify sampling times and locations that would likely result in the longest standing time for the remaining sites. The State has the discretion to waive the requirement for prior State approval of sites not meeting the six-hour stagnation time either through State regulation or written notification to the system.

* * * * *

(d) *Timing of monitoring*—(1) *Standard monitoring.* Standard monitoring is a six-month tap sampling monitoring period that begins on January 1 or July 1 of the year in which the water system is monitoring at the standard number of sites in accordance to paragraph (c) of this section.

(i) All water systems with lead service lines, including those deemed optimized under § 141.81(b)(3), and systems that did not conduct monitoring that meets all requirements of this section (*e.g.,* sites selected in accordance with paragraph (a) of this section, samples collected in accordance with paragraph (b) of this section, etc.) between January 15, 2021 and January 16, 2024, must begin the first standard monitoring period on January 1 or July 1 in the year following the January 16, 2024, whichever is sooner. Upon completion of this monitoring, systems must monitor in accordance with paragraph (d)(1)(ii) of this section.

(ii) Systems that conducted monitoring that meets all requirements of this section (*e.g.,* sites selected in accordance with paragraph (a) of this section, samples collected in accordance with paragraph (b) of this section, etc.) between January 15, 2021 and January 16, 2024, and systems that have completed monitoring under paragraph (d)(1)(i) of this section, must continue monitoring as follows:

(A) Systems that do not meet the criteria under paragraph (d)(4) of the section must conduct standard monitoring.

(B) Systems that meet the criteria under paragraph (d)(4) of this section must continue to monitor in accordance with the criteria in paragraph (d)(4).

(C) Any system monitoring at a reduced frequency in accordance with paragraph (d)(4) of this section that exceeds an action level must resume standard monitoring beginning January 1 of the calendar year following the tap sampling monitoring period in which the system exceeded the action level. Any such system must also monitor in accordance with § 141.87(b), (c), or (d) as applicable.

(D) Any system monitoring at a reduced frequency that exceeds the lead trigger level but meets the copper action level must not monitor any less frequently than annually and must collect samples from the standard number of sites as established in paragraph (c) of this section. This monitoring must begin the calendar year following the tap sampling monitoring period in which the system exceeded the action level. Any such system must also monitor in accordance with § 141.87(b), (c), or (d) as applicable.

(E) Any system that fails to operate at or above the minimum value or within the range of values for the water quality parameters specified by the State under § 141.82(f) for more than nine days in any monitoring period specified in § 141.87 must conduct standard tap water monitoring and must resume sampling for water quality parameters in accordance with § 141.87(d). This standard monitoring must begin no later than the 6-month period beginning January 1 of the calendar year following the water quality parameter excursion.

(F) Any water system that becomes a *large water system* without corrosion control treatment or any large water system without corrosion control treatment whose lead 90th percentile exceeds the lead practical quantitation level must conduct standard monitoring for at least two consecutive 6-month tap sampling monitoring periods and then must continue monitoring in accordance with this paragraph (d)(1)(ii)(F).

(2) *Monitoring after installation of initial or re-optimized corrosion control treatment, installation of source water treatment and addition of new source or change in treatment.* (i) Any water system that installs or re-optimizes corrosion control treatment, as a result of exceeding the lead or copper action level, must monitor for lead and copper every six months and comply with previously designated water quality parameter values, where applicable, until the State specifies new water quality parameter values for optimal corrosion control.

(ii) Any water system that re-optimizes corrosion control treatment as a result of exceeding the lead trigger level but has not exceeded the lead or copper action level must monitor annually for lead at the standard number of sites listed in paragraph (c) of this section. Samples shall be analyzed for copper on a triennial basis. Small and medium-size systems that do not exceed the lead trigger level in three annual monitoring periods may reduce lead monitoring in accordance with paragraph (d)(4) of this section.

(iii) Any water system that installs source water treatment pursuant to § 141.83(a)(3) must monitor every six months until the system at or below lead and copper action levels for two consecutive six-month monitoring periods. Systems that do not exceed the lead or copper action level for two consecutive 6-month monitoring periods may reduce monitoring in accordance with paragraph (d)(4) of this section.

(iv) If a water system has notified the State in writing in accordance with § 141.90(a)(3) of an upcoming addition

of a new source or long term change in treatment, the water system shall monitor every six months at the standard number of sites listed under paragraph (c) of this section until the system is at or below the lead and copper action levels for two consecutive six-month monitoring periods, unless the State determines that the addition of the new source or long term change in treatment is not significant and, therefore, does not warrant more frequent monitoring. Systems that do not exceed the lead and copper action levels, and/or the lead trigger level for two consecutive six-month monitoring periods may reduce monitoring in accordance with paragraph (d)(4) of this section.

(3) *Monitoring after State specifies water quality parameter values for optimal corrosion control treatment.* (i) After the State specifies the values for water quality control parameters under § 141.82(f), the system must conduct standard six-month monitoring for two consecutive six-month tap sampling monitoring periods. Systems may then reduce monitoring in accordance with paragraph (d)(4) of this section as applicable, following a State determination that reduced monitoring is approved.

(ii) Systems required to complete the re-optimization steps in § 141.81(d) due to the exceedance of the lead trigger level that do not exceed the lead and copper action levels must monitor for two consecutive 6-month tap sampling monitoring periods. Systems may then reduce monitoring in accordance with paragraph (d)(4) of this section as applicable following a State determination that reduced monitoring is approved.

(4) *Reduced monitoring based on 90th percentile levels.* Reduced monitoring refers to an annual or triennial tap sampling monitoring period. The reduced monitoring frequency is based on the 90th percentile value for the water system.

(i) A water system that meets the criteria for reduced monitoring under paragraph (d)(4) of this section must collect these samples from sampling sites identified in paragraph (a) of this section. Systems monitoring annually or less frequently must conduct the lead and copper tap sampling during the months of June, July, August, or September unless the State has approved a different sampling period in accordance with paragraph (d)(4)(i)(A) of this section.

(A) The State at its discretion may approve a different tap sampling period for conducting the lead and copper tap sampling for systems collecting samples at a reduced frequency. Such a period must be no longer than four consecutive months, within one calendar year, and must represent a time of normal operation where the highest levels of lead are most likely to occur. For a non-transient non-community water system that does not operate during the months of June through September and for which the period of normal operation where the highest levels of lead are most likely to occur is not known, the State must designate a period that represents normal operation for the system. This monitoring must begin during the period approved or designated by the State in the calendar year immediately following the end of the second 6-month monitoring period for systems initiating annual monitoring and during the 3-year period following the end of the third consecutive year of annual monitoring for systems initiating triennial monitoring.

(B) Systems monitoring annually that have been collecting samples during the months of June through September and that receive State approval to alter their tap sampling monitoring period under paragraph (d)(4)(i)(A) of this section must collect their next round of samples during a time period that ends no later than 21 months after the previous round of sampling. Systems monitoring triennially that have been collecting samples during the month of June through September and receive State approval to alter their sampling collection period as per paragraph (d)(4)(i)(A) of this section must collect their next round of samples during a time period that ends no later than 45 months after the previous tap sampling period. Subsequent monitoring must be conducted annually or triennially, as required by this section.

(C) Small systems with waivers granted pursuant to paragraph (g) of this section that have been collecting samples during the months of June through September and receive State approval to alter their tap sampling period as per paragraph (d)(4)(i)(A) of this section must collect their next round of samples before the end of the 9-year period.

(ii) Any system that meets the lead trigger level and the copper action levels during two consecutive 6-month tap sampling monitoring periods may reduce the monitoring frequency to annual monitoring and must sample at the standard number of sampling sites for lead and the reduced number of sites for copper as specified in paragraph (c) of this section. Systems operating *OCCT* must also have maintained the range of OWQPs set by the State in accordance with § 141.82(f) for the same period and receive a written determination from the State approving annual monitoring based on the State's review of monitoring, treatment, and other relevant information submitted by the system as required by § 141.90. This sampling must begin no later than the calendar year immediately following the last calendar year in which the system sampled.

(iii) Any water system that exceeds the lead trigger level but not the lead and copper action levels during two consecutive 6-month tap sampling monitoring periods must monitor no less frequently than annually at the standard number of sampling sites for lead and copper specified in paragraph (c) of this section. Systems operating OCCT must also have maintained the range of OWQPs set by the State in accordance with § 141.82(f) for the same period of 6-month monitoring and receive a written determination from the State approving annual monitoring based on the State's review of monitoring, treatment, and other relevant information submitted by the system as required by § 141.90. This sampling must begin no later than the calendar year immediately following the last calendar year in which the system sampled.

(iv) Any water system that exceeds the lead trigger level but not the lead and copper action levels during three consecutive years of monitoring may reduce the tap sampling monitoring period for copper to once every three years; however, the system may not reduce the tap sampling monitoring period for lead. Systems operating OCCT must also maintain the range of OWQPs set by the State in accordance with § 141.82(f) and receive a written determination from the State approving triennial monitoring based on the State's review of monitoring, treatment, and other relevant information submitted by the system as required by § 141.90. This sampling must begin no later than the third calendar year immediately following the last calendar year in which the system sampled.

(v) Any small or medium-sized system that does not exceed the lead trigger level and the copper action level during three consecutive years of monitoring (standard monitoring completed during both six-month periods of a calendar year shall be considered 1 year of monitoring) may sample at the reduced number of sites for lead and copper in accordance with paragraph (c) of this section and reduce the monitoring frequency to triennial monitoring. Systems operating OCCT must also have maintained the range of OWQPs set by the State in accordance

with § 141.82(f) for the same three-year period and receive a written determination from the State approving triennial monitoring based on the State's review of monitoring, treatment, and other relevant information submitted by the system as required by § 141.90. This sampling must begin no later than three calendar years after the last calendar year in which the system sampled.

(vi) Any water system that demonstrates for two consecutive 6-month monitoring periods that its 90th percentile lead level, calculated under § 141.80(c)(4), is less than or equal to 0.005 mg/L and the 90th percentile copper level, calculated under § 141.80(c)(4), is less than or equal to 0.65 mg/L may sample at the reduced number of sites for lead and copper in accordance with paragraph (c) of this section and reduce the frequency of monitoring to triennial monitoring. For water systems with corrosion control treatment, the system must maintain the range of values for the water quality parameters reflecting optimal corrosion control treatment specified by the State under § 141.82(f) to qualify for reduced monitoring pursuant to this paragraph (d)(4)(vi).

(e) *Additional monitoring by systems.* The results of any monitoring conducted in addition to the minimum requirements of this section (such as customer-requested sampling) shall be considered by the water system and the State in making any determinations (*i.e.,* calculating the 90th percentile lead or copper level) under this subpart. Lead service line water systems that are unable to collect the minimum number of samples from Tier 1 or Tier 2 sites shall calculate the 90th percentile using data from all the lead service lines sites and the highest lead and copper values from lower tier sites to meet the specified minimum number of samples. Systems must submit data from additional tier 3, 4 or 5 sites to the State but may not use these results in the 90th percentile calculation. Water systems must include customer-requested samples from known lead service line sites in the 90th percentile calculation if the samples meet the requirements of this section.

(f) *Invalidation of lead and copper tap samples used in the calculation of the 90th percentile.* A sample invalidated under this paragraph (f) does not count toward determining lead or copper 90th percentile levels under § 141.80(c)(4) or toward meeting the minimum monitoring requirements of paragraph (c) of this section.

* * * * *

(g) *Monitoring waivers for systems serving 3,300 or fewer persons.* Any water system serving 3,300 or fewer persons that meets the criteria of this paragraph (g) may apply to the State to reduce the frequency of monitoring for lead and copper under this section to once every nine years (*i.e.,* a ''full waiver'') if it meets all of the materials criteria specified in paragraph (g)(1) of this section and all of the monitoring criteria specified in paragraph (g)(2) of this section. If State regulations permit, any water system serving 3,300 or fewer persons that meets the criteria in paragraphs (g)(1) and (2) of this section only for lead, or only for copper, may apply to the State for a waiver to reduce the frequency of tap water monitoring to once every nine years for that contaminant only (*i.e.,* a ''partial waiver'').

* * * * *

(h) *Follow-up samples for ''find-and-fix'' under § 141.82(j).* Systems shall collect a follow-up sample at any site that exceeds the action level within 30 days of receiving the sample results. These follow-up samples may use different sample volumes or different sample collection procedures to assess the source of elevated lead. Systems shall submit samples collected under this section to the State but shall not include such samples in the 90th percentile calculation.

(i) *Public availability of tap monitoring results used in the 90th percentile calculation.* All water systems must make available to the public the results of compliance tap water monitoring data, including data used in the 90th percentile calculation under § 141.80(c)(4), within 60 days of the end of the applicable tap sampling period. Nothing in this section requires water systems to make publicly available the addresses of the sites where the tap samples were collected. Large systems shall make available the monitoring results in a digital format. Small and medium-size systems shall make available the monitoring results in either a written or digital format. Water systems shall retain tap sampling monitoring data in accordance to recordkeeping requirements under § 141.91.

■ 11. Revise § 141.87 to read as follows:

§ 141.87 Monitoring requirements for water quality parameters.

All large water systems, and all small- and medium-size water systems that exceed the lead or copper action level, and all small- and medium-size water systems with corrosion control treatment that exceed the lead trigger level must monitor water quality parameters in addition to lead and copper in accordance with this section.

(a) *General requirements*—(1) *Sample collection methods.* (i) Tap samples must be representative of water quality throughout the distribution system, taking into account the number of persons served, the different sources of water, the different treatment methods employed by the system, and seasonal variability. Tap sampling under this section is not required to be conducted at taps targeted for lead and copper sampling under § 141.86(a). Sites selected for tap samples under this section must be included in the site sample plan specified under § 141.86(a)(1). The site sample plan must be updated prior to changes to the sampling locations. [Note: Systems may find it convenient to conduct tap sampling for water quality parameters at sites used for total coliform sampling under § 141.21(a)(1) if they also meet the requirements of this section.]

(ii) Samples collected at the entry point(s) to the distribution system must be from locations representative of each source after treatment. If a system draws water from more than one source and the sources are combined before distribution, the system must sample at an entry point to the distribution system during periods of normal operating conditions (*i.e.,* when water is representative of all sources being used).

(2) *Number of samples.* (i) Systems must collect two tap samples for applicable water quality parameters during each monitoring period specified under paragraphs (b) through (e) of this section from the minimum number of sites listed in table 1 to this paragraph (a)(2)(i). Systems that add sites as a result of the ''find-and-fix'' requirements in § 141.82(j) must collect tap samples for applicable water quality parameters during each monitoring period under paragraphs (b) through (e) of this section and must sample from that adjusted minimum number of sites. Systems are not required to add sites if they are monitoring at least twice the minimum number of sites list in table 1 to this paragraph (a)(2)(i).

TABLE 1 TO PARAGRAPH (a)(2)(i)

System size (number people served)	Minimum number of sites for water quality parameters
>100,000	25
10,001–100,000	10
3,301–10,000	3
501–3,300	2
101–500	1
≤ 100	1

(ii)(A) Except as provided in paragraph (c)(2) of this section, water systems without corrosion control treatment must collect two samples for each applicable water quality parameter at each entry point to the distribution system during each monitoring period specified in paragraph (b) of this section. During each monitoring period specified in paragraphs (c) through (e) of this section, water systems must collect one sample for each applicable water quality parameter at each entry point to the distribution system.

(B) During each monitoring period specified in paragraphs (c) through (e) of the section, water systems with corrosion control treatment must continue to collect one sample for each applicable water quality parameter at each entry point to the distribution system no less frequently than once every two weeks.

(b) *Initial sampling for water systems.* Any large water system without corrosion control treatment must monitor for water quality parameters as specified in paragraphs (b)(1) and (2) of this section during the first two six-month tap sampling monitoring periods beginning no later than January 1 of the calendar year after the system either becomes a large water system, or fails to maintain their 90th percentile for lead below the PQL for lead. Any medium or small system that exceeds the lead or copper action level and any system with corrosion control treatment for which the State has not designated OWQPs that exceeds the lead trigger level shall monitor for water quality parameters as specified in paragraphs (b)(1) and (2) of this section for two consecutive 6-month periods beginning the month immediately following the end of the tap sampling period in which the exceedance occurred.

(1) At taps, two samples for:

(i) pH;

(ii) Alkalinity;

(2) At each entry point to the distribution system all of the applicable parameters listed in paragraph (b)(1) of this section.

(c) *Monitoring after installation of optimal corrosion control or re-optimized corrosion control treatment.* (1) Any system that installs or modifies corrosion control treatment pursuant to § 141.81(d)(5) or (e)(5) and is required to monitor pursuant § 141.81(d)(6) or (e)(6) must monitor the parameters identified in paragraphs (c)(1)(i) and (ii) of this section every six months at the locations and frequencies specified in paragraphs (c)(1)(i) and (ii) of this section until the State specifies new water quality parameter values for optimal corrosion control pursuant to paragraph (d) of this section. Water systems must collect these samples evenly throughout the 6-month monitoring period so as to reflect seasonal variability.

(i) At taps, two samples each for:

(A) pH;

(B) Alkalinity;

(C) Orthophosphate, when an inhibitor containing an orthophosphate compound is used;

(D) Silica, when an inhibitor containing a silicate compound is used.

(ii) Except as provided in paragraph (c)(1)(iii) of this section, at each entry point to the distribution system, at least one sample no less frequently than every two weeks (biweekly) for:

(A) pH;

(B) When alkalinity is adjusted as part of optimal corrosion control, a reading of the dosage rate of the chemical used to adjust alkalinity, and the alkalinity concentration; and

(C) When a corrosion inhibitor is used as part of optimal corrosion control, a reading of the dosage rate of the inhibitor used, and the concentration of orthophosphate or silica (whichever is applicable).

(iii) Any groundwater system can limit entry point sampling described in paragraph (c)(1)(ii) of this section to those entry points that are representative of water quality and treatment conditions throughout the system. If water from untreated groundwater sources mixes with water from treated groundwater sources, the system must monitor for water quality parameters both at representative entry points receiving treatment and representative entry points receiving no treatment. Prior to the start of any monitoring under this paragraph (c)(1)(iii), the water system must provide to the State, written information identifying the selected entry points and documentation, including information on seasonal variability, sufficient to demonstrate that the sites are representative of water quality and treatment conditions throughout the system.

(2) States have the discretion to require small and medium-size systems with treatment for which the State has not designated OWQPs that exceed the lead trigger level but not the lead and copper action levels to conduct water quality parameter monitoring as described in paragraph (c)(1) of this section or the State can develop its own water quality control parameter monitoring structure for these systems.

(d) *Monitoring after State specifies water quality parameter values for optimal corrosion control.* (1) After the State specifies the values for applicable water quality parameters reflecting optimal corrosion control treatment under § 141.82(f), systems must monitor for the specified optimal water quality parameters during 6-month periods that begin on either January 1 or July 1. Such monitoring must be spaced evenly throughout the 6-month monitoring period so as to reflect seasonal variability and be consistent with the structure specified in paragraphs (c)(1)(i) through (iii) of this section.

(i) All large systems must measure the applicable water quality parameters specified by the State and determine compliance with the requirements of § 141.82(g) every six months with the first 6-month period to begin on either January 1 or July 1, whichever comes first, after the State specifies the optimal values under § 141.82(f).

(ii) Any small or medium-size water system that exceeds an action level must begin monitoring during the six-month period immediately following the tap sampling monitoring period in which the exceedance occurs and continue monitoring until the water system no longer exceeds the lead and copper action levels and meets the optimal water quality control parameters in two consecutive 6-month tap sampling monitoring periods under § 141.86(d)(3). For any such small and medium-size system that is subject to a reduced monitoring frequency pursuant to § 141.86(d)(4) at the time of the action level exceedance, the start of the applicable 6-month monitoring period under this paragraph must coincide with the start of the applicable tap sampling monitoring period under § 141.86(d)(4).

(iii) Compliance with State-designated optimal water quality parameter values must be determined as specified under § 141.82(g).

(2) Any small or medium-size system that exceeds the lead trigger level, but not the lead and copper action levels for which the State has set optimal water quality control parameters must monitor as specified in paragraph (d)(1) of this section every six month, until the system no longer exceeds the lead trigger level in two consecutive tap sampling monitoring periods.

(3) States have the discretion to continue to require systems described in paragraph (d)(2) of this section to monitor optimal water quality control parameters.

(e) *Reduced monitoring.* (1) Any large water system that maintains the range of values for the water quality parameters reflecting optimal corrosion control treatment specified by the State under § 141.82(f) and does not exceed the lead trigger level during each of two consecutive 6-month monitoring

periods under paragraph (d) of this section must continue monitoring at the entry point(s) to the distribution system as specified in paragraph (c)(1)(ii) of this section. Such system may collect two tap samples for applicable water quality parameters from the following reduced number of sites during each 6-month monitoring period. Water systems must collect these samples evenly throughout the 6-month monitoring period so as to reflect seasonal variability.

TABLE 2 TO PARAGRAPH (e)(1)

System size (number of people served)	Reduced minimum number of sites for water quality parameters
>100,000	10
10,001–100,000	7
3,301–10,000	3
501–3,300	2
101–500	1
≤100	1

(2)(i) Any water system that maintains the range of values for the water quality parameters reflecting optimal corrosion control treatment specified by the State under § 141.82(f) and does not exceed the lead trigger level or copper action level during three consecutive years of monitoring may reduce the frequency with which it collects the number of tap samples for applicable water quality parameters specified in paragraph (e)(1) of this section, from every six months to annually. This sampling begins during the calendar year immediately following the end of the monitoring period in which the third consecutive year of 6-month monitoring occurs.

(ii) A water system may reduce the frequency with which it collects tap samples for applicable water quality parameters specified in paragraph (e)(1) of this section to every year if it demonstrates during two consecutive monitoring periods that its tap water lead level at the 90th percentile is less than or equal to the PQL for lead of 0.005 mg/L that its tap water copper level at the 90th percentile is less than or equal to 0.65 mg/L in § 141.80(c)(3), and that it also has maintained the range of values for the water quality parameters reflecting optimal corrosion control treatment specified by the State under § 141.82(f).

(3) A water system that conducts sampling annually must collect these samples evenly throughout the year so as to reflect seasonal variability.

(4) Any water system subject to the reduced monitoring frequency that fails to operate at or above the minimum value or within the range of values for the water quality parameters specified by the State in § 141.82(f) for more than nine days in any 6-month period specified in § 141.82(g) must resume distribution system tap water sampling in accordance with the number and frequency requirements in paragraph (d) of this section. Such a system may resume annual monitoring for water quality parameters at the tap at the reduced number of sites specified in paragraph (e)(1) of this section after it has completed two subsequent consecutive 6-month rounds of monitoring that meet the criteria of paragraph (e)(1) of this section and/or may resume annual monitoring for water quality parameters at the tap at the reduced number of sites after it demonstrates through subsequent rounds of monitoring that it meets the criteria of either paragraph (e)(2)(i) or (ii) of this section.

(f) *Additional monitoring by systems.* The results of any monitoring conducted in addition to the minimum requirements of this section must be considered by the water system and the State in making any determinations (*i.e.,* determining concentrations of water quality parameters) under this section or § 141.82.

(g) *Additional sites added from find-and-fix.* Any water system that conducts water quality parameter monitoring at additional sites through the ''find-and-fix'' provisions pursuant to § 141.82(j) must add those sites to the minimum number of sites specified under paragraphs (a) through (e) of this section unless the system is monitoring at least twice the minimum number of sites.

■ 12. Amend § 141.88 by:

■ a. Revising paragraphs (a)(1)(i), (b), (c), (d) heading, (d)(1) introductory text, (e)(1) introductory text, and (e)(1)(i);

■ b. Removing and reserving paragraph (e)(1)(ii);

■ c. Revising paragraph (e)(2) introductory text;

■ d. Removing ''; or'' at the end of paragraph (e)(2)(i) and adding a period in its place; and

■ e. Removing and reserving paragraph (e)(2)(ii).

The revisions read as follows:

§ 141.88 Monitoring requirements for lead and copper in source water.

(a) * * *

(1) * * *

(i) Groundwater systems shall take a minimum of one sample at every entry point to the distribution system after any application of treatment or in the distribution system at a point which is representative of each source after treatment (hereafter called a sampling point). The system shall take one sample at the same sampling point unless conditions make another sampling point more representative of each source or treatment plant.

* * * * *

(b) *Monitoring frequency after system exceeds tap water action level.* Any system which exceeds the lead or copper action level at the tap for the first time or for the first time after an addition of a new source or installation of source water treatment required under § 141.83(b)(2) shall collect one source water sample from each entry point to the distribution system no later than six months after the end of the tap sampling period during which the lead or copper action level was exceeded. For tap sampling periods that are annual or less frequent, the end of the tap sampling period is September 30 of the calendar year in which the sampling occurs, or if the State has established an alternate monitoring period, the last day of that period. If the State determines that source water treatment is not required under § 141.83(b)(2), the state may waive source water monitoring, for any subsequent lead or copper action level exceedance at the tap, in accordance with the requirements in paragraphs (b)(1)(i) through (iii) of this section.

(1) The State may waive source water monitoring for lead or copper action level exceedance at the tap under the following conditions:

(i) The water system has already conducted source water monitoring following a previous action level exceedance;

(ii) The State has determined that source water treatment is not required; and

(iii) The system has not added any new water sources.

(2) [Reserved]

(c) *Monitoring frequency after installation of source water treatment and addition of new source.* (1) Any system which installs source water treatment pursuant to § 141.83(a)(3) shall collect one source water sample from each entry point to the distribution system during two consecutive six-month monitoring periods by the deadline specified in § 141.83(a)(4).

(2) Any system which adds a new source shall collect one source water sample from each entry point to the distribution system until the system demonstrates that finished drinking water entering the distribution system has been maintained below the maximum permissible lead and copper concentrations specified by the State in § 141.83(b)(4) or the State determines that source water treatment is not needed.

(d) *Monitoring frequency after State specifies maximum permissible source water levels.* (1) A system shall monitor at the frequency specified in paragraphs (d)(1) and (2) of this section, in cases where the State specifies maximum permissible source water levels under § 141.83(b)(4).

* * * * *

(e) * * *

(1) A water system using only groundwater may reduce the monitoring frequency for lead and copper in source water to once during each nine-year compliance cycle (as that term is defined in § 141.2) provided that the samples are collected no later than every ninth calendar year and if the system meets the following criteria:

(i) The system demonstrates that finished drinking water entering the distribution system has been maintained below the maximum permissible lead and copper concentrations specified by the State in § 141.83(b)(4) during at least three consecutive monitoring periods under paragraph (d)(1) of this section.

* * * * *

(2) A water system using surface water (or a combination of surface water and groundwater) may reduce the monitoring frequency in paragraph (d)(1) of this section to once during each nine-year compliance cycle (as that term is defined in § 141.2) provided that the samples are collected no later than every ninth calendar year and if the system meets the following criteria:

* * * * *

■ 13. Amend § 141.89 by revising paragraphs (a) introductory text, (a)(1) introductory text, and (a)(1)(iii) to read as follows:

§ 141.89 Analytical methods.

(a) Analyses for lead, copper, pH, alkalinity, orthophosphate, and silica shall be conducted in accordance with methods in § 141.23(k)(1).

(1) Analyses for alkalinity, orthophosphate, pH, and silica may be performed by any person acceptable to the State. Analyses under this section for lead and copper shall only be conducted by laboratories that have been certified by EPA or the State. To obtain certification to conduct analyses for lead and copper, laboratories must:

* * * * *

(iii) Achieve method detection limit for lead of 0.001 mg/L according to the procedures in appendix B of part 136 of this title.

* * * * *

■ 14. Amend § 141.90 by:

■ a. Revising paragraphs (a)(1) introductory text and (a)(1)(i);

■ b. Adding paragraph (a)(1)(iii);

■ c. Revising paragraphs (a)(1)(iv) through (vi);

■ d. Removing the period at the end of paragraph (a)(1)(viii) and adding ''; and'' in its place;

■ e. Adding paragraph (a)(1)(ix);

■ f. Revising paragraphs (a)(2) introductory text, (a)(2)(i), (a)(3), and (a)(4)(i);

■ g. Removing paragraph (a)(4)(iv);

■ h. Revising paragraphs (c)(1), (e), (f)(1)(i), and (f)(3);

■ i. Adding paragraphs (f)(4) through (7);

■ j. Revising paragraphs (g), (h) introductory text, (h)(1), (h)(2)(i) and (ii), and (h)(3);

■ k. Adding paragraphs (i) and (j).

The revisions and additions read as follows:

§ 141.90 Reporting requirements.

* * * * *

(a) * * *

(1) Notwithstanding the requirements of § 141.31(a), except as provided in paragraph (a)(1)(viii) of this section, a water system must report the information specified in paragraphs (a)(1)(i) through (ix) of this section, for all tap water samples specified in § 141.86 and for all water quality parameter samples specified in § 141.87 within the first 10 days following the end of each applicable tap sampling monitoring period specified in §§ 141.86 and 141.87 (*i.e.,* every six months, annually, every three years, or every nine years). For tap sampling periods with a duration less than six months, the end of the tap sampling monitoring period is the last date samples can be collected during that tap sampling period as specified in §§ 141.86 and 141.87.

(i) The results of all tap samples for lead and copper including the location of each site and the site selection criteria under § 141.86(a)(3) through (10), used as the basis for which the site was selected for the water system's sampling pool, accounting for § 141.86(a)(11);

* * * * *

(iii) Water systems with lead service lines, galvanized service lines requiring replacement, or lead status unknown service lines in the lead service line inventory conducted under § 141.84(a) must re-evaluate the tap sampling locations used in their sampling pool prior to the compliance date specified in § 141.80(a) and thereafter prior to the next round of tap sampling conducted by the system, or annually, whichever is more frequent.

(A) By the start of the first applicable tap sampling monitoring period in § 141.86(d), the water system must submit a site sample plan to the State in accordance with § 141.86, including a list of tap sample site locations identified from the inventory in § 141.84(a), and a list a tap sampling WQP sites selected under 141.87(a)(1). The site sample plan must be updated and submitted to the State prior to any changes to sample site locations. The State may require modifications to the site sample plan as necessary.

(B) For lead service line systems with insufficient lead service line sites to meet the minimum number required in § 141.86, documentation in support of the conclusion that there are an insufficient number of lead service line sites meeting the criteria under § 141.86(a)(3) or (4) for community water systems or § 141.86(a)(8) for non-transient, non-community water systems, as applicable;

(iv) The 90th percentile lead and copper concentrations measured from among all lead and copper tap water samples collected during each tap sampling period (calculated in accordance with § 141.80(c)(4)), unless the State calculates the water system's 90th percentile lead and copper levels under paragraph (h) of this section;

(v) With the exception of initial tap sampling conducted pursuant to § 141.86(d)(1)(i), the water system must identify any site which was not sampled during previous tap sampling periods, and include an explanation of why sampling sites have changed;

(vi) The results of all water quality parameter tap samples that are required to be collected under § 141.87(b) through (g);

* * * * *

(ix) By the start of the first applicable tap sampling period in § 141.86(d), the water system must submit to the State, a copy of the tap sampling protocol that is provided to individuals who are sampling. The State shall verify that wide-mouth collection bottles are used and recommendations for pre-stagnation flushing and aerator cleaning or removal prior to sample collection are not included pursuant to § 141.86(b). The tap sampling protocol shall contain instructions for correctly collecting a first draw sample for sites without lead service lines and a first draw and a fifth liter sample for sites with lead service lines, where applicable. If the water system seeks to modify its tap sampling protocol specified in this paragraph (a)(1)(ix), it must submit the updated version of the protocol to the State for review and approval no later than 60 days prior to use.

(2) For a non-transient non-community water system, or a

community water system meeting the criteria of § 141.86(b)(5), that does not have enough taps that can provide first draw or fifth liter samples, the water system must either:

(i) Provide written documentation to the State identifying standing times and locations for enough non-first-draw and fifth liter samples to make up its sampling pool under § 141.86(b)(5) by the start of the first applicable monitoring period under § 141.86(d) unless the State has waived prior State approval of non-first-draw and fifth liter sample sites selected by the water system pursuant to § 141.86(b)(5); or

* * * * *

(3) At a time specified by the State, or if no specific time is designated by the State, as early as possible but no later than six months prior to the addition of a new source or any long-term change in water treatment, a water system must submit written documentation to the State describing the addition. The State must review and approve the addition of a new source or long-term treatment change before it is implemented by the water system. The State may require the system to take actions before or after the addition of a new source or long-term treatment change to ensure the system will operate and maintain optimal corrosion control treatment such as additional water quality parameter monitoring, additional lead or copper tap sampling, and re-evaluation of corrosion control treatment. Examples of long-term treatment changes include but are not limited to, the addition of a new treatment process or modification of an existing treatment process. Examples of modifications include switching secondary disinfectants, switching coagulants (*e.g.,* alum to ferric chloride), and switching corrosion inhibitor products (*e.g.,* orthophosphate to blended phosphate). Long-term changes can also include dose changes to existing chemicals if the water system is planning long-term changes to its finished water pH or residual inhibitor concentration. Long-term treatment changes would not include chemical dose fluctuations associated with daily raw water quality changes where a new source has not been added.

(4) * * *

(i) By the start of the first applicable tap sampling monitoring period in § 141.86(d), any small water system applying for a monitoring waiver shall provide the documentation required to demonstrate that it meets the waiver criteria of § 141.86(g)(1) and (2).

* * * * *

(c) * * *

(1) For water systems demonstrating that they have already optimized corrosion control, information required in § 141.81(b)(1) through (3).

* * * * *

(e) *Lead service line inventory and replacement reporting requirements.* Water systems must report the following information to the State to demonstrate compliance with the requirements of §§ 141.84 and 141.85:

(1) No later than January 16, 2024, the water system must submit to the State an inventory of service lines as required in § 141.84(a).

(2) No later than January 16, 2024, any water system that has inventoried a lead service line, galvanized requiring replacement, or lead status unknown service line in its distribution system must submit to the State, as specified in Section § 141.84(b), a lead service line replacement plan.

(3) The water system must provide the State with updated versions of its inventory as required in § 141.84(a) in accordance with its tap sampling monitoring period schedule as required in § 141.86(d), but no more frequently than annually. The updated inventory must be submitted within 30 days of the end of each tap sampling monitoring period.

(i) When the water system has demonstrated that it has no lead, galvanized requiring replacement, or lead status unknown service lines in its inventory, it is no longer required to submit inventory updates to the State, except as required in paragraph (e)(3)(ii) of this section.

(ii) In the case that a water system meeting the requirements of paragraph (e)(3)(i) of this section, subsequently discovers any service lines requiring replacement in its distribution system, it must notify the State within 30 days of identifying the service line(s) and prepare an updated inventory in accordance with § 141.84(a) on a schedule established by the State.

(4) Within 30 days of the end of each tap sampling monitoring period, the water system must certify that it conducted replacement of any encountered lead goosenecks, pigtails, and connectors in accordance with § 141.84(c).

(5) Within 30 days of the end of each tap sampling monitoring period, the water system must certify to the State that any partial and full lead service line replacements were conducted in accordance with § 141.84(d) and (e), respectively.

(6) If the water system fails to meet the 45-day deadline to complete a customer-initiated lead service line replacement pursuant to § 141.84(d)(4), it must notify the State within 30 days of the replacement deadline to request an extension of the deadline up to 180 days of the customer-initiated lead service line replacement.

(i) The water system must certify annually that it has completed all customer-initiated lead service line replacements in accordance with § 141.84(d)(4).

(ii) [Reserved]

(7) No later than 30 days after the end of the water system's annual lead service line replacement requirements under § 141.84(f) and (g), the water system must submit the following information to the State, and continue to submit it each year it conducts lead service line replacement under § 141.84(f) and (g):

(i) The number of lead service lines in the initial inventory;

(ii) The number of galvanized requiring replacement service lines in the initial inventory;

(iii) The number of lead status unknown service lines in the inventory at the onset of the water system's annual lead service line replacement program;

(iv) The number of full lead service lines that have been replaced and the address associated with each replaced service line;

(v) The number of galvanized requiring replacement service lines that have been replaced and the address associated with each replaced service line;

(vi) The number of lead status unknown service lines remaining in the inventory;

(vii) The total number of lead status unknown service lines determined to be non-lead; and

(viii) The total number of service lines initially inventoried as ''non-lead'' later discovered to be a lead service line or a galvanized requiring replacement service line.

(8) No later than 30 days after the end of each tap sampling period, any water system that has received customer refusals about lead service line replacements or customer non-responses after a minimum of two good faith efforts by the water system to contact customers regarding full lead service line replacements in accordance with § 141.84(g)(7), must certify to the State the number of customer refusals or non-responses it received from customers served by a lead service line or galvanized requiring replacement service line, and maintain such documentation.

(9) No later than 12 months after the end of a tap sampling period in which a water system exceeds the lead action level in sampling conducted pursuant to § 141.86, the system must provide to the State its schedule for annually replacing an average annual rate, calculated on a two year rolling basis, of at least three percent, or otherwise specified in § 141.84(g)(9), of the number of known lead service lines and galvanized lines requiring replacement when the lead trigger or action level was first exceeded and lead status unknown service lines at the beginning of each year that required replacement occurs in its distribution system.

(10) No later than 12 months after the end of a sampling period in which a system exceeds the lead trigger level in sampling conducted pursuant to § 141.86, and every 12 months thereafter, the system shall certify to the State in writing that the system has:

(i) Conducted consumer notification as specified in §§ 141.84(f)(4) and 141.85(g) and

(ii) Delivered public education materials to the affected consumers as specified in § 141.85(a).

(iii) A water system that does not meet its annual service line replacement goal as required under § 141.84(f) must certify to the State in writing that the water system has conducted public outreach as specified in § 141.85(h). The water system must also submit the outreach materials used to the State.

(11) The annual submission to the State under paragraph (e)(10) of this section must contain the following information:

(i) The certification that results of samples collected between three months and six months after the date of a full or partial lead service line replacement were provided to the resident in accordance with the timeframes in § 141.85(d)(2). Mailed notices post-marked within three business days of receiving the results shall be considered ''on time.''

(ii) [Reserved]

(12) Any system which collects samples following a partial lead service line replacement required by § 141.84 must report the results to the State within the first ten days of the month following the month in which the system receives the laboratory results, or as specified by the State. States, at their discretion may eliminate this requirement to report these monitoring results, but water systems shall still retain such records. Systems must also report any additional information as specified by the State, and in a time and manner prescribed by the State, to verify that all partial lead service line replacement activities have taken place.

(13) Any system with lead service lines in its inventory must certify on an annual basis that the system has complied with the consumer notification of lead service line materials as specified in § 141.85(e).

(f) * * *

(1) * * *

(i) The public education materials that were delivered, and a demonstration that the water system has delivered the public education materials that meet the content requirements in § 141.85(a) and the delivery requirements in § 141.85(b); and

* * * * *

(3) No later than three months following the end of the tap sampling period, each water system must mail a sample copy of the consumer notification of tap results to the State along with a certification that the notification has been distributed in a manner consistent with the requirements of § 141.85(d).

(4) Annually by July 1, the water system must demonstrate to the State that it delivered annual consumer notification and delivered lead service line information materials to affected consumers with a lead, galvanized requiring replacement, or lead status unknown service line in accordance with § 141.85(e) for the previous calendar year. The water system shall also provide a copy of the notification and information materials to the State.

(5) Annually by July 1, the water system must demonstrate to the State that it conducted an outreach activity in accordance with § 141.85(h) when failing to meet the lead service line replacement goal as specified in § 141.84(f) for the previous calendar year. The water system shall also submit a copy to the State of the outreach provided.

(6) Annually, by July 1, the water system must certify to the State that it delivered notification to affected customers after any lead service line disturbance in accordance with § 141.85(f) for the previous calendar year. The water system shall also submit a copy of the notification to the State.

(7) Annually, by July 1, the water system must certify to the State that it delivered the required find-and-fix information to the State and local health departments for the previous calendar year.

(g) *Reporting of additional monitoring data.* Any water system which collects more samples than the minimum required, shall report the results to the State within the first 10 days following the end of the applicable monitoring period under §§ 141.86, 141.87, and 141.88 during which the samples are collected. This includes the monitoring data pertaining to ''find-and-fix'' pursuant to §§ 141.86(h) and 141.87(g). The system must certify to the State the number of customer refusals or non-responses for follow-up sampling under § 141.82(j) it received and information pertaining to the accuracy of the refusals or non-responses, within the first 10 days following the end of the applicable tap sampling period in which an individual sample exceeded the action level.

(h) *Reporting of 90th percentile lead and copper concentrations where the State calculates a water system's 90th percentile concentrations.* A water system is not required to report the 90th percentile lead and copper concentrations measured from among all lead and copper tap water samples collected during each tap sampling monitoring period, as required by paragraph (a)(1)(iv) of this section if:

(1) The State has previously notified the water system that it will calculate the water system's 90th percentile lead and copper concentrations, based on the lead and copper tap results submitted pursuant to paragraph (h)(2)(i) of this section, and the water system provides the results of lead and copper tap water samples no later than 10 days after the end of the applicable tap sampling monitoring period;

(2) * * *

(i) The results of all tap samples for lead and copper including the location of each site and the criteria under § 141.86(a)(3) through (10) under which the site was selected for the water system's sampling pool; and

(ii) An identification of sampling sites utilized during the current tap sampling monitoring period that were not sampled during previous monitoring periods, and an explanation of why sampling sites have changed; and

(3) The State has provided the results of the 90th percentile lead and copper calculations, in writing, to the water system within 15 days of the end of the tap sampling period.

(i) *Reporting requirements for a community water system's public education and sampling in schools and child care facilities.* (1) A community water system shall send a report to the State by July 1 of each year for the previous calendar year's activity. The report must include the following:

(i) Certification that the water system made a good faith effort to identify schools and child care facilities in accordance with § 141.92(e). The good faith effort may include reviewing

customer records and requesting lists of schools and child care facilities from the primacy agency or other licensing agency. A water system that certifies that no schools or child care facilities are served by the water system is not required to include information in paragraphs (i)(1)(ii) through (iv) of this section in the report. If there are changes to schools and child care facilities that a water system serves, an updated list must be submitted at least once every five years in accordance with § 141.92(e).

(ii) Certification that the water system has delivered information about health risks from lead in drinking water to the school and child care facilities that they serve in accordance with § 141.92(a)(2) and (g)(1).

(iii) Certification that the water system has completed the notification and sampling requirements of § 141.92 and paragraphs (i)(1)(iii)(A) through (E) of this section at a minimum of 20 percent of elementary schools and 20 percent of child care facilities. Certification that the water system has completed the notification and sampling requirements of § 141.92(g) and paragraphs (i)(1)(iii)(A), (B), and (E) of this section for any secondary school(s) sampled. After a water system has successfully completed one cycle of required sampling in all elementary schools and child care facilities identified in § 141.92(a)(1), it shall certify completion of the notification and sampling requirements of § 141.92(g) and paragraphs (i)(1)(iii)(A), (B), and (E) of this section for all sampling completed in any school or child care facility, thereafter.

(A) The number of schools and child care facilities served by the water system;

(B) The number of schools and child care facilities sampled in the calendar year;

(C) The number of schools and child care facilities that have refused sampling;

(D) Information pertaining to outreach attempts for sampling that were declined by the school or child care facility; and

(E) The analytical results for all schools and child care facilities sampled by the water system in the calendar year.

(iv) Certification that sampling results were provided to schools, child care facilities, and local and State health departments.

(2) [Reserved]

(j) *Reporting requirements for small system compliance flexibility options.* By the applicable dates provided in paragraphs (j)(1) and (2), water systems implementing requirements pursuant to § 141.93, shall provide the following information to the State:

(1) Small water systems and non-transient, non-community water systems implementing the point-of-use device option under § 141.93(a)(3), shall report the results from the tap sampling required under § 141.93 no later than 10 days after the end of the tap sampling monitoring period. If the trigger level is exceeded, the water system must reach out to the homeowner and/or building management within 24 hours of receiving the tap sample results. The corrective action must be completed within 30 days. If the corrective action is not completed within 30 days, the system must provide documentation to the State within 30 days explaining why it was unable to correct the issue. Water systems selecting the point-of-use device option under § 141.93(a)(3) shall provide documentation to certify maintenance of the point-of-use devices unless the State waives the requirement of this paragraph (j)(1).

(2) Small community water systems and non-transient, non-community water systems implementing the small system compliance flexibility option to replace all lead-bearing plumbing under § 141.93(a)(4) must provide certification to the State that all lead-bearing material has been replaced on the schedule established by the State, within one year of designation of the option under § 141.93(a)(4).

■ 15. Revise § 141.91 to read as follows:

§ 141.91 Recordkeeping requirements.

Any system subject to the requirements of this subpart shall retain on its premises original records of all sampling data and analyses, reports, surveys, letters, evaluations, schedules, State determinations, and any other information required by §§ 141.81 through 141.88, 141.90, 141.92, and 141.93. Each water system shall retain the records required by this section for no fewer than 12 years.

■ 16. Add § 141.92 to read as follows:

§ 141.92 Monitoring for lead in schools and child care facilities.

All community water systems must conduct directed public education and lead monitoring at the schools and child care facilities they serve if those schools or child care facilities were constructed prior to January 1, 2014 or the date the State adopted standards that meet the definition of lead free in accordance with Section 1417 of the Safe Drinking Water Act, as amended by the Reduction of Lead in Drinking Water Act, whichever is earlier. Water systems must conduct lead sampling at elementary schools and child care facilities they serve once and on request of the facility thereafter. Water systems shall also conduct lead sampling at secondary schools they serve on request. The provisions of this section do not apply to a school or child care facility that is regulated as a public water system. The provisions in paragraph (a) of this section apply until a water system samples all the elementary schools and child care facilities they serve once as specified in paragraph (c) of this section. Thereafter, water systems shall follow the provisions as specified in paragraph (g) of this section.

(a) *Public education to schools and child care facilities.* (1) By the compliance date specified in § 141.80(a)(3), each water system must compile a list of schools and child care facilities served by the system.

(2) Each water system must contact elementary schools and child care facilities identified by the system in paragraph (a)(1) of this section to provide:

(i) Information about health risks from lead in drinking water on at least an annual basis consistent with the requirements of § 141.85(a);

(ii) Notification that the water system is required to sample for lead at elementary schools and child care facilities, including:

(A) A proposed schedule for sampling at the facility;

(B) Information about sampling for lead in schools and child care facilities (EPA's 3Ts for Reducing Lead in Drinking Water Toolkit, EPA–815–B–18–007 or subsequent EPA guidance); and

(C) Instructions for identifying outlets for sampling and preparing for a sampling event 30 days prior to the event.

(3) The water system must include documentation in accordance with § 141.90(i) if an elementary school or child care facility is non-responsive or otherwise declines to participate in the monitoring or education requirements of this section. For the purposes of this section, a school or child care facility is non-responsive after the water system makes at least two separate good faith attempts to contact the facility to schedule sampling with no response.

(4) The water system must contact all secondary schools in paragraph (a)(1) of this section on at least an annual basis to provide information on health risks from lead in drinking water and how to request lead sampling as specified in paragraph (g)(1) of this section.

(b) *Lead sampling in schools and child care facilities.* (1) Five samples per

school and two samples per child care facility at outlets typically used for consumption shall be collected. Except as provided in paragraphs (b)(1)(i) through (vi) of this section, the outlets shall not have point-of-use (POU) devices. The water system shall sample at the following locations:

(i) For schools: two drinking water fountains, one kitchen faucet used for food or drink preparation, one classroom faucet or other outlet used for drinking, and one nurse's office faucet, as available.

(ii) For child care facilities: one drinking water fountain and one of either a kitchen faucet used for preparation of food or drink or one classroom faucet or other outlet used for drinking.

(iii) If any facility has fewer than the required number of outlets, the water system must sample all outlets used for consumption.

(iv) The water system may sample at outlets with POU devices if the facility has POU devices installed on all outlets typically used for consumption.

(v) If any facility does not contain the type of faucet listed above, the water system shall collect a sample from another outlet typically used for consumption as identified by the facility.

(vi) Water systems must collect the samples from the cold water tap subject to the following additional requirements:

(A) Each sample for lead shall be a first draw sample;

(B) The sample must be 250 ml in volume;

(C) The water must have remained stationary in the plumbing system of the sampling site (building) for at least 8 but no more than 18 hours; and

(D) Samples must be analyzed using acidification and the corresponding analytical methods in § 141.89.

(2) The water system, school or child care facility, or other appropriately trained individual may collect samples in accordance with paragraph (b)(1) of this section.

(c) *Frequency of sampling at elementary schools and child care facilities.* (1) Water systems shall collect samples from at least 20 percent of elementary schools served by the system and 20 percent of child care facilities served by the system per year, or according to a schedule approved by the State, until all schools and child care facilities identified under paragraph (a)(1) of this section have been sampled or have declined to participate. For the purposes of this section, a water system may count a refusal or non-response from an elementary school or child care facility as part of the minimum 20 percent per year.

(2) All elementary schools and child care facilities must be sampled at least once in the five years following the compliance date in § 141.80(a)(3).

(3) After a water system has completed one required cycle of sampling in all elementary schools and child care facilities, a water system must sample at the request of an elementary school or child care facility in accordance with paragraph (g) of this section.

(4) A water system must sample at the request of a secondary school as specified in paragraph (g) of this section. If a water system receives requests from more than 20 percent of secondary schools identified in paragraph (a)(1) of this section in any of the five years following the compliance date in § 141.80(a)(3), the water system may schedule the requests that exceed 20 percent for the following year and is not required to sample an individual secondary school more than once in the five year period.

(d) *Alternative school and child care lead sampling programs.* (1) If mandatory sampling for lead in drinking water is conducted for schools and child care facilities served by a community water system due to State or local law or program, the State may exempt the water system from the requirements of this section by issuing a written waiver:

(i) If the sampling is consistent with the requirements in paragraphs (b) and (c) of this section; or

(ii) If the sampling is consistent with the requirements in paragraphs (b)(1)(i) through (vi) and (c) of this section and it is coupled with any of the following remediation actions:

(A) Disconnection of affected fixtures;

(B) Replacement of affected fixtures with fixtures certified as lead free; and

(C) Installation of POU devices; or

(iii) If the sampling is conducted in schools and child care facilities served by the system less frequently than once every five years and it is coupled with any of the remediation actions specified in paragraph (d)(1)(ii) of this section; or

(iv) If the sampling is conducted under a grant awarded under Section 1464(d) of the SDWA, consistent with the requirements of the grant.

(2) The duration of the waiver may not exceed the time period covered by the mandatory or voluntary sampling and will automatically expire at the end of any 12-month period during which sampling is not conducted at the required number of schools or child care facilities.

(3) The State may issue a partial waiver to the water system if the sampling covers only a subset of the schools or child care facilities served by the system as designated under paragraph (a)(1) of this section.

(4) The State may issue a written waiver applicable to more than one system (*e.g.,* one waiver for all systems subject to a statewide sampling program that meets the requirements of paragraph (d) of this section).

(e) *Confirmation or revision of schools and child care facilities in inventory.* A water system shall either confirm that there have been no changes to its list of schools and child care facilities served by the system developed pursuant to paragraph (a)(1) of this section, or submit a revised list at least once every five years.

(f) *Notification of results.* (1) A water system must provide analytical results as soon as practicable but no later than 30 days after receipt of the results to the school or child care facility, along with information about remediation options.

(2) A water system must provide analytical results annually to:

(i) The local and State health department; and

(ii) The State in accordance with § 141.90(i).

(g) *Lead sampling in schools and child care facilities on request.* (1) A water system must contact schools and child care facilities identified in paragraph (a)(1) of this section on at least an annual basis to provide:

(i) Information about health risks from lead in drinking water;

(ii) Information about how to request sampling for lead at the facility; and

(iii) Information about sampling for lead in schools and child care facilities (EPA's 3Ts for Reducing Lead in Drinking Water Toolkit, EPA–815–B–18–007, or subsequent EPA guidance).

(2) A water system must conduct sampling as specified in paragraph (b) of this section when requested by the facility and provide:

(i) Instructions for identifying outlets for sampling and preparing for a sampling event at least 30 days prior to the event; and

(ii) Results as specified in paragraph (f) of this section.

(3) If a water system receives requests from more than 20 percent of the schools and child care facilities identified in paragraph (a)(1) of this section in a given year, the water system may schedule sampling for those that exceed 20 percent for the following year. A water system is not required to sample an individual school or child care facility more than once every five years.

(4) If voluntary sampling for lead in drinking water is conducted for schools

and child care facilities served by a community water system that meets the requirements of this section, the State may exempt the water system from the requirements of this section by issuing a written waiver in accordance with paragraph (d) of this section.

■ 17. Add § 141.93 to read as follows:

§ 141.93 Small water system compliance flexibility.

The compliance alternatives described in this section apply to small community water systems serving 10,000 or fewer persons and all non-transient, non-community water systems. Small community water systems and non-transient, non-community water systems with corrosion control treatment in place must continue to operate and maintain optimal corrosion control treatment until the State determines, in writing, that it is no longer necessary, and meet any requirements that the State determines to be appropriate before implementing a State approved compliance option described in this section.

(a) A small community water system and non-transient, non-community water systems that exceeds the lead trigger level but does not exceed the lead and copper action levels must collect water quality parameters in accordance with § 141.87(b) and evaluate compliance options in paragraphs (a)(1) through (4) of this section and make a compliance option recommendation to the State within six months of the end of the tap sampling period in which the exceedance occurred. The State must approve the recommendation or designate an alternative from compliance options in paragraphs (a)(1) through (4) of this section within six months of the recommendation by the water system. If the water system subsequently exceeds the lead action level it must implement the approved compliance option as specified in paragraph (b) of this section. Water systems must select from the following compliance options:

(1) *Lead service line replacement.* A water system must implement a full lead service line replacement program on a schedule approved by the State but not to exceed 15 years. A water system must begin lead service line replacement within one year after the State's approval or designation of the compliance option.

(i) Lead service line replacement must be conducted in accordance with the requirements of § 141.84(e) and (g)(4), (8), and (9).

(ii) A water system must continue lead service line replacement even if the system's 90th percentile lead level is at or below the action level in future tap sampling monitoring periods.

(iii) A water system must have no lead service lines, galvanized service lines requiring replacement, or ''Lead status unknown'' service lines in its inventory by the end of its lead service line replacement program.

(2) *Corrosion control treatment.* A water system must install and maintain optimal corrosion control treatment in accordance with §§ 141.81 and 141.82, even if its 90th percentile is at or below the action level in future tap sampling monitoring periods. Any water system that has corrosion control treatment installed must re-optimize its corrosion control treatment in accordance with § 141.81(d). Water systems required by the State to optimize or re-optimize corrosion control treatment must follow the schedules in § 141.81(d) or (e), beginning with Step 3 in paragraph (d)(3) or (e)(3) of § 141.81 unless the State specifies optimal corrosion control treatment pursuant to either § 141.81(d)(2)(ii) or (e)(2)(i) or (ii), as applicable.

(3) *Point-of-use devices.* A water system must install, maintain, and monitor POU devices in each household or building even if its 90th percentile is at or below the action level in future tap sampling monitoring periods.

(i)(A) A community water system must install a minimum of one POU device (at one tap) in every household and at every tap that is used for cooking and/or drinking in every non-residential building in its distribution system on a schedule specified by the State, but not to exceed one year.

(B) A non-transient, non-community water system must provide a POU device to every tap that is used for cooking and/or drinking on a schedule specified by the State, but not to exceed three months.

(ii) The POU device must be independently certified by a third party to meet the American National Standards Institute standard applicable to the specific type of POU unit to reduce lead in drinking water.

(iii) The POU device must be maintained by the water system according to manufacturer's recommendations to ensure continued effective filtration, including but not limited to changing filter cartridges and resolving any operational issues. POU device must be equipped with mechanical warnings to ensure that customers are automatically notified of operational problems. The water system shall provide documentation to the state to certify maintenance of the point-of-use devices, unless the state waives this requirement, in accordance with § 141.90(j)(1).

(iv) The water system must monitor one-third of the POU devices each year and all POU devices must be monitored within a three-year cycle. First draw tap samples collected under this section must be taken after water passes through the POU device to assess its performance. Samples must be one-liter in volume and have had a minimum 6-hour stagnation time. All samples must be at or below the lead trigger level. The water systems must report the results from the tap sampling no later than 10 days after the end of the tap sampling monitoring period in accordance with § 141.90(j)(1). The system must document the problem and take corrective action at any site where the sample result exceeds the lead trigger level. If the trigger level is exceeded, the water system must reach out to the homeowner and/or building management no later than 24 hours of receiving the tap sample results. The corrective action must be completed within 30 days. If the corrective action is not completed within 30 days, the system must provide documentation to the State within 30 days explaining why it was unable to correct the issue.

(v) The water system must provide public education to consumers in accordance with § 141.85(j) to inform them on proper use of POU devices to maximize the units' lead level reduction effectiveness.

(vi) The water system must operate and maintain the POU devices until the system receives State approval to select one of the other compliance flexibility options and implements it.

(4) *Replacement of lead-bearing plumbing.* A water system that has control over all plumbing in its buildings, and no unknown, galvanized, or lead service lines, must replace all plumbing that is not lead free in accordance with Section 1417 of the Safe Drinking Water Act, as amended by the Reduction of Lead in Drinking Water Act and any future amendments applicable at the time of replacement. The replacement of all lead-bearing plumbing must occur on a schedule established by the State but not to exceed one year. Water systems must provide certification to the State that all lead-bearing material has been replaced in accordance with § 141.90(j)(2).

(b)(1) A water system that exceeds the lead action level after exceeding the lead trigger level but does not exceed the copper action level must implement the compliance option approved by the State under paragraph (a) of this section.

(2) A water system that exceeds the lead action level, but has not previously

exceeded the lead trigger level, and does not exceed the copper action level must complete the provisions in paragraph (a) of this section and must implement the compliance option approved by the State under paragraph (a) of this section.

(3) A water system that exceeds the trigger level after it has implemented a compliance option approved by the State under paragraph (a) of this section, must complete the steps in paragraph (a) and if it thereafter exceeds the action level, it must implement the compliance option approved by the State under paragraph (a) of this section.

■ 18. Amend § 141.153 by:

■ a. Revising paragraph (d)(4)(vi);

■ b. Removing the periods at the ends of paragraphs (d)(4)(ix) and (x) and adding semicolons in their places; and

■ c. Adding paragraphs (d)(4)(xi) and (xii).

The revision and additions read as follows:

§ 141.153 Content of the reports

* * * * *

(d) * * *

(4) * * *

(vi) For lead and copper: the 90th percentile concentration of the most recent round(s) of sampling, the number of sampling sites exceeding the action level, and the range of tap sampling results;

* * * * *

(xi) The report shall include a statement that a service line inventory (including inventories consisting only of a statement that there are no lead service lines) has been prepared and include instructions to access the service line inventory; and

(xii) The report shall notify consumers that complete lead tap sampling data are available for review and shall include information on how to access the data.

* * * * *

■ 19. Amend § 141.154 by revising paragraph (d)(1) to read as follows:

§ 141.154 Required additional health information.

* * * * *

(d) * * *

(1) A short informational statement about lead in drinking water and its effects on children. The statement must include the following information:

Lead can cause serious health problems, especially for pregnant women and young children. Lead in drinking water is primarily from materials and components associated with service lines and home plumbing. [NAME OF UTILITY] is responsible for providing high quality drinking water and removing lead pipes, but cannot control the variety of materials used in plumbing components in your home. You share the responsibility for protecting yourself and your family from the lead in your home plumbing. You can take responsibility by identifying and removing lead materials within your home plumbing and taking steps to reduce your family's risk. Before drinking tap water, flush your pipes for several minutes by running your tap, taking a shower, doing laundry or a load of dishes. You can also use a filter certified by an American National Standards Institute accredited certifier to reduce lead in drinking water. If you are concerned about lead in your water and wish to have your water tested, contact [NAME OF UTILITY and CONTACT INFORMATION]. Information on lead in drinking water, testing methods, and steps you can take to minimize exposure is available at *http://www.epa.gov/safewater/lead.*

* * * * *

■ 20. Amend appendix A to subpart O by removing the entry ''Lead (ppb)'' and adding the entry ''Lead'' in its place to read as follows:

APPENDIX A TO SUBPART O OF PART 141—REGULATED CONTAMINANTS

Contaminant	Traditional MCL in mg/L	To convert for CCR, multiply by	MCL in CCR units	MCLG	Major sources in drinking water	Health effects language
*	*		*	*	*	*
Lead	AL = .015	1000	AL = 15	0	Corrosion of household plumbing systems, Erosion of natural deposits..	Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to new learning and behavior problems or exacerbate existing learning and behavior problems. The children of women who are exposed to lead before or during pregnancy can have increased risk of these adverse health effects. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.
*	*		*	*	*	*

* * * * *

■ 21. Amend § 141.201 by adding paragraph (a)(3)(vi) and revising paragraph (c)(3) to read as follows:

§ 141.201 General public notification requirements.

* * * * *

(a) * * *

TABLE 1 TO § 141.201—VIOLATION CATEGORIES AND OTHER SITUATIONS REQUIRING A PUBLIC NOTICE

* * * * *
(3) * * *
(vi) Exceedance of the lead action level.
* * * * *

(c) * * *

(3) A copy of the notice must also be sent to the primacy agency and the Administrator (as applicable) in accordance with the requirements of § 141.31(d).

■ 22. Amend § 141.202 by adding paragraph (a)(10) to read as follows:

§ 141.202 Tier 1 Public Notice—Form, manner and frequency of notice.

(a) * * *

TABLE 1 TO § 141.202—VIOLATION CATEGORIES AND OTHER SITUATIONS REQUIRING A TIER 1 PUBLIC NOTICE

TABLE 1 TO § 141.202—VIOLATION CATEGORIES AND OTHER SITUATIONS REQUIRING A TIER 1 PUBLIC NOTICE—Continued

* * * * *
(10) Exceedance of the Action Level for lead as specified in § 141.80(c).
* * * * *

■ 23. Amend appendix A to subpart Q by revising the entry for ''C. Lead and Copper Rule (Action Level for lead is 0.015 mg/L, for copper is 1.3 mg/L)'' to read as follows:

Appendix A To Subpart Q of Part 141—NPDWR Violations and Other Situations Requiring Public Notice [1]

* * * * *

Contaminant	MCL/MRDL/TT violations [2]		Monitoring & testing procedure violations	
	Tier of public notice required	Citation	Tier of public notice required	Citation
* * *	*	*	*	*
C. Lead and Copper Rule (Action Level for lead is 0.015 mg/L, for copper is 1.3 mg/L).				
1. Lead and Copper Rule (TT)	2	141.80 (except 141.80(c))–141.84, 141.85(a)–(c) and (h), and 141.93.	3	141.86–141.90
2. Exceedance of the Action Level for lead	1	141.80(c).		
* * *	*	*	*	*

* * * * *

■ 24. Amend appendix B to subpart Q by revising the entry for ''23. Lead'' to read as follows:

Appendix B to Subpart Q of Part 141—Standard Health Effects Language for Public Notification

Contaminant	MCLG [1] mg/L	MCL [2] mg/L	Standard health effects language for public notification
* * *	*	*	*
D. Lead and Copper Rule			
23. Lead	zero	TT [13]	Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to new learning and behavior problems or exacerbate existing learning and behavior problems. The children of women who are exposed to lead before or during pregnancy can have increased risk of these adverse health effects. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.
* * *	*	*	*

* * * * *

[1] MCLG—Maximum contaminant level goal.

* * * * *

[2] MCL—Maximum contaminant level.

* * * * *

[13] Action Level = 0.015 mg/L.

* * * * *

■ 25. Amend § 141.401 by revising paragraph (c)(2) to read as follows:

§ 141.401 Sanitary surveys for ground water systems.

* * * * *

(c) * * *

(2) Treatment including corrosion control treatment and water quality parameters as applicable;

* * * * *

PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS IMPLEMENTATION

■ 26. The authority citation for part 142 continues to read as follows:

Authority: 42 U.S.C. 300f, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4, 300j–9, and 300j–11.

■ 27. Amend § 142.14 by:

■ a. Revising paragraphs (d)(8)(iii) through (v) and (viii);

■ b. Removing the word ''and'' at the end of paragraph (d)(8)(xvi);

■ c. Removing the period at the end of paragraph (d)(8)(xvii) and adding ''; and'' in its place;

[1] Violations and other situations not listed in this table (*e.g.,* failure to prepare Consumer Confidence Reports), do not require notice, unless otherwise determined by the primacy agency. Primacy agencies may, at their option, also require a more stringent public notice tier (*e.g.,* Tier 1 instead of Tier 2 or Tier 2 instead of Tier 3) for specific violations and situations listed in this Appendix, as authorized under § 141.202(a) and § 141.203(a).

[2] MCL—Maximum contaminant level, MRDL—Maximum residual disinfectant level, TT—Treatment technique.

■ d. Adding paragraphs (d)(8)(xviii) through (xx); and
■ e. Revising paragraph (d)(11).

The revisions and additions read as follows:

§ 142.14 Records kept by States.

* * * * *

(d) * * *

(8) * * *

(iii) Section 141.82(d)—designations of optimal corrosion control treatment and any simultaneous compliance considerations that factored into the designation;

(iv) Section 141.84(b)—lead service line replacement plans;

(v) Section 141.86(a)—compliance sampling pools and any changes to sampling pools;

* * * * *

(viii) Section 141.84(f) and (g)—determinations of lead service line replacement goal rate and determinations as to whether a shorter replacement schedule is feasible for mandatory full lead service line service line replacement;

* * * * *

(xviii) Section 141.88—evaluation and approval of water system source water or treatment changes;

(xix) Section 141.93—identification of small water systems and non-transient non-community water systems utilizing the compliance alternatives, and the compliance alternative selected by the water system and the compliance option approved by the State; and

(xx) Section 141.84(a)—completed lead service line inventories and required updates to inventories.

* * * * *

(11) Records of each system's currently applicable or most recently designated monitoring requirements. If, for the records identified in paragraphs (d)(8)(i) through (xx) of this section, no change is made to State determinations during a 12-year retention period, the State shall retain the record until a new decision, determination, or designation has been issued.

* * * * *

■ 28. Amend § 142.15 by:
■ a. Revising paragraphs (c)(4) introductory text, (c)(4)(i) introductory text, and (c)(4)(i)(A);
■ b. Removing and reserving paragraph (c)(4)(ii); and
■ c. Revising paragraphs (c)(4)(iii) introductory text and (c)(4)(iii)(A) through (E).

The revisions read as follows:

§ 142.15 Reports by States.

* * * * *

(c) * * *

(4) *Timing.* States shall report quarterly, in a format and on a schedule prescribed by the Administrator, the following information related to each system's compliance with the treatment techniques for lead and copper under 40 CFR part 141, subpart I, during the preceding calendar quarter. Specifically, States shall report as follows:

(i) States shall report the name and PWS identification number:

(A) Each public water system which exceeded the lead and copper action levels and the date upon which the exceedance occurred;

* * * * *

(iii) States shall report the PWS identification number of each public water system identified in paragraphs (c)(4)(iii)(A) through (F) of this section.

(A) For each public water system, regardless of size, all 90th percentile lead levels calculated during each tap sampling period specified in § 141.86 of this chapter, and the first and last days of the tap sampling period for which the 90th percentile lead level was calculated;

(B) For each public water system (regardless of size), the 90th percentile copper level calculated during each monitoring period in which the system exceeds the copper action level, and the first and last days of each monitoring period in which an exceedance occurred;

(C) For each public water system for which the State has designated optimal water quality parameters under § 141.82(f) of this chapter, or which the State has deemed to have optimized corrosion control under § 141.81(b)(1) or (3) of this chapter, the date of the determination and the paragraph(s) under which the State made its determination, the corrosion control treatment status of the water system, and the water system's optimal water quality parameters;

(D) For each public water system, the number of lead, galvanized requiring replacement, and lead status unknown service lines in its distribution system, reported separately;

(E) For each public water system required to begin replacing lead service lines after a lead trigger level or action level exceedance, as specified in § 141.84 of this chapter, the goal or mandatory replacement rate, and the date each system must begin replacement; and

* * * * *

■ 29. Amend § 142.16 by:
■ a. Revising paragraph (b)(3)(i)(B);
■ b. Adding paragraphs (d)(5) through (10); and
■ c. Revising paragraph (o)(2)(i)(B).

The revisions and additions read as follows:

§ 142.16 Special primacy requirements.

* * * * *

(b) * * *

(3) * * *

(i) * * *

(B) Treatment, including corrosion control treatment and water quality parameters as applicable.

* * * * *

(d) * * *

(5) Section 141.84—Providing or requiring the review of any resource, information, or identification method for the development of the initial inventory or inventory updates. Requiring water systems whose inventories contain only non-lead service lines and the water system subsequently finds a lead service line to prepare an updated inventory on a schedule determined by the State.

(6) Section 141.84—For community water systems serving greater than 10,000 persons, approving the lead service line replacement goal rate as recommended by the water system in its lead service line replacement plan, or designating an alternative goal rate than recommended, within six months of the compliance date specified in § 141.80(a) of this chapter.

(7) Section 141.84(g)(9)—Determining whether a greater mandatory lead service line replacement rate is feasible and notifying the system of the determination in writing within 6 months after the system is required to begin lead service line replacement (LSLR).

(8) Section 141.92—Defining a school or child care facility and determining any existing State or local testing program is at least as stringent as the Federal requirements.

(9) Section 141.82—Verifying compliance with ''find-and-fix'' requirements.

(10) Section 141.88—Reviewing any change in source water or treatment and making related determinations, including approval; establishment of additional requirements to ensure the system will operate and maintain optimal corrosion control treatment; and an evaluation of how this change may impact other national primary drinking water regulations in part 141 of this chapter.

* * * * *

(o) * * *

(2) * * *

(i) * * *

(B) Treatment, including corrosion control treatment and water quality parameters as applicable;

* * * * *

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Part III

Department of Transportation

Federal Aviation Administration

14 CFR Parts 11, 21, *et al.*
Operation of Small Unmanned Aircraft Systems Over People; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 11, 21, 43, and 107

[Docket No.: FAA–2018–1087; Amdt. Nos. 11–64, 21–105, 43–51, 107–8]

RIN 2120–AK85

Operation of Small Unmanned Aircraft Systems Over People

AGENCY: Federal Aviation Administration (FAA) and Office of the Secretary of Transportation (OST), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This rule finalizes the February 13, 2019 notice of proposed rulemaking titled ''Operation of Small Unmanned Aircraft Systems over People'' (the NPRM). In June 2016, the FAA published remote pilot certification and operating rules for civil small unmanned aircraft weighing less than 55 pounds. Those rules did not permit small unmanned aircraft operations at night or over people without a waiver. The NPRM proposed to modify these regulations to permit routine operations of small unmanned aircraft over people and at night under certain conditions, in addition to changing the recurrent training framework, expanding the list of persons who may request the presentation of a remote pilot certificate, and making other minor changes.

DATES: This rule is effective March 16, 2021, except for the amendments to §§ 107.61, 107.63, 107.65, 107.73, and 107.74 which are effective March 1, 2021.

FOR FURTHER INFORMATION CONTACT: Michael Machnik, General Aviation and Commercial Division, Flight Standards Service, Federal Aviation Administration, 55 M Street SE, 8th Floor, Washington, DC 20003; telephone 1–844–FLY–MYUAS; email: *UASHelp@faa.gov.*

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I. Executive Summary

A. Purpose of the Final Rule

This rule amends title 14 of the Code of Federal Regulations part 107 (14 CFR part 107) by permitting the routine operation of small UAS at night [1] or over people under certain conditions.[2] This rule is the next step in the FAA's incremental approach to integrating UAS into the national airspace system (NAS), based on demands for increased operational flexibility and the experience the FAA has gained since it initially published part 107. This rule also builds on the performance-based regulatory philosophy established in part 107.

B. Overview of the Final Rule

1. Operations Over People

This rule allows expanded routine operations of small unmanned aircraft over people without a waiver or exemption under certain conditions. Prior to this final rule, small UAS operations over people were limited to operations over people who are directly participating in the operation, located under a covered structure, or inside a stationary vehicle. This rule expands the ability to conduct operations over people, provided that the operation meets the requirements of one of four operational categories. This rule establishes subpart D to part 107, which sets forth the aircraft eligibility and operating requirements for the four categories of operations over people.

[1] *See* § 107.29. An operation at night was defined as an operation conducted between the end of evening civil twilight and the beginning of morning civil twilight, as published in the Air Almanac, converted to local time.

[2] *See* § 107.39. An operation over people was established as one in which a small unmanned aircraft passes over any part of any person who is not directly participating in the operation and who is not located under a covered structure or inside a stationary vehicle.

The first three categories of operations over people, which the Agency proposed in the NPRM (84 FR 3856, Feb. 13, 2019), are based on the risk of injury they present to people on the ground. In response to public comments, this rule also establishes a fourth category, which is based on the small unmanned aircraft having an airworthiness certificate. The FAA maintains the prohibition on open-air assemblies for Category 3, as proposed. Additionally, in response to comments, remote pilots are prohibited from operating a small unmanned aircraft as a Category 1, 2, or 4 operation in sustained flight over open-air assemblies unless the operation meets the requirements of § 89.110 or § 89.115(a) (remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules). To conduct operations involving sustained flight over open-air assemblies for Category 1, 2, and 4, remote pilots must voluntarily comply with the operating and broadcast requirements of § 89.110 or § 89.115(a) prior to the operational compliance date of the final rule for Remote Identification of Unmanned Aircraft. Following the operational compliance date for the final rule for Remote Identification of Unmanned Aircraft, all unmanned aircraft required to register must meet the operating requirements of the remote identification rule. Sustained flight over an open-air assembly includes hovering above the heads of persons gathered in an open-air assembly, flying back and forth over an open-air assembly, or circling above the assembly in such a way that the small unmanned aircraft remains above some part the assembly. 'Sustained flight' over an open-air assembly of people in a Category 1, 2, or 4 operation does not include a brief, one-time transiting over a portion of the assembled gathering, where the transit is merely incidental to a point-to-point operation unrelated to the assembly Examples of open-air assemblies are described later in the preamble in Section VI.E.1. The FAA may waive compliance with this provision as appropriate. However, conditions of any waiver issued may require the operator to notify local law enforcement prior to the operation.

a. Category 1 Operations

Category 1 operations over people are permitted using a small unmanned aircraft that: (a) Weighs 0.55 pounds or less, including everything that is on board or otherwise attached to the aircraft at the time of takeoff and throughout the duration of each operation; and (b) does not contain any exposed rotating parts that would lacerate [3] human skin on impact with a human being. Remote pilots are responsible for determining that their small unmanned aircraft does not exceed the weight threshold and ensuring that their small unmanned aircraft does not contain any exposed rotating parts that would lacerate human skin. Furthermore, no remote pilot in command may operate a small unmanned aircraft as a Category 1 operation in sustained flight over open-air assemblies unless the operation meets the applicable remote identification requirements. The requirements for Category 1 operations over people are discussed in Section V of this preamble.

b. Category 2 Operations

Category 2 provides performance-based eligibility and operating requirements when conducting operations over people using unmanned aircraft that weigh more than 0.55 pounds but do not have an airworthiness certificate under part 21. To be eligible for Category 2 operations, a small unmanned aircraft must comply with the following three safety requirements.[4] First, the small unmanned aircraft must be designed, produced, or modified such that it will not cause injury to a human being that is equivalent to or greater than the severity of injury caused by a transfer of 11 foot-pounds (ft-lbs) of kinetic energy upon impact from a rigid object. A small unmanned aircraft will only be eligible to conduct Category 2 operations if the person submitting the declaration of compliance (the applicant) can demonstrate that the injury resulting from an impact between the small unmanned aircraft and a person on the ground is less than this injury severity limit.

Second, the small unmanned aircraft must not contain any exposed rotating parts that would lacerate human skin on impact with a human being. Third, the small unmanned aircraft must not contain any safety defects.

As a point of clarification, this rule uses the term ''applicant'' to refer to the person [5] who submits a declaration of compliance to the FAA for review and acceptance. An applicant for a declaration of compliance may be anyone who designs, produces, or modifies a small unmanned aircraft.[6]

Furthermore, a small unmanned aircraft eligible to conduct Category 2 operations must: (1) Display a label on the aircraft indicating eligibility to conduct Category 2 operations; (2) have current remote pilot operating instructions that apply to the operation of the small unmanned aircraft; and (3) be subject to a product support and notification process. The eligibility requirements for Category 2 are discussed in Section VI.A. of this preamble.

This rule also sets forth certain operating requirements for remote pilots who conduct Category 2 operations. Specifically, a remote pilot must use a small unmanned aircraft that is: (1) Eligible for Category 2 operations; (2) listed on an FAA-accepted declaration of compliance as eligible for Category 2 operations; and (3) labeled as eligible to conduct Category 2 operations. Additionally, no remote pilot in command may operate a small unmanned aircraft as a Category 2 operation in sustained flight over open-air assemblies unless the operation meets the remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules even prior to the operational compliance date for remote

[3] As explained in the NPRM, the FAA's decision to ensure protection of skin from lacerating injuries is similar to the logic the National Highway Traffic Safety Administration employs. See Federal Motor Vehicle Safety Standards: Glazing Materials, 65 FR 44710, 44711 (July 19, 2000) (explaining NHTSA's decision to assess whether ''advanced glazings'' are more likely to cause lacerations than ''current glass,'' and stating, ''[a]lthough facial lacerations injuries are relatively minor (AIS 1 or 2), they . . . can be disfiguring'').

[4] The Agency used the term ''safety level'' in the NPRM to refer to the ''limitation of injury severity caused by transfers of kinetic energy from a rigid object, exposed rotating parts, or safety defects.'' The term referred generally to the grouping of these three safety requirements for Categories 2 and 3 operations over people. Proposed § 107.125, ''Means of Compliance,'' also contained the term ''safety level,'' to require ''justification, including any substantiating material, showing the means of compliance establishes achievement of or equivalency to the safety level identified in §§ 107.115(b)(1) and 107.120(b)(1).''

Since ''safety level'' implies a number or threshold on a scale as opposed to an overall level of safety afforded to the public based on a set of safety regulations, the FAA has decided instead to use the term ''safety requirements'' applicable to the specific category of operation. Further, the FAA clarifies that a means of compliance need only address the limitation of injury severity caused by impacts with small unmanned aircraft and exposed rotating parts capable of lacerating skin.

[5] As defined in § 1.1, a person is an individual, firm, partnership, corporation, company, association, joint-stock association, or governmental entity. It includes a trustee, receiver, assignee, or similar representative of any of them.

[6] As explained in Section VI.C., in the final rule the FAA has replaced the term ''manufacturer'' with applicant in order to make it clear that anyone may submit a declaration of compliance to the FAA, provided they can meet all the requirements of a declaration of compliance.

identification. The operating requirements for Category 2 are discussed in Section VI.E. of this preamble.

c. Category 3 Operations

Similar to Category 2, to be eligible for Category 3 operations a small unmanned aircraft must meet certain safety requirements. Although Category 3 operations are subject to a higher injury severity limit than Category 2, the risk of injury to an individual is mitigated by applying operating limitations.

To be eligible for Category 3 operations, a small unmanned aircraft must comply with the following three safety requirements. First, the small unmanned aircraft must be designed, produced, or modified such that it will not cause injury to a human being that is equivalent to or greater than the severity of injury caused by a transfer of 25 ft-lbs of kinetic energy upon impact from a rigid object. Second, the small unmanned aircraft must not contain any exposed rotating parts that would lacerate human skin on impact with a human being. Third, the small unmanned aircraft must not contain any safety defects.

Furthermore, a small unmanned aircraft eligible to conduct Category 3 operations must: (1) Display a label on the aircraft indicating eligibility to conduct Category 3 operations; (2) have current remote pilot operating instructions that apply to the operation of the small unmanned aircraft; and (3) be subject to a product support and notification process. The eligibility requirements for Category 3 are discussed in Section VI.A. of this preamble.

This rule also sets forth certain operating requirements for remote pilots who conduct Category 3 operations. Specifically, a remote pilot must use a small unmanned aircraft that is: (1) Eligible for Category 3 operations; (2) listed on an FAA-accepted declaration of compliance; and (3) labeled as eligible to conduct Category 3 operations. Category 3 also includes additional operating limitations not applicable to Category 2. These operating limitations are necessary to mitigate the increased risk of injury associated with the higher injury severity limit allowed for small unmanned aircraft conducting Category 3 operations. Specifically, Category 3 operations are prohibited over open-air assemblies of human beings and are only permitted if: (1) The operation is within or over closed- or restricted-access sites and everyone within that site has been notified that a small unmanned aircraft may fly over them; or (2) the small unmanned aircraft does not maintain sustained flight over a person not directly participating in the operation or located under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling small unmanned aircraft. Sustained flight includes hovering above any person's head, flying back and forth over an open-air assembly, or circling above an uninvolved person in such a way that the small unmanned aircraft remains above some part of that person. Additionally, a closed- or restricted-access site could be an area that contains physical barriers, personnel, or both, as appropriate, to ensure no inadvertent or unauthorized access can occur. The operating requirements for Category 3 operations over people are discussed in Section VI.E. of this preamble.

d. Demonstrating Compliance With Safety Requirements

Before a small unmanned aircraft can be used for Category 2 or Category 3 operations, this rule requires the applicant to declare compliance with the applicable injury severity limit and the exposed rotating parts prohibition. The rule also requires the applicant to declare the small unmanned aircraft does not contain any safety defects and is subject to a product support and notification process. The applicant will be required to submit to the FAA a declaration of compliance in which the applicant declares it has demonstrated, using an FAA-accepted means of compliance, that the small unmanned aircraft, or specific configurations of that aircraft, satisfies the injury severity limit and exposed rotating parts prohibition. This rule also includes a record retention requirement for a person who either submits a declaration of compliance or a means of compliance. The FAA uses the term ''means of compliance'' to refer to the method the applicant uses to show that its small unmanned aircraft would not exceed the applicable injury severity limit on impact with a human being and does not contain any exposed rotating parts that could cause lacerations. The FAA must accept a means of compliance before an applicant can rely on it to declare compliance with the requirements of this rule.

This rule allows anyone to develop and submit to the FAA for acceptance any means of compliance that fulfills the Category 2 or Category 3 requirements. In the NPRM, the FAA provided a means of compliance for small unmanned aircraft to demonstrate that they do not have exposed rotating parts that could lacerate human skin on impact with a human being. This means of compliance is not applicable to all types of small unmanned aircraft. The FAA anticipates that industry will develop and submit for FAA acceptance more comprehensive means of compliance that give credit for innovative materials and designs. The requirements related to means of compliance are discussed in Section VI.B. of this preamble.

This rule also requires an applicant to provide remote pilot operating instructions on sale or transfer of the small unmanned aircraft, or use of the aircraft by someone other than the applicant. The applicant must also establish and maintain a process to notify the public and FAA of any safety defects that cause the small unmanned aircraft to no longer meet the requirements of Category 2 or Category 3.

e. Category 4 Operations

The FAA received comments in response to the NPRM that criticized the Agency for insufficiently considering the reliability of the unmanned aircraft in determining whether a small unmanned aircraft could be operated safely over people. The FAA also received comments stating that if small unmanned aircraft were issued an airworthiness certificate, that certification should be sufficient to permit the small unmanned aircraft to operate over people. The FAA agrees that demonstrable reliability of the small unmanned aircraft is an alternative path for operations over people. Therefore, this final rule includes a fourth category to allow small unmanned aircraft issued an airworthiness certificate under part 21 [7] to operate over people in accordance with part 107, so long as the operating limitations specified in the approved Flight Manual or as otherwise specified by the Administrator, do not prohibit operations over human beings.[8]

[7] *See* 14 CFR part 21, which provides the procedural requirements for airworthiness certification.

[8] Small unmanned aircraft that receive an airworthiness certificate from another country will be treated in the same manner as other aircraft with a foreign airworthiness certificate. Currently, however, such aircraft will not be able to obtain recognition based on their certificating authority meeting an international standard because no international standards currently exist for the airworthiness certification of small unmanned aircraft. Individuals who wish to operate such aircraft in accordance with Category 4 will need to deregister their aircraft from the foreign authority's registry, and the FAA must receive notification of deregistration from the foreign authority. These individuals must also register their aircraft in the United States, apply for and receive an

Additionally, no remote pilot in command may operate a small unmanned aircraft as a Category 4 operation in sustained flight over open-air assemblies unless the operation meets the remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules even prior to the operational compliance date for remote identification.

To preserve the continued airworthiness of the small unmanned aircraft and continue to meet a level of reliability that the FAA finds acceptable for flying over people in accordance with Category 4, certain additional requirements apply. The person performing any maintenance, preventive maintenance, or alterations must use the methods, techniques, and practices prescribed in the manufacturer's current maintenance manual or Instructions for Continued Airworthiness that are acceptable to the Administrator, or other methods, techniques, and practices acceptable to the Administrator. In addition, the person must have the knowledge, skill, and appropriate equipment to perform the work. The owner must, unless they have entered into an agreement with another entity to operate the small unmanned aircraft, maintain records of maintenance performed on the aircraft as well as records documenting the status of life-limited parts, compliance with airworthiness directives, and inspection compliance of the small UAS. The requirements for Category 4 operations over people are discussed in Section VII of this preamble.

2. Operations Over Moving Vehicles

While small unmanned aircraft operations over people in moving vehicles were prohibited in § 107.39, the NPRM proposed to add a new section that made it clear that such operations were expressly prohibited. The FAA considered, however, allowing the operation of small unmanned aircraft over people in moving vehicles without a waiver and sought public comment on this proposal. After considering the comments received, the FAA finds that operations over people in moving vehicles can be conducted safely, subject to certain conditions. Therefore, this rule allows small unmanned aircraft operations over people inside moving vehicles, subject to the following conditions. First, the small unmanned aircraft operation must either meet the requirements for a Category 1, 2, or 3 operation under the new subpart D of part 107 or meet the requirements for Category 4 small unmanned aircraft. Second, for Category 1, 2, or 3, the operation must meet one of the following conditions: (1) The small unmanned aircraft must be within or over a closed- or restricted-access site where any human being located inside a moving vehicle within the closed- or restricted-access site is on notice that a small unmanned aircraft may fly over them; or (2) if the operation is not within or over a closed- or restricted-access site, the small unmanned aircraft must not maintain sustained flight over moving vehicles. The requirements for operations over moving vehicles are discussed in Section VIII of this preamble.

3. Operations at Night

This rule allows routine operations of small UAS at night under two conditions. First, the remote pilot in command must complete a current initial knowledge test or recurrent training, as applicable, to ensure familiarity with the risks and appropriate mitigations for nighttime operations. Second, the small unmanned aircraft must have lighted anti-collision lighting visible for at least 3 statute miles that has a flash rate sufficient to avoid a collision. The requirements for operations at night are discussed in Section IX of this preamble.

4. Other Changes to Part 107

In addition to permitting routine operations over people and at night, this rule also amends part 107 to address the following subjects.

Remote Pilot Testing and Training Requirements

Part 107 previously required initial small UAS remote pilot applicants and small UAS remote pilots to complete either an initial aeronautical knowledge test or a recurrent aeronautical knowledge test within the previous 24 calendar months prior to operating a small UAS. This final rule revises these regulations to require recurrent training instead of a recurrent aeronautical knowledge test. This final rule maintains, as proposed, the provision that people who hold a part 61 pilot certificate (other than holders of a student pilot certificate) and have completed a flight review within the previous 24 calendar months in accordance with § 61.56 may continue to complete either initial training or recurrent training. The final rule also harmonizes the subjects covered in the testing and training. The FAA is updating the related testing and training materials to add new information about night operations. The changes to the remote pilot testing and training requirements are discussed in Section X of this preamble.

Inspection, Testing, and Demonstration of Compliance

Section 107.7 contains certain requirements pertaining to inspection, testing, and demonstrations of compliance. In accordance with § 107.7(a), remote pilots must present their remote pilot certificate and identification on request from the Administrator. This rule extends that obligation to require remote pilots to present their remote pilot certificate and identification on request from: The Administrator; an authorized representative of the National Transportation Safety Board (NTSB); any Federal, State, or local law enforcement officer; and any authorized representative of the Transportation Safety Administration (TSA). In addition, the final rule requires that the person operating the small UAS must have their remote pilot certificate and identification in their possession when operating.

This rule also adds requirements to § 107.7 for any person holding an FAA-accepted declaration of compliance under subpart D. Under this rule, any person holding an FAA-accepted declaration of compliance must, on request, provide to the FAA such declaration and any other document, record, or report required to be kept in accordance with the regulations of this chapter. Furthermore, this rule allows the FAA to inspect the person's facilities, technical data, and small unmanned aircraft covered by the declaration of compliance to determine compliance. The amendments to § 107.7 are discussed in Section XI.A. of this preamble.

airworthiness certificate issued under part 21, and operate the small UAS in accordance with the operating limitations, which must not prohibit operations over people or over moving vehicles.

The FAA has used the terms ''unmanned aircraft system'' and ''UAS'' broadly when discussing UAS regulations. While this term is correct under many circumstances, it is imprecise in others. A small unmanned aircraft is simply the aircraft itself, while ''unmanned aircraft system'' refers also to the aircraft, the ground control station, communication links, and other components. In the case of operating over people, the remote pilot flies the aircraft over people, not the ground control station. In an effort to remediate any confusion the use of the term ''small UAS'' may have caused, this final rule uses the term ''small unmanned aircraft'' in any section discussing operations over people and moving vehicles, with the exception of where that term overlaps with existing requirements in part 107 that use ''small UAS.'' For example, the rule refers to small unmanned aircraft when discussing the requirements to operate over people and moving vehicles, but refers to small UAS when discussing the remote pilot operating instructions, as the regulations that refer to remote pilot responsibilities use ''small UAS.'' Additionally, the FAA maintained instances where ''small UAS'' was used by commenters or in existing references (*e.g.,* UAS Sightings Report).

This rule also makes minor clarifying amendments to several other sections of part 107, as described in Section XI of this preamble. In addition, to improve clarity, the FAA also made some organizational changes to the proposed regulatory sections, including renumbering of sections and restructuring the regulatory text.

C. Summary of Benefits and Costs

The FAA analyzed the impacts of this rule and expects the benefits to exceed the costs. The rule enables further operations of small UAS that will benefit the economy and facilitate innovation and growth across a variety of sectors, such as construction, education, infrastructure inspection, insurance, marketing, and event photography. Operations currently allowed under part 107 will become less onerous and, in many instances, more efficient with this rule because, in general, remote pilots would not necessarily need to avoid flying over people or clear an area of non-participating people in advance of flying.[9]

The costs of this rule include the FAA converting the administration of tests to administration of training; manufacturers conducting testing, analysis, or inspection to comply with the requirements of manufacturing a small unmanned aircraft for operations over people; and remote pilots studying additional subject matter related to activities enabled by the final rule. The cost savings of this rule include relief provided through online training for remote pilots and relief from time the FAA expends in processing waivers.

The FAA bases the analysis of this rule on a fleet forecast for small unmanned aircraft that includes base, low, and high scenarios. Accordingly, this analysis provides a range of net impacts from low to high based on these forecast scenarios. The FAA considers the base scenario as the primary estimate of net impacts of this rule. For the primary estimate, over a 10-year period of analysis this rule will result in present value net cost savings (savings less costs) of $688.27 million at a three percent discount rate, with annualized net cost savings of $80.69 million. At a seven percent discount rate, this rule will result in present value net cost savings of $551.31 million, with annualized net cost savings of $78.49 million. The following table summarizes the quantified costs and cost savings of this rule for the three forecast scenarios.

TABLE 1—COSTS AND COST SAVINGS OF FINAL RULE

[$millions] *

Forecast scenario	10-Year present value (3%)	Annualized (3%)	10-Year present value (7%)	Annualized (7%)
Base Scenario—Primary Estimate:				
Costs	146.44	17.17	119.98	17.08
Cost Savings	(834.71)	(97.85)	(671.28)	(95.58)
Net Cost Savings	(688.27)	(80.69)	(551.31)	(78.49)
Low Scenario:				
Costs	102.96	12.07	85.32	12.15
Cost Savings	(616.60)	(72.28)	(501.51)	(71.40)
Net Cost Savings	(513.64)	(60.21)	(416.19)	(59.26)
High Scenario:				
Costs	207.17	24.29	169.27	24.10
Cost Savings	(1,158.84)	(135.85)	(927.41)	(132.04)
Net Cost Savings	(951.67)	(111.56)	(758.14)	(107.94)

* Table notes: Columns may not sum to total due to rounding. Savings are shown in parenthesis to distinguish from costs. Estimates are provided at three and seven percent discount rates per Office of Management and Budget (OMB) guidance.

The operation of small unmanned aircraft over people may result in an increased safety risk. Although the FAA expects the probability of injuries that may occur from an operation of a small unmanned aircraft over people to be small, when that low probability is multiplied by an increased number of operations, some additional risk of injury exists. This final rule's performance-based requirements establish four categories of small unmanned aircraft operations defined primarily by injury severity level posed. Compliance with the manufacturer and operating requirements that apply to these categories would mitigate the level of risk when operating over people.

[9] The rule does not permit Category 3 operations over open-air assemblies of people. Operations that occur pursuant to Category 1 and Category 2, however, would not be subject to this prohibition.

II. Legal Authority

The primary authority for this rulemaking is based on 49 U.S.C. 44807, which permits the Secretary of Transportation to determine whether ''certain unmanned aircraft systems may operate safely in the national airspace system.'' Section 44807 directs the Secretary to use a risk-based approach in making such determinations.[10] Section 44807(b) establishes a specific list of factors the Secretary must consider in determining which types of UAS may operate safely: Size, weight, speed, operational capability, proximity to airports and populated areas, operation over people, operation within visual line of sight, or operation during the day or night. The Secretary must determine, based on these factors, which types of UAS do not create a hazard to users of the NAS or the public. If the Secretary determines that certain unmanned aircraft systems may operate safely in the NAS, then the Secretary must ''establish requirements for the safe operation of such aircraft systems in the national airspace system.'' 49 U.S.C. 44807(c). Although the authority of the Secretary to make determinations under Section 44807 whether certain unmanned aircraft systems may operate safely in the national airspace system terminates on September 30, 2023, the statute itself remains in effect after that date as a continuing source of specific authority for part 107.

Furthermore, this rulemaking is promulgated pursuant to 49 U.S.C. 40103(b)(1) and (2), which directs the FAA to issue regulations: (1) To ensure the safety of aircraft and the efficient use of airspace; and (2) to govern the flight of aircraft for purposes of navigating, protecting and identifying aircraft, and protecting individuals and property on the ground. In addition, 49 U.S.C. 44701(a)(5) charges the FAA with promoting safe flight of civil aircraft by prescribing regulations the FAA finds necessary for safety in air commerce and national security.

This rulemaking is also promulgated under 49 U.S.C. 44703(a), which requires the Administrator to prescribe regulations for the issuance of airman certificates when the Administrator finds, after investigation, that an individual is qualified for, and physically able to perform the duties related to the position authorized by the certificate.

Finally, this rulemaking is also being issued consistent with DOT's regulatory policy which requires that DOT regulations ''be technologically neutral, and, to the extent feasible, they should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt.'' [11]

III. Background

As technology improves and the utility of small UAS for activities that previously required manned aircraft increases, the FAA anticipates an increased demand for flexibility in small UAS operations. This rulemaking is one of a number of regulatory steps the FAA is taking to allow for this growth. This rule permits small unmanned aircraft operations to operate over people, moving vehicles, and at night, allowing greater operational flexibility for uses such as motion picture filming, newsgathering, law enforcement, aerial photography, sports photography, and construction or surveying. This rule enables further operations integration of small UAS, which will benefit the economy by increasing opportunities for small UAS operations.

The FAA received over 900 comments in response to publication of the NPRM on February 13, 2019. The FAA considered the comments carefully, as described in this final rule.[12]

A. Related FAA and DOT Actions

The FAA is incorporating the operation of small UAS into the NAS using a phased, incremental, and risk-based approach.[13] In 2012, Congress passed the FAA Modernization and Reform Act of 2012 (Pub. L. 112–95). Section 333 of Public Law 112–95 directed the Secretary to determine which types of UAS do not create a hazard to users of the NAS or the public or pose a threat to national security. Based on such findings, Congress directed the Secretary to establish requirements for the safe operation of such UAS.[14]

1. Registration and Marking Requirements for Small Unmanned Aircraft

On December 16, 2015, the FAA published the Registration and Marking Requirements for Small Unmanned Aircraft interim final rule (Registration Rule).[15] The Registration Rule established, at 14 CFR part 48, a streamlined, web-based registration system for small unmanned aircraft. The FAA provided this process as an alternative to the registration requirements for manned aircraft found in 14 CFR part 47. The Registration Rule required all small UAS owners to register under part 47 or part 48 by March 31, 2016.

The Registration Rule also established marking requirements for small unmanned aircraft. In accordance with that rule, all small unmanned aircraft must display a unique identifier. Each small UAS operated in accordance with part 107 must display a unique registration number, visible on inspection of the small unmanned aircraft. Additionally, the FAA published the External Marking Requirement for Small Unmanned Aircraft interim final rule (External Marking Rule) on February 13, 2019.[16] The External Marking Rule, effective February 25, 2019, requires all small unmanned aircraft owners display the FAA registration number on an external surface of the aircraft, rather than enclosing it in a compartment of the aircraft.

2. Operation and Certification of Small Unmanned Aircraft Systems

On June 28, 2016, the FAA and DOT jointly issued the Operation and Certification of Small Unmanned Aircraft Systems (hereinafter, ''2016

[10] The predecessor to 49 U.S.C. 44807 was section 333 of Pub. L. 112–95 (section 333), which the Agency identified as the source of authority for 14 CFR part 107. The FAA Reauthorization Act of 2018 clarifies that, notwithstanding the repeal of section 333, all determinations and regulations issued under section 333 would continue in effect until modified or revoked. Section 44807(d) states the authority to make determinations under 49 U.S.C. 44807 will terminate on September 30, 2023. By this final rule, which the Agency publishes before the aforementioned sunset date, the Secretary determines that the small unmanned aircraft to which part 107 applies may continue to operate pursuant to part 107.

[11] 49 CFR 5.5(e).

[12] 84 FR 3856. Also on February 13, 2019, the FAA published two UAS-related rulemakings, in addition to the Operation of Small UAS Over People NPRM: The External Marking of Small Unmanned Aircraft Interim Final Rule (84 FR 3669) and the Safe and Secure Operations of Small Unmanned Aircraft Systems Advance Notice of Proposed Rulemaking (84 FR 3732).

The FAA notes that, as three rules were published related to UAS on the same day, a number of commenters submitted comments regarding a particular rule to another rule's docket. Where a comment submitted to one docket clearly addressed only provisions contained in another rule, the FAA moved that comment to the appropriate docket and addressed it in the appropriate rule. Where a comment submitted to only one docket addressed more than one rule, the FAA left that comment in the docket to which the commenter had originally submitted the comment. The FAA has ensured that all comments addressing topics in each rule have been appropriately considered, regardless of the docket to which the comment was originally submitted.

[13] For more information regarding the operation of small UAS, see *http://www.faa.gov/uas.*

[14] Section 347 of Public Law 115–254 repealed Section 333, but replaced the relevant substantive provisions, codified at 49 U.S.C. 44807.

[15] 80 FR 78594.

[16] 84 FR 3669.

final rule'').[17] That rule, codified at 14 CFR part 107, allows small UAS operations without requiring airworthiness certification, exemption, waiver, or certificate of authorization (COA). Part 107 sets forth a framework of operational rules to permit routine civil operation of small UAS in the NAS in a safe manner.

To mitigate risk to people on the ground and other users of the airspace, the 2016 final rule limited small UAS to daylight and civil twilight operations, confined areas of operation, and visual line-of-sight operations. The 2016 final rule also established airspace restrictions, remote pilot certification, visual observer requirements that apply when a remote pilot in command opts to use a visual observer, and operating limitations, to maintain the safety of the NAS and ensure small UAS do not pose a threat to national security. Finally, the 2016 final rule included a waiver provision, which allows individual operations to deviate from several applicable operating limitations if the Administrator finds the applicant could safely conduct the proposed operation under the terms of the certificate of waiver.

3. Secure Operations of Small Unmanned Aircraft Systems

The FAA has engaged in extensive outreach with Federal, State, local, and tribal law enforcement entities on the subject of small UAS operations. The FAA recognizes law enforcement officials are often in the best position to detect and deter unsafe and unauthorized UAS operations. The FAA works closely with these agencies to provide information regarding the evidence the FAA needs when taking enforcement actions and to share information in a timely manner.

As part of the FAA's commitment to working with security partners, the Agency published the Safe and Secure Operations of Small Unmanned Aircraft Systems advance notice of proposed rulemaking (ANPRM) on February 13, 2019.[18] In that publication, the FAA sought comment on whether, and in what circumstances, the Agency should promulgate new rules to require stand-off distances, additional operating and performance restrictions, the use of UAS Traffic Management (UTM), and payload restrictions. The FAA also sought comment on whether it should prescribe design requirements and require unmanned aircraft to have critical safety systems. The FAA received over 1,800 comments in response to the ANPRM.

In addition, the FAA is establishing requirements for the remote identification of UAS. On May 4, 2017, the FAA convened an Aviation Rulemaking Committee (ARC) of industry stakeholders and observers from relevant government agencies to provide recommendations regarding technologies available for remote identification and tracking of UAS (UAS–ID ARC). The UAS–ID ARC's objectives included identifying and recommending emerging technology as well as identifying requirements for fulfilling security and public safety needs of law enforcement, homeland defense, and national security communities. The UAS–ID ARC's members included experts with knowledge and experience in electronic data capture, law enforcement, and public safety, among other areas. The working groups presented their findings and conclusions to the full UAS–ID ARC for consideration in making its recommendations. The UAS–ID ARC submitted its report to the FAA on September 30, 2017.[19]

The FAA published the Remote Identification of Unmanned Aircraft Systems NPRM (Remote ID NPRM) on December 31, 2019,[20] in which the FAA discussed the ARC's report.[21] The Remote Identification of Unmanned Aircraft Systems final rule (Remote ID final rule) is published in the same edition of the **Federal Register** as this final rule.

4. Limited Recreational Operations of Unmanned Aircraft

This rule amends part 107 and applies only to operations conducted under that part. Although this rule does not apply to operations that flyers conduct under 49 U.S.C. 44809 (''Exception for Limited Recreational Operations of Unmanned Aircraft''), the FAA received comments concerning recreational operations. This section establishes an ''exception for limited recreational operations of unmanned aircraft''. It allows a person to fly an unmanned aircraft without specific certification or operating authority if the operation fulfills certain criteria.

B. Micro UAS Aviation Rulemaking Committee

On February 24, 2016, the FAA chartered the Micro UAS Aviation Rulemaking Committee (ARC) (hereinafter ''the Micro ARC'') on the subject of enabling operations of small UAS over people. On April 2, 2016, the Micro ARC provided a final report with recommendations[22] to establish four categories for operations over people with small UAS, defined primarily by level of risk of injury posed. For each category, the Micro ARC recommended the FAA adopt a risk threshold that correlates to either a weight or an impact energy equivalent. The Micro ARC also recommended implementation of performance-based standards and operational restrictions to the extent necessary to minimize the risks associated with the operations.[23]

IV. Operations Over People: General Discussion

This final rule allows routine operations over people in accordance with part 107 and under certain conditions without a waiver or exemption.[24] Consistent with the FAA's proposal, the requirements for routine operations over people vary depending on the level of risk that operations of small unmanned aircraft present to people on the ground. The FAA proposed three categories of permissible operations over people based on the risk of injury they present: Category 1, Category 2, and Category 3. This rule finalizes those three categories as described in the following sections and adds a fourth category to permit operations over people that occur with small unmanned aircraft that have an airworthiness certificate. The following sections describe the requirements and limitations that mitigate the risks associated with operations over people. The discussion below also includes responses to comments received to the NPRM.

[17] 81 FR 42064.

[18] 84 FR 3732.

[19] The UAS Identification and Tracking Aviation Rulemaking Committee charter is available at *https://www.faa.gov/news/updates/media/UAS_ID_and_Tracking_ARC_Charter.pdf.* The UAS ID and Tracking ARC report is available at *https://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/UAS%20ID%20ARC%20Final%20Report%20with%20Appendices.pdf.*

[20] 84 FR 72438.

[21] 84 FR at 72456.

[22] A copy of the Micro ARC's final report has been placed in the docket for this rulemaking.

[23] 84 FR 3856, 3866–3867.

[24] Title 14 CFR 107.200 states that the Administrator may issue a certificate of waiver authorizing a deviation from any regulation specified in § 107.205 if the Administrator finds that a proposed small UAS operation can safely be conducted under the terms of that certificate of waiver. Section 107.205(g) currently lists the operations over people prohibition as a regulation that is subject to waiver. The Administrator also maintains authority to issue exemptions from regulations promulgated under 49 U.S.C. 44701(a) or (b) or any of sections 44702–44706 of title 49, if the Administrator finds the exemption is in the public interest. Title 14 CFR 11.81–11.103 details the process for obtaining such an exemption.

A. Safety Concerns

1. Risks of Operation

Some commenters expressed concern that the proposed rule was too permissive, not enforceable, and would have a negative effect on public safety. Chicago's First Lady Cruises, the International Association of Amusement Parks and Attractions (IAAPA), and numerous individuals expressed concerns about the proposed rulemaking because of the potential risks. The National Agricultural Aviation Association (NAAA) opposed allowing operations over people without a waiver because there is a lack of safety data, among other reasons addressed elsewhere in this rule. The commenter was concerned that the widespread use of small UAS has caused several incidents over the last two years, and allowing operations over people to become routine would open the floodgates to operators conducting unsafe operations. A few commenters opposed the proposed rule because they believe there is no way to properly enforce the rule. One commenter opposed operations over crowds, towns, and cities because of the lack of redundancy and safety infrastructure. Another individual cited unmanned aircraft interference with aerial firefighting activities as an example of the negative impact. One commenter noted a single unmanned aircraft can damage an aircraft or structure and expressed concern about unskilled remote pilots.

Between 2016 and September 2020, the Agency has issued 175 waivers for operations over people. The FAA issued these waivers based on a wide range of safety cases and has utilized available research, including the ASSURE reports. None of the 175 operations over people waiver holders have reported injuries to persons on the ground, nor have they reported damage to any property on the ground in excess of $500.00, events that are required to be reported by § 107.9. Considering the safety record of these waivers for operations over people, the available safety data supports the determination that operations over people can occur safely in accordance with this rule.

Compliance with manufacturer and operating requirements as established for Categories 1, 2, and 3 and the airworthiness certification requirements of Category 4 will mitigate the safety risks of operating over people to a level the FAA finds acceptable. Moreover, the FAA has a carefully structured Compliance Program and an Enforcement Program to handle all statutory and regulatory violations, including violations of part 107. The FAA establishes regulatory standards to ensure safe operations in the NAS. The FAA's system is largely based on, and dependent on, voluntary compliance with regulatory standards. FAA personnel use compliance, administrative, or legal enforcement actions to uphold the public's safety interest in ensuring that all regulated persons conform their conduct to statutory and regulatory requirements. FAA Order 8000.373A, *FAA Compliance Program,* and Order 2150.3, as amended, *Compliance and Enforcement Program,* are used to address safety concerns and actual or apparent deviations from regulations or standards. Public law and agency policy allow FAA program offices to use discretion when taking action to resolve safety issues in the NAS. FAA Orders 8000.373A and 2150.3, as amended, and the policies and procedures issued by program offices, guide agency personnel in the exercise of prosecutorial discretion, including the use of compliance, administrative, and legal enforcement action, to best ensure that regulated persons conform their conduct to statutory and regulatory requirements. Noncompliances by regulated persons willing and able to comply and willing to cooperate in corrective actions may be addressed with compliance actions, except when legal enforcement action is required or is preferred under agency policy. Under the Compliance and Enforcement Program, FAA program offices, such as Flight Standards Service, are policy owners for compliance actions. The FAA anticipates that in situations where law enforcement personnel need to ascertain whether an unmanned aircraft operating over people under this rule are compliant, the serial numbers broadcast by unmanned aircraft as required in the Remote ID final rule will allow law enforcement to expeditiously determine the make and model in the FAA database. Noncompliances by regulated persons unwilling or unable to comply or not cooperative in corrective actions are addressed with enforcement action.

Finally, the FAA notes that this rule prohibits Category 3 over open-air assemblies. Additionally, in response to comments, remote pilots are prohibited from operating a small unmanned aircraft as a Category 1, 2, or 4 operation in sustained flight over open-air assemblies unless the operation meets the requirements of § 89.110 or § 89.115(a) (remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules). The FAA may waive compliance with this provision as appropriate. However, conditions of any waiver issued may require the operator to notify local law enforcement prior to the operation. All small unmanned aircraft operations are subject to remote identification requirements upon the applicable remote identification compliance date, as specified in the Remote Identification for Unmanned Aircraft final rule. This prohibition is discussed in more detail in Section XIV.B. For a further explanation of open-air assemblies and sustained flight, please see Section VI.E.

2. Risks of Small UAS Operations

Several commenters generally supported small UAS operations over people, and offered various suggestions. A commenter supported operations over people by those who conduct pre- and post-flight inspections of the small UAS and operate in a safe manner. Another commenter supported operations over people if the regulations mirror those of general aviation aircraft operating in a similar capacity. One commenter also expressed concerns about remote communication for UAS operations, stating that the U.S. must take steps to protect the ''RF spectrum.'' In response to these comments, the FAA notes that the requirement to conduct safe operations exists in §§ 107.15, 107.19, and 107.23 and the requirement to conduct a preflight inspection is codified at § 107.49; moreover, small UAS and manned aircraft have different safety requirements and operational considerations, which the FAA has addressed in distinct regulations. As for protection of radio frequencies (RF) for small unmanned aircraft operations, the Remote Identification of Unmanned Aircraft Systems rule, which appears in this same issue of the **Federal Register**, addresses concerns about radio frequencies and UAS operations.

The Motion Picture Association of America (MPAA) and NCTA—the Internet & Television Association (NCTA) urged the FAA to use conditions and limitations of current film and television waivers as a baseline for professional newsgathering and closed-set small UAS operations over people. The FAA has reviewed and processed numerous requests for relief from the prohibition of operating small unmanned aircraft over people and has considered this information in finalizing this rule.

For Category 2 or Category 3 operations over people, a commenter asked whether the FAA would require

a second- or third-class medical certificate or BasicMed and suggested compliance with § 61.53(b). The FAA did not propose Categories 2 and 3 operations to require medical certification. Section 107.61(c) states that, to be eligible for a remote pilot certificate with a small UAS rating, the applicant must not know or have reason to know that they have a physical or mental condition that would interfere with the safe operation of the small UAS. The responsibility for knowing the effects of medication resides with the remote pilot and the FAA has many publications that are informative regarding remote pilots' use of medications.

3. Commenters Favoring Fewer Restrictions

Other commenters opposed regulations or restrictions for UAS, in general. DJI commented that flights over people are already occurring without serious consequences. DJI and the Commercial Drone Alliance (CDA) both believe proposing this rule for all unmanned aircraft under 55 pounds is too strict in consideration of the risks the operations present. CDA wrote that the proposed rules would impose undue costs without a corresponding safety or security benefit, and that there would be ''no meaningful or scalable expansion of commercial small UAS operations, which would be limited to the smallest and lightest unmanned aircraft and narrowly-drawn operational areas.'' CDA asserts such an absence of expansion will result in the United States surrendering its leadership in innovation and aviation safety.

The FAA disagrees with these commenters, as this rule facilitates routine operations over people by implementing performance-based requirements, eliminating the burden of applying for a waiver, while still ensuring the safety of the public. In addition, the four categories of small unmanned aircraft operations over people allows for a significant expansion in the commercial utility of small UAS in the United States. All four categories of small UAS under 55 pounds may operate over people under certain conditions, which do not inherently limit operations to the lightest aircraft, nor do they result in narrowly-drawn operational areas. This rule supports innovation and allows the United States to continue to be a leader in UAS integration.

4. Airspace Comments

The FAA received some comments concerning operations over people in certain types of airspace. The City of New York (NYC) objected to ''open ended'' Category 1 and Category 2 operations over people due to the complexity of NYC's airspace. NYC wrote that it ''is home to huge volumes of manned air traffic, skyscrapers which block and reflect signals, and one of the most complex and noisy radio frequency environments.'' NYC reported it also faces heightened security and safety issues due to its dense population and critical infrastructure. Similarly, Metropolitan Airports Commission (MAC) expressed concerns regarding operations over people in and around areas with airports.

Most of the airspace in and around NYC is either class B, C, D, or E and includes Special Flight Rules Areas (SFRA) and Temporary Flight Restrictions (TFR), both of which require operators to receive specific authorizations to operate. For example, § 107.41 requires remote pilots to obtain airspace authorization from the FAA prior to operating in Class B, C, or D airspace or within the lateral boundaries of the surface area of Class E airspace adjacent to an airport. The FAA finds that the existing requirements for authorizations coupled with the operations over people requirements of this final rule are sufficient to mitigate risks in airport environments. The FAA disagrees with NYC's comment that Category 1 and Category 2 operations are ''open ended.'' Category 1 restricts operation by weight and prohibits small unmanned aircraft from having any exposed rotating parts that would lacerate human skin. Aircraft eligible for Category 2 operations must comply with injury severity limits and are subject to the exposed rotating parts prohibition and a prohibition on having safety defects.

NYC also argued that NYC agencies must be permitted to provide input on whether specific waivers should be granted for small UAS operations over people in their airspace. The FAA does not agree and finds this request outside the scope of this rule. The FAA will evaluate all requests for waiver of the requirements finalized in this rule based on information the applicant provides.

A commenter stated the FAA should allow operations over people if there are no manned aircraft in the area, and suggested the operations should occur directly over the operator. Section 107.37(b) already prohibits operations of small unmanned aircraft so close to another aircraft as to create a collision hazard. In addition, § 107.39 continues to permit operations over a person who is directly participating in the operation.

The National Football League (NFL), Major League Baseball (MLB), the National Association for Stock Car Auto Racing (NASCAR), and the National Collegiate Athletic Association (NCAA), responding together, noted the NPRM does not specify that ''all other existing aviation restrictions, such as the sporting event temporary flight restriction, restrain the operations identified in the rule.'' These organizations asked FAA to specify that the authorizations provided in the proposed rules remain subject to rules generally applicable to aircraft. The FAA continues to restrict operations over sporting events by issuing TFRs and will not discontinue these restrictions with the implementation of this rule.

B. Comments in Support of Additional Requirements

Numerous commenters generally supported allowing operations over people without a waiver only if the FAA imposed requirements on the remote pilot, the small UAS, or restricted the operating environment.

Some commenters recommended allowing operations over people only if the remote pilot has an emergency plan to land the small unmanned aircraft safely away from people. Section 107.23 currently prohibits operating a small UAS in a manner so as to endanger the life or property of another. Although the FAA declines to require remote pilots to have an emergency plan, contingency planning may be necessary to mitigate the potential risks of undue hazards that could endanger persons or property on the ground. Section 107.49(a) requires that, prior to flight, the remote pilot must assess the operating environment and consider the risks to persons and property in the immediate vicinity. The FAA recommends that, as part of this assessment, remote pilots utilize a risk mitigation process prior to the initiation of every small UAS operation to control or eliminate hazards.[25] This may include emergency landing contingency planning. Additionally, remote pilots may only operate over people if they have an eligible small unmanned aircraft.

Several commenters recommended requiring additional training or testing for certain categories of operations over people. One commenter recommended hands-on training and stated a pilot should know how to fly proficiently, without the assistance of automation. A

[25] The FAA provides material on how to develop effective risk management processes in numerous Aviation Handbooks and Manuals, available on the FAA website, *https://www.faa.gov/*. In addition, the Advisory Circular (AC) associated with this rule, AC 107–2, provides additional information on risk management processes.

commenter also wrote that training pilots to identify and assess the risks of an operation is only worthwhile if pilots, in conducting operations over people, are trained to respond to (1) the loss of a Global Positioning System (GPS) signal, (2) the loss of communications links, (3) wind shears and other wind events, and (4) low-altitude weather events. As pilots are required to remain up to date on the current regulations, they should expect that required training and testing will include the regulatory requirements to fly over people. Additionally, §§ 107.73 and 107.74 include knowledge areas on adverse weather and emergency planning,

Great Midwestern Home Inspections, LLC suggested requiring onboard safety devices such as obstacle avoidance and GPS for a small unmanned aircraft used in operations over people. Another commenter wrote that a drone purchased off the shelf for $29.95 should not be flown over people and that it would be preferable for the FAA to support responsible pilots through education and certification, and to work with manufacturers to design and equip a small UAS capable of avoiding accidents. Several commenters stated the FAA should not oversee or impose requirements on all small UAS in the same manner, but did not agree on which types of small UAS the FAA should regulate more closely than others. Several commenters asserted off-the-shelf ''toys'' presented safety problems. Other commenters opined the proposed rule favored ''high-quality'' small UAS equipped with safety features. In contrast, another commenter thought the FAA should regulate ''over-the-counter'' small UAS less than custom, commercial, and specialized small UAS. The FAA declines to require in this rule specific safety devices or prescriptive requirements based on perceived consumer quality. The FAA does not consider the cost of a small UAS is an indicator of its safety; rather, as described in this preamble, treatment under this rule turns on whether a small unmanned aircraft fulfills the requirements of one of the four categories.

Some commenters recommended significantly restricting operations over people. A few commenters suggested the FAA only allow remote pilots to operate small UAS over people when the operation occurs within a closed site within which all human beings wear protective equipment. Regarding the comments on the requirement for a closed or restricted access site, please see the discussion about closed sites in greater detail in Section VI.E. below. Category 3 operations must comply with such restrictions, which are not necessary for operations conducted in Category 1 or Category 2, as those operations are lower risk. As discussed later in Section VII, Category 4 small unmanned aircraft have demonstrated reliability through airworthiness certification; as a result, they do not require applicability of a regulation that restricts the operation to certain types of sites. However, Category 1, 2, or 4 operations that are not compliant with remote identification are prohibited from sustained flight over open air assemblies. Lastly, while the NPRM did not suggest wearing personal safety equipment, remote pilots and other personnel are not prohibited from wearing safety equipment.

Several commenters suggested the inclusion of limitations on who would be eligible to operate over people. One commenter suggested the FAA require (1) an active membership with the Academy of Model Aeronautics (AMA), and (2) that small unmanned aircraft be registered, have tracking lights, and be marked with numbers from both the FAA and AMA. These commenters recommended that pilots have a remote pilot certificate under part 107 for all commercial operations and that any failure to follow the rules result in heavy fines. The Agency disagrees with these recommendations. Requiring membership in an organization places an unnecessary burden on operators when multiple safety measures codified in part 107 already exist. Small unmanned aircraft registration is currently required under parts 47 and 48 and all part 107 operators are required to have a current remote pilot certificate. No regulatory changes are necessary for the FAA to take action in response to non-compliance with these rules.

Another commenter recommended imposing an age minimum for remote pilots allowed to conduct operations over people because the commenter believed young pilots cause problems that result in restrictions for responsible operators. Section 107.61 already requires applicants for remote pilot certificates to be at least 16 years old, and the FAA does not have data indicating that additional age restrictions are necessary at this time.

Several commenters asked the FAA to develop separate rules or requirements for specific types of operations. A commenter who opposed the NPRM suggested allowing operations over people only if the operations are necessary and occur pursuant to permission from the FAA, which should consider the operator's training and liability insurance. This commenter recommended a 24-hour hotline exist for operators to call for permission to fly over people.

Several commenters opposed operations over people except for commercial reasons, such as making a movie. PrecisionHawk, Inc. suggested the FAA create a separate category for operations over people to permit such operations when they occur to save lives or reduce exposure to hazardous situations. Similarly, a few commenters asked the FAA to establish a new category for low-risk operations and exempt such operations from certain rules; these commenters suggested this approach would obviate the need for waivers and thereby reduce the burden on the FAA. Part 107 does not distinguish between the purpose or type of the operation. This rule establishes minimum requirements for safe operations over people; these requirements apply to all part 107 operations. Amending the requirements based on purposes of operations would be inconsistent with the framework of part 107 and the risk assessment model on which it is based.

Small UAV Coalition commented that the FAA should add references to the section titled ''Limitations on operations over human beings'' to include other regulatory references because operations over people can also be authorized by waiver or exemption. The FAA does not believe this addition is necessary, as the opportunity to apply for and receive waivers and exemptions is clearly defined within the current regulatory framework.

C. Requests for Clarification

Some commenters supported allowing operations over people but believed the rules are too complicated or need clarification. A commenter suggested removing the double negative in the proposed draft of § 107.120(a)(3)(ii) to make it easier to read and to remove any potential textual ambiguity. This rule includes an update to the text of § 107.125(c)(2) [formerly § 107.120(a)(3)(ii)], for clarity.

A commenter noted that proposed § 107.39(a) is missing the ''or'' before paragraph (b), which the commenter believed is an error. The FAA notes that the language in this, and all regulations, states that (a), (b), or (c) applies, and is understood that in a continuous list that the ''or'' applies to all items previously listed.

Several commenters questioned how one could determine whether a small unmanned aircraft is flying directly over an individual. Section 107.31 requires all operations to be within visual line of

sight, specifically requiring that the remote pilot or visual observer (if used), must (1) know the unmanned aircraft's location; (2) determine the unmanned aircraft's attitude, altitude, and direction of flight; (3) observe the airspace for other air traffic hazards; and (4) determine that the unmanned aircraft does not endanger the life or property of another. Therefore, as the remote pilot or visual observer are required to have a holistic and complete view of the operating environment, they should be able to ascertain whether the unmanned aircraft is flying over people. Since part 107 became effective in 2016, remote pilots and visual observers have refrained from flying over people by keeping the small unmanned aircraft within visual line of sight. This requirement to maintain visual line of sight continues to apply to small UAS operations that occur under part 107.

Several commenters suggested the FAA consider population density in the development of this rule and categorize approvals of operations on this basis.[26] The FAA developed the eligibility requirements for Categories 1 and 2 to mitigate the risk of injury, regardless of population density in the operating area. Similarly, the eligibility requirements for Category 3 mitigate the risk of injury with both design elements and operating limitations, as described in Section VI.E. Finally, Category 4 small unmanned aircraft may operate over a variety of population densities, subject to the operating limitations associated with their airworthiness certification. With the risk mitigation measures this rule established for each category, limitations based on population density are unnecessary. Furthermore, Category 1, 2, or 4 operations that are not compliant with remote identification are prohibited from sustained flight over open air assemblies.

D. Minimum Stand-Off Distances

In the NPRM, the Agency requested comment on whether a prescriptive standard should exist for a minimum vertical or horizontal distance, and whether it should apply for operations of small unmanned aircraft over people.[27] The FAA also requested commenters provide data to support any comments identifying a prescriptive standard.

Several commenters responded to this request, including the Association for Unmanned Vehicle Systems International (AUVSI); Motorola Solutions; the American Public Power Association (APPA), the Edison Electric Institute (EEI), and the National Rural Electric Cooperative Association (NRECA), responding together; and the Republic of China. These commenters supported the FAA's decision not to require specific minimum stand-off distances for operations over people. Droneport Texas, LLC commented that because the pilot only has access to the first 400 feet above the ground, further restrictions on the available airspace would ''serve to handcuff remote pilots by reducing the latitude of operations.'' The National League of Cities (NLC) raised concerns that potential horizontal or vertical stand-off distances would be unachievable when combined with the safety requirements in the proposed rule. NLC stated this inability to comply might create incentives for small unmanned aircraft to operate at lower altitudes above people and property. Many commenters agreed that stand-off distances would reduce the number of locations that would be acceptable for small UAS operations.

Several commenters, including the Air Line Pilots Association, International (ALPA); the National Association of Counties; the National Association of State Aviation Officials (NASAO); the Air Medical Operators Association (AMOA) and the Association of Air Medical Services (AAMS), responding together; and the Metropolitan Airports Commission (MAC), supported the establishment of stand-off distances. Commenters encouraged stand-off distances as a way to prevent accidental collision, but did not agree on what those distances should be. Although APPA, EEI, and NRECA stated they do not support across-the-board mandatory standoff distances, they expressed support for creating a stand-off distance for non-utility unmanned aircraft operated near electric infrastructure. These commenters referred to the requirements of Section 2209 of the FAA Extension, Safety, and Security Act of 2016 (FESSA 2016)[28] and stated imposing such a restriction would protect infrastructure from unmanned aircraft interference and any potential harm.

Flytcam Motion Pictures was undecided about stand-off distances, but suggested that if they were required, the FAA should quantify the stand-off distance based on the size of the aircraft, its potential velocity, weight, and size of rotating edges. Another commenter suggested the FAA establish specific stand-off distances that consider the performance, size, and payload capabilities of small unmanned aircraft.

On further review, the FAA has determined that the framework of part 107 as codified in the final rule will maintain safety in the NAS. Mandatory minimum stand-off distances for small unmanned aircraft are not appropriate at this time. Part 107 already requires the remote pilot to ensure the small UAS operation does not pose an undue hazard to other aircraft, people, or property in the event of a loss of control of the aircraft. A prescriptive stand-off distance would not increase the level of safety of small UAS operations beyond the level that compliance with part 107, as amended by this rule, already achieves.

V. Category 1 Operations

The NPRM proposed to establish a category of operations over people using small unmanned aircraft that weigh 0.55 pounds or less, including everything that is on board or otherwise attached to the aircraft at the time of takeoff. The FAA determined that operations of small unmanned aircraft weighing 0.55 pounds or less, subject to all of the existing requirements governing operations in part 107, pose a low risk of injury when operating over people. The NPRM referred to this category of small unmanned aircraft operations as Category 1.

The NPRM explained that remote pilots in command would be responsible for determining that their small unmanned aircraft does not exceed 0.55 pounds and would therefore be eligible for operations in this category. The weight limit would apply from takeoff to landing, meaning that any cargo attached to the small unmanned aircraft must not cause the aggregate weight (unmanned aircraft

[26] Commenters suggested the FAA consider population density for a multitude of reasons. A commenter noted to consider population density to assist in the risk analysis of ''hover versus transit only operations.'' Another commenter suggested the level of mitigation requirements should increase as the density of people in the operation area increases. One commenter stated Augusta, Georgia has an ordinance that includes a definition of highly populated area that they believe will help reduce the risk of accidents from unmanned operations over people. Another commenter asserted the FAA has not considered increasingly unpredictable weather patterns or population density leading to increasing accident rates.

[27] 84 FR at 3888–89.

[28] Section 2209 requires ''the Secretary of Transportation to establish a process to allow applicants to petition the Administrator of the Federal Aviation Administration to prohibit or restrict the operation of an unmanned aircraft in close proximity to a fixed site facility.'' The FAA Extension, Safety and Security Act of 2016, Public Law 114–190, sec. 2209, 130 Stat. 615, 633–635 (2016). The FAA has determined that operations over moving vehicles can be conducted safely when following the requirements of this rule. A separate rulemaking action will address the process by which entities can submit a request to the FAA to restrict the airspace over a fixed site.

plus cargo) to exceed 0.55 pounds. The NPRM did not propose any design standards for Category 1. The FAA invited public comment, however, on any available data on the risk of injury to persons posed by operations using small unmanned aircraft that weigh 0.55 pounds or less. The FAA also invited public comment on whether operations of small unmanned aircraft eligible to operate pursuant to Category 1 should be subjected to a performance-based requirement for exposed rotating parts.

A. Weight Threshold

The FAA received many comments on the proposed 0.55-pound weight threshold for small unmanned aircraft to qualify for Category 1 operations over people. Several commenters, including Droneport Texas, LLC, ALPA, Small UAV Coalition, and others supported the proposed weight threshold for Category 1. Many commenters supported having a weight-based category for low risk unmanned aircraft, but found the proposed weight limit too conservative and recommended to increase the threshold to 1 pound. Other commenters recommended weight thresholds ranging from 0.70 pounds to 8 pounds.

A number of commenters specifically cited the ASSURE study and recommended the Agency consider it for setting the weight threshold for Category 1 operations. As discussed in Section VI.A., the ASSURE study is consistent with the safety requirements the FAA proposed for small unmanned aircraft above 0.55 pounds. The FAA finds that small unmanned aircraft above 0.55 pounds must demonstrate compliance with the safety requirements to operate over people. Commenters also frequently cited the 0.55 pound weight limit as a stop-gap weight pulled from other studies in the early stages of UAS development that is now outdated.[29] DJI cited a June 2018 report from the National Academies of Science, Engineering, and Medicine, which opined that the FAA has an ''overly conservative approach to safety risk assessments'' and ''tends to overestimate the severity and likelihood of risks from many types of drone operations.'' The June 2018 National Academies of Science, Engineering, and Medicine report referenced by DJI was delivered prior to the publication of this proposed rule, and as such did not address the proposed requirements. The report provided recommendations on how the FAA could better facilitate the integration of small UAS by making changes to the management and approval structure and did not opine on the specific requirements the FAA should consider for new regulations.

The 0.55 pound weight threshold as proposed is appropriate for a low-risk, weight-based category for small unmanned aircraft operations over people. Although several commenters recommended an increase in the weight threshold to 1 pound or more, the FAA reiterates that nothing in this rule precludes small unmanned aircraft weighing above 0.55 pounds from operating over people, as long as these small unmanned aircraft demonstrate that they do not pose an unacceptable risk to people on the ground by meeting the requirements for a Category 2, Category 3, or Category 4 operation.[30]

As noted earlier, DJI and other commenters referenced the recommendations of the UAS Registration Task Force, which originally proposed the 0.55-pound weight threshold as a basis for determining the need to register a small unmanned aircraft, and stated this weight should not apply in the form of an operational safety requirement. When developing their recommendations for a weight-based threshold for Category 1 operations, the Micro UAS ARC considered the stipulations from the UAS Registration Task Force concerning use of the 0.55-pound threshold for anything other than a requirement to register the aircraft.

The FAA does not find that DJI's report is specifically relevant to Category 1, as their analysis reviewed the small unmanned aircraft holistically, rather than the specifics of operations over people. While the FAA does not find the RTF report to be outdated, the FAA did not rely solely on it in determining the weight limit, as DJI implied. Instead, the FAA took the recommendation from the Micro UAS ARC report and the FAA analysis as described in the proposed rule and determined that the 0.55-pound weight limit was an appropriate limit for Category 1. The FAA has updated its analysis of Category 1 small unmanned aircraft based on comments received, as discussed further in Section V.B.

A commenter suggested the category should be based more on speed than weight. This commenter said that ''physics teaches that as speed increases it's actually momentum or inertia that doubles.'' Other commenters similarly suggested alternatives for the altitude or speed requirements for Category 1 small unmanned aircraft. Specifically, a commenter suggested the Agency permit Category 1 small unmanned aircraft to operate over people if they do not exceed 10 to 15 mph. This commenter believed the risk of injury increases as speed increases.

Although Boeing supported the 0.55-pound weight limit, it advocated for inclusion of a kinetic energy limit as well, which the company said would be consistent with FAA's risk-based approach of regulating small UAS operations. To that end, Boeing recommended the rule include both a 0.55-pound weight limit and a requirement that the aircraft ''will not cause injury to a human being that is equivalent to or greater than the severity of injury caused by a transfer of 10 foot-pounds of kinetic energy upon impact from a rigid object.''

The FAA proposed Category 1 to provide remote pilots with a low-risk category that is simple and straightforward. Remote pilots can determine compliance by simply weighing the aircraft and everything onboard or otherwise attached, which does not require any specialized equipment to measure. A category based on speed or injury limitation based on kinetic energy on impact would require a means of compliance to show how technology or other solutions would comply with the limitation. The 0.55-pound weight threshold represents an acceptable level of risk for Category 1. Any additional speed or altitude limitations beyond what is already required under part 107 would be inconsistent with the objective of having a lower-risk category.

B. Prohibition Against Exposed Rotating Parts

Due to comments received, this rule now prohibits from Category 1 eligibility all small unmanned aircraft with any exposed rotating parts that would lacerate human skin. The proposed rule did not include such a prohibition for Category 1. ALPA and the Coalition of Airline Pilots Association (CAPA) both stated that the Category 1 weight threshold alone is not sufficient for mitigating the potential risk of injury from exposed rotating parts. ALPA recommended prohibiting

[29] ARC, Registration Task Force ARC Report, 84 FR 3856, 3866–3867.

[30] While the FAA did not receive compelling data that the Category 1 weight limit should increase, the FAA will undertake a study to determine if the limit should be raised and perform a retrospective review of the rule. The timing of the retrospective review is based on conducting research on the safety of increasing the Category 1 limit in the future and collecting and analyzing cost and benefit data after the compliance date of the rule (*i.e.,* over enough of a time period to adequately collect and measure impacts from implementation). In addition, as part of the retrospective review, the FAA will undertake a study to determine whether the prohibition on exposed rotating parts that would lacerate human skin should be maintained or modified.

exposed rotating parts that could lacerate human skin for Category 1 operations. Other commenters believed propeller guards and other mitigations should be required equipment for operations over people, referring to potential serious eye injuries that exposed rotating parts could cause.

In contrast, Droneport Texas, LLC wrote that rotating parts on a small unmanned aircraft weighing 0.55 pounds or less are generally made of materials and rotate at speeds that could result in injuries rated at an abbreviated injury scale (AIS) level of 3 only if the operator conducted the operation in an extremely careless manner. This commenter asserted the probability of injury of this magnitude appears to be insufficient to justify a prohibition on exposed rotating parts.

The Agency agrees with the commenters who stated that exposed rotating parts on small unmanned aircraft weighing 0.55 pounds or less could be capable of causing lacerations even if the operator takes precautions. In addition, as small unmanned aircraft technology advances and high levels of performance are achieved with materials of construction that are lighter and stiffer than materials used today, small unmanned aircraft weighing 0.55 pounds or less will continue to experience performance improvements, which could increase the risks of laceration from exposed rotating parts. Category 1 operations must pose only a low risk of injury; therefore, it is the responsibility of the remote pilot to fly at appropriate altitudes and speeds to prevent their aircraft from causing injury to persons on the ground in the event of a mishap or collision. Finally, these small unmanned aircraft must not contain any exposed rotating parts that would lacerate human skin.

Category 1 provides a means for small unmanned aircraft to operate over people with minimal burden to the operator. As a result, in contrast to Categories 2 and 3, this rule does not require the submission of a declaration of compliance. Instead, this rule requires remote pilots of small unmanned aircraft to ensure that the rotating parts, if exposed, would not cause lacerations to human skin. Remote pilots may accomplish this by installing protective devices before operating over people. The original unmanned aircraft manufacturer could make available protective devices, purchased as aftermarket parts, or the owner or operator could design and install them. Regardless of the source of any protective device, the remote pilot must ensure the small unmanned aircraft does not contain exposed rotating parts that would lacerate human skin and does not exceed the weight-based limitation of Category 1.

C. Prohibition on Sustained Flight Over Open-Air Assemblies for Category 1

While the NPRM did not propose any additional operating requirements for Category 1 beyond the existing regulations in part 107, the FAA received comments that necessitate an additional operating requirement. As discussed in Section XIV.B., remote pilots are prohibited from operating a small unmanned aircraft as a Category 1 operation in sustained flight over open-air assemblies unless the operation fulfills the remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules. Sustained flight over an open-air assembly includes hovering above the heads of persons gathered in an open-air assembly, flying back and forth over an open-air assembly, or circling above the assembly in such a way that the small unmanned aircraft remains above some part of the assembly.

VI. Category 2 and 3 Operations

To conduct operations over people using small unmanned aircraft that weigh more than 0.55 pounds, the Agency proposed two categories of aircraft eligibility based on the risk of significant human injury. To be eligible for operations over people in either of these categories, a small unmanned aircraft would first have to demonstrate compliance with the safety requirements applicable to the specific category of operation. These requirements set injury severity limits that impacts from a small unmanned aircraft might cause, prohibit lacerations from exposed rotating parts, and prohibit safety defects. Category 3 aircraft would be subject to additional operating limitations as a mitigation for allowing a higher level of injury severity than Category 2.

The FAA developed this rule under the framework of performance-based rulemaking, which allows for the greatest flexibility in meeting minimum safety requirements. The FAA anticipates that industry will utilize a wide variety of designs, configurations, materials, and methods to meet the safety requirements established by this rule. Small unmanned aircraft that meet the requirements and adhere to applicable limitations of Category 2 or Category 3, paired with the operating requirements of the respective categories, provide for a level of safety the Administrator has determined is acceptable.

A. Eligibility of Small UAS To Conduct Category 2 and Category 3 Operations: Design and Production Requirements

To be eligible for Category 2 or Category 3 operations, the FAA proposed to require a small unmanned aircraft be designed, produced, or modified such that it does not exceed the applicable injury severity limit; does not contain any exposed rotating parts that would lacerate human skin on impact with a human being; and does not contain any safety defects identified by the Administrator. Additionally, the FAA proposed that an applicant would have to ensure that a small unmanned aircraft eligible for use in Category 2 or Category 3 operations would also have to display a label indicating which category or categories of operations it is eligible to conduct, have current remote pilot operating instructions, be subject to a product support and notification process, and that the applicant has received notification that the FAA has accepted the declaration of compliance.

As a point of clarification, this rule uses the term applicant to refer to the person who submits a declaration of compliance to the FAA for review and acceptance. An applicant for a declaration of compliance may be anyone who designs, produces, or modifies a small unmanned aircraft and is responsible for ensuring it meets all eligibility requirements to operate over people.

The FAA is finalizing most of these same eligibility requirements. The small unmanned aircraft must be designed, produced, or modified such that it does not exceed the applicable injury severity limit; does not contain any exposed rotating parts that could lacerate human skin on impact with a human being; and does not contain any safety defects to be eligible to operate over people in Category 2 or Category 3.

While the NPRM referred to these safety defects as being ''identified by the Administrator,'' the FAA recognizes that this phrasing could be misleading for both applicants and remote pilots. The FAA did not intend to limit who can identify a safety defect. While this list is not exhaustive, any safety defect identified by the Administrator, the applicant, a remote pilot, or a member of the public could affect the small unmanned aircraft's eligibility for Category 2 or Category 3. Additionally, the safety defect could result in the FAA initiating the process to rescind a declaration of compliance, as discussed in Section VI.C.9–12. The FAA has resolved this in the regulatory text,

which reads ''has verified that the unmanned aircraft does not contain any safety defects,'' for both Categories 2 and 3.[31] Additionally, the FAA changed ''could cause lacerations'' to ''would cause lacerations'' to better reflect the requirement the applicant must meet.

The FAA adopts the requirement that an applicant must ensure that a small unmanned aircraft eligible for use in Category 2 or Category 3 displays a label indicating which category or categories of operations it is eligible to conduct, has remote pilot operating instructions, and is subject to a product support and notification process. While the small unmanned aircraft must still be listed on a declaration of compliance, the FAA removed the eligibility requirement that the applicant must be notified, because the requirement as written implied that the applicant had a persistent need to check the declaration of compliance to ensure continued eligibility.

The Agency received numerous comments regarding the proposed eligibility requirements for Category 2 and Category 3 operations. As discussed in the following sections, commenters were concerned that the injury severity limits and the safety risk assessment were too conservative. Other commenters criticized the FAA for not considering the probability of an impact and focusing only on injury severity. Additionally, as discussed in greater detail in Section VII, several commenters faulted the FAA for failing to consider aircraft reliability. In consideration of the comments, the Agency adopts the proposed safety requirements for eligibility, but provides clarification in this preamble with respect to injury severity limits, the means of compliance process, and the declaration of compliance requirement.

The responsibility for ensuring eligibility of the small unmanned aircraft falls to the applicant. The applicant for a declaration of compliance must ensure his or her small unmanned aircraft complies with the eligibility requirements for Category 2 or Category 3, or both in accordance with §§ 107.120 and 107.130, as applicable. The applicant for a declaration of compliance must follow the process required by § 107.160, described in VI.C. of this preamble. The applicant must submit a declaration of compliance and receive acceptance from the FAA in order for its small unmanned aircraft to be eligible for operations over people. An applicant whose declaration of compliance has been accepted by the FAA must continuously fulfill the requirements in §§ 107.120 and 107.130, as applicable, for the subject small unmanned aircraft to continue to be eligible for use in Category 2 or Category 3 operations.

1. Must Not Exceed Applicable Injury Severity Limit

The prohibition on exceeding the injury severity limit of the applicable category of eligibility is a critical component of the safety requirements. For Category 2 operations, the small unmanned aircraft must not be capable of causing an injury to a human being that is more severe than an injury caused by a transfer of 11 ft-lbs of kinetic energy from a rigid object. For Category 3 operations, the small unmanned aircraft must not be capable of causing an injury to a human being that is more severe than an injury caused by a transfer of 25 ft-lbs of kinetic energy from a rigid object. As discussed in Section VI.B., the applicant seeking to demonstrate eligibility of a small unmanned aircraft for Category 2 or Category 3 operations must use an FAA-accepted means of compliance, such as a test procedure contained in an industry consensus standard, to show that the small unmanned aircraft does not exceed the applicable injury severity limit.

Several commenters specifically addressed the injury severity limit based on a rigid object with 11 ft-lb of kinetic energy proposed for Category 2. A few commenters suggested that 11 ft-lbs of kinetic energy from a rigid object on collision with a person might not provide sufficient protection for children, the elderly, people with disabilities, or even the average citizen. The City of New York said a point of concern is the acceptability of a ''Scale level 3'' injury and ''what that truly means relative to infants, elderly persons, during mass gatherings, and the effect on agitating a confined crowd.'' Another individual opposed operations over people because the proposed rule did not address blunt force trauma and the varying impacts it could have, based on the existing condition of the individual who is hit or the part of the body that is hit.

The proposed rule stated the 11 ft-lb kinetic energy level ''considers variations for all parts of the body for both adults and children, including when people are in various positions, such as standing, sitting, and prone.''[32] The 11 ft-lb impact kinetic energy value that forms part of the injury severity limit for small unmanned aircraft impacts considers risks to various populations and averages these risks across those populations. An injury that a small unmanned aircraft could cause to a person depends on many factors, including the person's age, condition, or disability. The severity of injury also depends on additional factors such as the point of impact, the angle of impact, and the unmanned aircraft's kinetic energy at the time of impact. For the reasons discussed in the following section, the injury severity limits provide an acceptable level of injury risk to all persons; accordingly, this rule finalizes the standards for Categories 2 and 3 as proposed, with no changes.

a. Range Commanders Council (RCC) Standards

As stated in the NPRM, the Agency based the proposed injury severity limits for operations under Categories 2 and 3 on extensive government research of human injury risk discussed in the Range Commanders Council's (RCC) Common Risk Criteria Standards for National Test Ranges and existing FAA commercial space regulations for public safety. The RCC standards inform public safety risk from commercial space launches, government space launches, and aircraft operations at national test ranges. These standards are based on impacts from inert debris and other types of rigid objects and assume these rigid objects transfer all their kinetic energy on impact with a person. As explained in the NPRM, however, research conducted by the UAS Center for Excellence under the Alliance for System Safety of UAS through Research Excellence (ASSURE) establishes that small unmanned aircraft do not always impact a person or surface in the same manner that metallic fragments impact them.[33]

To account for the disparity between impacts from rigid objects such as metallic fragments and small unmanned aircraft, the FAA proposed using injury severity caused by an impact from a rigid object as a threshold, rather than using an impact kinetic energy threshold alone. This standard aligns with existing risk acceptance policies for falling debris from commercial space launches,[34] and limits the risk of injury to the public, but expresses the safety limit in a way that allows small

[31] See §§ 107.120(a)(3) and 107.130(a)(3).

[32] 84 FR at 3875.

[33] Arterburn, et al., FAA UAS Center of Excellence Task A4: UAS Ground Collision Severity Evaluation: Revision 2 (Apr. 28, 2017) (hereinafter ''A4 Report''). The final report underwent peer review of researchers from FAA, the National Aeronautics and Space Administration, and industry participants. The report is available in the docket for this rulemaking.

[34] See *Licensing and Safety Requirements for Launch,* Supplemental Notice of Proposed Rulemaking, 67 FR 49456 (July 30, 2002), which the FAA finalized on August 25, 2006. 71 FR 50508.

unmanned aircraft to take advantage of design features that limit the amount of kinetic energy that is ultimately transferred to a person on impact.

In the NPRM, the FAA specifically solicited comments on whether establishing an impact kinetic energy threshold and using kinetic energy transferred on impact is the appropriate method to measure the potential injury a small unmanned aircraft could cause on impact with a person. The FAA also solicited comments on the methods, processes, procedures used in the studies on which the FAA based its proposed standards.

Multiple commenters took issue with the FAA's reliance on RCC thresholds. CDA commented that, given the critical difference between commercial space vehicles or missiles and unmanned aircraft, the kinetic energy impact thresholds for commercial space have no relevant application to UAS. In its comment, ASSURE pointed out that it previously determined that the ''RCC probability of fatality data is overly conservative and largely not applicable to elastic UAS.'' [35] Virginia Tech Mid-Atlantic Aviation Partnership (MAAP) stated rigid object energy thresholds are an overly conservative characterization of risk and commented that ''an inelastic object impacting a person does not emulate UAS impact events.'' MAAP stated the generalization in the NPRM based on ''the range commander data,'' which analyzed the impact of rigid shrapnel, is distinct from the impact of unmanned aircraft. MAAP asserted the reasons for the distinction are impact duration, contact area, and its energy transfer. MAAP explained these reasons in detail and concluded that ''[a] straightforward and more transparent approach to defining thresholds can be achieved by establishing acceptable risk limits using biomechanical metrics applicable to the generalized UAS impact conditions.''

AUVSI stated the proposed rule's injury threshold for Categories 2 and 3, and its basis on existing commercial space safety regulations and the RCC standards, was ''fundamentally flawed.'' AUVSI asserted that the use of RCC standards would impose unnecessary burdens on UAS manufacturers because small UAS manufacturers would be forced to conduct testing and present data on the injury risk presented by both the aircraft and energy transfer from a rigid object. AUVSI wrote there is no ''record basis'' for FAA proposing to use the RCC guidelines and declining to use the automotive injury criteria proposed by ASSURE or identifying an acceptable percentage-based risk as proposed in the ARC Report.

Several commenters also took issue with FAA's proposal to use injury thresholds based on kinetic energy measurements that are the same as those that apply to debris and shrapnel impacts from a commercial space launch operation, guided and unguided missiles, missile intercepts, and space reentry vehicles. Several of these individuals remarked, ''[t]his is not the appropriate standard for small drones because no small drone has the characteristics of rocket shrapnel, and the FAA's injury assumptions are based on outdated studies from the 1960's.'' Like AUVSI, these commenters recommended instead that the FAA ''make use of the research conducted by the ASSURE program, and use impact measurements, standards, and injury severity testing from the automotive industry, which are far more appropriate and informative.''

The News Media Coalition was concerned that some of the specific kinetic energy thresholds rely on data and testing that is not available to consumers, including the journalist in the Coalition. The commenter wrote that industry ''will be slow in rolling out new models that comply with the proposed rules'' and journalists will not be able to conduct operations over people. The FAA expects manufacturers generally will conduct the required testing and declare compliance with the requirements of Category 2 or Category 3, rather than operators and remote pilots. The FAA envisions most journalists would simply purchase a small unmanned aircraft that has an FAA-accepted declaration of compliance and follow the applicable operating rules for the category of operation over people being conducted.

The FAA carefully reviewed comments related to the applicability of the RCC impact kinetic energy thresholds and reiterates certain key aspects of the Agency's policy. First, the FAA agrees with commenters that the RCC impact kinetic energy thresholds are applicable to impacts from inert debris and that small unmanned aircraft do not behave like inert debris when impacting a person. The Agency addressed this disparity by proposing injury severity limitations rather than kinetic energy thresholds, and notes that applicants must demonstrate through test, analysis, or inspection that the small unmanned aircraft does not exceed the applicable injury severity limits. An FAA-accepted means of compliance will address the minimum testing, inspection, or analysis necessary to demonstrate compliance with the safety requirements. While some commenters objected to conducting tests, it is not appropriate to permit operations over people without applicants demonstrating compliance to the applicable regulations. This rule does not permit injuries caused by impacts of small unmanned aircraft that would be more severe than the injuries that could occur under commercial space regulations. It is unclear whether the commenters are advocating for higher risk to the general public when small unmanned aircraft are operating over them. Using biomechanical metrics does not align with the FAA's objective of creating performance-based safety requirements. However, any applicant could submit a means of compliance to the FAA for acceptance that utilized biomechanical metrics to show compliance with the safety requirements of this rule.

b. ASSURE Research Findings

The FAA sponsored ASSURE Tasks A4 and A14: UAS Ground Collision Severity Evaluation research to study and address several questions: (1) What should the hazard severity criteria be for a UAS collision? (2) What is the severity of a UAS collision with people on the ground? (3) What are the design characteristics of a UAS that could minimize the potential injury during a ground collision? and (4) Can the severity of UAS collision with a person be characterized into categories based on the UAS? ASSURE conducted research in consideration of such questions between 2015 and 2019, performing over 512 impact tests and simulations with 16 different fixed-wing and multi-rotor UAS, as well as various objects and payloads with weights ranging from 0.75 lbs. to 13.2 lbs. at a range of low to terminal velocities. ASSURE used impact testing with wood blocks to assess the injury that would result from an impact kinetic energy transfer from a rigid object at different kinetic energy levels (such as the levels for Categories 2 and 3). The ASSURE research team initially performed testing using crash test dummies to review and determine thresholds of serious but non-lethal injury utilizing the AIS. ASSURE then increased the fidelity of the injury modeling and testing by utilizing Post Mortem Human Subjects (PMHS) and compared the thresholds for serious but non-lethal injury established using the crash test dummies with the injury thresholds yielded from PMHS testing.

[35] David Arterburn, ASSURE Public Comment on the Notice of Proposed Rulemaking for Operations of Small Unmanned Aircraft Systems Over People 25 (February 27, 2019). Arterburn, et al., FAA UAS Center of Excellence Task A14: UAS Ground Collision Severity Evaluation 2017–2019 (August 15, 2019) (hereinafter ''A14 Report'').

Based on the FAA's experience evaluating waiver applications for operations over people and in consideration of the ASSURE research findings (Task A14: UAS Ground Collision Severity Evaluation 2017–2019), the Agency concludes a typical small unmanned aircraft can impact a person with significantly more than 11 or 25 ft-lbs of pre-impact kinetic energy and still not exceed the injury severity limits in the proposed rule. When discussing the ASSURE report and its definition of kinetic energy,[36] the FAA refers to the potential to cause injury due to the vehicle's mass and speed just prior to the collision as pre-impact kinetic energy. A portion of this pre-impact kinetic energy is transferred to a person during impact.

For example, the FAA analyzed the ASSURE research and found that, for a certain impact orientation, a DJI Phantom 3 unmanned aircraft can impact a person with up to 130 ft-lbs of pre-impact kinetic energy before exceeding the Category 2 injury threshold proposed in the NPRM. This situation demonstrates that an unmanned aircraft can impact a person with up to 11 times more pre-impact kinetic energy than a rigid object (130 ft-lbs vs. 11 ft-lbs) and result in the same level of injury severity. The FAA finds this example and other examples contained in the ASSURE research demonstrate that the injury severity limits based on transfers of impact kinetic energy from rigid objects will ensure that small unmanned aircraft meeting these requirements pose no greater risk to the general public than operations currently allowed under existing, relevant commercial space regulations.[37]

The ASSURE research also found that small changes in small unmanned aircraft impact orientation, Center of Gravity (CG) alignment of the skull, and small unmanned aircraft impact location cause large changes in impact energy transfer. Addressing different impact orientations is relevant when assessing small unmanned aircraft typical failure modes for a means of compliance, as discussed in the following section.

Many commenters, including ParaZero Drone Safety Systems, AUVSI, CDA, AiRXOS, Inc., AIA, Small UAV Coalition, New Mexico State University Physical Science Laboratory, PrecisionHawk, Inc., MAAP, Deseret UAS, DJI, and numerous individuals considered and discussed research, particularly the ASSURE research, and contended that the FAA's analysis results in overly conservative kinetic energy impact thresholds. These commenters suggested the FAA should have more closely followed the findings of the Center of Excellence ASSURE's UAS Ground Collision Severity Evaluation. ASSURE wrote:

> The NPRM's proposed performance-based metric of injury resulting from the impact of a rigid object at 11 ft-lbs and 25 ft-lbs . . . are overly conservative based upon the result of [Anthropomorphic Test Dummy (ATD)] and [Post-Mortem Human Surrogate (PMHS)] testing and lead to ambiguity in how to test sUAS to achieve Category 2 and Category 3 approvals.[38]

ASSURE noted that its Task A14 team proposes the use of automotive injury performance-based metrics ''consistent with the extensive FAA sponsored and funded testing conducted over the last two years to enable the use of standardized automotive based test methods and increase the number of aircraft capable of achieving [Category 2 and 3 operations] while still achieving the casualty definitions outlined in the NPRM.''

The Agency developed the performance-based injury severity limits to allow industry to develop unique means of compliance. The FAA anticipates that the methodologies ASSURE highlighted in its comment to measure injury severity will be included in means of compliance submitted to the FAA for acceptance. Developers of means of compliance can use any measurable human injury scales as long as they demonstrate that small unmanned aircraft impacts do not cause injuries more severe than those caused by impact of a rigid object. Further, applicants must explain how the injury scales address the most severe types of injuries that would likely occur from a small unmanned aircraft impact. The FAA expects a means of compliance might consider a suite of injury scales to cover the likely types of injuries from a small unmanned aircraft impact. The FAA anticipates that organizations, including industry consensus standards bodies, may develop means of compliance by conducting rigid object testing against existing injury scales to meet the injury severity limits of this final rule and that the FAA would accept these means of compliance. Applicants submitting a declaration of compliance may then use this FAA-accepted means of compliance without themselves having to conduct the rigid object testing.

The FAA carefully considered the findings of ASSURE. The ASSURE research confirms that the injury severity limits for Categories 2 and 3 the Agency proposed in the NPRM provide an acceptable level of safety. Many commenters focused on the perception that the Categories 2 and 3 injury severity limits in the NPRM were too restrictive, without observing that the NPRM uses the injury severity caused by the impact of a rigid object at certain energy levels as the threshold for acceptability. The ASSURE research, summarized in the Task A14: UAS Ground Collision Severity Evaluation 2017–2019 report, provides data, injury metrics, and a test method to assess the injuries caused by the impacts of rigid objects with humans at the kinetic energy levels proposed in the NPRM and compares them to the injuries caused by small unmanned aircraft impacts with humans. Through the use of their test methods and injury analysis metrics, the ASSURE results show that a small unmanned aircraft can impact a human being with a much higher kinetic energy while causing a comparable level of injury as the injury that would result from an impact with a rigid object at the proposed kinetic energy levels. The ASSURE research establishes that small unmanned aircraft do not behave like rigid objects during an impact and have greater flexibility, frangibility, and so on.

Data provided in ASSURE's reports as well as in ASSURE's comment on the NPRM demonstrate that small unmanned aircraft do not behave like rigid objects during an impact. For example, Figure 10 of ASSURE's comment in response to the NPRM shows ASSURE's data and evaluation results for the DJI Phantom 3 using the ATD Impact Head Injury Criteria (HIC_{15}).[39] The FAA's analysis of the results show that to cause equivalent HIC_{15} injury level as the injury caused by a rigid object at 11 ft-lbs, the Phantom 3 would need to achieve an pre-impact kinetic energy of 130 ft-lbs. The same figure shows that to cause equivalent HIC_{15} injury level as the injury caused by a rigid object at 25 ft-lbs, the Phantom 3 would need to

[36] The A14 Report at vii states, ''KE—Kinetic Energy (The impact KE forms the potential to cause injury due to the vehicle's mass and speed just prior to the collision while the material and structural response of the vehicle influence its ability to transfer KE to an impacted person and cause injury).''

[37] A14 Report at 7, 18; David Arterburn, ASSURE Public Comment on the Notice of Proposed Rulemaking for Operations of Small Unmanned Aircraft Systems Over People at 25 (February 27, 2019).

[38] David Arterburn, ASSURE Public Comment on the Notice of Proposed Rulemaking for Operations of Small Unmanned Aircraft Systems Over People, 1 (February 27, 2019).

[39] A4 Report.

achieve a pre-impact kinetic energy of 220 ft-lbs. These examples, as well as other data in ASSURE's reports and comment on the NPRM, show that ASSURE tested small UAS that could meet the injury severity limits of the NPRM by placing some reasonable operating limitations on the small UAS, such as altitude or speed restrictions. Additionally, the small unmanned aircraft used in ASSURE's testing were all manufactured prior to the publication of the NPRM, and may not have design features that limit or reduce the amount of kinetic energy transferred on impact.

With the publication of this rule, manufacturers may take this opportunity to design new small unmanned aircraft of similar size, weight, and capability as the existing small unmanned aircraft designs ASSURE tested. ASSURE tested existing models of small unmanned aircraft to determine the severity of injuries potentially caused by impact. The FAA found that, in reviewing the ASSURE report, many existing models could, potentially with modifications, meet the injury severity limits of the proposed rule.

The FAA does not agree with ASSURE and other commenters that the requirements of this rule are too conservative. This final rule is performance-based, therefore the FAA anticipates that applicants would be able to use a variety of injury scales in a means of compliance including the injury scales identified by ASSURE and other commenters. The FAA finds that the requirements for Categories 2 and 3 as finalized in this rule set an appropriate balance between allowing small unmanned aircraft to operate over people without an airworthiness certificate while also limiting the risks of small unmanned aircraft operations to the general public.

The FAA also tasked ASSURE to develop a repeatable and simplified test methodology for assessing the level of injury severity of small unmanned aircraft to people on the ground in the event of a collision. The test methodology ASSURE produced from this research utilizes the lessons learned from their high fidelity crash test dummy and PMHS testing.[40] The methodology is a comprehensive means to perform impact testing and assess the severity of injury in a manner that is not cost prohibitive. The FAA would likely find acceptable a means of compliance based on ASSURE's test method, as described in the A14 Report. For further discussion about means of compliance, see Section VI.B.

c. Other Methodologies To Evaluate Injury Severity

The Small UAV Coalition said the FAA's narrow focus on kinetic energy is inconsistent with other risk assessment models, such as the Specific Operations Risk Assessment (SORA) model adopted by the European Commission, based on its development by the Joint Authorities for Rulemaking on Unmanned Systems (JARUS). CDA similarly recommended adopting the JARUS–SORA model. The SORA provides a qualitative methodology to determine the intrinsic operational risk and a means to apply strategic and tactical mitigations to reduce risk to an acceptable level as determined by the approving authority. The SORA also recommends types of risk mitigations or controls that address common threats, scalable to the level of risk, to ensure the safety of the UAS operation. Under the SORA methodology, an operation over a gathering of people would require airworthiness certification or a mitigation or control acceptable to the approving authority. Operations under Categories 2 and 3, conducted in accordance with the requirements and the declaration of compliance process are consistent with the recommendations of the SORA. Further, the FAA has added a Category 4 to this rule, which enables small unmanned aircraft with an airworthiness certificate to operate over people in accordance with part 107. The FAA anticipates that waiver and exemption applicants will continue to use the SORA methodology to support waivers and exemptions including for activities not permitted under this rule, such as beyond visual line of sight operations. An individual commenter said operations over people should be governed by an equation that considers: (1) Probability of crash (considering weather, condition of UAS, proximity to buildings, etc.); (2) angle of flight path relative to people; (3) speed (including whether it will hover or just transition over people); and (4) height. The FAA acknowledges that considering the probability of a crash, angle of flight path, and speed is one method to determine risk to persons on the ground. However, this approach requires the FAA to evaluate each element for each operation to determine acceptability, which would increase the burden on applicants and the FAA. The commenter's equation does not provide specific performance-based requirements. The performance-based injury severity limits, exposed rotating parts prohibition, and operating limitations that this rule establishes provides an acceptable level of safety while allowing flexibility for industry to develop varying ways to comply with the applicable requirements.

d. Injury Severity and Failure Rate Uncertainty

The European Union Aviation Safety Agency (EASA) recommended aligning the criteria to allow small UAS operations over people as much as possible between the United States and Europe. EASA noted that Category 3 ''identifies a maximum KE threshold of 25 feet-lbs (about 34 Joules) for impact with a solid object.'' The requirements for the proposed 34 joules applicable to Category 3 small UAS and the 80 joules applicable to the new EASA Class 1 unmanned aircraft refer to transferred kinetic energy, address the effects of blunt trauma, limit operations over uninvolved people, and include additional technical requirements. Because they are quantitatively different, however, EASA was concerned ''they could set Europe and the US on different regulatory courses for 'fly over people' operations.'' EASA stated the data from the RCC standard described in the proposed rule are too conservative. EASA reported that it had reviewed, in particular, the Gurdjian experiments to recalculate the energy values.[41] As described in their comment, EASA asserts the ASSURE Ground Collision Severity Evaluation final report supports its recommendation to include a kinetic energy threshold of 80 joules.[42]

The Category 3 operation in this rule and EASA's Class 1 unmanned aircraft operation share similarities, but have important differences. In particular, the EASA Sub-category C1, which includes the limitation of 80 joules of energy transfer on impact, also contains noise, alerting, structural, navigation, and datalink requirements that are not included in the FAA's Category 2 or Category 3 eligibility requirements. The design requirements addressing topics such as structural integrity and navigational performance are better suited for the aircraft certification process and are not appropriate for non-certificated aircraft. Because small unmanned aircraft under Categories 2 and 3 are not required to have an airworthiness certificate or meet design requirements such as those adopted by

[40] A14 Report, Scope p.1–5.

[41] EASA's comment cited Gurdjian, ES., Webster J.E., and Lisnner, H.R. (1949) Studies on skull fracture with particular reference to engineering factors. *American Journal of Surgery, 78(5), 736–751. https://doi.org/10.1016/0002-9610(49)90315-3.*

[42] EASA, *https://www.regulations.gov/document?D=FAA-2018-1087-0415.*

EASA, an increase in the kinetic energy values would allow injuries that are significantly more severe than the injuries that could occur under Category 2 or Category 3 of this rule. Both the ASSURE research and the Gurdjian experiments support the fact that an increase in the kinetic energy from the proposed requirement, without any mitigating design requirements such as those required under EASA's regulations, increases the injury severity limit beyond an acceptable level. The FAA envisions that the variety of the four different categories will likely provide greater flexibility than what EASA has provided. Without including additional design or certification requirements, the change EASA suggests would result in an unacceptable level of safety for the general public. The injury severity limits and exposed rotating parts prohibition are an appropriate set of regulations for enabling aircraft without airworthiness certification to operate over people in accordance with an acceptable level of safety.

The Agency, however, agrees that conformity to design requirements is another way to enable small unmanned aircraft operations over people, and has thus added a Category 4 to accommodate certificated aircraft. The proposed rule included a request for comments regarding how the FAA should approach the uncertainties regarding failure rates and injury severity. Several commenters contended that the FAA relied too heavily on the injury severity limits and did not adequately consider the reliability of the small UAS or the probability of failure. With regard to probability of failure, the Agency received several divergent comments: Some believe probability of failure was inherently low, while others thought probability of failure could be high. Although the reliability of the small unmanned aircraft is one factor in determining whether an operation over people is safe, the FAA's process for considering the reliability of aircraft is the airworthiness certification process. Given that operations under part 107 do not need to occur with small unmanned aircraft that have an airworthiness certificate, probability of failure is a less appropriate measurement than the combination of injury severity limits and restrictions on exposed rotating parts and safety defects for Categories 2 and 3, in addition to the operating limitations in Category 3 that reduce likelihood of impact to a human being. To address these comments, this rule allows aircraft that have an airworthiness certificate that does not prohibit operations over people to be used for operations over people. These Category 4 eligibility requirements are discussed in Section VII of this preamble.

One commenter asked why the Agency did not distinguish between rotorcraft and fixed-wing aircraft. The commenter stated, ''[t]hey fall differently, but we have the same rules for both.'' Although rotary-wing and fixed-wing small unmanned aircraft have unique flight characteristics and the manner in which they could impact a person could be different, any small unmanned aircraft must not exceed the injury severity limits, regardless of whether it is a rotary-wing, fixed-wing, or any other type aircraft. An acceptable means of compliance must account for the variations in aircraft configurations, unique failure modes, most probable impact orientations, impact trajectory angles, and velocities from flight test and dynamic modeling for different types of small unmanned aircraft to demonstrate compliance. A few commenters said the categories should be based on the flight altitude for the same small unmanned aircraft. A commenter suggested that a ''Mavic Air'' would be rated Category 2 up to 50 feet and Category 3 up to 80 feet.[43] The NPRM discussed the possibility of individual small unmanned aircraft being eligible for operations in more than one category through the use of variable modes or configurations. The FAA would consider a design feature that limits the altitude of a small unmanned aircraft to the maximum altitude associated with compliance as an example of a variable mode; for example, when not operating over people, a certain small unmanned aircraft would not need to limit its altitude. However, to operate over people, the remote pilot would operate in a mode that limits the aircraft's altitude to comply with the requirements for operating over people. To use variable modes or configurations, the remote pilot must not be able to inadvertently change the mode or configuration and instructions for how to change between modes or configurations must be available in the remote pilot operating instructions. Variable modes and configurations are discussed in Section VI.F.

2. Must Not Have Exposed Rotating Parts

To be eligible to conduct Category 2 or Category 3 operations over people, the Agency proposed prohibiting a small unmanned aircraft from being designed, produced, or modified such that it contains exposed rotating parts that could lacerate human skin on impact with a human being. As stated in the proposed rule, exposed rotating parts could cause lacerations or other serious injuries if these parts were to come into contact with a person. Such parts are a common feature to small unmanned aircraft on the market today. Due to the hazards this feature can pose, the Agency proposed restricting eligibility for Categories 2 and 3 to small unmanned aircraft that do not contain any exposed rotating parts that could lacerate human skin on impact. While the NPRM acknowledged that exposed rotating parts could be capable of injuries beyond just lacerations (*e.g.,* injuries to hair, teeth, and eyes), the Agency determined this prohibition, combined with the other limitations, were sufficient to mitigate the risk of injuries.

Several commenters asserted that protections for exposed rotating parts are not necessary for small unmanned aircraft. One of these commenters pointed out that data shows fewer injuries to uninvolved parties result from exposed propellers on small unmanned aircraft than the number of annual fatalities that occur from rotorcraft and operations that occur under part 103.[44]

Manned aircraft with approved designs do not require shrouded rotors because compliance with applicable certification standards and operating limitations reduce the likelihood of an impact with a human being and therefore do not present a significant hazard to persons on the ground. Operating a small unmanned aircraft under Category 2 or Category 3 does not require airworthiness certification but, as described in this rule, design features such as shrouded propellers can mitigate the risk of laceration to persons on the ground. Ultralight vehicles operating in accordance with part 103 do not have airworthiness certificates. However, to mitigate the risk to persons on the ground, these vehicles are prohibited from operations over any congested area of a city, town, or settlement, or over any open-air assembly of persons.[45]

[43] The Mavic Air is a small unmanned aircraft that weighs in the range of 0.95–1.25 pounds, depending on the model and series.

[44] Title 14 CFR part 103 (''Ultralight Vehicles'') applies to manned vehicles that only a single occupant operates for recreation or sport and, if unpowered, weigh less than 155 pounds. Part 103 applies to powered vehicles that weigh less than 254 pounds empty weight that meet other criteria. See 14 CFR 103.1.

[45] See 14 CFR 103.15 (''Operations over congested areas'').

Many commenters suggested the prohibition on exposed rotating parts is too restrictive. The Small UAV Coalition commented that while the preamble of the NPRM refers to the prohibition on exposed rotating parts as a performance standard, it appears to result in requiring installing guards or shrouds to ensure that rotating parts are not exposed on impact. Uber Technologies asserted that the exposed rotating parts prohibition strictly based on any skin laceration, without consideration of severity or probability, creates an additional blanket prohibition on aircraft with any exposed rotating parts. If the restriction remains in the final rule, Uber Technologies recommended including a waiver process for exposed rotating parts, with appropriate inclusion of risk- and performance-based metrics. AeroVista Drone Academy believed the requirement for a manufacturer to establish that an aircraft design would not have exposed rotating parts that could lacerate human skin is ''materially infeasible'' without specific guidance as to what would meet this threshold. The Academy wrote that manufacturers would have to conduct prohibitively expensive and costly testing. A-Cam Aerials asked the Agency to reword the requirement so that small unmanned aircraft eligible for operations in Categories 2 and 3 be designed such that they ''minimize'' lacerations to human skin on impact with a person.

The FAA clarifies the primary safety objective of the exposed rotating parts prohibition is to protect human beings on the ground from lacerations upon impact with a small unmanned aircraft in typical human encounters and unmanned aircraft operational scenarios (including potential failure modes). The FAA distinguishes between a laceration, meaning a cut that goes all the way through the skin and may require emergent medical attention, and an abrasion, meaning a superficial injury to the skin. Additionally, the FAA uses the expression ''typical human encounter'' to describe normal impacts, such as an unmanned aircraft impacting a human being due to a loss of control, small UAS failures, or remote pilot error. Exposed rotating parts may pose a significant laceration hazard if they contact human skin, which is unacceptable for the safety of the general public. The performance-based standards for Categories 2 and 3 will protect persons on the ground from potentially serious injury. This rule does not prohibit the applicant from using exposed rotating parts, but only prohibits the presence of rotating parts capable of lacerating human skin in typical human encounters. The FAA has issued waivers to companies for operations over people that employed combinations of motor stop technology and exposed rotating parts materials that could cause abrasions, but not lacerations. The technology and the testing methodologies these companies used could be utilized in a means of compliance accepted by the FAA.

The FAA anticipates that organizations, including industry consensus standards bodies, may develop means of compliance for an unmanned aircraft with exposed rotating parts that meet the prohibition on exposed rotating parts that would cause lacerations. Once those standards are accepted by the FAA, applicants submitting a declaration of compliance may then use that means of compliance without themselves having to develop the testing methodology or technology. Such a means of compliance may include specific material requirements, rotor specifications, or additional mitigating technologies.

As for the waiver process, § 107.39 will remain subject to waiver and the FAA will continue to review waiver applications on a case-by-case basis. With regard to the costs of complying with the prohibition, a summary of impacts is in the regulatory impact analysis available in the public docket for this rule.

Commenters were also concerned about installing shrouds that would guard propellers. An individual wrote that propeller guards and full body cages can ''adversely affect flight characteristics'' and that propeller guards could increase the likelihood of loss of control for some quadcopters. In addition, DJI said shrouding an entire rotating part, if that part is involved in propulsion, can affect the aerodynamics and performance of the aircraft.

This rule is performance-based and allows exposed rotating parts as long as they do not lacerate human skin. Adding rotor shrouds, full body cages, or other safety features might be ways to fulfill the requirement. The rule permits applicants to employ propeller guards or full body cages in consideration of maintaining appropriate flight characteristics for the small unmanned aircraft. Designs that use propeller guards that prevent the exposure of rotating parts in typical human encounters, would be acceptable to the FAA. The FAA acknowledges that lacerations to human skin may not be entirely preventable in every encounter scenario. The means of compliance will address how this requirement is met, and may contain design characteristics and test methods to ensure that the applicant has taken all reasonable measures to mitigate the possibility of lacerations upon impact with a human being. While the inclusion of propeller guards or full body cages could adversely affect the flight performance of the small unmanned aircraft, the safety benefits provided by the prohibition outweigh the potential loss of performance.

An individual noted that lacerations from propellers and other parts do not rise to the level of AIS level 3. Not all lacerating injuries will result in severe injury, but rotating propellers and rotors could pose a significant laceration hazard if they come in contact with human skin. Overall, protection from lacerating injuries is necessary to mitigate the risk to the general public.

Droneport Texas, LLC said the FAA should be open to timely consideration and acceptance of alternatives to ducting or shrouding rotors, such as rotor shedding, in which lightweight rotors are jettisoned and drift to the ground, and rotor braking, in which all exposed rotating parts are mechanically or electrically stopped prior to impact. Ducting or shrouding of rotating parts is only one method of design implementation to protect from laceration. This rule does not prescribe specific design features to provide protection from exposed rotating parts; any such design features that Droneport Texas, LLC identified will be acceptable if they meet an FAA-accepted means of compliance.

DJI said it supports protecting people from sharp moving parts during operations where risks of lacerations exist, but notes this could exist with respect to operations near, not necessarily over, people. Section 107.19(c) states, ''the remote pilot in command must ensure that the small unmanned aircraft will pose no undue hazard to other people, other aircraft, or other property in the event of a loss of control of the small unmanned aircraft for any reason.'' [46] As stated in the NPRM, for small unmanned aircraft with exposed rotating parts that could cause a laceration, the remote pilot is responsible for determining the appropriate stand-off distance to ensure the small unmanned aircraft does not pose a hazard to other people when operating near them.

A few commenters urged the FAA to consider the likelihood of a laceration if a blade were to come into contact with human skin. Skydio said propeller

[46] In the NPRM, the FAA proposed clarifying § 107.19, as discussed in Section XII.C of this preamble.

guards are not necessary in all occasions because blade design and construction (*e.g.,* size, speed, angles, and ability to retract) have a large impact on the likelihood of a laceration if a blade were to come into contact with a person. Additionally, Skydio said emergency propeller stopping mechanisms in software can shut down the rotors if they come close to or contact a person. Skydio advocated for a performance-based standard that allows exposed rotating parts, ''so long as it can be demonstrated that the design heavily mitigates the chances and severity of the blades hurting people.'' A commenter asserted folding propellers should be a mitigation factor for operations over people in deciding if a small unmanned aircraft could be used under § 107.39.

Under this rule, blade guards or shrouds on exposed rotating parts are not required if applicants can demonstrate, by a means acceptable to the FAA, that unprotected exposed rotating parts are incapable of lacerating human skin. Implementing a rotor brake or similar approach to stop the exposed rotating part before it makes contact with a person may be effective in protecting from lacerations, but this requires the applicant to demonstrate their effectiveness in all likely small unmanned aircraft failure scenarios. Similarly, folding propellers would be acceptable if the design is shown incapable of causing lacerations in accordance with an FAA-accepted means of compliance.

NASAO noted that some small unmanned aircraft have guards on the rotors, but stated it is not clear if this would meet the eligibility requirement. AUVSI and MAAP requested clarification that the prohibition on parts that can lacerate human skin applies only during the operating envelope of the aircraft or during failure mode. Several commenters supported the proposed rule if the small unmanned aircraft has propeller guards or some other piece of safety equipment, or is recognized as reliable, to mitigate the risk of a falling small unmanned aircraft. A commenter would give ''professional-level'' small UAS more latitude to conduct operations over groups of people, ''while restricting toy drones that are less capable.''

The FAA agrees that the regulations should provide safety protection from propellers that could cause lacerations. This rule finalizes the prohibition on exposed rotating parts that could cause lacerations for Categories 2 and 3 as proposed, with no changes. Moreover, existing small unmanned aircraft designs will have to show compliance with these requirements. Small unmanned aircraft that already incorporate rotor guards would need to demonstrate the effectiveness of the rotor guard to protect from lacerating human skin when impacting a person by following an FAA-accepted means of compliance. The applicability of the exposed rotating parts prohibition is limited to small unmanned aircraft operating over people under Categories 1, 2, and 3. To be eligible for Category 2 or Category 3 operations over people, the applicant must use an FAA-accepted means of compliance and demonstrate the design does not contain any exposed rotating parts that would lacerate human skin on impact.

3. Must Not Contain Safety Defects

To be eligible to conduct operations over people in accordance with Category 2 or Category 3, the Agency proposed requiring each small unmanned aircraft be designed, produced, or modified such that it does not contain any safety defects identified by the Administrator. As discussed previously, the FAA has removed ''identified by the Administrator'' for the sake of clarity. The NPRM explained the Agency considers a safety defect to be a material, component, or feature of a small unmanned aircraft that increases the likelihood that the small unmanned aircraft could cause a casualty or fatality to a person during an operation over people. As defined in the proposed rule, a safety defect in a small unmanned aircraft eligible for conducting Category 2 operations would cause the unmanned aircraft to exceed a low probability of causing a casualty to a person during an operation over people. A safety defect in a small unmanned aircraft eligible for conducting Category 3 operations would cause a small unmanned aircraft to exceed a low probability of causing a fatality to a person during an operation over people.

The NPRM proposed to define a casualty to be a serious injury, which corresponds to a level 3 injury on the AIS. While the FAA still finds the AIS to be a valuable tool in determining the severity of an injury, the FAA concludes that it is not necessary to define it strictly. Furthermore, several commenters suggested the FAA use AIS in lieu of the injury severity limits adopted in this rule. As discussed in the NPRM, the FAA did not find the use of AIS in measuring injury severity appropriate.[47] In order to eliminate confusion, the FAA finds it prudent to remove any regulatory references to AIS. The dictionary definition of ''casualty''—a serious or fatal accident[48]—provides sufficient clarity as to the safety defect requirement. As such, the definition of ''casualty'' proposed in the NPRM has been removed from the final rule.

The NPRM provided the following examples of safety defects: Exposed wires or hot surfaces on a small unmanned aircraft that could cause electrocution or burns to a person on impact; damaged or defective lithium polymer or lithium-ion batteries that could cause casualties from battery fires or explosions; and sharp edges or projections that could cause lacerations or punctures as a result of an impact with a person. The NPRM also noted that as small unmanned aircraft designs evolve over time, potentially hazardous features or characteristics, unknown at the present time, could emerge.

One commenter noted the FAA did not provide an objective standard or process for discerning what constitutes a safety defect. Another commenter asked how egregious a safety defect would need to be to result in action on the part of the FAA.

To ensure this rule remains flexible and responsive to the changes in technology, this rule does not contain an exhaustive list of all potential safety defects or issues. An identified safety defect or issue will require action on the part of the FAA if the probability of serious injury or fatality exceeds the parameters of acceptable risk for Category 2 or Category 3. As discussed in Section VI.C., Declaration of Compliance, the FAA has implemented a process by which it will work with applicants on addressing and resolving any identified safety defects or issues that would render the small unmanned aircraft ineligible to operate over people. This rule adopts the prohibition of safety defects in small unmanned aircraft eligible to conduct operations in accordance with Categories 2 and 3, without change.

4. Must Display a Label

To qualify for operations over people in accordance with Category 2 or Category 3, the Agency proposed requiring the display of a label on each small unmanned aircraft, indicating the category or categories for which the small unmanned aircraft is eligible to conduct operations. The Agency explained that such labeling will assist the FAA in its oversight role by providing a simple and efficient way to determine whether a small unmanned

[47] 84 FR 3856 at 3873.

[48] ''Casualty.'' *Merriam-Webster.com Dictionary,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/casualty.* Accessed 12 Aug. 2020.

aircraft is eligible to conduct operations over people. In addition, it will provide notice to remote pilots which category of operations they are eligible to conduct using that aircraft.

The Agency did not propose a prescriptive labeling requirement that specifies exactly how an applicant [49] must label an aircraft, what size font to use, specific location, and so on. Due to the large variety of small unmanned aircraft models that exist, the Agency explained that such a prescriptive requirement would be unnecessary. Instead, the proposed rule stated the small unmanned aircraft could be labeled by any means as long as the label is in English, legible, prominent, and permanently affixed to the aircraft. Given that a small unmanned aircraft could be eligible to conduct operations in more than one category of operations over people, the small unmanned aircraft would have to be labeled with each category of operations for which the small unmanned aircraft is eligible. The NPRM noted that some small unmanned aircraft that are manufactured prior to final publication of this rule may qualify for one or more categories of operations over people. If the FAA has accepted a declaration of compliance for one of these previously-manufactured small unmanned aircraft, the proposed rule would allow a remote pilot in command to operate the small unmanned aircraft over people, provided the unmanned aircraft is labeled for the appropriate category or categories of operation. This final rule requires a remote pilot to label a previously-manufactured small unmanned aircraft in accordance with the declaration of compliance. Also, if a label degrades such that it is no longer legible or attached to the aircraft, the proposed rule included a requirement that the remote pilot relabel the small unmanned aircraft. In response to the proposed labeling requirement, an individual commenter asked for an explanation of the purpose of the labeling requirement, saying he would personally prefer not to add additional markings to the aircraft. The FAA requires the label for two purposes. For the remote pilot, the purpose of the label is to list the categories of operations over people the small unmanned aircraft is eligible to conduct, as indicated on the FAA-accepted declaration of compliance. The other purpose of the label is for the FAA and other agencies to determine that the small unmanned aircraft is eligible to conduct the operation.

AUVSI commented that the proposal would benefit from further clarification about who is responsible for labeling. AUVSI stated the NPRM is inconsistent about whether manufacturers or operators must label the aircraft. AUVSI noted that the proposed rule did not affirmatively require manufacturers to label unmanned aircraft, but that labeling is a prerequisite for a small unmanned aircraft to be eligible to conduct Category 2 or Category 3 operations. AUVSI interpreted this as placing the burden on the operators who want to conduct such operations. An individual commenter requested clarity on what responsibility the remote pilot in command has for ensuring that the small unmanned aircraft is properly labeled for Category 2 or Category 3.

This rule requires the applicant to label the small unmanned aircraft. Under this rule, the label must remain affixed to the small unmanned aircraft to remain eligible for Category 2 or Category 3 operations. For small unmanned aircraft manufactured prior to the effective date of this rule and listed on a declaration of compliance, the remote pilot has the responsibility of labeling the small unmanned aircraft before he or she may conduct operations under Category 2 or Category 3. Once the small unmanned aircraft is in the possession of the remote pilot, it becomes his or her responsibility to ensure the label remains clear, legible, and affixed to the aircraft. DJI opposed the proposed labeling requirement, expressing concern that the requirements for manufacturers would be too burdensome and that if the FAA rescinds a declaration of compliance, the labeling may become erroneous or outdated. The FAA does not consider the labeling requirement to be unduly burdensome, given the performance-based nature of the requirement. Additionally, because the remote pilot is ultimately responsible for ensuring the unmanned aircraft is both labeled appropriately and listed on an FAA-accepted declaration of compliance, per the applicable operating requirements, the risk of erroneously-labeled small unmanned aircraft being used for operations over people is low. The FAA encourages industry to develop a standard for the label to promote consistency and ease of understanding.

DJI recommended the FAA maintain a database of aircraft, similar to that instituted by Transport Canada, and allow this to inform potential small UAS buyers of the accepted products that currently meet the requirements for their mission needs. The FAA will make available on the FAA website the status of each applicant's declaration of compliance for public access, to enable remote pilots to determine which small unmanned aircraft are eligible for operations over people. The FAA anticipates listing the aircraft by make, model and series, if applicable, serial number, and category.[50] This database will be the primary source of the eligibility of the small unmanned aircraft, while the label provides a simple and efficient way to indicate eligibility for operations over people.

DJI also expressed concern that operators may modify a manufacturer's small UAS, rendering the label ''outdated''. The FAA emphasizes the remote pilot is responsible for ensuring any modifications to the small UAS are in accordance with the remote pilot operating instructions in order for the small UAS to remain eligible under the FAA-accepted declaration of compliance. This rule requires the applicant to provide remote pilot operating instructions, on sale or transfer of the small unmanned aircraft, or use of the small unmanned aircraft by someone other than that person. The operating instructions should address, among other things, modifications that will not change the eligibility of the small unmanned aircraft to operate over people. To be eligible to operate over people, the applicant is required to label the small unmanned aircraft, however, this rule does not preclude remote pilots from labeling their own aircraft. Finally, the remote pilot is responsible for verifying the small unmanned aircraft is properly labeled before each flight and knowing the type of operations for which the small UAS is eligible.

Finally, Section 107.5, which prohibits any fraudulent or intentionally false record from being made, kept, or used to show compliance with any requirement of part 107, applies to records, which includes labels. In this regard, falsifying any part of any record intended to constitute proof of compliance with applicable requirements could subject the person who submitted the record to a civil penalty and could be a basis for rescinding a declaration of compliance if the FAA determined that the applicant falsified the records.

A clear and legible label will enable straightforward means of identification of the operations for which the small

[49] As described in Section VII.C., this rule identifies the person who submits a declaration of compliance as an applicant, rather than a manufacturer. An applicant is anyone who can attest to the ability that they meet all the requirements of the declaration of compliance.

[50] The NPRM proposed to list the aircraft by make and model, but did not list series. This rule contains the phrase ''series, if applicable'' to allow for both flexibility to applicants and for refined specificity in identifying small UAS eligible to operate over people.

unmanned aircraft is eligible. The FAA clarifies the language for the labeling requirement to include the word ''missing'' to ensure that remote pilots label previously manufactured small unmanned aircraft. As a result, this rule adopts the labeling requirement with this clarification.

5. Must Have Remote Pilot Operating Instructions

The Agency proposed requiring applicants to provide remote pilot operating instructions with product-specific information for operations in Category 2 or Category 3, including system description and system limitations and the category or categories of operations over people for which the applicant has declared compliance. The proposed rule stated that a person who submits a declaration of compliance for a small UAS for Category 2 or Category 3 should provide remote pilot operating instructions upon sale or transfer of the small unmanned aircraft, or use of the small unmanned aircraft by someone other than that person. Instructions would need to remain up-to-date to account for any modifications the applicant makes to the small UAS for as long as the declaration of compliance remains valid. Specifically, the proposed rule included a requirement to include all modifications the applicant determined do not change the ability of the small UAS to meet the requirements for the category of operation for which the applicant declared compliance in the remote pilot operating instructions. For a small unmanned aircraft that has variable modes or configurations, the applicant would provide instructions on how to verify the mode or configuration that the small UAS is in and how to switch between modes or configurations.

The FAA received a few comments related to the contents of the remote pilot operating instructions, which are addressed in Section VI.C. This rule finalizes the requirement, without change, that in order for the small unmanned aircraft to be eligible to operate over people, the applicant must provide remote pilot operation instruction requirements.

6. Must Be Subject to Product Support and Notification Process

The NPRM proposed requiring applicants certify on the declaration of compliance that a process exists to notify the public and the FAA if the applicant identifies a safety defect or condition with its small unmanned aircraft that would render the small UAS ineligible for operations over people. The proposed rule did not suggest the FAA would automatically rescind a declaration of compliance if such notification occurred. The proposed rule stated the FAA would evaluate the report and correspond with an applicant to determine whether taking corrective action or rescinding the acceptance of the declaration would be appropriate. This process is described in more detail in VII.C.8–12.

Reporting safety issues will assist the FAA in both discovering product hazards and identifying risks of injury the FAA could address through direct communication with applicants, publication of Notices of Availability in the **Federal Register**, or education. Applicants' reporting will be a timely and effective source of information because applicants often learn of potential product safety problems at an early stage. For this reason, the NPRM proposed to require applicants to develop a system for maintaining and reviewing information about their products. This system will identify when an applicant's product might have a safety defect that increases the probability of causing serious injury or fatality during operations over people.

Subsequent to an applicant's discovery of noncompliance, the Agency proposed to require an applicant who submits a declaration of compliance to notify the FAA and the public of the existence of the safety defect. The notification to the FAA will describe the nature of the noncompliance and how the applicant plans to address it.

Notification to the public and owners of that make/model and series, if applicable, is a critical step in ensuring continued safety. Such notification could take the form of a notice on an applicant's website, electronic notification to owners who have registered the small unmanned aircraft with the applicant, or an update to the software used for the small unmanned aircraft, which advises the remote pilot of the change in status. Applicants should exercise diligence to ensure the intended audience receives communications involving any potential safety issues that would render the aircraft ineligible for operations over people. In this regard, the FAA expects applicants to design and utilize a system that will facilitate communication between the applicants and the owners of the small unmanned aircraft and could also inform the public at large.

The Small UAV Coalition supported the requirement that manufacturers establish a product support and notification process. APPA, EEI, and NRECA, commenting jointly, supported the need for manufacturer accountability, but believed the FAA should require manufacturers to contact registered UAS owners directly by electronic means or by unmanned aircraft software updates. Commenters wrote that the need to avoid inefficient methods is critical when responding to an outage or other emergency. Commenters further stated ''electric industry UAS operators require a uniform, reliable, predictable way of receiving information to ensure they can quickly and accurately identify information that would affect [their] compliance.''

While believing the requirements for the notification process to be generally sufficient, a commenter wrote that manufacturers should make it easier for pilots to know when a small unmanned aircraft is no longer compliant. This commenter suggested manufacturers provide instructions in their product manuals directing pilots to their websites to learn of safety defects. This commenter also suggested notifying purchasers through software or by email. A commenter also thought the FAA should require each pilot to register their small UAS when taking the mandated bi-annual knowledge test; that way, pilots could go no more than 24 months without receiving notification that a small UAS is non-compliant.

Another commenter stated the proposed rule did not provide a way for the FAA to identify and inform a specific fleet that a safety issue exists. The commenter believed the manufacturer has no responsibility to notify customers of safety issues, and that this is neither prudent nor scalable. This commenter suggested requiring manufacturers keep a list of customers and communicate directly with them and post notices of deficiencies on their websites.

The FAA disagrees with the commenter who believed that the proposed regulation was unclear regarding whether an applicant has a responsibility to provide notice of product issues to owners. The responsibility rests with applicants who submit declarations of compliance for the small unmanned aircraft, as they are in the best position to identify issues in a timely manner and to communicate with the owners. Additionally, the FAA may take action to inform the public in certain circumstances, in addition to the applicant's notification.

It is critical that applicants notify small unmanned aircraft owners of any product issues. The FAA declines to specify how the notification must occur. Applicants may have numerous ways of

contacting owners of small unmanned aircraft; the FAA declines to prescribe the manner of contact, particularly as technology evolves. This rule requires the applicant who submitted the declaration of compliance to notify the owners of safety deficiencies in a timely manner. The FAA agrees with commenters that it is important for this information to be received quickly so that owners and remote pilots can take appropriate action as necessary regarding use of their small unmanned aircraft. Therefore, the FAA finalizes the product notification requirements as proposed.

B. Means of Compliance

1. Means of Compliance

The Agency proposed to require an applicant producing a small unmanned aircraft eligible for Category 2 or Category 3 operations declare compliance with the safety requirements for the chosen category by using an FAA-accepted means of compliance. Demonstrating compliance with safety requirements includes verifying there are no safety defects, as described in Section VI.A.3. Under the proposed rule, a voluntary consensus standards body or an individual could develop an acceptable means of compliance, the latter of which the NPRM referred to as a custom means of compliance. Once the FAA accepts a means of compliance, any person submitting a declaration of compliance could use it to establish their small unmanned aircraft fulfills the requirements of the rule.

Several commenters suggested the means of compliance proposal was onerous, putting overly restrictive requirements on manufacturers. Commenters were concerned the proposed rule did not allow for innovation, would be too costly to implement, or would require manufacturers to create a system to a set of standards that seem arbitrary. In contrast, some commenters believed operators should be required to prove the small unmanned aircraft are safe to operate. The Agency carefully considered these comments and has determined the flexible, performance-based requirements combined with the means of compliance and declaration of compliance processes provide an effective and cost-efficient way to establish which small unmanned aircraft meet the appropriate eligibility requirements for operations over people.

Some commenters expressed concern that the requirements do not provide sufficient clarity as to how manufacturers would safely establish their small unmanned aircraft would not exceed the injury severity limitations. One commenter believed standardized procedures should exist, possibly involving impacting test dummies, showing the impact effects of a small unmanned aircraft collision so that minor or negligent testing by manufacturers cannot be used to show compliance. The FAA agrees standardized test procedures could be an effective way to demonstrate applicants have fulfilled the applicable standards, but notes the rule allows for wide variance in the operating criteria and designs of small unmanned aircraft. The performance-based nature of this rule allows industry to develop new or innovative standardized methods, which might include test dummies, that will be effective in demonstrating compliance.

Some commenters asked whether owners of self-built small UAS can test their own aircraft. The FPVFC volunteered to create a checklist for small UAS self-certification of compliance for safety testing, which anyone could use. Any person intending to operate a self-built small UAS over people must follow an FAA-accepted means of compliance to list the small UAS on the declaration of compliance submitted to the FAA. The FAA anticipates small unmanned aircraft manufacturers producing many small unmanned aircraft may find some means of compliance more appropriate than others, as some test procedures may involve destructive testing of multiple small unmanned aircraft to demonstrate compliance. This rule permits owners of self-built small unmanned aircraft to develop a means of compliance that does not involve destructive testing of multiple copies of a particular small unmanned aircraft. Anyone may submit a proposed means of compliance to the FAA for review.

The News Media Coalition believed the Agency should rely on findings of the safety of certain models of small UAS and experience with waivers for operations over people to inform performance-based rulemaking that reflects the FAA's data. Until a final rule is published, the commenter wrote that the FAA should allow any subsequent operators of a model of small UAS that has already received a waiver to secure a waiver without undergoing new performance testing. Waivers are issued on a case-by-case basis in accordance with § 107.200. The decision to renew or modify a waiver will continue to depend on the details of the proposed operation.

2. Submittal and Acceptance of a Means of Compliance

As described previously, applicants submitting a declaration of compliance for acceptance must use an FAA-accepted means of compliance to establish compliance with the requirements. Any person may propose a means of compliance. A person who submits a means of compliance for FAA acceptance must provide a detailed description of the means of compliance and explain exactly how the testing, analysis, or inspection establishes the small UAS meets one or more of the safety requirements. When proposing the means of compliance for FAA acceptance, the applicant must include substantiating data, including studies or research reports, that supports the proposed means of compliance.

The FAA will indicate acceptance of a means of compliance by publishing a Notice of Availability in the **Federal Register** identifying the means of compliance as accepted and by informing the applicant of its acceptance.[51] If the FAA does not accept a means of compliance, the FAA will notify the applicant of the rationale for its decision. The FAA may rescind a previously accepted means of compliance on determining the means of compliance does not meet the applicable requirements for operations over people.

When reviewing a means of compliance, the FAA will utilize a comprehensive set of criteria. The FAA will determine whether the testing, analysis, or inspection described in the means of compliance demonstrates that a small unmanned aircraft meets the appropriate regulatory requirements. A means of compliance must address the injury severity limits, the exposed rotating parts prohibition, or a combination of both, and verification that there are no safety defects. The FAA will determine whether the proposed means of compliance aligns with accepted methods used by the medical industry, consumer safety groups, or other peer-reviewed test methods. In addition, the FAA will consider whether the proposed means of compliance relies on exceptional remote pilot skill or excessive pilot workload to satisfy the requirements.

The NPRM provided a means of compliance in which an applicant could use a drop test procedure to

[51] A means of compliance is not considered to be ''FAA-accepted'' until the means of compliance has been evaluated by the FAA, the applicant has been notified of acceptance. The FAA will publish a Notice of Availiabity in the **Federal Register** identifying the means of compliance as accepted.

demonstrate the small unmanned aircraft complies with the injury severity limits for Category 2 or Category 3. This FAA-provided means of compliance does not consider the effect of these aspects on an impact with a person because it assumes that the total kinetic energy of the small unmanned aircraft would be transferred to the person on impact.

In reality, however, the small unmanned aircraft may transfer much less energy than this assumed maximum. In this regard, the Agency acknowledged structural configuration, materials of construction, or other design features may function to reduce the amount of the total kinetic energy that is transferred to a person from a small unmanned aircraft during an impact. For example, the presence of energy-absorbing materials, or an energy-absorbing protective cage, may reduce the transfer of kinetic energy during an impact with a person. An applicant may provide data showing the amount of kinetic energy that is transferred to a person during an impact based on the impact-absorbing characteristics of the small unmanned aircraft. Some applicants might seek to use design features such as parachutes or other deployable devices that reduce impact velocity to establish a small unmanned aircraft would impact a person with a reduced amount of kinetic energy. Such design features will require the FAA's review to determine whether they assist in achieving an acceptable means of compliance if the small UAS relies on the proper functioning of these features.

Any person may propose a new means of compliance to the FAA as a way to show compliance with the requirements. The NPRM had referred to this as a ''custom means of compliance,'' which several commenters found confusing. Commenters such as CDA and AirXOS remarked on the time and expense associated with the approval process for a custom means of compliance and were concerned that it would be difficult, time-consuming, and costly. The Agency agrees that any individual creating a means of compliance would likely incur greater cost compared to using the FAA-provided means of compliance or an existing FAA-accepted means of compliance. The FAA encourages the development and use of standardized test procedures from a voluntary consensus standards body as a means of compliance. However, applicants are not required to use them.

The NPRM only referred to ''custom means of compliance'' to distinguish the FAA-provided means of compliance or a means of compliance provided by a voluntary consensus standards body from any other type of means of compliance. The NPRM stated a means of compliance submitted by a voluntary consensus standards body may be accepted more quickly than those submitted independently. The FAA will evaluate means of compliance submitted by a voluntary consensus standards body and by an independent party with the same level of rigor. The FAA generally works with voluntary consensus standards bodies in the development of these standards. As a result, any means of compliance based on these standards will already have gone through a comprehensive review process during development.

A commenter asked whether a deadline will exist for the means of compliance and if manufacturers could choose the methods to bring their small UAS into compliance. The FAA notes that there is no deadline for the submittal or acceptance of the means of compliance other than that it must be accepted by the FAA before an applicant can list it on a declaration of compliance. The NPRM stated a person submitting a means of compliance for FAA review could also submit the declaration of compliance listing that means of compliance at the same time. However, given that the FAA is no longer using the term ''custom means of compliance,'' the FAA clarifies that, to obtain acceptance of a declaration of compliance, an applicant must identify the FAA-accepted means of compliance that it used. The FAA will finalize the means of compliance acceptance process as described in this section.

3. Rescission Process for a Means of Compliance

The NPRM proposed that it could rescind a means of compliance if the FAA determined from service history that the means of compliance did not meet the applicable standards for operations over people. However, the NPRM did not include regulatory text. In this final rule, the FAA has maintained the right to rescind a previously-accepted means of compliance and added regulatory text for clarity.

Some commenters expressed concerns about the ability of applicants to demonstrate compliance with the safety requirements. While Vortezon, Inc. agreed that small UAS manufacturers should bear the burden of demonstrating compliance with the injury severity limits, the commenter wrote that FAA itself should independently and thoroughly test the data submitted to support any means of compliance applications. The commenter believed that delegating that responsibility might result in a lack of uniformity in establishing the standards under which the industry will operate. Vortezon wrote that the procedures the Federal Communications Commission (FCC) uses to approve radio frequency devices might provide a template for the FAA. Another commenter noted that the proposed rule sets up the FAA as the final authority in determining compliance with the requirements, which they considered an appropriate balance.

To ensure the continued eligibility of small unmanned aircraft operating over people, the FAA finds it necessary to make clear that compliance is an ongoing process, and that the FAA maintains the authority to continuously evaluate that the applicant's means of compliance provides factual and correct data. The FAA can exercise its authority to rescind a means of compliance if the small unmanned aircraft does not meet any or all of the requirements of the subpart as a result of errors or deficiencies in the test, inspection, or analysis. As such, this final rule includes a regulatory provision to allow the FAA to rescind the means of compliance.

4. FAA-Provided Means of Compliance

As described above, the FAA-provided means of compliance includes a test and inspection method in which applicants demonstrate their small unmanned aircraft will not exceed injury severity limitations or the exposed rotating parts prohibition. The FAA has not made any changes to the FAA-provided means of compliance discussed in the NPRM. The FAA anticipates applicants will submit for comprehensive means of compliance that include innovative materials and designs, unlike the FAA-provided means of compliance described in the NPRM.

a. FAA-Provided Injury Severity Limit Means of Compliance

The FAA-provided means of compliance for the injury severity limitations entails an applicant's calculation of the small unmanned aircraft's maximum kinetic energy. This means of compliance does not account for impact dynamics or other factors, but consists of using only the formula the FAA describes to calculate the small unmanned aircraft maximum kinetic energy. Use of this formula alone establishes the small unmanned aircraft will not exceed one of the injury severity limits because, as described above in Section VI.A.1. of this

preamble, 11 ft-lbs (for Category 2 operations) and 25 ft-lbs (for Category 3 operations) are kinetic energy values that assume a limit on injury severity. Applicants interested in using this test may find more information about the FAA-provided means of compliance in the NPRM and the associated Advisory Circular (AC) for this rule, AC 107–2A.[52]

Several commenters specifically addressed the FAA-provided means of compliance. ASSURE stated, ''[u]sing this means of compliance, there will be no aircraft with a commercially viable payload that can meet the § 107.115 Category 2 operations in the NPRM and as such this NPRM will do nothing to expand the operations of the sUAS in the U.S.'' The Small UAV Coalition and AirXOS both agreed with ASSURE's conclusion. The Small UAV Coalition urged the FAA to use the automotive injury metrics as ASSURE suggested. AirXOS and CDA both stated the FAA-provided means of compliance does not sufficiently permit different materials or structural configurations, which can affect the damage resulting from a collision with a small unmanned aircraft. Both commenters were similarly concerned the FAA-provided means of compliance does not consider devices that may deploy and reduce the maximum impact speed or the reduced probability of failure or impact. These commenters stated the rule, if adopted, would impede innovation. CDA also believed the risk analysis should give operators credit for operational safeguards.

The FAA acknowledges the limitations associated with the FAA-provided means of compliance for the injury severity limits. The Agency intended to provide a test method that applicants could use to show compliance with the injury severity limitations, with the understanding that industry would develop more flexible means of compliance using consensus standards organizations. The FAA expects these industry standards to consider that small unmanned aircraft often have non-rigid structures, which can reduce the kinetic energy transferred to a person on impact. The FAA also expects industry consensus standards to address the use of deployable devices, such as parachutes, to demonstrate compliance with the injury severity limitations. Unlike the FAA-provided means of compliance, those that industry provides could leverage variable modes and configurations. The FAA-provided means of compliance allows applicants to have a method of complying with the injury severity limitations prior to development of any other means of compliance.

The FAA-provided means of compliance considers typical failures and environmental conditions during testing. Boeing asked the FAA to define what the NPRM meant in using the term ''typical.'' In this case, ''typical'' describes a likely occurrence during normal operations of the small unmanned aircraft, (*e.g.,* human error, systems failures, or environmental conditions that could lead to a loss of operational control). Because each small unmanned aircraft and its anticipated operating environment are different, the applicant is best-suited to determine what is typical. This rule requires the applicant to submit substantiating data that includes sufficient information concerning the environmental conditions and the maximum speeds the manufacturer utilized, as well as any unique test conditions for both the level flight and free-fall scenarios. This means of compliance is now available as an FAA-accepted means of compliance with the finalization of this rule.

b. FAA-Provided Exposed Rotating Parts Means of Compliance

In the NPRM, the FAA provided a means of compliance for the exposed rotating parts prohibition, which would require an applicant to ensure the small unmanned aircraft does not have parts that are exposed. For example, if the propellers that provide lift and thrust for the small unmanned aircraft are internal to the unmanned aircraft, such as in a ducted fan configuration, and are incapable of making contact with a person as a result of an impact, then the parts would not be exposed. As a result, the aircraft would satisfy this requirement. An applicant must inspect the small unmanned aircraft to establish that it does not have any exposed rotating parts and determine that any rotating parts would not become exposed during an impact with a person.

The NPRM noted an industry consensus organization could develop a standard for small unmanned aircraft that have rotating parts protected by safety features. If the applicant tests those safety features and establishes they remain effective during impact, this could demonstrate that exposed rotating parts would not be capable of lacerating human skin. If, however, a small unmanned aircraft has rotating parts that are exposed without any protective safety features, the NPRM proposed to permit applicants or others to show through testing, analysis, or inspection that the rotating parts would not be capable of lacerating human skin on impact with a person.

Several commenters addressed the issue of using a means of compliance to establish compliance with the exposed rotating parts prohibition. One commenter stated the ability to create novel means of compliance would drive innovation in finding alternatives to exposed rotating parts. The commenter believed the FAA should clarify that a small unmanned aircraft without rotating parts should not be required to submit proof of compliance.

To satisfy the eligibility requirements for Categories 2 and 3, a small unmanned aircraft must meet the performance-based requirements for exposed rotating parts by following an FAA-accepted means of compliance. A small unmanned aircraft that does not have any rotating parts would meet the FAA-provided means of compliance; the declaration of compliance would include an indication of this. Even if the small unmanned aircraft is designed to operate without rotating parts, the applicant must still submit a declaration of compliance to demonstrate the small unmanned aircraft complies with the exposed rotating parts prohibition and the injury severity limitation. This means of compliance is now available as an FAA-accepted means of compliance with the finalization of this rule.

5. Deployable Devices and Other Safety Mechanisms

In the proposed rule, the Agency stated applicants may want to consider the use or testing of design features such as parachutes, ballistic recovery systems, or other deployable devices that create drag to reduce the maximum impact speed. While the FAA did not consider the use of a deployable device in the FAA-provided means of compliance, this rule does not prohibit anyone from submitting a means of compliance that considers deployable devices. The FAA will evaluate such design features to determine whether they assist in achieving an acceptable means of compliance.

Several commenters submitted comments regarding the use of deployable devices. AirXOS said that, consistent with the FAA's Safety Risk Management Policy,[53] the safety risk of a particular hazard should be assessed using a combination of the severity and likelihood (probability) of the potential

[52] 84 FR 3877–3879. A copy of the AC 107–2A is available in the public docket for this rulemaking.

[53] FAA Order 8040.4B, Safety Risk Management Policy (May 2, 2017), available at *https://www.faa.gov/documentLibrary/media/Order/FAA_Order_8040.4B.pdf.*

outcome of the hazard. AirXOS stated the FAA should consider comparative safety benefits when evaluating the overall risk for operations over people. In addition to technological mitigations, AirXOS said the risk analysis should also consider operational safeguards, such as an operator having a comprehensive safety management system and flight proficiency training. MPAA and NCTA, commenting jointly, stated design safety features such as frangible components, propeller cages, propeller guards, parachutes, or padding that may increase the weight of a small unmanned aircraft are also likely to minimize the risk of injury. Some commenters suggested small UAS could be equipped with a range of safety mechanisms, including visual and audible alerts, collision avoidance systems, and parachutes.

Under this rule, applicants may choose to demonstrate compliance with the appropriate safety requirements of Category 2 or Category 3 using designs with safety features such as frangible components, propeller cages, propeller guards, parachutes, or padding. To do so, they must use an FAA-accepted means of compliance that incorporates those safety features as a means to comply with the injury severity limitations.

While use of other safety mechanisms (*e.g.,* visual and audible alerts, collision avoidance systems, etc.) may decrease the likelihood of an impact with a person, the FAA will not factor in these devices in considering proposed means of compliance for Category 2 or Category 3 because they do not address the injury severity limitations or exposed rotating parts prohibition. The FAA may consider these devices as part of the Category 4 process or in a waiver application, particularly for applicants considering reliability and likelihood.

ParaZero and Indemnis both asserted that, even when equipped with a parachute, very few unmanned aircraft models will be capable of meeting the applicable kinetic energy limitation. A-Cam Aerials noted the proposed performance-based requirements would not permit certain operations even with mitigations, such as parachutes that adhere to the ASTM F3322–18 parachute standard.[54] The commenter requested the FAA consider allowing operational mitigations instead of requiring design mitigations, asserting these design considerations would limit the number of manufacturers that could meet the injury severity limitations. The rule, however, does not require manufacturers to meet the requirements using the FAA-provided means of compliance. An applicant may choose to demonstrate compliance with the injury severity limitations using deployable devices, as long as the applicant describes the use of them in the proposed means of compliance. The Agency encourages industry to develop means of compliance that leverage existing and future industry standards for the design, maintenance, and testing of such devices.

One commenter believed parachutes are not necessary based on the accident record for small unmanned aircraft or the ASSURE report. The UAS Program Leader for the Memphis Fire Department wrote that if parachutes are required, these systems are unable to be tested. He noted that the fire department performs a preflight safety inspection and flight check before every takeoff, but would be unable to test, check, or inspect a parachute system. The FAA clarifies that a deployable device system is not required. Applicants have the discretion to incorporate the use of a deployable device.

C. Declaration of Compliance

The NPRM stated self-certification is the appropriate method for manufacturers to declare compliance with a performance standard. Self-certification, combined with the Agency's determination that the means of compliance the manufacturer has used is acceptable, will ensure the small unmanned aircraft, when operated over people, will afford the public an appropriate level of safety.

1. Persons Who May Submit a Declaration of Compliance

The NPRM proposed that any person or entity that designs, produces, or modifies a small unmanned aircraft for use in Category 2 or Category 3 operations must submit a declaration of compliance to the FAA for acceptance. The NPRM characterized any person who designs, produces, or modifies a small unmanned aircraft for such operations as a ''manufacturer'' for purposes of this rule.

Several commenters, including AUVSI, FPVFC, and several other individuals, commented on the use of the term ''manufacturer.'' AUVSI indicated the FAA did not account for the entire range of entities that may wish to submit a declaration of compliance and recommended the Agency clarify that non-manufacturer third parties and operators that do not alter a small UAS would be eligible to submit a declaration of compliance in order for that small UAS to become eligible for Category 2 or Category 3 operations, regardless of whether the entity originally manufactured or modified the small UAS. The person who submits the declaration of compliance must be able to demonstrate they have used an FAA-accepted means of compliance to fulfill the standard. Although the FAA does not expect the resale of small unmanned aircraft by non-manufacturer third parties to be a typical occurrence, if the applicant wishing to make the small unmanned aircraft eligible for operations under Category 2 or Category 3 is able to submit a declaration of compliance with all required elements, the FAA would accept that declaration even though that person has not designed, produced, or modified the small unmanned aircraft. To reduce confusion, the final rule clarifies that the responsible party is the applicant.

To be eligible to operate in accordance with Category 2 or Category 3, the small unmanned aircraft must be listed on an FAA-accepted declaration of compliance. The FAA does not restrict who may submit a declaration of compliance and anticipates entities that produce and sell a complete and operable small unmanned aircraft to submit the most declarations of compliance. Other persons who may submit a declaration of compliance include designers or producers of kits that contain all the components and parts from which to build an operable small unmanned aircraft eligible for Category 2 or Category 3 operations. One commenter stated the FAA should not consider someone who assembles a kit to be a manufacturer. A small unmanned aircraft listed on an FAA-accepted declaration of compliance could be sold as a kit. The person who assembles such kit per the provided instructions is not required to submit a declaration of compliance; however, in order for the small unmanned aircraft assembled from that kit to be eligible for Category 2 or Category 3 operations, the producer of the kit must have submitted a declaration of compliance and received from the FAA acceptance of the declaration.

Any person who builds a small unmanned aircraft from parts not in a complete kit or who modifies a small unmanned aircraft to be compliant with Category 2 or Category 3 must submit a declaration of compliance and receive FAA acceptance of it before the small unmanned aircraft would be eligible for operations under the applicable category. For example, a person who modifies a small unmanned aircraft that

[54] ASTM F3322–18, Standard Specification for Small Unmanned Aircraft System (sUAS) Parachutes, ASTM International, West Conshohocken, PA, 2018, *http://www.astm.org/cgi-bin/resolver.cgi?F3322.*

was originally produced prior to the effective date of this rule so that the small unmanned aircraft becomes eligible to conduct Category 2 or Category 3 operations must submit a declaration of compliance.

A small unmanned aircraft is not covered by a declaration of compliance if it has been modified outside the configurations and modifications allowed in the remote pilot operating instructions for that small UAS. For example, the person who submitted the declaration of compliance for the Category 2 operation would not be responsible for the new configuration of the small unmanned aircraft after modification. The person who modified the unmanned aircraft would be responsible for submitting a new declaration of compliance describing the new configuration and receiving acceptance of it to establish eligibility for the appropriate category before the small unmanned aircraft can be operated over people.

A few commenters suggested people who build their own small unmanned aircraft should not be considered manufacturers and therefore not be required to submit a declaration of compliance. Another commenter asserted a primary reason people choose to build their own small unmanned aircraft is to save money and these people will not have the financial resources or access to testing equipment to demonstrate compliance. The FAA disagrees with the assertion that a distinction should exist between home-built small unmanned aircraft and other small unmanned aircraft. The four categories this rule establishes are not based on the purpose for which the small unmanned aircraft was built. Any person designing and building a small unmanned aircraft and intending to operate over people under Categories 2 or 3 must submit a declaration of compliance.

The FAA finalizes the term ''applicant'' to describe the person who submits the declaration of compliance. The applicant refers to the person who declares that the small unmanned aircraft meets the eligibility requirements for operations over people.

2. Submission of Declaration of Compliance for FAA Acceptance

For a small unmanned aircraft to be eligible to conduct operations over people in accordance with Category 2 or Category 3, the Agency proposed to require the applicant to declare that the small unmanned aircraft complies with the applicable performance-based requirements through use of an FAA-accepted means of compliance. The applicant would do this by submitting a declaration of compliance via an electronic form available on the FAA's website.

By submitting a declaration of compliance, an applicant would declare that it: (1) Established and maintained a process to notify owners of small unmanned aircraft and the FAA of any unsafe conditions that render those small unmanned aircraft non-compliant with subpart D; (2) would correct any safety defects the FAA identified; and (3) would allow the Administrator to inspect its facilities, technical data, and any manufactured small unmanned aircraft and witness any tests necessary to determine compliance with this subpart.

In response to the proposed declaration of compliance requirements, one commenter believed the assumption of liability must be inherent to the concept of a declaration of compliance. The existence of a declaration of compliance, however, does not automatically release the applicant or the remote pilot from any potential liability. For example, if a remote pilot were to operate the small unmanned aircraft over people in a configuration not specified in the remote pilot operating instructions, in an unsafe condition, or in a careless or reckless manner, a valid declaration of compliance does not release the remote pilot from responsibility. This commenter also asked how the declaration of compliance relates to section 345 of the FAA Reauthorization Act of 2018, which deals with self-certification.[55] This rule is consistent with the statutory requirements in section 345 of the 2018 FAA Reauthorization Act This statute requires FAA to develop a process for accepting ''risk-based consensus safety standards relating to the design, production, or modification of small unmanned aircraft systems.'' Public Law 115–254, sec. 345(a)(1). In consideration of these requirements, this rule allows an applicant to request FAA acceptance of a means of compliance that is based on consensus safety standards.

The Small UAV Coalition supported the proposal to allow ''self-certification'' of compliance with the applicable standards; however, because the FAA will accept declarations of compliance on determining the manufacturer has demonstrated compliance with the requirements of the rule, the Coalition noted the requirements seem similar to the means of compliance. The means of compliance and declaration of compliance go hand in hand. The means of compliance answers the question of how a person or entity meets the requirements of the rule. The declaration of compliance establishes the applicant is declaring it has met the applicable injury severity limitations, the exposed rotating parts prohibition, or a combination of these requirements through an FAA-accepted means of compliance.

DJI urged the Agency to allow manufacturers to demonstrate compliance to certain regulations through the declaration of compliance and recommended using Transport Canada's ''Remotely Piloted Aircraft Systems Safety Assurance Advisory Circular'' (AC 922–001) as a model. While the FAA did not accept this recommendation to incorporate Transport Canada's AC, the FAA notes that this rule allows applicants to show compliance with the requirements by submitting a declaration of compliance and receiving FAA acceptance.

While generally supporting the proposed framework for the declaration of compliance, AUVSI recommended the FAA ensure the framework operates flexibly to avoid undue burden on small UAS operators who modify their small UAS and on non-manufacturers that wish to certify a small UAS. AUVSI asked the FAA to ensure the framework would permit manufacturers to certify a ''wide variety'' of payloads and configurations without the need for re-certification as long as modifications were within a certain range. The Coalition asked the FAA to ensure compatibility between the rules allowing night operations and operations over people, including any modifications for night operations.

Operations of small unmanned aircraft under Category 1, Category 2, or Category 3 must adhere to the applicable performance-based eligibility requirements, regardless of any modifications. The FAA will permit applicants to identify acceptable modifications, including payloads and configurations, in the remote pilot operating instructions as part of their declaration of compliance. Because the injury caused by an impact from the small unmanned aircraft could be different for each modification that changes the small unmanned aircraft configuration or properties, they must fulfill the applicable standard through an FAA-accepted means of compliance. This rule allows such evaluation by test, analysis, or inspection. For example, an applicant may not have to conduct

[55] Public Law 115–254, sec. 345 (Oct. 5, 2018) (''Small Unmanned Aircraft Safety Standards'') requires the FAA to establish a process for acceptance and use of consensus safety standards for the design, production, and modification of small UAS.

separate evaluations for two different brands of propellers if they are the same diameter, pitch, weight, and material. If, through analysis, an applicant proves the propellers will behave the same, he or she would only have to conduct the impact test with one brand of propeller, but could list both brands of propellers as approved equipment in the remote pilot operating instructions.

A commenter recommended including a requirement in the declaration of compliance that all ''written communications be written in proper English and follow standards for plain language.'' The FAA declines to accept this recommendation, as the Agency finds it unnecessary to provide prescriptive writing requirements.

This rule adopts the declaration of compliance submission as proposed, with the clarification that any person may submit a declaration of compliance for FAA acceptance. The Agency has determined accepting declarations of compliance is appropriately risk-based and suitable for allowing operations over people, as it is sufficient for the level of risk involved.

3. Contents of Declaration of Compliance

The NPRM proposed that an applicant intending to list a small unmanned aircraft as eligible for operations over people in accordance with Category 2 or Category 3 would submit a declaration of compliance to the FAA. A template for the declaration of compliance will be available in an electronic form on the FAA's website. A completed declaration of compliance will include information the Administrator would require for both determining that a small unmanned aircraft complies with the applicable requirement and for tracking those models of small unmanned aircraft that were declared compliant. Applicants will declare they have met the requirements of the rule through an FAA-accepted means of compliance and include the following information:

- FAA-accepted means of compliance used.
- Name of the applicant.
- Physical address of the applicant.
- Email address of the applicant.
- Small unmanned aircraft make, model and series, if applicable.
- Serial number or range of serial numbers for the small unmanned aircraft (open-ended are permitted).
- Whether the declaration of compliance was an initial or an amended declaration of compliance and, if amended, the reason for the resubmittal.
- Declaration that the applicant:
  - Has demonstrated the small unmanned aircraft meets the injury severity limitations of Category 2, Category 3, or both, and the exposed rotating parts prohibition;
  - Has demonstrated the small unmanned aircraft does not have any safety defects;
  - Has satisfied the requirement to maintain a product support and notification process; and
  - Will, upon request, allow the Administrator to inspect its facilities and its technical data.
- Any other information as required by the Administrator.

If an applicant amends an FAA-accepted declaration of compliance, the applicant must include the reason for the amendment. For example, the amendment could be to identify a different means of compliance, update an address, or correct a misspelling.

This final rule states the applicant must make a declaration for the items in the declaration of compliance instead of a certification. This change in the regulatory text does not change items required in the declaration of compliance; instead, it simply removes any potential confusion associated with the airworthiness certification process.

Information contained in declarations of compliance will be publicly available. By posting the declarations or otherwise making the information in the declarations publicly available, the FAA and the public will be able to determine which make, model, and series, if applicable of small unmanned aircraft are eligible to conduct operations over people pursuant to Categories 2 and 3.

No comments specifically addressed the contents of the declaration of compliance. The Agency also did not receive any comments regarding its proposal to make information about accepted declarations of compliance available to the public through an FAA website. This rule adopts the requirements related to contents of the declaration of compliance, as proposed.

Some commenters addressed the requirement that applicants allow the FAA to inspect their facilities. A commenter stated that the requirement for facility inspections seems difficult for overseas manufacturers and generally unnecessary. Access to each applicant's facilities provides a mechanism for the FAA to validate procedures, processes, and methods as well as the data used to demonstrate compliance with the safety requirements. The FAA regularly performs routine inspections of facilities of those who hold type certificates and production certificates overseas. The FAA maintains authority to inspect overseas facilities at which a manufacturer designs, produces, or modifies small unmanned aircraft for operations under Category 2 or Category 3.

One commenter found the proposed rule unclear regarding whether a person who either designed or modified a small unmanned aircraft would be subject to the on-site inspections proposal. An applicant who submits a declaration of compliance to operate over people would be subject to the onsite inspection requirement. On request, the person who submits the declaration of compliance must be prepared to demonstrate how they can validate that they are in compliance with their declaration of compliance and this rule.

The Agency adopts the list of information that must be included in the declaration of compliance as proposed, with no changes.

4. Accountability for Persons Submitting Declarations of Compliance

After an applicant declares a specific small unmanned aircraft meets the requirements of a particular category, the Agency proposed to require the applicant to monitor the small unmanned aircraft to ensure it complies with the applicable requirements. Specifically, an applicant would monitor the validity of the means of compliance used and verify it does not exceed the injury severity limitations and complies with the exposed rotating parts prohibition. The applicant would track the construction, related safety analysis, and service history to ensure they do not reveal any hazardous conditions or safety defects that could increase the risk of a small unmanned aircraft operation over people. Moreover, the applicant must continue to ensure that the remote pilot operating instructions satisfy the regulatory requirements. To satisfy these obligations, an applicant may have to monitor its manufacturing processes, small unmanned aircraft operational usage, and collection of accident and incident data. Monitoring could also include information that owners and operators of the small unmanned aircraft provide. Should the FAA identify a safety issue that warrants review of an applicant's data, records, or facilities, this rule requires applicants to grant access to facilitate such review.

Furthermore, the Agency proposed to require applicants submit an actual record declaring compliance. Section 107.5, which prohibits any fraudulent or intentionally false record from being made, kept, or used to show compliance with any requirement of part 107, will apply to such records. In this regard,

falsifying any part of any record intended to constitute proof of compliance with applicable requirements could subject the person who submitted the record to a civil penalty and would be a basis for rescinding a declaration of compliance.

The Agency did not receive any comments regarding the falsification provisions proposed and adopts those provisions without change.

5. Declaring Compliance for Multiple Small Unmanned Aircraft With the Same Make and Model

In the NPRM, the Agency recognized that applicants producing the same make and model of small UAS on a large scale may not wish to perform individual unit testing to demonstrate that each small unmanned aircraft fulfills the applicable requirements. The Agency clarified that the proposed rule text would allow applicants to declare compliance for a make and model of small unmanned aircraft, rather than declaring compliance for *each* small unmanned aircraft an applicant designs, produces, or modifies.[56] The NPRM stated the applicant could establish and maintain a production quality system and design configuration control system to provide for consistent repeatability, to confirm each small unmanned aircraft fulfills the applicable standard for which the applicant declared compliance. As a result, an applicant could avoid testing every aircraft it constructs. Using a quality assurance system could confirm each aircraft subsequently manufactured would meet the performance-based requirements of this rule. The FAA received no comments on this policy and adopts the inclusion of ''make and model'' in the regulatory text of the section that sets forth the requirements for declarations of compliance, as proposed.

6. Declaring Compliance for a Small Unmanned Aircraft That Is Eligible for Multiple Categories of Operations

If an applicant conducts testing or engages in analysis or inspection to determine a small unmanned aircraft could meet the requirements for operations in both Categories 2 and 3 in the appropriate modes or configurations, the NPRM proposed to require the applicant to submit only one declaration of compliance. On that declaration of compliance, the applicant would identify the categories of operation for which it determined the small unmanned aircraft was compliant and the means of compliance used for each category. The Agency did not receive any comments regarding this proposal and adopts it without change. For more information on the requirements for small unmanned aircraft with variable modes and configurations, see Section VI.F. of this preamble.

7. FAA Acceptance of a Declaration of Compliance

The NPRM proposed to require an applicant to provide information on its declaration of compliance regarding whether it has used an FAA-accepted means of compliance or a means of compliance the FAA has not yet accepted. If an applicant uses a means of compliance that the FAA has not yet accepted, the FAA must review and accept the means of compliance before the FAA can accept the declaration of compliance. The FAA will notify the applicant of its decision regarding acceptance of the means of compliance and declaration of compliance. Once the FAA accepts a declaration of compliance, the FAA will make the declaration of compliance, or information from the declaration, publicly available. The Small UAV Coalition commented that the NPRM does not describe what the FAA review will entail or how long it will take. The Small UAV Coalition further commented that, because the Agency did not describe whether it would undertake any discretionary review of the declaration of compliance, it expects a quick acceptance or denial.

The FAA will use its discretion to review and validate that the applicant meets the requirements of the FAA-accepted means of compliance through test data, third party validation, or the like, before rendering a decision on the declaration of compliance. Because means of compliance will vary in complexity, the FAA cannot provide estimates regarding the time needed for considering declarations. The FAA may request additional information from the applicant to determine whether the small unmanned aircraft listed in the declaration of compliance meets the listed FAA-accepted means of compliance. The FAA will respond to declaration of compliance submissions once it completes its review.

The proposed rule provides a sufficient framework for the Agency's approach for overseeing compliance with the proposed standards. The FAA adopts the process for accepting the declaration of compliance as proposed, with no changes.

8. Submitting a New Declaration of Compliance for a Modified Small Unmanned Aircraft

The Agency proposed to require any person who modifies a small unmanned aircraft in a way that could affect the eligibility of the small unmanned aircraft to operate over people under Category 2 or Category 3 to submit a new declaration of compliance and receive FAA acceptance of it before anyone operates the small unmanned aircraft over people. If an individual modifies the small unmanned aircraft in a manner that the original applicant identifies in the remote pilot operating instructions as an allowable change, the individual will not need to submit a new declaration of compliance. When a person submits a declaration of compliance for a small unmanned aircraft that was not previously eligible for operations over people, the FAA would verify the small unmanned aircraft fulfills the applicable standard.

The News Media Coalition stated this requirement imposes an unnecessary and unreasonable burden and suggested the FAA require any buyer of a secondhand small UAS to be solely responsible for determining their own compliance with the rules, rather than requiring the seller of secondhand small UAS to provide remote pilot operating instructions or meet other requirements. Before operating over people, the remote pilot is responsible for ensuring that the small unmanned aircraft they intend to use is eligible to conduct operations over people. Prior to purchasing a small unmanned aircraft for the purpose of operations over people, buyers should verify the small unmanned aircraft has current remote pilot operating instructions and is listed on a valid declaration of compliance.

Some applicants may choose to provide criteria that describes acceptable modifications in their remote pilot operating instructions, rather than specific acceptable parts. In this regard, several commenters were concerned that adding or changing a camera could result in a disqualifying modification. Applicants can determine which payloads or modifications would be permitted and still meet the standard of Category 2 or Category 3.

Another commenter asked the FAA to specify that ''modifying the firmware'' would be exempt from the requirement, as the commenter stated several manufacturers install firmware that is more restrictive than the regulations. Updates to small unmanned aircraft firmware would be acceptable as long as they occur in accordance with the remote pilot operating instructions.

[56] 84 FR at 3882.

APPA, EEI, and NRECA, commenting jointly, applauded the FAA's recognition of the need for operational flexibility and supported the proposal ''as an appropriate balance between operators' needs and public safety with minor clarification.'' Specifically, the commenters recommended the rule require manufacturers to identify permissible modifications in terms of weight, size, and shape, as opposed to specific identification of a make or model of equipment. The Agency declines to include this prescriptive requirement, as such detail is unnecessary and market forces will incentivize manufacturers to craft operating instructions that address the needs of prospective buyers and users of the small unmanned aircraft.

9. Notification of a Safety Issue

The NPRM stated the FAA would notify an applicant that submitted a declaration of compliance if it determines the small unmanned aircraft is not compliant with the injury severity limits or prohibition on exposed rotating parts or because the small unmanned aircraft has a potential safety defect. The FAA would identify such safety issues through a variety of means. The FAA may receive consumer complaints, industry safety bulletins, or an individual applicant's notification that a safety issue has arisen. Applicants would have the opportunity to discuss potential safety issues with the FAA. As a result of such discussion, the FAA may determine a safety issue does not actually exist, that the applicant has incorporated an adequate mitigation to address and correct the safety issue, or that a safety issue still exists.

To correct a safety issue, an applicant could develop a correction and test the aircraft to ensure the aircraft no longer has a safety issue. The applicant must correct any safety issues they identify after manufacturing the small unmanned aircraft on an ongoing basis to ensure continued eligibility for Category 2 or Category 3 operations.

The Agency proposed to require resolution of any identified safety issue. In the absence of acceptable resolution, the rule indicates the FAA would commence rescission proceedings, as explained below. A commenter stated, that as the NPRM is written, the FAA has no way of identifying, then informing a specific fleet that there is a safety issue. This commenter further stated there is no requirement for manufacturer responsibility to keep a list of customers and both communicate directly and post notices of defects and rescission on their website. As noted previously, there are multiple ways by which the FAA could become aware of a safety issue. The FAA must inform the applicant of any known safety issues. Additionally, the holder of the declaration of compliance must establish and maintain a product support and notification process to ensure that safety issues are communicated to the public and the FAA. This rule adopts the safety issue process, as proposed.

10. Notice of Rescission of a Declaration of Compliance

The NPRM proposed to rescind a declaration of compliance if the FAA becomes aware that a small unmanned aircraft for which an applicant has declared compliance is no longer qualified for operations over people. The FAA proposed new procedural rules to govern any action to rescind a declaration of compliance; therefore, the FAA's rules under 14 CFR part 13 would not apply.

The proposed rule stated the FAA may rescind a declaration of compliance if any of the following conditions exist: (i) A small unmanned aircraft for which a declaration of compliance was accepted no longer complies with the applicable safety requirements; (ii) the FAA finds a declaration of compliance violates § 107.5(a); or (iii) the Administrator determines a safety emergency exists.

The proposed rule set forth a procedure for rescission that begins with the FAA sending the applicant a notice of proposed rescission. The notice would set forth the Agency's basis for the proposed rescission and provide the applicant 10 business days to submit evidentiary information to refute the proposed notice of rescission. DJI commented on the proposed timeline for submitting information, stating 10 days is not sufficient to understand the notice and gather and provide information to FAA. DJI suggested 30 calendar days. The FAA agrees that 10 days might be insufficient. This rule extends the notice period to 30 calendar days.

If an applicant does not contest the allegation that a safety issue exists, or if the applicant fails to respond within the required time period, the NPRM proposed to issue a notice rescinding the declaration of compliance. The FAA would publish the final rescission on the FAA website and specify the category of small unmanned aircraft to which the rescinded declaration applies. If the FAA rescinds a declaration of compliance as a result of an unresolved safety issue, the FAA proposed to allow an applicant to petition for reconsideration of the decision or modify the small unmanned aircraft such that the safety issue is resolved, at which point the applicant could submit a new declaration of compliance, which the FAA may accept.

As noted in the NPRM, a rescission of a declaration of compliance would not render a small unmanned aircraft inoperable, but rather no longer eligible for operations over people in Category 2 or Category 3. The small unmanned aircraft could resume operations over people only after the FAA reinstates acceptance of the declaration of compliance or accepts a new declaration that applies to the small unmanned aircraft. Either the original or a subsequent applicant could submit a new declaration of compliance.

In addition to publishing any final rescission of a declaration of compliance on the FAA website, the Agency stated the FAA would publish notification of any applicable safety defects in the **Federal Register** as a Notice of Availability. Such a notice will inform remote pilots that the identified aircraft are no longer eligible to conduct operations over people and would notify applicants not to incorporate the defective material, component, or feature into any upcoming designs without appropriate mitigations. The NPRM also proposed that, on rescinding a declaration of compliance, the FAA would publish the makes and models of small unmanned aircraft that are no longer eligible to operate over people. Remote pilots would be prohibited from using those aircraft to operate over people until the issue is resolved. On correcting a safety defect, the applicant would submit a new declaration of compliance to the FAA identifying the means of compliance the applicant used to correct the safety defect.

Additionally, the NPRM proposed to permit the owner or remote pilot of a small unmanned aircraft to correct a safety defect associated with their aircraft. Any person who chooses this option must submit a declaration of compliance to the FAA identifying the means of compliance used to correct the safety defect. By modifying the small unmanned aircraft such that it is again in compliance with the applicable requirements, that person would become the responsible person listed on the declaration of compliance for their specific small unmanned aircraft.

The FAA sought comment on whether this process provides sufficient opportunities for applicants to resolve safety issues and whether the procedure would adequately inform the public of safety defects. The FAA received a few comments regarding the process. DJI

expressed general support, saying it agrees it is important for the FAA to have a mechanism for serious safety issues to be discussed and addressed by the applicant in collaboration with FAA for operations over people.

The National Association of Mutual Insurance Companies (NAMIC) stated publication of the rescission on the FAA website and the Notice of Availability in the **Federal Register** are insufficient to notify pilots that operations over people are no longer safe. NAMIC recommended the FAA use the contact information it has for registered small unmanned aircraft to notify registered operators of safety defects and rescissions. Another commenter stated that, as written, the proposed rule does not give the FAA a means to identify a safety issue and then inform a specific fleet of that issue; nor does it impose a responsibility on the manufacturer to do so. The commenter questioned why the proposed rule would not require the manufacturer to communicate directly with its customers and post notices of defects and rescissions on their website. The commenter also questioned whether the **Federal Register** is an effective means of communication, suggesting that ''while it may satisfy the legal concept of the FAA's obligation, it is not a useful way to reach operators.''

Publication in the **Federal Register** and on the FAA website are sufficient notification. This process of notification is similar to what the FAA uses for airworthiness directives and resolution of safety issues. The **Federal Register** and the FAA website are an effective and timely means of communicating aviation-related safety considerations to the public. The FAA may consider using the registration system as an additional way to notify registered owners of small unmanned aircraft. The rule allows the FAA to request compliance documentation and to inspect facilities as appropriate. Further, members of the public, including applicants and owners, may inform the FAA of potential safety defects. With regard to notification to owners and operators, each applicant must maintain a notification process and is required to inform the public and the FAA of safety defects. Although the rule does not specify how applicants would comply with this requirement, applicants may find posting on their websites an effective way to notify owners of any small unmanned aircraft safety defects. The FAA expects applicants to use their notification processes to disseminate this information.

Aside from increasing the notification period before the rescission from 10 business days to 30 calendar days, the Agency adopts the rescission procedure as proposed.

11. Emergency Rescission of a Declaration of Compliance

The NPRM proposed an emergency rescission process for a declaration of compliance. Prior to rescission of a declaration of compliance, the FAA would typically initiate the safety issue notification process with the applicant. However, if the Administrator determines an emergency exists and safety of persons requires an immediate rescission of a declaration of compliance, the FAA may exercise its authority under 49 U.S.C. 46105(c) [57] to issue an emergency order rescinding a declaration of compliance. Under these circumstances, rescission would go into effect immediately, without the FAA initiating the notification process or the rescission procedures previously described. The order would remain in effect until the basis for issuing the order no longer exists. The emergency order would be considered a final agency decision; as such, an applicant may appeal the decision as provided in 49 U.S.C. 46110 following the issuance of the order. The FAA did not receive any comments about the emergency rescission process. This rule adopts the process as proposed, with no changes.

12. Petition for Reconsideration of a Rescission of a Declaration of Compliance

Once a declaration of compliance is rescinded, the FAA proposed that an applicant would have the opportunity to petition the FAA for reconsideration. An applicant seeking reconsideration must petition the FAA within 60 days of the date of issuance of the notice of rescission. The petition would have to show: (1) The lack of a material fact in the original response to the notification of the safety issue and address why that fact was not present in the original response; (2) an important factual error existed in the decision to rescind the declaration of compliance; or (3) that the FAA did not correctly interpret a law, regulation, or precedent. The FAA would consider this petition and issue a final agency decision either affirming or withdrawing the rescission of the declaration of compliance. An applicant could appeal the final agency decision as provided in 49 U.S.C. 46110.

The FAA did not receive comments concerning the reconsideration process. The FAA adopts the reconsideration process, as proposed, with no changes.

D. Small Unmanned Aircraft Manufactured Previous to the Effective Date of This Rule

Some remote pilots and manufacturers of small unmanned aircraft may wish to use existing small unmanned aircraft to conduct operations over people. The Agency does not seek to preclude existing small unmanned aircraft from conducting operations over people. Instead, the proposed rule included procedures to establish the eligibility of existing small unmanned aircraft to operate over people. As explained in the NPRM, an applicant with a previously manufactured small unmanned aircraft may establish eligibility to operate over people by listing the applicable aircraft serial numbers for the identified small unmanned aircraft on the declaration of compliance submitted to the FAA. An applicant requesting acceptance would be responsible for developing remote pilot operating instructions for the existing aircraft and making those instructions available to remote pilots or owners of the small UAS.

The NPRM did not propose to require that an applicant locate owners or remote pilots operating existing small unmanned aircraft and provide the remote pilot operating instructions personally to them. Rather, if a remote pilot owns an existing aircraft that an applicant has identified on a declaration of compliance as eligible for Category 2 or Category 3 operations and the remote pilot intends to conduct operations over people using that aircraft, the remote pilot would be able to access the remote pilot operating instructions if the applicant posted them online.

The proposed rule did not identify an applicant seeking FAA acceptance of a declaration of compliance as the only person who could label a small unmanned aircraft manufactured prior to the effective date of the rule. Requiring an applicant to contact all remote pilots of a particular make and model of small unmanned aircraft and provide them with labels would be unreasonable. The NPRM noted that an applicant could make a label available to remote pilots, either as a website download or for cost. Overall, remote pilots could choose to label their existing aircraft in any manner that meets the requirements of the proposed rule.

The American Petroleum Institute (API) and other commenters suggested the FAA ensure small UAS owners are not required to buy new aircraft that are appropriately labeled or submit their

[57] When the Administrator determines that an emergency exists related to safety in air commerce and requires immediate action, the Administrator may issue an immediately effective order to meet the emergency, with or without notice, under 49 U.S.C. 46105(c).

own declaration of compliance. The News Media Coalition wrote that its members had made significant investments in their current fleets of small unmanned aircraft and do not wish to see them become ''immediately obsolete.'' An individual commenter said they should be allowed to make modifications to allow their small UAS to become eligible to be used for Category 2 or Category 3 operations. A commenter stated small unmanned aircraft might need upgrades to make the blades safer, but believed the FAA should leave those owners alone. Another commenter asked for guidance on how the use of shrouds applies to existing models. A commenter sought a simple way for everyday operators to determine whether existing equipment can safely operate over people. This commenter wrote that while 'certified' equipment may accomplish this going forward, there is a large gap for existing small UAS. This commenter recommended the example of the European notice of proposed amendment (NPA), which specifies certain altitude limits, speeds, and weights.

Small UAS designs that can currently operate under the provisions of part 107 will continue to be able to operate in accordance with part 107 after this rule becomes effective. When the remote pilot wishes to conduct operations over people, however, that person must ensure his or her existing small unmanned aircraft is eligible for the operation. For operations in accordance with Category 2 or Category 3, this involves verifying the FAA has accepted a declaration of compliance concerning the small unmanned aircraft. For Category 1, the remote pilot must verify the aircraft complies with the weight and exposed rotating parts standards. Anyone with a previously manufactured small unmanned aircraft may follow an existing FAA-accepted means of compliance and submit and request acceptance of a declaration of compliance verifying the aircraft is eligible to operate over people.

News Media Coalition believed the FAA should encourage manufacturers to test and certify currently available models, both newly manufactured models and recently sold models. The News Media Coalition asked the FAA to encourage manufacturers to offer a way to upgrade existing small UAS so that they are compliant with any new rules. The News Media Coalition said manufacturers could accomplish this through either a kit or a software or firmware upgrade.

The Agency declines to specify how or if small unmanned aircraft manufactured prior to the effective date of this rule may meet the requirements of this rule, but notes that an applicant may follow an FAA-accepted means of compliance that incorporates any number of mitigations, including software or firmware updates.

The Small UAV Coalition supported the proposal to apply the requirements of this rule to existing small unmanned aircraft models, such that operations over people with those models may not occur until the FAA has accepted a declaration of compliance for them. The Small UAV Coalition suggested the rulemaking explicitly recognize that an operation with an existing small unmanned aircraft model may occur pursuant to a waiver or exemption, without a declaration of compliance. This rule does not eliminate the ability for a person to submit a waiver under part 107. The FAA evaluates such requests on a case-by-case basis.

The Security Industry Association opined that the proposed rule's certification process for manufacturers and users seeking to acquire a means of compliance was reasonable. The commenter, however, asked the FAA to provide guidance to small businesses that manufacture small UAS on writing service agreements that comply with the rulemaking and do not subject the small business owners to frivolous lawsuits. However, such agreements are outside the scope of this rulemaking.

The FAA included the previously manufactured small unmanned aircraft section in the NPRM to ensure the requirement for labeling of such small unmanned aircraft would be clear. Given the reorganization of the regulatory text, that specific section is no longer necessary and therefore, the final rule does not include this section.

E. Remote Pilot Operating Requirements

The NPRM proposed to apply several operating limitations and requirements to operations under Categories 2 and 3. Several of the operating requirements apply to both Categories 2 and 3, while Category 3 operations are also subject to additional operating limitations and requirements. This rule adopts the requirements as proposed and clarifies that the remote pilot must verify that the declaration of compliance associated with the small unmanned aircraft is valid. It is the remote pilot's responsibility to ensure that the small unmanned aircraft is eligible for the intended operation, which the remote pilot can determine by checking the FAA website.

To conduct operations over people under Category 2 or Category 3, remote pilots must ensure their small unmanned aircraft is eligible for the applicable category or categories of operations. The remote pilot must ensure that the small unmanned aircraft meets the injury severity limits, exposed rotating parts prohibition, and the prohibition on safety defects. The FAA does not expect, nor does it require the remote pilots to inspect the means of compliance or to verify the product support and notification system. However, the remote pilot has a requirement to check that the small UAS is in a condition for safe operation, per § 107.15. The most effective way for a remote pilot to verify that the small unmanned aircraft meets the safety requirements is to ensure it is listed on an FAA-accepted declaration of compliance.

Remote pilots must also ensure their small unmanned aircraft is labeled to indicate the category of eligibility. If a label degrades such that it is no longer legible or attached to the aircraft, the remote pilot must ensure the small unmanned aircraft is relabeled in English such that the label is legible, prominent, and will remain on the small unmanned aircraft for the duration of the operation before operating the aircraft over people. The FAA received a few comments on the labeling requirement, one of which expressed support for it. Several commenters asked the FAA to clarify who is responsible for labeling the small unmanned aircraft. An individual commenter believed the labeling provision could force current UAS owners to buy future systems that are already labeled for operations over people, in the event that the UAS manufacturer chooses not to submit a declaration of compliance for those systems currently in the market. Finally, another commenter opposed making the manufacturer responsible for labeling the small unmanned aircraft. The applicant must meet the eligibility requirements for the small unmanned aircraft if he or she wishes to obtain FAA acceptance of a declaration of compliance to operate over people. Furthermore, if the remote pilot wishes to use a small unmanned aircraft that is listed on a FAA-accepted declaration of compliance, but does not possess a label because the small unmanned aircraft was produced prior to the effective date of this rule, the remote pilot must ensure the small unmanned aircraft is labeled in accordance with the terms of the declaration of compliance before using the aircraft for operations under Category 2 or Category 3.

The proposed rule did not restrict the areas in which operations under Category 1 or Category 2 may occur

because these categories present a lower risk of causing severe injuries. The proposed rule did, however, restrict the areas in which Category 3 operations may occur, due to the increased injury severity limits of Category 3. Specifically, the FAA proposed to prohibit Category 3 operations over open-air assemblies of human beings. The FAA also proposed to limit Category 3 operations as follows: The operation is within or over closed- or restricted-access sites after anyone within that site is on notice that a small unmanned aircraft may fly over them; or, if not in a closed- or restricted-access site, the small unmanned aircraft does not sustain flight over a person not either directly participating in the operation, located under a covered structure, or inside a stationary vehicle. Furthermore, in response to comments, remote pilots are prohibited from operating a small unmanned aircraft as a Category 1, 2, or 4 operation in sustained flight over open-air assemblies unless the operation meets the requirements of § 89.110 or § 89.115(a) (remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules). Sustained flight over an open-air assembly includes hovering above the heads of persons gathered in an open-air assembly, flying back and forth over an open-air assembly, or circling above the assembly in such a way that the small unmanned aircraft remains above some part the assembly. The FAA may waive compliance with this provision as appropriate and is discussed in more detail in Section XIV.B. However, conditions of any waiver issued may require the operator to notify local law enforcement prior to the operation. All small unmanned aircraft operations are subject to remote identification requirements upon the applicable compliance date, as specific in the Remote Identification for Unmanned Aircraft final rule.

1. Operations Over Open-Air Assemblies of Human Beings

The FAA received a few comments addressing the proposal to prohibit Category 3 operations over open-air assemblies of people. One commenter recommended the FAA clarify what it means by an ''assembly of people'' and provide a quantity or density of people that constitute a significant risk. The FAA has declined to define this term by regulation; rather, the FAA employs a case-by-case approach in determining how to apply the term ''open-air assembly.'' [58] Whether an operational area is an open-air assembly is evaluated by considering the density of people who are not directly participating in the operation of the small unmanned aircraft and the size of the operational area. Such assemblies are usually associated with public spaces. The FAA considers some potential examples of open-air assemblies may include sporting events, concerts, parades, protests, political rallies, community festivals, or parks and beaches during certain events. Some potential examples that are less likely to be considered open-air assemblies include individual persons or families exiting a shopping center, athletes participating in friendly sports in an open area without spectators, individuals or small groups taking leisure in a park or on a beach, or individuals walking or riding a bike along a bike path, but whether an open-air assembly exists depends on a case-by-case determination based on the facts and circumstances of each case. The remote pilot must assess whether the operational area would be considered an open-air assembly prior to conducting flight operations. Legal interpretations and opinions regarding open-air assemblies may be found on the FAA website.[59] The FAA will continue to provide education opportunities and outreach to remote pilots on conducting safe operations. Additional resources for operators can be found on the FAA website.

The Washington Progress Group stated the prohibition on Category 3 operations over open-air assemblies is reasonable for operators who are satisfied with restricting flights to unpopulated areas, or who are able and willing to control the ground environment over which they are flying, but asserted the restriction is too limiting for most commercial missions that operate in populated open areas and may need to hover. The commenter suggested the FAA consider allowing operations to occur in airspace the public assumes is safe.[60] To implement this standard, the commenter suggested the FAA require a proponent for UAS operations to proffer a safety case.

The FAA maintains its prohibition on Category 3 small unmanned aircraft operations over open-air assemblies of people, as the limitation will be a means for the FAA to maintain an appropriate level of safety for such operations. This prohibition is subject to waiver. An applicant who proposes risk mitigation measures that would achieve an acceptable level of safety when operating over open-air assemblies may qualify for and receive a waiver. Alternatively, a person choosing to demonstrate the reliability of their small unmanned aircraft may choose to obtain an airworthiness certificate and be eligible for Category 4 operations.

The Electronic Privacy Information Center (EPIC) provided statistics from a 2017 Pew survey [61] that the commenter believed are ''directly relevant to the proposal to allow drones to operate over people.'' EPIC argued that the limitations proposed for Category 3 operations should apply to all operations. For flying over open-air assemblies of people, EPIC believed the FAA should require operators obtain and hold a permit that would ''allow for press or photography drones,'' as a means of accountability.

The FAA developed the limitations for Category 3 operations as a way to mitigate the level of risk associated with the increased injury severity limitations. The FAA does not find it necessary to apply the limitations to operations under Categories 1 and 2, as those categories are sufficiently safe to operate over open-air assemblies without prior notification to persons not directly participating in the operation. However, in response to security concerns raised in comments, remote pilots are prohibited from operating a small unmanned aircraft as a Category 1, 2, or 4 operation in sustained flight over open-air assemblies unless the operation meets the requirements of § 89.110 or § 89.115(a) (remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules). See Section VI.E.3. for a description of sustained flight and open-

[58] Rebecca MacPherson, *Legal Definition of ''Densely Populated'' and ''Congested Airway,''* FAA Office of Chief Counsel, Regulations Division (August 28, 2012); Rebecca MacPherson, *Response to December 4, 2009 Letter,* FAA Office of Chief Counsel, Regulations Division (March 3, 2010).

[59] *https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/Interpretations/.*

[60] The commenter cited Matthews, et al., ''An Achievable Path to UAS Integration in the NAS'', *https://www.safeaccess4uas.com/paperuas-integration-nas.html*; FAA Sponsored Sense and Avoid Workshop, ''Sense and Avoid (SAA) for Unmanned Aircraft Systems (UAS), Second Caucus Workshop Report,'' January 18, 2013. The commenter refers to measurements of accident levels in certain airspace as a ''Target Level of Safety.'' The commenter also cited FAA Order 1100.161 CHG 1, *https://www.faa.gov/documentLibrary/media/Order/Order_1100.161_CHG_1.pdf.*

[61] Hitlin, Paul, ''8% of Americans Say They Own a Drone, While More than Half Have Seen One in Operation,'' Pew Research Center (Dec. 19, 2017), *available at https://www.pewresearch.org/fact-tank/2017/12/19/8-of-americans-say-they-owna-drone-while-more-than-half-have-seen-one-in-operation/.*

air assemblies. The FAA may waive compliance with this provision as appropriate. The FAA similarly does not issue permits for specific operations, such as small unmanned aircraft operated by the press, because the FAA's statutory obligations concerning aviation safety do not require differentiating between the purposes for operations that may occur under part 107.

The Agency did not propose training or testing requirements for persons operating a small unmanned aircraft eligible to operate in either Category 2 or Category 3. With regard to Category 3 operations, the NPRM requested responses to several questions related to whether the Agency should require pilot training and testing requirements before allowing Category 3 operations over open-air assemblies. Specifically, the FAA requested comment on the following questions:

- To conduct operations over open-air assemblies using a small unmanned aircraft that can transfer up to 25 ft-lbs kinetic energy to a person on impact, should the remote pilot-in-command have additional skills, experience, or currency beyond what part 107 currently requires?
- If so, what kind of skill, experience, or currency should be required (*e.g.,* minimum time operating the small UAS to be used, minimum number of take offs and landings, etc.)?
- How should that skill, experience, or currency be documented?

Several commenters responded to these questions. Commenters did not agree on the path forward with regard to open-air assemblies and Category 3. One commenter recommended the FAA consider training requirements to conduct Category 3 operations over open-air assemblies of people. Motorola Solutions stated public safety officials should be allowed to conduct operations over open-air assemblies without a waiver using a Category 3 small unmanned aircraft if the remote pilot in command has additional skills, experience, and currency beyond what part 107 currently requires. In contrast, the News Media Coalition said the FAA should not require training based on the number of people on the ground, but should focus on ensuring remote pilots are trained and knowledgeable in all circumstances. Another commenter opined that, until the FAA requires a practical test with specified minimum skills, experience, and currency for remote pilots, any additional requirements for Category 3 operations over open-air assemblies should be left to market forces to create industry-accepted standards.

This rule does not require additional training, skills, experience, or currency for Category 3 operations. Although pilot experience might be relevant in determining whether an operation under either category meets the level of safety required for operations over people, the FAA lacks sufficient information and data to assess whether any training or time spent piloting a particular aircraft would be appropriate for ensuring safety.

2. Operations Within or Over Closed- or Restricted-Access Site

The FAA proposed allowing Category 3 operations at closed- or restricted-access sites in which access to the site is restricted and when those people who are permitted access to the sites are advised of the occurrence of the operation. The FAA anticipates that a closed- or restricted-access site could be an area that contains physical barriers, personnel, or both, as appropriate, to ensure no inadvertent or unauthorized access can occur. For example, an operator should ensure that access is restricted through public notices and signage, flagging and barricading, erecting temporary fencing, or posting personnel at points of entry, as appropriate. In addition, issuing notice that a small unmanned aircraft may operate over people within the site will enhance the situational awareness of people within it. Notice could be written and posted at the entry point of the restricted area or be in a letter or contract prior to the operation. Verbal notice in addition to the written notice might be appropriate in some cases. Operators may want to consider whether providing written notification could be helpful to meet operators' own evidentiary needs. In accordance with this limitation, remote pilots must ensure no inadvertent or unauthorized access to the site occurs. The FAA expects adequate assurance could include receiving assistance from personnel, or placing physical barriers such as barricading and fencing or monitoring personnel to ensure inadvertent or unauthorized access to a closed- or restricted-access site does not occur. Geographical boundaries, such as rivers, canals, cliffs, and heavily wooded areas may also serve as effective barriers to restrict access. In some circumstances, it may not be possible for a small unmanned aircraft to take off and land inside a closed- or restricted-access site. The proposed limitations on Category 3 operations would therefore allow for takeoffs and landings to occur outside the site. In such circumstances, small unmanned aircraft could then transit to the site to conduct the desired operation, provided the aircraft does not maintain sustained flight over persons not directly participating when outside the site.

The FAA received several comments relevant to the restriction of Category 3 operations from sustaining flight over people unless those people are within a closed- or restricted-access site and have received notice that a small unmanned aircraft may fly over them. One commenter stated consent, rather than notice, would be most appropriate in restricted spaces because the public would likely be more amenable to the use of larger unmanned aircraft over them if consent was first required. This commenter recommended the FAA create another category for small UAS that require only consent and not notice. ALPA said a single, one-time notification to people not directly involved in the small UAS flight operation is not sufficient to reduce the risk of the operation. ALPA added this is true when an operation of small unmanned aircraft occurs in an open area where the zone of operations cannot easily be defined or depicted.

The FAA declines to require consent for Category 3 operations over people in a closed- or restricted-set because notice is sufficient for persons who choose to assume the risk of being present in the area of operation. With regard to ALPA's concerns about Category 3 operations in dynamic airport environments, the FAA is aware that areas like a non-movement area at an airport do not permit public access and are an appropriately closed- or restricted-sites. If an airport authority chooses to conduct Category 3 operations at the airport, they must provide notification prior to the operation. The FAA encourages providing frequent and timely notification to ensure the safety and awareness of all persons in the environment of operation.

The National Institute for Occupational Safety and Health (NIOSH) invited the FAA to join it in developing a performance-based, tiered approach for operations of small unmanned aircraft near people at worksites to minimize the occupational risks. NIOSH believes additional research and proactive risk mitigation measures are necessary. NIOSH also encouraged the FAA to collaborate with the Occupational Safety and Health Administration (OSHA). The FAA declines to require additional standards specific to construction sites. Part 107 does not place any additional burden or restrictions on any workplace. The wide variety of small unmanned aircraft types and operations make it impractical to set specific criteria, including stand-off

distances, speed limits, mass, altitude, and the like, for operations over people. Workplace personnel responsible for safety rules should consider developing operating conditions to ensure remote pilots conduct safe small unmanned aircraft operations.

Flytcam Motion Pictures agreed that having restricted sites for Category 3 operations was reasonable, particularly around construction sites, agricultural fields, oil fields, and areas of search and rescue operations. The commenter noted these sites already have established safety measures in place and many of the personnel wear hard hats or helmets. The commenter did not, however, believe Category 3 operations are appropriate on closed-set motion picture and television productions. The commenter also pointed out that personnel on motion picture and television sets are unlikely to be wearing equipment to protect them. The commenter recommended that closed-set motion picture filming still require the user to go through the waiver process to describe how they can conduct operations safely. Additionally, ALPA recommended that small unmanned aircraft operations in these areas be restricted to Category 1 or Category 2. For operations over people at a construction site, the Associated General Contractors (AGC) of America asked FAA to clarify in this rulemaking that workers at the construction site qualify as ''participating in the operation.''

The injury severity limits, exposed rotating parts prohibition, and the operating restrictions for Category 3 operations are sufficient risk mitigations for all closed- and restricted-access sites. Under these requirements, operation of the small unmanned aircraft itself presents a sufficiently low risk, particularly when combined with a notification requirement that allows people in the vicinity of the operation to assume the risk or to leave the area when the operation is taking place. Construction sites are often closed- or restricted-access sites in which people within the sites might not directly participate in the small unmanned aircraft operation. Under these circumstances, operations over people can still occur over these individuals in accordance with this rule. The FAA discussed the distinction between people directly participating and not participating in the final rule for part 107.[62] This final rule for operations over people does not change that policy.

[62] 81 FR 42064, 42128 (June 28, 2016).

3. Operations Not Within or Over Closed- or Restricted-Access Sites

For Category 3 operations over people not located within a closed- or restricted-access site, the Agency proposed to prohibit sustained flight, as doing so reduces the likelihood of injury by limiting protracted duration of a flight over a person. Additionally, the Agency proposed to prohibit remote pilots from operating a Category 3 aircraft over open-air assemblies of people.

In response to the proposal concerning Category 3 operations over people not located within closed- or restricted-access sites, the Small UAV Coalition pointed out the proposed rule did not include a definition of ''sustained'' operation. The Coalition stated the FAA should consider hovering or circling over persons to be ''sustained,'' in contrast to merely transiting over a person. The FAA maintains the prohibition on sustained flight for Category 3 operations outside of a closed- or restricted-access site, in addition to prohibiting all operations over open-air assemblies. Sustained flight includes hovering above any person's head, including any person in an open-air assembly; flying back and forth over a person or open-air assembly; or circling above an uninvolved person or open-air assembly in such a way that the small unmanned aircraft remains above some part of that person or open-air assembly. Operations conducted under Category 3 only permit sustained operations over people directly participating in the operation or under a covered structure or inside a stationary vehicle. Category 1, 2, or 4 operations that are not compliant with remote identification are also prohibited from sustained flight over open-air assemblies.

The AeroVista Drone Academy recommended allowing ''transient overflight'' of non-participating persons who are equipped with hardhats and other equipment or non-participants who have provided informed consent. In addition, AeroVista recommended the establishment of a new category of ''active participants,'' which would consist of persons involved in an operation, are informed of the risks, have provided informed consent, and can carry out appropriate emergency procedures. These active participants would be identified by special clothing or being in a closed-access site.

This rule provides flexibility for operating over people not directly participating in the operation, unless it is a sustained flight over an open-air assembly for Category 1, 2, or 4. This rule allows operations under Category 1 or Category 2 to occur over all people, including sustained flight over people not directly participating in the operation, unless that sustained flight is over an open-air assembly. The FAA finalizes the requirement to permit Category 3 over people only if: (i) The operation is within or over closed- or restricted-access sites and anyone within that site has been notified that a small unmanned aircraft may fly over them; or (ii) the small unmanned aircraft does not maintain sustained flight over a person not either directly participating in the operation, located under a covered structure, or inside a stationary vehicle with no changes. Such restrictions are consistent with the risk-based framework for this rulemaking.

F. Variable Modes and Variable Configurations of Small UAS

The Agency proposed to allow small unmanned aircraft configured to conduct operations in more than one category. For example, an aircraft may be designed in such a way that it would be eligible to conduct Category 2 operations in one mode or configuration and Category 3 operations in another. Alternatively, a small unmanned aircraft could meet the requirements to operate over people only when in one particular mode or configuration.

Using different modes or configurations, an applicant could design a small unmanned aircraft to meet the performance requirements of multiple categories of operations over people. The NPRM explained that, to transition between various modes or configurations, an applicant could use a variety of methods, such as software-enabled performance limitations or hardware configurations. The Agency proposed that a small unmanned aircraft would only be eligible for operation in more than one category if the remote pilot in command cannot inadvertently change the mode or configuration. A change of mode or configuration, therefore, could only result from a deliberate action on the part of the remote pilot in command. The applicant should test the small unmanned aircraft in the mode or configuration to which the applicant wishes to declare compliance. The declaration of compliance must include each category for which the applicant has tested or analyzed the small unmanned aircraft.

The Agency sought comment on means of compliance that address incorporation of software, including software updates or changes, to enable performance limitations and variable modes or configurations to meet the

proposed safety level. The FAA also sought comment in the NPRM on how it should review means of compliance for the impact kinetic energy or exposed rotating parts safety thresholds to address the appropriateness of using software to limit or establish safe performance of the small unmanned aircraft. In response, the Agency received general comments on variable modes and configurations.

Flytcam Motion Pictures expressed concern that many pilots lack both the technical understanding of various systems and procedures required to operate safely and to understand the regulations in part 107. While agreeing the pilot should not be able to change the mode inadvertently, Flytcam was concerned the Agency had ''a lot of confidence that the pilot will ensure the aircraft is configured properly.'' The FAA does not share these concerns because the regulations require remote pilot operating instructions to describe how to verify and change the mode or configuration of the small unmanned aircraft. Remote pilots who hold certificates under part 107 are capable of using the remote pilot operating instructions to determine how to employ the appropriate mode or configuration for the intended operation. The remote pilot in command is also responsible for complying with all applicable regulations, including conducting a preflight inspection.

The Agency adopts the proposal as drafted to allow small unmanned aircraft to be configured in more than one category.

G. Record Retention Requirements

The Agency proposed requiring applicants to maintain small unmanned aircraft records related to their declarations of compliance for a minimum of two years after ceasing production and requiring applicants to retain all supporting information for a means of compliance for as long as the means of compliance remains accepted. The NPRM explained that, in the event of a safety defect, or if the FAA initiated an action to address a compliance issue, this information would be critical to determine the cause, scope, and severity of the defect or infraction.

For applicants submitting a means of compliance for FAA acceptance, the submitter would be required to retain and make available to the Administrator, on request, and for as long as the means of compliance remains accepted, the detailed description of the means of compliance and justification showing how the means of compliance meets the requirements. When submitting a declaration of compliance, the applicant must retain all supporting information used to meet the safety requirements. The applicant must retain this information for 2 years after the cessation of production of the small unmanned aircraft listed on the declaration of compliance. Furthermore, if the applicant designs or modifies the small unmanned aircraft, they must retain the supporting information for 2 years after they submit the declaration of compliance. The FAA has modified the text of the regulatory requirements for record retention as they were proposed in the NPRM to provide clarity.

NAMIC and the Small UAV Coalition supported the proposal to require the holder of a declaration of compliance to retain records for a minimum of 2 years. In contrast, two individual commenters opposed the 2-year record retention requirement, arguing that it should be longer. One of these commenters wrote that, to accommodate lawyers and lawsuits, the Agency should extend the record retention period to match the statute of limitations, which the commenter stated is 10 years. The other commenter similarly suggested that records be retained for the length of all statutes of limitation, because the recordkeeping requirements will benefit the injured party. This commenter also stated that the NPRM did not provide a reason for treating the document retention and inspection requirements for the declaration of compliance and the means of compliance differently. The commenter asserted that if the method of proving compliance cannot be investigated and verified, ''the Certificates of Declaration are suspect.'' The Agency finds that the record retention requirements are appropriate: It is not necessary to retain records that are the bases for declarations of compliance longer than 2 years, although the FAA notes that individuals may find it in their interest to retain the records for a longer period of time.

The Small UAV Coalition also commented in support of the proposal to require the holder of a means of compliance retain records for as long as the means of compliance remains acceptable to the FAA. Commenting on the proposed retention requirement for substantiating data related to custom means of compliance, an individual commented that, so long as the manufacturers are the only entities using their own custom means of compliance, it makes sense for them to keep substantiating data ''with no caveats. ''The commenter stated, ''however, given that other manufacturers may rely on [another] manufacturer's custom means of compliance . . . the rule should provide some means whereby a creator of a custom means of compliance can notify those who use it that they will no longer utilize it.'' Data would then either be deleted or transferred to entities that wish to continue using the means of compliance. The commenter noted that, without this exception, a person who creates and submits for FAA acceptance a means of compliance must bear the cost of maintaining substantiating data related to that means of compliance even if the manufacturer no longer makes use of it.

An individual commenter expressed support for the proposed amendment to require any person holding an FAA-accepted declaration of compliance to make available to the Administrator, on request, the declaration of compliance and any other document, record, or report required to be kept. The commenter suggested the FAA clarify that only the person(s) required to keep the record must produce the record.

The proposed language sufficiently affirms that the person who is required to keep the record must be the one to produce the record on request. Further, the Agency adopts the record retention requirements as proposed, with minor clarifying amendments to ensure sufficient information is available to the FAA on request. These requirements are consistent with the level of oversight that is appropriate for small unmanned aircraft eligible to conduct operations in accordance with Category 2 or Category 3.

VII. Category 4: Operations Based on Airworthiness

The proposed rule included only three categories of aircraft that could conduct operations over people under part 107. In response, several commenters stated the Agency had not considered the reliability of aircraft. Other commenters stated a small UAS issued an airworthiness certificate should be allowed to operate over people.

The Agency designed part 107 to encompass small UAS that were not certificated, allowing for expansion of UAS operations in the NAS without requiring airworthiness certification. In response to commenters' suggestions, this rule considers reliability of small UAS by establishing a fourth category of small unmanned aircraft eligible to operate over people. This final rule allows small unmanned aircraft issued an airworthiness certificate under part 21 to operate over people in accordance with part 107. An appropriate airworthiness certificate would be one

which does not prohibit operations over people or over moving vehicles. Operating limitations may be specified in the approved Flight Manual or as otherwise specified by the Administrator. Certification is how the FAA manages risk through safety assurance. It provides the FAA confidence that a proposed product or operation will meet FAA safety expectations to protect the public. Certification affirms that FAA requirements have been met. Small unmanned aircraft that have obtained airworthiness certification will be allowed to operate over people and over moving vehicles in accordance with part 107, so long as the operating limitations applicable to that aircraft do not prohibit those operations. Consistent with other regulatory frameworks, such as part 91 and part 135, the owner is responsible for the maintenance and records retention requirements for small unmanned aircraft operated in accordance with Category 4 under part 107, unless the owner has entered into an agreement with another entity to operate the small unmanned aircraft. It is expected that most operators of Category 4 small unmanned aircraft operated under part 107 will also be the owner, or operating under direction of the owner. In this case, the owner is responsible for compliance with the Category 4 small unmanned aircraft maintenance and records retention requirements. However, to maintain flexibility for those owners of a Category 4 small unmanned aircraft who wish to enter in to a lease agreement with another entity for the operation of their small unmanned aircraft without the owner's intervention or control, this rule provides the means for the responsibility for the maintenance requirements and retention of records to be clearly defined in such an agreement. If so specified in the agreement, the FAA would hold the operator responsible for compliance with the Category 4 small unmanned aircraft maintenance and records retention requirements. An agreement between an owner and an operator may be in the form of a written lease or contract, verbal agreement, or other agreement. If any agreement is found invalid or unenforceable, then the owner has the responsibility to meet these requirements. The provisions of any agreement should address, at a minimum, the requirements of § 107.140(c).

The UAS Program Leader for the Memphis Fire Department stated the FAA or the manufacturer should certify small UAS that are reliable aircraft for use in operations over people. AIA asked the Agency to consider the probability of a small unmanned aircraft hitting a moving vehicle or a human. A commenter wrote that there are currently no clear data on this topic and such data is critical to industry and public acceptance of this rule. AIA stated the Agency should consider the risk of UAS operations as consistent with the risks posed by traditional manned aviation as well as the other risks that the public faces daily. Airworthiness certification is not necessary for operations over people; as a result, the proposed rule did not require it for operations under any of the three proposed categories of operation.

Flytcam Motion Pictures surmised the risk of unmanned aircraft mishap would be higher with increased operations and suggested the creation of a fourth category that would include all the systems outside Category 3. Rising Tide Cinema proposed three classes of small UAS: Operations that occur under waiver, small UAS with technological advantages approved by the FAA, and a third category of small UAS with an ''airworthiness release.'' Another commenter recommended several specific requirements for small UAS type certification, including a ''demonstrated hover stability rating,'' pilot notification, and cybersecurity requirements. Drone Safe Communities suggested manufacturer requirements for protocol to apply during a loss of signal experience.

The Agency agrees with the commenters that demonstrable reliability should be an alternative path for operations over people. This rule includes several updates to regulatory text to allow aircraft with airworthiness certification to operate under part 107 and to be eligible to operate over people. This rule also removes the phrase, ''[e]xcept for aircraft subject to the provisions of part 107'' from § 21.1, to clarify small UAS may seek airworthiness certification even if part 107 applies to the intended aircraft operation. This final rule includes a new provision, § 107.2, which clarifies that, notwithstanding the change to § 21.1, small unmanned aircraft operating under part 107 are not required to obtain airworthiness certification. Except where the airworthiness certification is used as a basis for operating over people in accordance with Category 4, the provisions of part 21 will continue to be inapplicable to small unmanned aircraft subject to part 107. This final rule also revises § 107.1 to clarify that part 107 does not apply to any operation that an operator elects to conduct under part 91 with a small unmanned aircraft that has been issued an airworthiness certificate: an operator may conduct small unmanned aircraft operations under either part 107 or part 91 when the operation and small unmanned aircraft meet the applicable requirements.

A. Remote Pilot in Command Operating Requirements for Category 4

To operate under Category 4, the remote pilot in command must use a small unmanned aircraft that has an FAA-issued airworthiness certificate. Operating limitations may be specified in the approved Flight Manual or as otherwise specified by the Administrator and must not prohibit operations over people or moving vehicles. When using a small unmanned aircraft with an airworthiness certificate issued under part 21, remote pilots must operate in accordance with all operating limitations, which the FAA specifies for each aircraft when issuing the airworthiness certificate. Operating limitations are prescribed to ensure that the aircraft is operated within an acceptable level of risk to maintain the safety of the NAS and to protect persons and property on the ground. To ensure this safety, remote pilots must adhere to any operating limitations, especially those specific to operations over people. Any noncompliance with operating limitations increases risk.

Additionally, in response to comments, remote pilots are prohibited from operating a small unmanned aircraft as a Category 4 operation in sustained flight over open-air assemblies unless the operation meets the requirements of § 89.110 or § 89.115(a). Sustained flight over an open-air assembly includes hovering above the heads of persons gathered in an open-air assembly, flying back and forth over an open-air assembly, or circling above the assembly in such a way that the small unmanned aircraft remains above some part the assembly. The FAA may waive compliance with this requirement as appropriate. For more information on this requirement, please see Sections VI.E. and XIV.B.

B. Small Unmanned Aircraft System Requirements and Continued Airworthiness for Category 4

The aircraft must be maintained or altered in a manner using the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator. Additionally, the

small unmanned aircraft must be inspected in accordance with either the manufacturer's instructions or instructions acceptable to the Administrator. The small unmanned aircraft must also be maintained or altered using parts of such a quality that the condition of the aircraft will be at least equal to its original or properly altered condition.

The person performing any maintenance, preventive maintenance, or alterations must use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness that are acceptable to the Administrator, or other methods, techniques, and practices acceptable to the Administrator. In addition they must have the knowledge, skill, and appropriate equipment to perform the work. While this rule does not require the person performing maintenance to hold a mechanic certificate, it is incumbent on the owner or operator to ensure that maintenance occurs in a manner that ensures that the small unmanned aircraft remains in a condition eligible to be operated over people in accordance with Category 4. If the small unmanned aircraft is operated, and subsequently crashes due to improperly performed maintenance, the small unmanned aircraft owner or operator could be held responsible. The person performing the maintenance must have the basic skills and knowledge to follow the manufacturer's instructions and use the tools that the manufacturer recommends. Or, if adequate instructions are not available, or if an alternative process is desired, then the maintenance provider may use instructions acceptable to the Administrator in lieu of the manufacturer's instructions.

Many of these requirements are similar to the requirements of part 43 that apply to maintenance of aircraft. The FAA has long relied on maintenance providers' compliance with these requirements to ensure the aircraft remains in an airworthy condition. In this regard, the requirements ensure the small unmanned aircraft retains the capabilities and characteristics the small unmanned aircraft had at the time of certification and that the certification determination remains valid. The conclusion that the aircraft will remain safe is critical in determining the aircraft is suitable for operating over people in accordance with Category 4, as it is consistent with the risk-based framework the Agency uses in establishing the appropriate policy for small UAS operations over people.

C. Maintenance Records

This rule requires the owner or operator to retain maintenance records for aircraft eligible for operations under Category 4 for at least 1 year from when the work is performed, or until the maintenance is repeated or superseded by other work. Furthermore, the owner or operator must retain and transfer records documenting the status of life-limited parts, compliance with airworthiness directives, and inspection status of the small unmanned aircraft when ownership of the small unmanned aircraft transfers. The records must be specific to the small unmanned aircraft and be made available to the Administrator on request. All records of maintenance, preventive maintenance, and alterations performed on the small unmanned aircraft must be documented in a manner acceptable to the Administrator. The records must contain the description of the work performed, the date the work was completed, and the name of the person who performed the work.

The FAA will use these records to verify that the small unmanned aircraft has been maintained in a manner that assures it remains in a condition eligible for operations over people in accordance with Category 4. In addition, while the Agency does not establish a process of requiring a small unmanned aircraft be removed from service, repaired, and returned to service by a certificated mechanic, the small unmanned aircraft must be properly maintained to ensure it remains in a safe condition. Appropriate record-keeping will verify compliance with this requirement.

When a remote pilot operates a small unmanned aircraft in accordance with part 107 that has been issued an airworthiness certificate under part 21, the requirements of part 43 and part 91 do not apply. However, a small unmanned aircraft that has been issued an airworthiness certificate may also be eligible to operate under part 91, under certain circumstances. This rule contains necessary updates to the regulatory text, to reflect the applicability of operating rules. Due to the differences in the regulations about how aircraft must be maintained under each suite of operating rules, it may be difficult for an owner or operator to switch back and forth between operating rules. In particular, a small unmanned aircraft that has been operated and maintained in accordance with part 107 may find it difficult to show compliance with the requirements of part 43 and 91. To address this concern, an owner or operator can elect to comply with the relevant part 43 and 91 requirements, even while operating in accordance with part 107. Under these circumstances, electing to comply with the relevant part 43 and 91 requirements may help facilitate moving back and forth between operational parts, if desired, because the requirements of parts 43 and 91 are more stringent than those of § 107.140 with regard to maintenance and airworthiness.

VIII. Operations Over Moving Vehicles

A. Proposed Prohibition and Comments Received

The Agency proposed to prohibit the operation of small unmanned aircraft over people in moving vehicles; however, the proposed rule stated the FAA could waive the proposed prohibition if a person demonstrates the small unmanned aircraft operation could occur safely under the terms of a waiver. In the proposed rule, the Agency stated the moving vehicle operating environment is dynamic and the remote pilot in command could not control it directly. The Agency considered, however, allowing the operation of small unmanned aircraft over people in moving vehicles without a waiver and sought public comment on whether it should take this action.

Many comments addressed operations of small UAS over people who are in moving vehicles. Several comments supported the prohibition and said the FAA should not consider allowing such operations without a waiver. A few comments only addressed the proposal to allow small unmanned aircraft operations over people in moving vehicles through the part 107 waiver process. Most commenters opposed the prohibition and said the FAA should allow small unmanned aircraft operations over moving vehicles without a waiver in all or limited circumstances.

Some commenters, including the CAPA, the Association of American Railroads, the Minnesota Department of Transportation (MnDOT), IAAPA, and EPIC, supported the prohibition as proposed in the NPRM. Both the Association of American Railroads and IAAPA asked the Agency to clarify what constitutes a moving vehicle and further requested clarity about whether the prohibition would apply to trains and amusement park rides.

IAAPA urged the Agency ''to prohibit the flight of any unauthorized small UAS over fixed site amusement parks,'' citing concerns over small unmanned aircraft operating over amusement park rides. IAAPA stated operators who receive a waiver will be more familiar

with the higher level of risk associated with operating over an amusement park. IAAPA asked the Agency to recognize the need to prohibit flight over, and in close proximity to, amusement parks by clarifying that amusement park rides are ''moving vehicles'' for purposes of the prohibition. Alternatively, the commenter asked the Agency to address the prohibition through Section 2209 of the FAA Extension, Safety, and Security Act of 2016.[63] The commenter asserted the kinetic energy of a small unmanned aircraft hitting an exposed individual on even a relatively slow-moving ride poses a substantial safety risk to the rider who is hit, to those around him or her, and potentially to all the riders on a ride.

Chicago's First Lady Cruises wrote that the inconvenience of the current regulation is outweighed by reasonable safety and liability concerns. The commenter noted that their open-air vessels provide their customers with unobstructed views of the Chicago skyline and could be considered an open-air assembly of people.

Several commenters supported the prohibition on operations over moving vehicles as long as it remains subject to waiver. MnDOT recommended the FAA require applicants for a waiver explain how they considered the safety of the combinations of altitude, speed, and distance from a roadway exist to avoid distracting drivers.[64] One commenter recommended the FAA differentiate between operations over people in moving vehicles with knowledge of the operation (*e.g.,* vehicles being filmed) and operations over people in moving vehicles without knowledge of the operation (*e.g.,* vehicles on public roads). Another individual commenter suggested the Agency only allow operations of small unmanned aircraft over moving vehicles with a waiver, hands-on training, and rules preventing operation over roadways where vehicles travel above certain speeds. The commenter said testing would be necessary to determine appropriate speeds, and would likely be similar to the testing conducted for this NPRM to set UAS categories, considering the likelihood of harm to bystanders that may occur at various speeds. The commenter also stated a small unmanned aircraft that causes a driver of a car or truck to lose control of a vehicle would create much greater havoc than that contemplated by this NPRM.

Some commenters recommended a prohibition against hovering or sustained flight over moving vehicles. NAMIC said it recognizes sustained operation of a small unmanned aircraft over moving vehicles can present safety issues and should not be permitted without a waiver, but ''temporarily transiting over roads with moving vehicles during normal operations'' should be permitted. A couple of commenters stated small unmanned aircraft operations should only be permitted without a waiver for purposes of transiting over moving vehicles or when the flight is done at certain angle, for example, perpendicular to the roadway or at a 90-degree angle. One commenter said any prohibition on hovering or sustained flights over moving vehicles should not apply to lifesaving or search-and-rescue efforts.

In contrast, many comments opposed the prohibition on small unmanned aircraft operations over moving vehicles and recommended the FAA allow such operations without a waiver. Most of these commenters cited at least one of the following reasons: (1) A small unmanned aircraft that malfunctions is unlikely to collide with a moving vehicle operating below it because both vehicles are in motion; (2) in the event of a collision, the risk of injury to people inside the moving vehicle is low because they are protected by the structure of the car; and (3) the risk of distraction to drivers is low. Commenters stated the small unmanned aircraft will operate directly overhead and therefore not be visible to the drivers, who must focus on distractions that are equal to or greater than a small unmanned aircraft operating overhead. Commenters also stated the FAA failed to consider the benefits of allowing small unmanned aircraft operations over moving vehicles and failed to provide sufficient evidence or data to support the Agency's stated concerns regarding risks to people in vehicles. Commenters asserted a blanket restriction on small unmanned aircraft operations over moving vehicles would severely limit small unmanned aircraft operations, especially in urban areas, and will negatively impact various industries, public safety operations, and emerging technologies. A few commenters noted helicopters and ultralight vehicles routinely operate over moving vehicles and present a greater risk to people in moving vehicles than small unmanned aircraft operating overhead. Other commenters opposed the prohibition due to concerns with the burden on the FAA and small UAS operators of using the part 107 waiver process to allow the operations.

Commenters also pointed to the difficulty of having to interrupt an operation by landing the unmanned aircraft, crossing the roadway, then resuming the operation. Utah Department of Transportation (UDOT) noted that, to avoid operating over moving vehicles, it closes lanes of traffic to conduct bridge, sign, and other infrastructure inspections via UAS, causing delays and incurring cost to society. Several commenters, including DJI, suggested allowing operations of small unmanned aircraft over moving vehicles without a waiver using a risk-based approach and to consider factors such as the speed and density of traffic, minimum altitude requirements, the location, type, and speed limit on the roadway or site being overflown, and the weight of the small unmanned aircraft. A few commenters suggested the rule include weather restrictions.

Some commenters recommended allowing such operations only in certain circumstances. A commenter recommended requiring operators to comply with reporting requirements, such as reporting property damage to local and State departments of motor vehicles. Commenters generally supported allowing operations over low-speed and low-density traffic when vehicles are in closed or restricted sites. Commenters also recommended that small unmanned aircraft operations be permitted over moving vehicles if the drivers are part of, or are aware of and consent to, the operations or when the operators are ''professionally trained, certified, and insured.'' A few commenters who support such operations at construction sites asserted the nature of heavy equipment at such sites, the added protection of personal protective equipment, and the additional training for workers and operators would mitigate the risks of the operation. A commenter recommended viewing each operating environment on a case-by-case basis to allow operations where deemed safe and responsible, based on a variety of factors.

[63] Section 2209 requires ''the Secretary of Transportation to establish a process to allow applicants to petition the Administrator of the Federal Aviation Administration to prohibit or restrict the operation of an unmanned aircraft in close proximity to a fixed site facility.'' The FAA Extension, Safety and Security Act of 2016, Public Law 114–190, sec. 2209, 130 Stat. 615, 633–635 (2016). The FAA has determined that operations over moving vehicles can be conducted safely when following the requirements of this rule. A separate rulemaking action will address the process by which entities can submit a request to the FAA to restrict the airspace over a fixed site.

[64] The commenter cited the following Oregon Department of Transportation study, which investigated driver distraction caused by UAS: Hurwitz, D., Olsen, M., & Barlow, Z. (2018) ''Driver Distraction Due to Drones,'' *Oregon Department of Transportation (ODOT),* Salem, OR, 1–100, available at *http://www.davidhurwitz.org/wp-content/uploads/2019/02/Driving_Distraction_due_to_Drones.pdf.*

B. Response to Comments for Determination

The Agency agrees with the commenters who stated operations over people in moving vehicles could be conducted safely, subject to certain conditions. Although small unmanned aircraft operations over moving vehicles may present additional risks due to the potential speeds of such vehicles, the Agency has determined operations of small unmanned aircraft over people who are inside moving vehicles can be conducted safely, under limited circumstances. Therefore, this rule will allow small unmanned aircraft operations over people inside moving vehicles subject to specific conditions. The rule contains a new section describing the conditions under which small unmanned aircraft may be operated over people inside moving vehicles.

This rule allows operations over people inside moving vehicles under the following conditions. First, the small unmanned aircraft operation must meet the requirements for a Category 1, 2, or 3 operation under subpart D. Second, regardless of the category of operation, the operation must meet either of the following conditions: (1) The operation must be within or over a closed- or restricted-access site where any human being located inside a moving vehicle within the closed- or restricted-access site is on notice that a small unmanned aircraft may fly over them, or (2) if the operation is not within or over a closed- or restricted-access site, the small unmanned aircraft must not maintain sustained flight over moving vehicles.

The application of the requirements of Categories 1, 2, or 3 will reduce the risk of injury to human beings. The weight limitation and exposed rotating parts prohibition for Category 1 and the injury severity limitations and exposed rotating parts prohibition for Categories 2 and 3 reduce the risk of injury to human beings located in or on moving vehicles, as well as the severity of damage to a moving vehicle if an impact occurs. Having a single set of conditions for Categories 1, 2, and 3 to operate over moving vehicles also simplifies the requirement while achieving an acceptable level of safety.

Category 4 small UAS may be eligible to operate over moving vehicles as long as the applicable operating limitations in the FAA-approved Flight Manual or as otherwise specified by the Administrator do not prohibit such operation. For the reasons described in the discussion of Category 4 in Section VII. of this preamble, operation of a Category 4 small unmanned aircraft over a person in a moving vehicle is consistent with the level of safety that operations of small unmanned aircraft under Categories 1, 2, and 3 achieve.

For the purpose of this rule, the Agency considers a vehicle to be any means of transportation, regardless of whether it is motorized. For example, cars, trucks, buses, trains, motorcycles, scooters, and rollercoasters are all vehicles. In addition, non-motorized means of transportation such as bicycles would also be considered vehicles because they have the potential to move at speeds the Agency did not contemplate when establishing the requirements for operations over people. Watercraft such as sightseeing vessels, motorboats, and personal watercraft are also vehicles for the purpose of this rule.

The closed- or restricted-access site restrictions that apply to some operations over moving vehicles are similar to the restrictions for Category 3 operations over people and will apply to *all* operations over moving vehicles. For example, a Category 2 operation over people is not restricted to closed- or restricted-access sites, but if the operation involves operations over moving vehicles, then this restriction will apply. When operating within a closed- or restricted-access site, no limitations apply concerning the duration of sustained flight or hover over any moving vehicle. Small unmanned aircraft operations over moving vehicles within or over closed- or restricted-access sites have the most flexibility for operating over moving vehicles.

As with the operating limitations that apply to operations pursuant to Category 3, as discussed in Section VI.E., remote pilots must ensure no inadvertent or unauthorized access to the closed- or restricted-access site can occur. Such a site could be an area that contains physical barriers, personnel, or both, to ensure no inadvertent or unauthorized access is possible.

In addition, this rule requires that a remote pilot verify that people operating vehicles within the closed- or restricted-access site are provided notice that a small unmanned aircraft may operate over them within the site, to enhance the situational awareness of the people operating vehicles within the site. Public notices, signage, and flagging are some effective means of notifying people within the site, as are written notices posted at the entry point to the restricted area or a briefing between the small unmanned aircraft operator and the vehicle operators. When a person operating a vehicle receives a letter or contract stating small unmanned aircraft operations may occur over him or her, this would serve as sufficient actual notice, no matter the amount of time that passes between receipt of the information and the small unmanned aircraft operation, as long as the receipt of the notice occurs before the operation begins. Small UAS operators should provide verbal notice in addition to a written notice in cases in which a verbal notification is necessary to ensure the information is received and understood. Operators may want to consider whether providing written notification could be helpful to meet operators' own evidentiary needs. The notice should describe precautions or other recommended actions to ensure safety during a small unmanned aircraft operation. The remote pilot in command must verify that people in or on vehicles within the closed- or restricted-access site have received notice.

If the operation over moving vehicles takes place outside a closed- or restricted-access site, the small unmanned aircraft is prohibited from sustained flight over moving vehicles. This prohibition applies to holding above, hovering, or maintaining sustained flight above moving vehicles. This requirement should ensure only momentary exposure to any moving vehicle in which occupants do not have the benefit of awareness and coordination that operators of vehicles on closed- or restricted-access sites have. Limiting the amount of time the small unmanned aircraft operates over moving vehicles reduces the likelihood of an impact with a moving vehicle. Small unmanned aircraft operators who want to conduct sustained operations over moving vehicles not in a closed- or restricted-access site must apply for a certificate of waiver.

The remote pilot in command remains responsible for ensuring the operation does not create a hazard to anyone, including a person in a moving vehicle. The FAA will rely on fulfillment of this responsibility especially when the small unmanned aircraft crosses an active roadway or waterway, as the Agency declines to limit crossing roadways to particular angles, such as perpendicular to the roadway, or at certain altitudes. The remote pilot in command is best suited to evaluate the moving vehicle environment to determine a safe manner for crossing an active roadway or waterway to not present a hazard to the moving vehicles underneath. The remote pilot in command should consider the type of roadway or waterway; the types of vehicles; the small unmanned aircraft design and performance characteristics;

obstructions to flight such as buildings, trees, powerlines, roadway signs; and any other aspect of the operating environment that could influence the safety of the operation.

The Agency also agrees with the commenters who supported the availability of waivers of the prohibition on operating small unmanned aircraft over moving vehicles. This rule will allow an applicant to seek a waiver from these provisions by adding § 107.145 to the list of provisions subject to waiver in § 107.205. Small UAS operators may receive waivers to allow them to deviate from the conditions for operating small unmanned aircraft over moving vehicles as long as they can demonstrate that the operation can occur safely pursuant to the terms of a certificate of waiver.

IX. Operations at Night

A. Proposed Requirements and Comments Received

The NPRM proposed to permit routine operations of small UAS at night, subject to specific requirements. The FAA proposed to amend § 107.29 to permit operations at night when: (1) The small unmanned aircraft has an anti-collision light that is visible for 3 statute miles, and (2) the remote pilot in command has completed an updated knowledge test or recurrent training, as applicable, to ensure familiarity with the risks and appropriate mitigations for nighttime operations. Additionally, the FAA proposed adding the anti-collision lighting requirement to the list of regulations subject to waiver in § 107.205.

Many commenters supported the proposal to allow small UAS operations at night without a waiver. Comments in favor of routine night operations significantly outnumbered comments in opposition to the proposed change. Several commenters expressed concern about the risk of midair collisions between manned and unmanned aircraft. Commenters referred to the inherent lack of situational awareness in night operations and stated remote pilots were insufficiently trained to address adequately the complexity of the airspace. After reviewing these concerns about midair collisions and situational awareness, the FAA determined several existing operating requirements of part 107 combined with the requirements of this final rule provide a sufficient level of safety to allow for night operations. Similar to the NPRM, the final rule requires that remote pilots operating at night equip their small unmanned aircraft with an anti-collision light visible for 3 statute miles, but adds the requirement for the anti-collision lights to flash at a rate sufficient to avoid a collision.

Many commenters appeared to misunderstand the purpose of anti-collision lighting. The purpose of anti-collision lighting is not for the remote pilot to maintain visual line of sight and see the orientation of their small unmanned aircraft, but for the awareness of other pilots operating in the same airspace. Section 107.29(b) already requires that anti-collision lighting be visible for 3 statute miles for civil twilight operations to help prevent midair collisions.

AMOA and AAMS, commenting jointly, questioned whether the FAA had examined the available sightings data and confirmed its reliability as its basis for expanding small UAS operations at night. The commenter noted that data collected from 1998–2017 indicates 36% of all helicopter air medical flights were conducted at night and 49% of the accidents from 1998–2017 occurred during night operations, and that routine night operations could put air medical flights at greater risk. The commenter asserted the FAA did not adequately address the potential threats posed by increased small unmanned aircraft activity in the NPRM, particularly to helicopter air medical flights.

The FAA analyzed available data, including thousands of waivers allowing night operations, and determined allowing routine small UAS operations at night, subject to compliance with certain requirements, will be safe. Although the FAA reviews small unmanned aircraft sighting reports, the FAA did not rely on those reports as justification for this rule, because many of those reports are unverifiable due to a lack of detailed information provided by the reporter of a small unmanned aircraft sighting. Because small UAS operations under part 107 are limited to 400ft AGL and below, the effect on helicopters of night operations is minimal. Although the introduction of routine night operations could introduce more complexity to the airspace,[65] compliance with sufficient mitigations will provide for safe operations.

In addition, other risk mitigation measures limiting the risk of midair collisions at night exist: Fewer general aviation aircraft fly at the altitudes in which small unmanned aircraft operate. Manned aircraft have restrictions on minimum safe altitudes, which places the majority of operations well above the 400 ft AGL limit for part 107 operations. Pilots authorized to operate manned aircraft below 400 ft AGL during daylight hours can visually see the terrain and obstacles to navigate the airspace. At night, these visual cues do not exist and many general aviation aircraft that could operate during daylight at lower altitudes lack sophisticated equipment like night vision goggles, a radar altimeter, Forward Looking Infrared, Radar, or a Heads Up Display, typically found on military or emergency service aircraft. Because general aviation aircraft may lack electrical systems such as aircraft lighting, or other necessary safety features, operating such aircraft at night would cause a significant increase in the level of risk of the operation.

NAAA voiced concern about pilot difficulty of spotting a small unmanned aircraft while the pilot is operating at a very low altitude in what is already a high task load environment. They pointed to a 2015 test conducted by the Colorado Agricultural Aviation Association, which determined that it was difficult for pilots who conduct agricultural aviation operations to detect and track a small unmanned aircraft at the same time as maneuvering their aircraft for agricultural operations. Pilots operating manned aircraft at low altitudes would experience difficulty in identifying small unmanned aircraft operating at night, but, as discussed previously, numerous mitigations exist to decrease the likelihood of a midair collision. With regard to the report made by the Colorado Agricultural Aviation Association, while the study provided data, the report only tested four pilots operating during daylight hours. In addition, the Agency disagrees with NAAA's determination that night operations would be difficult to identify, as operating with an anti-collision light at night would increase the visibility of the small unmanned aircraft.

Several commenters expressed concern about the risk small unmanned aircraft pose for commercial aircraft. The period of flight in which a manned, commercial aircraft is at or below 400 ft AGL is just prior to landing and seconds after takeoff. These phases of flight occur in the immediate vicinity of the runway, an area of airspace in which small UAS operations under part 107 are prohibited from flying without authorization. The requirement for anti-collision lights that are visible for 3 statute miles and that have a flash rate sufficient to avoid a collision, along with the existing requirements to maintain visual line of sight, give way

[65] See: *U.S. Helicopter Safety Team (USHST) Report Helicopter Safety Enhancements;* October 3, 2017. *http://www.ushst.org/Portals/0/PDF/USHST%20LOCI%20UIMC%20LALT%20Final%20Report_2017Oct3.pdf.*

to manned aircraft, and obtain authorization to operate in controlled airspace are all practical mitigations to address the risks posed by small UAS operations at night.

B. Knowledge Requirements for Remote Pilots Conducting Operations at Night

Only remote pilots who complete an updated aeronautical knowledge test or updated training will meet the remote pilot qualification requirements to act as pilot in command of a small UAS at night. As with all persons who received their remote pilot certificate prior to the enactment of this rule, part 61 pilots previously holding a remote pilot certificate will also need to complete the updated training before acting as pilot in command of a small UAS at night.

The Agency proposed to revise the regulations to require that the remote pilot complete a knowledge test or training concerning small UAS operations at night. This rule finalizes those additions, as proposed. Applicants who are eligible to obtain a remote pilot certificate must complete an updated knowledge test prior to conducting operations at night. This rule also requires existing holders of a part 107 remote pilot certificate to complete updated training prior to operating as a remote pilot at night.

The updated knowledge test and training will assess applicants' and pilots' knowledge of risks and situations that are not present during daylight operations. The new testing and training will include questions on anti-collision light requirements, when the anti-collision light is allowed to be dimmed, how to determine aircraft position, obstacle avoidance with lack of visual cues, what aircraft may be conducting low level night operations, night physiology, circadian rhythm effects, and other topics. Through this education, the remote pilot will have the knowledge to operate a small UAS at night safely and implement the appropriate protocols and tools to mitigate risks they have identified for their operation.

The updated testing and recurrent training required to conduct night operations will be made available on the FAA website on March 1, 2021. This date provides a 15 day period for new applicants or current Remote Pilot Certificate holders to complete the updated testing or training, as applicable, for those who seek to conduct night operations on the effective date of this rule.

After the effective date of this rule, remote pilots operating under a waiver received prior to the effective date will be allowed to continue to operate at night under the provisions of that waiver without meeting the updated recurrent training requirement for a period of 60 days. All night waivers issued prior to the effective date of this rule that authorize deviation from § 107.29 Daylight Operation terminate on May 17, 2021. This date provides time for waiver holders to come into compliance with this rule and allow the holder to request a new certificate of waiver, if applicable, prior to the termination date.

Several commenters suggested the night operation testing and training be separate from the general part 107 training. One commenter suggested the FAA offer incentive licensing endorsements, in which a certain minimum score on the night operations section of the part 107 knowledge test would allow the remote pilot to operate a small UAS at night. Some commenters, including Airlines for America (A4A), recommended the FAA impose a nighttime practical training requirement for remote pilot certification, particularly for pilots who do not hold a part 61 certificate or related nighttime endorsement. The inclusion of night operations does not introduce a level of complexity to the operations conducted under part 107 that would necessitate practical training. A single curriculum for both the aeronautical knowledge test and recurrent training will cover all necessary topics for operations under part 107. To operate at night, all remote pilots must either take the updated initial knowledge test or complete the applicable recurrent training that includes the new subject areas on night operations. In this regard, it is necessary to standardize the training and testing; incentive licensing endorsements the FAA issues for other skills are not appropriate for knowledge testing or training. The standardization this rule provides is appropriate for small UAS operations at night.

A few commenters requested the Agency decline to require pilots who have certificates under part 61 to complete recurrent training specific to night operations. The Agency disagrees. Small UAS operations at night have operational needs and safety requirements that differ from manned aircraft operations at night. This rule requires part 61 pilots to take the recurrent training in its entirety, including those sections pertinent to night operations, despite having taken manned-aircraft-specific nighttime training for their part 61 certification. Several commenters made suggestions regarding the content of the test and course material. Some commenters, including AOPA, AMOA, and AAMS, suggested the initial testing, initial training, and recurrent training for night operations emphasize collision avoidance with other unmanned aircraft and manned aircraft. They asked whether the additional testing for night operations will specifically address limited depth perception and difficulty of perceiving reference points during night operations. Under this rule, in addition to the existing testing and training that addresses collision avoidance, additional subject areas will address night physiology, lighting requirements, and night illusions from the perspective of the remote pilot.

One commenter suggested the FAA produce a study guide with subject matter specific to small UAS operations at night. The FAA plans to publish a revised Small Unmanned Aircraft Systems Airman Certification Standard (ACS) and a revised iteration of Advisory Circular (AC) 107–2 to address changes pertaining to the certification of small UAS remote pilots. This AC will also provide updated guidance for conducting small UAS operations in accordance with part 107. In response to the suggestion that the FAA produce a UAS-specific study guide with subject matter relevant to operating at night, the FAA has updated the Remote Pilot—Small Unmanned Aircraft Systems Study Guide (FAA–G–8082–22), and renamed it Small Unmanned Aircraft Systems Operating Handbook (FAA–H–8083–24).[66] Furthermore, applicants may supplement through self-study, which could include taking an industry-offered online training course, an in-person training course, or any combination thereof.

One commenter suggested the Agency require one or more visual observers who have taken the night vision test to participate in operations at night. The visual line of sight requirement in part 107, combined with other requirements, is sufficient to address the risk associated with night operations; therefore, this rule does not require a night vision test for remote pilots or visual observers. One commenter said the proposal would impose more cost on the operator and increase the barriers to UAS night operations. Another stated the additional testing and training requirements would not improve the safety of night operations. This rule establishes the recurrent training process, the completion of which will be free of cost to remote pilots. This rule

[66] See ''Part 107 Knowledge Test Suggested Study Materials,'' available at *FAA Policy Document Library,* at *https://www.faa.gov/uas/resources/policy_library/.*

does not impose any changes to the costs of the initial knowledge test.

C. Anti-Collision Lighting

The NPRM stated the small size of most small unmanned aircraft (as compared to their manned counterparts), combined with reduced visibility during darkness, favors requiring anti-collision lighting to reduce the risk involved with small UAS operations at night. The Agency stated it anticipated the presence of anti-collision lights would provide other aircraft with awareness of a small unmanned aircraft's presence. As stated in the NPRM, the anti-collision light is not the sole means of avoiding midair collisions between a manned aircraft and a small unmanned aircraft. Prior to and throughout the operation, this rule requires the remote pilot to ensure the anti-collision lights are operating, are visible for 3 statute miles, and have a flash rate sufficient to avoid a collision at the operating location. The anti-collision light also does not relieve the remote pilot from complying with the remaining requirements of part 107, which include yielding right of way to all other aircraft. Although the risk of a midair collision at night is low due to the altitude and volume of aircraft operating at night, additional risk mitigation measures are appropriate for the safety of other aircraft that may be operating at night. The requirement to have an anti-collision light for night operations is also consistent with the requirements in part 107 for small UAS operations during civil twilight.

1. Flash Rate

As noted in the proposed rule, the FAA's requirement for anti-collision lights for twilight operations under the final rule for part 107 was based on the daylight operations requirements for ultralight vehicles.[67] Such vehicles may only operate during civil twilight hours as long as they are equipped with ''an operating anti-collision light visible for at least 3 statute miles.'' [68] When promulgating that requirement, the FAA clarified that such anti-collision lights are ''any flashing or stroboscopic device that is of sufficient intensity so as to be visible for at least 3 statute miles.'' [69] Given the comments received in response to the NPRM, this rule provides additional clarification concerning the anti-collision light requirement. As demonstrated by the comparison to ultralight anti-collision lights above, requiring anti-collision lights for operations during both civil twilight and at night to flash, rather than be static, is appropriate. This rule requires anti-collision lights used in accordance with § 107.29 to flash at a sufficient rate to avoid a collision.

Many commenters expressed support for the proposed anti-collision lighting requirement, with some commenters recommending changes or additions to the requirement. Some commenters opposed the requirement. Several commenters addressed specific characteristics of the anti-collision lighting, including flash rate.

The Helicopter Association International (HAI), along with A4A, AGC, NAAA, the Experimental Aircraft Association (EAA), and the American Association of Airport Executives (AAAE), stressed the need for standardization in unmanned aircraft anti-collision lighting, with respect to flash rate, signature, visibility requirement, intensity, type of lighting, and configuration. A few commenters recommended the FAA work with industry to develop standards specific to small unmanned aircraft or rely on existing standards for manned aircraft. A commenter recommended clarifying the requirement in the proposed rule.

While the NPRM only proposed small unmanned aircraft have an anti-collision light, the Agency has since determined the anti-collision lights should flash. In addition to the requirement for the light to be visible for 3 statute miles, anti-collision lighting with a sufficient flash rate to avoid a collision will aid in creating awareness to all pilots of the presence of the small unmanned aircraft.

Under this rule, the remote pilot is responsible for ensuring the anti-collision lights are operating, are visible for 3 statute miles, and have a flash rate sufficient to avoid a collision at the operating location, both prior to conducting and during each night operation. The performance-based requirements for anti-collision lighting—with regard to intensity, flash rate, fields of coverage, and other relevant characteristics—will ensure the small unmanned aircraft is sufficiently visible to other aircraft. The remote pilot may rely on manufacturer statements indicating the anti-collision lighting is visible for 3 statute miles and has a flash rate that is sufficient to comply with the requirements of this rule. However, the remote pilot ultimately remains responsible for verifying that anti-collision lighting is operational, visible for 3 statute miles, and has a flash rate sufficient to avoid a collision at the operating location.

The FAA does not require manned aircraft pilots to distinguish between the lights for airplanes and rotorcraft, or antennas and windmills, but only to avoid those obstacles. This requirement, therefore, will result in the small unmanned aircraft becoming more conspicuous to other operators, regardless of whether other operators identify it as a small unmanned aircraft. A manned aircraft pilot would be most likely to distinguish movement of external lighting against a stagnant, dark background rather than specific lighting characteristics.

2. Design of Anti-Collision Lights

The Agency proposed to require small unmanned aircraft operating at night to have an anti-collision lighting component visible for 3 statute miles, rather than a light that fulfills prescriptive design criteria. The proposed rule requested comments regarding whether a specific color or type requirement should apply to the anti-collision light, as well as an explanation of how a prescriptive standard might ensure safety of the small UAS operations.

The FAA received numerous comments addressing a color requirement for the anti-collision lights. Comments in support of performance-based requirements for anti-collision lights outnumbered those in favor of more prescriptive requirements. Many commenters opposed the idea of specific anti-collision lighting color or type requirements, including Small UAV Coalition, AUVSI, News Media Coalition, the U.S. Chamber of Commerce, APPA, EEI, and NRECA, commenting jointly; the People's Republic of China; DJI; Skydio; and numerous individuals.

Commenters opposed to a specific color standard generally noted a prescriptive requirement could stifle innovation without providing any safety benefits. A number of individual commenters stated no specific color or type of lighting should be required, as the FAA has not included such a requirement for waivers that permit operations at night. DJI commented that a different, or additional, lighting requirement from those provided in the part 107 waivers would require manufacturers to develop new designs and equipment without apparent benefit. Both DJI and the People's Republic of China asked for scientific data in the event the Agency requires specific colors for anti-collision lights.

Several commenters explicitly supported requiring some kind of color

[67] 81 FR 42064, 42103 (citing 14 CFR 103.11, which states no person may operate an ultralight vehicle except between the hours of sunrise and sunset, but permitting operations during certain periods of twilight).

[68] 14 CFR 103.11(b)(1).

[69] 47 FR 38770, 38773 (September 2, 1982).

or type requirement for anti-collision lights. Some commenters suggested requirements for plain red and white lights would suffice, but emphasized the FAA should not require color definitions as detailed as those codified at § 23.1397. AOPA noted the proposed rule does not identify whether the Agency considers white strobe lights, red beacon lights, or if any color or lighting configuration as sufficient for anti-collision lights that are visible for at least 3 statute miles. Another commenter similarly recommended a red (front) and white (rear) color pattern. Several commenters recommended following the existing practices of manned aviation operators regarding the colors of lights. Other commenters recommended the FAA impose specific colors or color patterns for certain situations, such as when an aircraft descends or experiences an operational system failure. One commenter recommended the FAA consider requiring colors that are compatible with color-blindness. NIOSH stated specifying an anti-collision light color would improve safety, given that color is a significant factor for improving the visibility of an object.

Prescriptive color requirements would unnecessarily restrict design. Since August of 2016, the FAA has issued over 4,000 waivers that permit operations at night. While none of these waivers include color or type requirements, many of these small unmanned aircraft utilize white anti-collision lights to meet the 3 statute mile visibility requirement. No commenters explained how a prescriptive color requirement would mitigate the risk of operations at night. Overall, requiring a specific color or type of light is unnecessary. This rule's performance-based requirement is appropriate for the level of risk associated with night operations and allows for flexibility as technology evolves.

The NAAA stated some small unmanned aircraft may be equipped with anti-collision lights that are not compatible with the Night Vision Goggles (NVG) that agricultural pilots typically wear. In these cases, the pilot would not see the small unmanned aircraft at night while looking through the NVG. The FAA recognizes the NVG incompatibility with certain lighting may be an issue for agriculture and medical helicopters. Existing operational regulations specific to the use of NVGs for manned pilots limit hazards to manned aircraft, making specific color or design elements for small unmanned aircraft unnecessary. While this rule does not require specific characteristics of the anti-collision lighting, remote pilots remain obligated, before each operation, to consider the environment in which they are operating, particularly in areas that are known to have regular agricultural operations at night.[70]

3. Waivers

The NPRM proposed making the anti-collision lighting requirement for small UAS night operations subject to waiver and invited comments on this aspect of the proposal. The Agency stated it would consider granting a certificate of waiver allowing nighttime small unmanned aircraft operations without an anti-collision light visible for 3 statute miles if an applicant demonstrates sufficient measures to mitigate the risk associated with the proposed operation. As discussed later in this section, allowing waivers of the anti-collision lighting requirement will accommodate unique operational circumstances without reducing safety.

EPIC opposed allowing waivers of the anti-collision lighting requirement for small UAS operations at night, noting concerns about security, privacy, and the potential for nefarious use. Neither this rule nor any potential waivers from the anti-collision requirement authorize the use of small unmanned aircraft for criminal activities. All persons requesting a waiver from the anti-collision requirement must include a description of the proposed operation and explain how they will mitigate any risks. The FAA will only issue waivers for operations that can occur safely.

AMOA and AAMS, commenting jointly, asked the Agency to clarify under what conditions it would grant a waiver of the anti-collision lighting requirement. The FAA expects waiver applicants to establish a deviation from the anti-collision lighting requirement would not reduce the level of safety of the operation. The FAA declines to prescribe specific criteria that would apply to all applications for waiver, as doing so would be impractical. In response to comments suggesting the FAA should develop separate processes for law enforcement and first responders, the FAA declines to create a separate process for a particular subset of part 107 operators.

D. Position Lighting Not Required

The proposed rule did not provide a requirement for position lighting. The Agency invited comments from the public, however, on whether it should require position lighting, in addition to the anti-collision lighting.

Several commenters, including AOPA, EPIC, and AMOA and AAMS, commenting jointly, recommended requiring position lighting for night operations. Several of these commenters said the position lighting should be similar to those found on manned aircraft. AOPA noted that night operations are inherently challenging and visual line of sight would be better maintained with lights that aid in determining directional movement of the aircraft. EPIC agreed that small unmanned aircraft position lighting would be important for collision avoidance and to convey the position of the small unmanned aircraft to manned aircraft. The Director of the Autonomous Aerial Systems Office at the University of Montana encouraged the FAA to require position lighting in addition to anti-collision lighting that is consistent with current navigational standards, stating this requirement would improve safety in see-and-avoid situations in addition to improving remote pilots' situational awareness of aircraft position.

Many commenters supported the FAA's decision to not require position lighting for small unmanned aircraft. For example, DJI stated position lighting should not be required ''because in many circumstances the remote pilot has the ability to determine the position, direction and orientation of the drone in other ways at night.'' DJI also noted it might be helpful at times to turn off the position lighting to capture the type of data required for the operation without interference of these lights, which are typically more visible to the on-board camera or sensor than other lights because they are located at the ends of motor arms. Several commenters noted that, although position lighting may provide a visual reference to determine the location of the small unmanned aircraft, it may not provide accurate information about the orientation of the small unmanned aircraft in flight.

Position lighting might assist a remote pilot in meeting the applicable visual line-of-sight requirements in § 107.31(a), such as knowing the unmanned aircraft's location, attitude, altitude, and direction of flight. However, this rule does not require position lighting because it is not the only means by which a remote pilot could meet these requirements. Although position lighting is not necessary for safe operation, a remote pilot may use position lighting if he or she determines

[70] See 14 CFR 107.49(a), which requires remote pilots in command to assess the operating environment and consider risks to persons and property in the immediate vicinity of the intended operation, prior to each operation.

it would be the best solution for safe operation.

E. Miscellaneous Night Operations Considerations

AMOA and AAMS also noted the NPRM does not discuss testing for the acuity of a remote pilot's night vision and said they believe remote pilots should be required to attest annually to this visual capability. As discussed in the 2016 final rule, operations under part 107 do not require airman medical certificates, given the low risk associated with small UAS operations, the limited operational range of visual line of sight operations, and the requirement that the remote pilot may operate only within their capabilities.[71] As stated in the part 107 final rule, even with normal vision, a small unmanned aircraft might be so small that the operational space must be reduced to meet the visual line-of-sight requirements of § 107.31. Furthermore, the FAA prohibits a person from manipulating the flight controls of a small UAS or acting as a remote pilot in command or visual observer if he or she knows or has reason to know that he or she has a physical or mental condition that would interfere with the safe operation of a small UAS.[72]

Some commenters requested the rule include additional requirements on the remote pilot, on the small unmanned aircraft, or on the operating environment for operations at night. MAC said regulations allowing night operations must ensure the safety of all aircraft operations in both the airport environment and the NAS. They also said the FAA should establish measures to identify clearly a small unmanned aircraft at similar distances to those that apply to manned aircraft. Exclusions from these requirements could include the use of small UAS for the purposes of airport safety, security, and operation activities, especially in situations of emergency response. A commenter suggested requiring remote pilots perform their intended night operations during the day prior to execution, map out the flight path, and ensure awareness of any obstacles. Commenters requested altitude restrictions, speed restrictions, and distance or operational radius limitations for night operations. A commenter also suggested requiring the remote pilot to have a radio on the appropriate frequency to detect any air traffic in the area. The current regulations under part 107, combined with the requirements in this final rule, contain adequate restrictions for operations at night.[73] As discussed earlier, as of September 2020, the FAA has issued over 4,000 waivers allowing nighttime small UAS operations since August 2016. These operations have been conducted safely and the Agency does not have data indicating that the restrictions in this rule would be inadequate.

A commenter believed the FAA should require that remote pilots operating at night be AMA members, register their small unmanned aircraft with the FAA, and use ''tracking'' lighting for both day and night operations. The FAA requires registration for all small unmanned aircraft that operate under part 107. This requirement is sufficient for providing the FAA an avenue for oversight. Furthermore, as noted earlier, remote pilots are not prohibited from using position (or ''tracking'') lighting to assist in meeting the visual line-of-sight requirement; however, for the reasons stated above, this rule does not require position lighting.

NAAA recommended all small UAS be equipped with ''ADS–B In-like'' technology. NAAA and an individual commenter both suggested all small UAS operating under part 107 be equipped with technology that would allow them to sense the presence of and avoid manned aircraft. Part 107 requires remote pilots to maintain visual line of sight of the small unmanned aircraft at all times and give the right of way to all aircraft. Manned aircraft are not required to be equipped with ADS–B Out in all classes of airspace. For example, ADS–B Out is not required in Class G airspace. Therefore, requiring ADS–B In for small unmanned aircraft would not be sufficient in all circumstances to aid the remote pilot in detecting manned aircraft. Given this existing requirement, requiring ADS–B In-like technology is not necessary.

NAAA also suggested, to operate safely at night, small unmanned aircraft should have a registered N-number on an indestructible and unmovable plate attached to the small unmanned aircraft and should have an electronic identification and tracking technology so that it can be tracked by law enforcement. The registration and marking requirements as implemented by the Registration and Marking Requirements for Small Unmanned Aircraft rule, and amended by the External Marking Requirements for Small Unmanned Aircraft interim final rule, are sufficient for operations conducted under part 107. The Agency declines to impose additional registration requirements that would apply to operations at night, as no safety benefit would result from such requirements.

F. Effect on Human Activity

The NPRM invited comments on whether characteristics or effects of anti-collision lighting at low altitude could have an effect on normal human activities, and if so, potential mitigations or alternatives the FAA should consider. Some commenters stated anti-collision lighting could affect human activities.

NIOSH stated, ''[i]t is reasonable to assume that in some situations anti-collision lights could distract people'' who are working and that, depending on their activities, this effect could have significant safety risks. NIOSH said it is not aware of any evidence supporting a mitigation strategy and recommended ''exploring potential mitigation methods that follow the hierarchy of controls.'' This rule does not require use of the hierarchy of controls for small UAS operations at night because considering every possible scenario or assessing how distracting anti-collision lights may be to non-participants is not possible. Anti-collision lighting in night operations is a critical component in making small unmanned aircraft sufficiently conspicuous when operating under part 107. The safety need for such lighting outweighs the concerns these comments present.

Motorola Solutions stated anti-collision lighting at low altitudes could affect normal human activities associated with lights coming from unidentified sources and with unknown justification. The commenter said operations performed by public safety officers can mitigate the effect of unidentified unmanned aircraft light sources by replacing or augmenting the anti-collision lights with other lights such as those officers use for public safety operations. Requiring specific colors or additional lights for certain types of operations will not reduce the effect on human activity.

Droneport Texas, LLC said anti-collision lighting might startle or distract those engaged in normal human activities. To mitigate such distractions, the commenter recommended a remote pilot be allowed to reduce the intensity of the anti-collision lights that are ''observable uniquely from the bottom side'' of the aircraft and change them from flashing to a steady display. This rule requires all anti-collision lights to flash at a rate sufficient to avoid a collision. Furthermore, the remote pilot may use their discretion to determine

[71] 81 FR 42064, 42159–42160.

[72] 14 CFR 107.17.

[73] See 14 CFR 107.19, 107.31, 107.37, 107.41, 107.43, 107.49, 107.51.

the circumstances under which they could safely reduce the intensity of, but not extinguish, the anti-collision lighting.

DJI commented that, to mitigate the effects of anti-collision lighting on human activities, the FAA could encourage lights be placed on top of the small unmanned aircraft where it is most visible to manned traffic above and less bothersome to people below; however, DJI said it is unaware of complaints from the public about lighting, so such guidance should not be made a requirement. This rule does not include any prescriptive design criteria for anti-collision lighting. However, no provision of this rule precludes the placement of anti-collision lights on the top of a small unmanned aircraft.

One commenter suggested anti-collision lights could have an effect on the public due to light pollution and visual disturbances caused by the high intensity light and said the strobe effect could distract manned aircraft. Another commenter stated the purpose of the anti-collision lighting requirement is to call attention to the small unmanned aircraft, ''in effect to distract the viewer.'' The commenter further stated that, depending on the frequency and density of operations, blinking or strobe lights could disturb people engaging in traditional outdoor activities or even normal activities in their homes. The Agency anticipates anti-collision lighting will be no more distracting to individuals engaging in outdoor activities at night than the light from various other artificial sources. Red and white lights are often used at night, on vehicle headlights and taillights, street lights, school bus strobes, and other sources. The benefits of allowing small UAS operations at night in accordance with these requirements outweigh the potential drawback of distracting people on the ground. The FAA has carefully considered these concerns, however, and has prepared a finding of the categorical exclusion that applies to this rule, which assesses light emissions and visual impacts, and is available in the public docket for this rulemaking.

One commenter asked the FAA to consider allowing municipalities to designate certain public, open spaces as night flight zones. One commenter opposed operations at night and the use of anti-collision lighting over parklands and ''Dark Sky'' communities where municipalities restrict artificial lighting and suggested the FAA follow restrictions on train horns and allow communities to request prohibitions of night operations within the municipality. This commenter further noted the FAA has responsibilities under the Department of Transportation Act, Sec. 4(f), for any lighting if it impairs in any way night skies, vistas, and contemplative recreation in protected areas such as wilderness and parks.

The National Conference of State Legislature and the National Association of Counties stated the importance of State and local authorities' ability to regulate UAS on a State and county level. One commenter suggested allowing different UAS regulations in different states. Other commenters expressed concerns about local entities placing requirements on the airspace and operating requirements.

States and municipalities may use their police powers, such as those relating to land use, zoning, privacy, anti-voyeurism, trespass, and law enforcement operations, to address small UAS operations in the community. Through their land use and zoning power, municipalities have authority to determine the placement of aircraft takeoff and landing areas within the community. However, municipalities do not have authority to enact operational restrictions on aviation safety or the efficiency of the navigable airspace, including regulation of unmanned aircraft flight altitude, flight paths or operational bans. The applicability of the Department of Transportation Act, Section 4(f), is discussed in the supporting documentation for the categorical exclusion documentation, which is included in the public docket for this rulemaking.

All aircraft operations in the navigable airspace, whether manned or unmanned, and whether during the day or at night, are regulated by the Federal government. Congress has long vested the FAA with authority to regulate the areas of airspace use, management, and efficiency; air traffic control; safety; navigational facilities; and aircraft noise at its source.[74] In addition, a citizen of the United States has a statutory public right of transit through the navigable airspace.[75] The FAA is aware of the International Dark-Sky Association and its work in encouraging communities, parks, and protected areas to preserve and protect dark sites through responsible lighting policies and public education. Designated dark sky communities would be free to request UAS operators minimize nighttime operations, citing their community's dedication to the preservation of the sky through the implementation and enforcement of outdoor lighting ordinances to promote responsible lighting and dark sky stewardship. However, under the Federal statutory and regulatory framework, communities would not have the authority to prohibit small UAS operations at night or regulate small unmanned aircraft lighting.

[74] See 49 U.S.C. 40103, 44502, and 44701–44738.

[75] See 49 U.S.C. 40103(a)(2).

X. Part 107 Remote Pilot Knowledge Testing and Training

The NPRM proposed to maintain the initial knowledge test requirement and initial training requirement for persons seeking to obtain a remote pilot certificate with a small UAS rating.[76] However, with respect to recency of experience requirements, the FAA proposed to require recurrent training every 24 calendar months in lieu of the recurrent knowledge testing.[77] Additionally, the NPRM proposed to add a knowledge area covering operations at night for the initial knowledge test, initial training, and recurrent training. The NPRM also proposed to revise the list of knowledge areas for remote pilots, requiring inclusion of the same list of knowledge areas on both the initial knowledge test and the recurrent training for pilots who hold a remote pilot certificate under § 107.65(b). As for pilots who already hold a pilot certificate under part 61 as described in § 107.65(c), the NPRM proposed to require the initial and recurrent training to cover identical knowledge areas. For the reasons discussed below, the Agency adopts these proposed amendments without change.

A. Recurrent Training and Aeronautical Knowledge Recency

Prior to this final rule, § 107.65(a) and (b) required persons to complete either an initial aeronautical knowledge test or a recurrent aeronautical knowledge test within the previous 24 calendar months prior to operating a small UAS. This final rule revises § 107.65(b) to allow remote pilots to take recurrent training instead of a recurrent aeronautical knowledge test. People who hold a part 61 pilot certificate (other than a student pilot certificate) who have completed a

[76] Under § 107.61, to be eligible to apply for a remote pilot certificate, a person must pass an initial aeronautical knowledge test covering the areas of knowledge specified in § 107.73(a). Alternatively, if a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 and meets the flight review requirements specified in § 61.56, that person may complete initial training covering the areas of knowledge specified in § 107.74(a).

[77] Recurrent training was already an option for any person holding a pilot certificate (other than a student pilot certificate) issued under part 61 provided the person also meets the flight review requirements specified in § 61.56.

flight review within the previous 24 calendar months in accordance with § 61.56 may continue, under § 107.65(c), to complete either initial or recurrent training covering the areas of knowledge specified in § 107.74.

Recurrent training ensures remote pilots maintain ongoing familiarity with small UAS operations and the provisions of part 107. Moreover, remote pilots can complete recurrent training online, which provides a less costly option and results in the remote pilot maintaining a level of knowledge comparable to receiving recurrent testing. The FAA's use of online training enables the FAA to adapt the training as necessary as technology or regulations change.

The rule continues to allow an eligible person who holds a part 61 pilot certificate (other than a student pilot certificate) to complete training on the knowledge areas specified in § 107.74 when seeking a remote pilot certificate.[78] Furthermore, the rule allows all remote pilots to complete recurrent training online every 24 calendar months, in place of a recurrent knowledge test. The rule amends the aeronautical knowledge test and training requirements for remote pilots provided in §§ 107.73 and 107.74 to include a new knowledge area related to operating a small UAS at night. For more information about the testing and training on the night operations knowledge area, please see Section IX.B.

This final rule requires the initial knowledge test and the recurrent training cover identical areas of knowledge under § 107.73. Similarly, for eligible part 61 pilots, the initial training and recurrent training will cover the same knowledge areas under § 107.74. The FAA is concurrently updating the part 107 Airman Certification Standards (ACS), the initial aeronautical knowledge test, the part 107 certification course for eligible part 61 pilots, and the recurrent training.[79] The updated aeronautical knowledge test and updated training replaces the current knowledge test and training after the effective date of the rule. Both the updated aeronautical knowledge test and the updated training will be available on March 1, 2021.

NASAO asked that the recurrent education make pilots aware of updates to operating rules, rather than retesting the initial knowledge test. One commenter believed there should be a ''grading scale'' to ensure pilots have stayed current on operations and regulations. Another commenter agreed that it was likely that operators would need to take refresher training, but suggested that if an individual scores above a certain level on their initial knowledge test, the FAA exclude that person from having to take recurrent training. Several commenters objected to the current 24-month interval for the testing and recurrent training process. Commenters recommended a range of intervals for recurrent training from 36 months to 5 years, or eliminating altogether for ''professional operators.''

Part 107 requires the recurrent training to cover applicable regulations relating to small UAS rating privileges, limitations, and flight operation. As a result, recurrent training will ensure remote pilots are aware of current and updated operating rules. While a high score on an initial aeronautical knowledge test may demonstrate initial competency, knowledge is perishable and degrades over time. Online recurrent training allows remote pilots to maintain critical knowledge and keep abreast of dynamic issues, including changes to regulations, that arise while ultimately completing the updated knowledge requirements related to operating small UAS. Additionally, the Agency finds the 24-month interval an appropriate time period. This recurrent training interval is consistent with the requirement for manned aircraft pilots meeting the requirement to complete a flight review as required by § 61.56. On completion of this recurrent training, a printable completion certificate is available to demonstrate aeronautical knowledge recency in accordance with the revisions to § 107.65. The FAA provides educational material on the FAA website about updates to operating rules. AOPA commented that the FAA should not be the exclusive provider of the required knowledge training because there are numerous training courses offered by industry that might be more effective and better meet the needs of the unmanned aircraft operator. Another commenter asked the FAA to clarify what training would qualify.

The Coalition of Airline Pilots Association suggested the FAA require all small UAS operators to meet the same operational recency and testing requirements that are currently in place for manned commercial airman certificates. ALPA noted that a person who manipulates the flight controls of a small UAS should be a certified pilot and pass a knowledge test, but objected that the proposed requirement would allow an individual to be granted a remote pilot certificate without assurance of practical experience with a small UAS. Several commenters recommended specific practical training requirements, including flight training for operations over people and at night. One commenter believed an unprepared remote pilot may have to resort to manual flight operation and may not be qualified for that operation. AUVSI commented that any mandatory training involving operations over people should be competency-based. They also recommended the FAA consider how industry initiatives could support a new training requirement to help ensure that small UAS operations occur safely and in accordance with the rules. Another commenter wrote a higher level of training should be required to operate a small UAS commercially.

The Agency continues to find that formal training, a practical test for the issuance of a part 107 remote pilot certificate, and testing requirements similar to those for part 61 commercial pilot certificates, are not necessary. As discussed in the 2016 final rule, the limitations of many small unmanned aircraft (*e.g.,* size, ease of landing, lack of people on board), combined with the operational restrictions of part 107, minimize the need for flight proficiency testing or formal training. A prescriptive formal training requirement is not necessary for part 107 operations. Instead, this rule allows remote pilot certificate applicants to attain the necessary aeronautical knowledge through any number of different methods, including self-study, enrolling in a training seminar or online course, or through one-on-one instruction with a trainer familiar with small UAS operations and part 107. This performance-based approach is preferable because it allows individuals to select a method of study that works best for them.[80] The FAA maintains this rationale for operations over people and night operations. While the introduction of operations over people and night operations may introduce additional complexity to the NAS, the FAA developed the design and operational requirements of this rule to balance the risk associated with the incremental integration of small UAS. This rule discusses those risk mitigations in more detail in Sections VI and IX, respectively.

The FAA understands formal training would be overly burdensome to an applicant. By requiring a person to only take a knowledge test for certification, allowing online recurrent training, and not requiring formal training, the FAA anticipates that this will result in cost

[78] In order to be eligible to obtain a remote pilot certificate under § 107.65(c), the person must satisfy the flight review requirements of § 61.56.

[79] *https://www.faa.gov/training_testing/testing/acs/.*

[80] 81 FR 42064, 42160–42161.

savings for remote pilots, as discussed in the regulatory impact analysis. In addition, requiring formal training and a practical test would not be consistent with the original framework of part 107.[81] The FAA does not find it necessary to require practical testing to obtain a remote pilot certificate. This approach is consistent with the risk-based framework the 2016 final rule established.[82]

One commenter expressed concern that requiring the recurrent training to be identical to the initial training for part 61 pilots would be duplicative. Commenters asked the FAA to review the areas already covered in the Private Pilot Airman Certification Standards and keep duplicative or conflicting subject areas to a minimum. Another commenter suggested that part 61 should include certification to be a remote pilot.

As discussed previously, knowledge degrades over time and requiring recurrent training provides assurances that experienced remote pilots remain aware of the specifics of operating a small UAS. Additionally, as noted in the NPRM, the FAA finds it necessary to ensure consistency in remote pilots' knowledge of the topic areas for the safe operation of small UAS. To compensate for the differences between manned aircraft and small unmanned aircraft, the list of knowledge areas includes topics that are specific to small UAS operations. For example, determining the performance of a manned aircraft is distinct from the manner in which a pilot should determine the performance of a small UAS; in this regard, the preflight check requirements of § 107.49 are distinct from those codified in part 91 and in other, similar regulations specific to manned aircraft.

Several commenters objected to the cost associated with the initial knowledge test and other commenters recommended the FAA lower the test costs. However, one commenter wrote that everyone who owns a small UAS should have to pass the initial knowledge test and recurrent testing to eliminate the threat of people flying dangerously. One commenter objected to having to pay a third party for recurrent testing. Some commenters wrote that section 44809 of the FAA Reauthorization Act of 2018 requires the FAA to develop a test for recreational operations that can be administered online and that this should be extended to part 107 remote pilot certification, thereby reducing the cost to $50 associated with the initial knowledge test.

The FAA clarifies that part 107 does not mandate formal training to obtain a remote pilot certificate, and any cost that a part 107 applicant incurs for formal training is at their discretion. Additionally, on March 1, 2021 the FAA will provide free, online recurrent training to all remote pilots. The FAA enters into contracts for testing delivery through a third party vendor. The FAA's rationale to contract the initial test through knowledge testing centers remains the same as it was in the 2016 final rule.[83] This delivery model allows the FAA to enter into a contract that provides a zero cost model to the U.S. government and to the taxpayers. The testing vendor has many locations throughout the United States that are close to large and small population centers, therefore the requirement to take a knowledge test at a testing location is not an undue burden on applicants. The third party vendor is allowed to charge the contract rate to administer a knowledge test; however, that amount is not to exceed $160. The FAA Reauthorization Bill of 2018 requirement for the FAA to have an online test for limited recreational operators does not apply to part 107 remote pilot certification.

B. Other Comments Related to Initial Testing or Recurrent Training

Several commenters expressed concern about the risks of people without certification or training operating small UAS. Other commenters, referencing certification of pilots and mandatory registration for equipment, stated that all operators should be licensed regardless of size or weight of small unmanned aircraft. The FAA agrees that persons operating small UAS in the NAS should have appropriate aeronautical safety knowledge, knowledge of applicable rules, and knowledge of airspace constraints before operating in the NAS. Part 107 rules require that all small unmanned aircraft are registered and operated by a certificated remote pilot. The FAA currently requires initial testing or training before the issuance of a remote pilot certificate with a small UAS rating for operations under part 107.

Multiple commenters requested that both testing and training be provided online, with several commenters specifically recommending that the initial knowledge test be available online. The FAA agrees that in-person recurrent testing under part 107 is no longer necessary for part 107 certificate holders. Therefore, to meet the recency requirements under § 107.65, any person who holds a part 107 certificate may maintain recency of experience by completing an online training course. For security reasons, the initial knowledge testing must be done in person, similar to the regulatory framework for training under part 61.

A commenter suggested that test questions for each online test be pulled randomly from a larger set of questions so an applicant cannot take the same test over and over until the applicant achieves a score of 100 percent and would be required to learn the material. The part 107 knowledge tests are created from a large bank of questions that were specifically drafted for small UAS remote pilot certification. Although it is possible that a person could take the part 107 knowledge test enough times that they would eventually see all of the questions, and possibly get them all correct, this is not very probable especially given the mandatory 14-day waiting period required before a person can retake the knowledge test after a failure.[84] In addition, a person who is not prepared for the test, and does not have a working knowledge of the material, will have a very low probability of passing the test. The FAA will continue to administer knowledge testing in the same form and manner that has proven effective for many years.

A commenter recommended the FAA define minimum standards for training that would allow certain people to conduct operations without requiring a waiver to operate over people or at night. This rule adopts routine night operations and operations over people without the need for waivers. Additionally, under part 107, the FAA does not maintain minimum standards for training like those in part 61. For example, an applicant for a remote pilot certificate with a small UAS rating does not have to show that they have received formal training from a certified instructor on the National Airspace System. As there are two pathways for remote pilot certification, an applicant will have either met a minimum testing standard via a knowledge test or they will have taken training which will also test their knowledge. All persons who hold a remote pilot certificate will also need to maintain currency by taking currency training every 24 months from the month in which they take and pass the knowledge test or training for certification. The updated knowledge areas for the testing and training

[81] For further discussion of rationale, please see 84 FR 3856, 3891–3892; 81 FR 42064, 42160–42171.

[82] 81 FR 42161.

[83] 81 FR 42064, 42169–70.

[84] Section 107.71.

requirements are the minimum standard for small UAS operations conducted under part 107.

Some commenters proposed the Agency tailor the part 107 knowledge test to specific types of operators or certain topics and have different tests based on the type of operation. A few commenters recommended the part 107 knowledge test be redesigned to better test commercial small UAS pilots piloting skills and safe operations. These commenters noted the part 107 knowledge test appeared to derive from manned pilot standards and the Pilot Handbook of Aeronautical Knowledge (PHAK), which the commenters argued do not apply directly to small UAS flights. Another commenter asked for knowledge and testing specific to small UAS operations over people, such as first aid training. A commenter suggested the FAA have two separate knowledge tests: A basic test for hobbyists and small businesses, etc., and a more complex test for large commercial operations, large, fixed-wing small unmanned aircraft, or those flying in urban areas or all over the country.

All test questions were developed specifically for the part 107 remote pilot certification. Some of the required test questions, however, are also applicable to manned aircraft, such as questions related to airspace regulations that apply to all aircraft. The FAA carefully evaluated the knowledge test areas to ensure they remain comprehensive. The small UAS Airman Certification Standards and knowledge test contain each of the topics required for knowledge and testing, and the Agency does not consider remote pilot first aid training a necessary requirement for such low-risk operations. The requirements are the same for anyone flying under part 107; therefore, the knowledge and training should be the same for all certificated remote pilots under part 107.

Some commenters suggested passing the part 107 knowledge test or the level of the remote pilot's training and experience should permit them certain privileges. A commenter wrote that passing the part 107 test should grant part 107 pilots the ability to fly over people and beyond line of sight. A commenter requested the FAA add levels of additional authorization for a remote pilot to fly over people, carry payloads, or fly at night based on their levels of training and experience added as ratings to the certificate. One commenter stated that part 61 pilots should have more ''capability and freedom,'' as they have already demonstrated their responsibility by obtaining a part 61 certificate. Another commenter asked the FAA to educate businesses that use remote pilots without a part 107 certificate to conduct commercial small UAS operations.

The FAA declines to add authorizations or ratings to the remote pilot certification in this final rule. A person who holds a remote pilot certificate is afforded all privileges of the certificate. The FAA has taken the approach of tailoring its requirements for night operations and operations over people with the expectation that all part 107 pilots have the same level of certification. The Agency did not propose authorizing routine beyond visual line of sight operations in this rulemaking; therefore, adding authorizations or ratings to address such operations is beyond the scope of the rule. Additionally, part 107 does not prohibit payload-bearing operations, but the small unmanned aircraft and any payload must be less than 55 pounds and must follow all applicable regulations for safe operation. Remote pilots who operate a small UAS under part 107 without an FAA-issued pilot certificate are subject to the FAA's Compliance and Enforcement Policy. Additional educational material is available on the FAA website.[85]

XI. Other Amendments to Part 107

A. Presentation of Remote Pilot in Command Certificate

The Agency proposed to add to § 107.7 the requirement for remote pilots to present their remote pilot in command certificate with a small UAS rating as well as a form of identification to authorized individuals on request. This update aligns the text of § 107.7 with § 61.3(l). The existing rule requires the remote pilot in command, owner, or person manipulating the controls of the small UAS to present to the Administrator, on request, the remote pilot certificate with small UAS rating and any other document, record, or report required under part 107. The proposed change to § 107.7 expanded the list of authorized individuals who might request the information, to include authorized representatives of the National Transportation Safety Board (NTSB) or Transportation Security Administration (TSA); or any Federal, State, or local law enforcement officer. Under the proposed rule, the form of identification would include any identification containing the person's photograph, signature, date of birth, and permanent mailing address.

Several commenters expressed support for the proposed changes to § 107.7. These commenters stated the proposal aligns with § 61.3(l) requirements, would help enforce a safe UAS operating environment, or would aid investigations into violations of Federal and State rules. Other commenters indicated § 107.7 should include modifications or additional requirements. Individual commenters recommended the FAA allow for the use of electronic credentials to facilitate compliance with the requirement in a convenient manner. The Agency declines to allow electronic credentials as a form of identification, as the lack of standardization in electronic credentials in the United States eliminates the ability of authorized persons to verify the identity of the remote pilot. A commenter also encouraged the Agency to allow a passport to be used as an identification document even though it does not include a mailing address. According to this commenter, allowing the use of a passport would more closely match the part 61 identification regulation.[86] Part 61 and the text the Agency proposed for § 107.7 differ because part 61 does not require identification for the purpose of § 61.3(l) to include a mailing address. Although part 107 requires a mailing address for the purpose of being eligible to take a knowledge test under part 107,[87] the Agency has determined a mailing address is not necessary for adequate identification of a remote pilot in command under § 107.7. This rule, therefore, contains a revision to the regulatory text to permit forms of identification that do not contain a mailing address for the purpose of presenting identification in accordance with § 107.7.

Two commenters suggested the FAA require the remote pilot in command to present his or her certificate and identification only when it is safe to do so, and does not pose a danger or hazard to persons, property, or public safety. The FAA declines to impose requirements based on prescriptive circumstances. However, authorized officials should allow ample time for the remote pilot to provide a form of identification and remote pilot certificate in a safe manner.

NFL, MLB, NASCAR, and NCAA, in a joint submission, expressed their support for the proposed changes to

[85] *https://www.faa.gov/uas.*

[86] Section 61.3(l) requires presentation of an airman certificate or other, specific type of certificate along with ''photo identification as described in [§ 61.3(a)(2)].'' Section 61.3(a)(2) does not specifically require the form of photo identification include the person's mailing address.

[87] See 14 CFR 107.67(b).

§ 107.7, noting it is essential that local law enforcement officials have the authority to request remote pilot certificates because local law enforcement provides security services at the sporting events. The sports organizations also recommended adding private security officials who work with local law enforcement to enforce a temporary flight restriction or section 2209 designation to the list of individuals authorized to request remote pilot certificates and identification. Federal, State, and local law enforcement officers hold the appropriate authority to verify the identity of a remote pilot. The Agency declines to speculate on the division of authority within Federal, State, and local law enforcement organizations.

A few commenters opposed the FAA's proposal to require UAS operators to present their pilot certification and identification to officials outside the FAA on request. These commenters supported the requirement to present their credentials to an FAA official who understands the regulations, but noted officials outside the FAA are not trained or supervised by the FAA, and were concerned about their ability to properly handle situations involving small UAS operations as a result. Another commenter suggested the small UAS operator should be required to present the documents if an incident occurs. Other individual commenters did not oppose the proposed provision, but recommended that the FAA work on educating law enforcement officials about who may operate UAS, and where, how and when they may operate. NASAO asked for clarification regarding Federal, State, or local officials requesting proof of an operator's license and requested the Agency provide a clearer definition of the intent for enforcement.

The Electronic Frontier Foundation (EFF) and the News Media Coalition commented that remote pilots in command should only be required to present their credentials when officials have reasonable suspicion that the remote pilot in command is engaging in criminal activity or violating FAA regulations. EFF asserted the proposed rule conflicts with existing Fourth Amendment law and to bring the proposal in line with the FAA's rationale, EFF recommended the Agency amend § 107.7 to include the reasonable suspicion standard. The News Media Coalition indicated it does not oppose providing law enforcement with their certification papers under narrow and well-defined circumstances. However, the Coalition expressed concern that blanket authorization for local law enforcement to demand immediate presentation of papers would interfere with journalists' First Amendment rights to lawfully gather the news without unwarranted government interference. The Coalition also recommended that the FAA provide law enforcement with training on the regulations to avoid government overreach.

To maintain the safety and security of the airspace, it is vital to know who is operating in the NAS.[88] The FAA implements these regulatory inspection requirements as a measure to ensure this safety and security. The amended regulation neither abrogates the protections of the Fourth Amendment nor the responsibility to comply with it. The ability to identify remote pilots provides critical information to the Administrator, the NTSB, and law enforcement officials charged with ensuring public safety. Moreover, the amended regulation aligns the list of authorized individuals in § 107.7 with not only § 61.3(l), but other longstanding FAA regulations with similar requirements.[89] The FAA has continuously conducted outreach efforts with Federal, State, and local law enforcement on small UAS operations. Additionally, the FAA has the Law Enforcement Assistance Program (LEAP), which provides, as appropriate, aviation-related support and education to law enforcement agencies.

B. UAS Exemption-Holders

The existing text of § 107.1 excludes from the applicability of part 107 remote pilots who hold an exemption for a UAS operation pursuant to section 333 of Public Law 112–95. The text identifies the remote pilot as the person who is excluded from the applicability of part 107. This identification is imprecise, as the text should identify the excluded party as the exemption-holder, rather than the remote pilot. In addition, on October 5, 2018, the President signed the FAA Reauthorization Act of 2018. The statute codified within title 49 of the United States Code the authority previously provided in section 333 of Public Law 112–95. As a result, the citation within § 107.1(b)(3) should reflect 49 U.S.C. 44807 as the exemption authority. The NPRM proposed rephrasing the text of § 107.1(b)(3), accordingly. The Agency did not receive any comments on this change and adopts it, as proposed.

C. Remote Pilot in Command

Section 107.19 outlines the responsibilities of the remote pilot in command under part 107. Following the promulgation of part 107, the FAA identified the need for a minor edit to paragraph (c) of § 107.19, which currently requires each remote pilot in command to ''ensure the small unmanned aircraft will pose no undue hazard to other people, other aircraft, or other property in the event of a loss of control of the aircraft for any reason.'' The Agency proposed to amend the phrase ''loss of control of the aircraft'' to say ''loss of control of the small unmanned aircraft,'' for clarity.[90] The Agency did not receive any comments on this change and adopts it, as proposed.

D. Operation of Multiple Small UAS

The proposed rule included an amendment to the existing text of § 107.35, which prohibits contemporaneous operation of more than one small unmanned aircraft. Following the promulgation of part 107, the FAA realized the use of the term ''operate'' in § 107.35 could result in the perception that a single company or operator was prohibited from employing more than one remote pilot in command and conducting more than one small UAS operation at the same time. The proposed change to this section will allow companies to run two or more simultaneous small UAS operations, provided each aircraft is under the control of its own remote pilot in command.

Two commenters addressed the proposed change to § 107.35. ALPA supported the proposed change, saying it clarifies the difference between flight operations by a company and the remote pilot in command. ALPA also strongly supported the restriction that each small UAS remote pilot only be in control of one small unmanned aircraft at any given time. The Small UAV Coalition said it does not object to this provision; however, it noted that the prohibition is subject to a waiver under § 107.205. The Agency adopts the amendatory language, as proposed.

XII. Section 44807 Statutory Findings

To determine whether certain UAS may operate safely in the NAS pursuant to 49 U.S.C. 44807, the Secretary must find that the operation of the UAS would not create a hazard to users of the NAS or the public. The Secretary must also determine whether a certificate under 49 U.S.C. 44703 (''Airman certificates'') or section 44704 (''Type

[88] See Section III., Background A. Related FAA and DOT Actions 4. Secure Operations of Small Unmanned Aircraft Systems.

[89] 14 CFR 65.49, 65.89, 65.95, 65.111.

[90] 84 FR 3856, 3893.

certificates, production certificates, and airworthiness certificates, and design and production organization certificates''), or a certificate of waiver or certificate of authorization, is required for the operation of UAS, which includes small UAS subject to this rule. In the NPRM, the Secretary proposed to determine, using a risk-based approach, that small UAS operations under this rule would operate safely in the NAS; the individual findings that section 44807 requires are as follows.

A. Hazards to Users of the NAS or the Public

Section 44807(b)(1) requires the Secretary to determine which types of small UAS operations do not create a hazard to users of the NAS or the public. In the NPRM, the Secretary proposed to find that small UAS operations subject to this rule would not create a hazard to users of the NAS or the public. The FAA invited comments on this proposed finding.

Several commenters expressed general concerns about introducing small UAS into the NAS. Other commenters were concerned about potential risks that small UAS would pose to the manned aircraft operating at the same low level altitude. HAI, American Airlines, A4A, NAAA all stated they supported the expansion of small UAS operations, but requested the FAA specifically consider the potential risk of small UAS operations to manned aircraft, particularly those operating in low-altitude airspace. American Airlines referred the FAA to its comments submitted to the docket for the Safe and Secure Operations of Small Unmanned Aircraft Systems ANPRM for a discussion on its safety and security concerns. AMOA and AAMS, commenting jointly, also expressed concern that the proposed rule does not fully acknowledge the collision risk posed by an increase in UAS operations to low-altitude manned aircraft and ''relies too heavily and without adequate foundation on the skills of the UAS remote pilot to avoid conflict.'' NAAA noted UAS present a hazard to low-flying pilots similar to that presented by birds, which is significant because, according to NAAA, aircraft-wildlife strikes are the second leading cause of aviation related fatalities.

Drone Safe Communities stated the NPRM fails to address ''the risks posed by unauthorized UAS operations by negligent or malicious users.'' As such, the commenter asserted the FAA should focus on including unauthorized users in its analysis and in developing counter UAS technologies to enforce UAS regulations and integrate UAS into the NAS. The commenter criticized the FAA for providing guidance that tells facility owners to call local law enforcements during such sightings rather than dealing with these disruptions as an agency, especially because local enforcement agencies may not have the resources to deal with such risks.

In contrast to commenters who felt the FAA did not adequately consider the risks associated with introducing small UAS operations to the NAS, Precision Hawk stated the FAA was ''singularly focused'' on such risks, while failing to consider all the benefits small UAS operations would bring related to worker safety. This commenter noted that small UAS offer multiple opportunities to enhance employee and public safety and save lives by obviating the need for manned aircraft flight in particularly hazardous mission situations.

Through this rule, the Secretary addresses commenters' safety concerns and suggestions for considering increased opportunities that small UAS operations present. The requirements of part 107 mitigate the risks to manned aircraft by requiring the remote pilot to maintain visual line of sight of the small unmanned aircraft and to give way to manned aircraft at all times. In addition, this rule includes requirements that mitigate the risks associated with an increase in small UAS operations. For example, the anti-collision lighting required for nighttime operations, as discussed in detail in Section IX, increases operators' awareness of a small UAS operating within the same airspace. Moreover, this rule publishes concurrently with the final rule for Remote Identification of Unmanned Aircraft Systems, which addresses the security considerations raised. The FAA has developed relationships of mutual interest with law enforcement to address the safety and security concerns prompted by the proliferation of small UAS operations. To facilitate the safe integration of small UAS, the Agency must develop regulatory pathways for operation. This rule is an important step in enabling safe operations by balancing the risk of those operations with operational and design requirements that mitigate it. As previously discussed in Section IV.A.1., the safety record of 175 waiver holders, as of September 2020, to conduct operations over people have reported no injuries to persons on the ground and no damage to property on the ground exceeding $500.00. Considering the safety record of these waivers for operations over people, the available safety data supports the determination that operations over people can occur safely in accordance with this rule.

B. Certificate Requirements

Additionally, 49 U.S.C. 44807(b)(2) requires the Secretary to determine whether small UAS operations subject to this proposed rule pose a safety risk sufficient to require airworthiness certification or airman certification. The Secretary proposed to find, pursuant to 49 U.S.C. 44807(b)(2), that airworthiness certification is unnecessary for small UAS subject to this proposed rule and that a certificate under 49 U.S.C. 44703 should remain a requirement.

AMOA and AAMS, commenting jointly, stated the lack of discussion in the NPRM section pertaining to Section 44807 Statutory Findings made it difficult to determine what the significance of this proposed requirement will be. They sought clarification on what this requirement would mean for part 107 pilots, inquiring whether remote pilots would need medical certificates or be listed in the national pilot database.

The findings of the Secretary are based on compliance with the requirements outlined in this rule. The requirements and limitations of part 107, as amended by this rule, indicate small UAS operations can occur safely without the small UAS having an airworthiness certificate. For example, under the existing requirements of part 107, a remote pilot must conduct a pre-flight inspection in accordance with § 107.49. The remote pilot would, if operating over people, ensure that the aircraft meets the eligibility requirements to operate over people, as discussed in the preamble of this rule. Similarly, operations at night may only occur after the remote pilot has taken the updated knowledge test or training that includes content on night operations and when the small unmanned aircraft maintains an illuminated and flashing anti-collision light. This rule does not require pilots conducting operations under part 107 to hold a medical certificate. Remote pilots who hold a part 107 certificate, however, will remain included in the national pilot database; such inclusion is a necessary means of oversight. Moreover, the Secretary finds small UAS operations can occur safely under part 107 as long as the remote pilot holds a remote pilot certificate, pursuant to § 107.12.

XIII. Other Considerations

A. Liability

Several commenters suggested the FAA should require UAS operators hold valid liability insurance or require that operators be liable for property damage or personal injury arising out of an accident involving UAS, especially for operations of small UAS at night. Some commenters stated the FAA should set the minimum coverage standards. Another commenter addressed product liability, stating manufacturers should not be liable for the misuse of their products.

In response to commenters' suggestions that there be an insurance requirement for operations over people or at night, the FAA notes that it lacks jurisdiction to mandate the purchase of liability insurance. Similarly, OST also lacks authority to impose liability insurance requirements on small UAS operations covered by this rule because those operations do not rise to the level of air transportation.[91] However, the Department emphasizes that remote pilots who offer these types of services are responsible for the operation, and could be held liable for any injury or damage that could result. Prudent remote pilots should evaluate their existing insurance policies to determine whether they have appropriate coverage for these operations.

Finally, this rule did not propose operators obtain insurance coverage for operations subject to this rule. The Agency considers comments concerning insurance and liability as outside the scope of the rule.

B. Privacy

Commenters cited privacy issues as reasons for opposing the proposed rule. The FAA acknowledges that privacy issues could be a concern with operations over people; however, the proposed performance-based rule focuses on the risk of injury involved with operations over people and does not address privacy issues. EPIC believed that the unrestricted use of small unmanned aircraft over protests could have a chilling effect on free speech. They also stated people over whom a small unmanned aircraft flies should receive advance warning, both at public events and in closed or restricted-access sites. Similarly, the News Media Coalition wrote that restrictions on operations over people raise First Amendment concerns, such as when police departments set a perimeter around an accident or incident site that prevents a fly-over. An individual commenter recommended that the FAA conduct an information campaign to reduce the concerns the public might have related to privacy.

Although the Agency is not authorized to impose regulations based on privacy concerns, the FAA has collaborated with the public, stakeholders, and other agencies with authority and subject matter expertise in privacy law and policy. As stated in the 2016 final rule, the FAA's mission is to provide the safest, most efficient aerospace system in the world, and does not include regulating privacy or free speech.[92] Privacy issues are outside the focus and scope of the rule. The FAA emphasizes, however, that this rule does not relieve the operator from complying with other laws or regulations that are applicable to the purposes for which the operator is using the small UAS.

C. Noise From Unmanned Aircraft

Several commenters state that noise was potentially an issue with operations over people. The comments were mostly general, citing concerns about nighttime operations disturbing sleep, noise that might be created in recreational areas that people visit to get away from noise, and that small UAS should generally be banned in residential areas. A few suggestions were more specific, such as limiting small UAS operations to an unspecified straight-line distance from structures and people to alleviate noise and privacy concerns, prohibiting operations within 30 feet of people, allowing operations over roadways to lessen impacts on noise-sensitive locations like schools and hospitals, and education of remote pilots as to local noise ordinances for nighttime operation. A few commenters conclude that compared to current ambient noise levels of cars, large aircraft, and ''heavy lift UAS,'' small UAS operations would not contribute noticeably to noise. One commenter states that the FAA said the Agency did not have authority over noise; that statement is an incorrect reading of the proposed rule.

The FAA primarily manages aircraft source noise as a matter of aircraft certification rather than operational restrictions. The FAA is aware that limited data are available quantifying the acoustics of most unmanned aircraft and almost none relating to the effect on people when unmanned aircraft of any size are operated in close proximity. When the FAA promulgated part 107, it determined that it would not impose any noise requirements (in the form of testing individual aircraft) because of the limited size of small unmanned aircraft and the scope of operations that were allowed under that part. In the years since the adoption of part 107, however, the number of UAS operating has increased, the FAA has granted operational waivers, and the Agency is now expanding part 107 operations outside of the initial operational box. The expansion of the number of unmanned aircraft and their operations has outpaced FAA certification actions to measure and analyze noise from these aircraft, and the FAA has recently added UAS to its noise reporting portal workflow in response to increasing public awareness and concern for UAS operations near them. The FAA continues to seek and collect available noise data on more unmanned aircraft models, however, the efforts have faced challenges due to the rapid expansion of operations under part 107 with unmanned aircraft that are not required to be certificated under part 36.

When an aircraft is presented for type certification under part 21, the FAA undertakes noise certification in accordance with part 36 standards. To date, the Agency has treated unmanned aircraft as either small airplanes or rotorcraft depending on their means of flight. Manufacturers who seek type certification for unmanned aircraft—either because they exceed the 55 pound weight limit of part 107 or seek to operate outside part 107 limits (such as under part 91 or part 135)—are tested and their noise levels measured, but the few already certificated have resulted in only incremental increases in the FAA's noise database on these aircraft. In addition, as larger unmanned aircraft are added to the fleet, there is increased potential for noise impacts. Accordingly, the FAA has begun to apply more relevant test procedures and noise limits for new unmanned aircraft models presented for type certification under part 21.[93]

The forecasted proliferation of unmanned aircraft that weigh less than 55 pounds has led the FAA to assess its future ability to analyze and understand the noise impacts of unmanned aircraft. As the operating environment expands to include more operations over people that are not directly participating in the operation, the FAA will need to address

[91] As discussed in the part 107 final rule, air carriers (which are not included in this rule) are subject to liability insurance requirements. 81 FR 42064 at 42074–75. *See* 49 U.S.C. 41112 (noting that the Secretary may issue a certificate to a citizen of the United States to provide air transportation as an air carrier only if the citizen complies with the Secretary's orders and regulations governing the filing of an insurance policy or self-insurance plan).

[92] 81 FR 42064 at 42190–42192.

[93] These standards are being applied to individual certification projects as they are presented and found appropriate, with the complementary intent of informing future standards of general applicability for UAS noise in part 36.

eventual test procedures and the criteria for determining which of these aircraft would require noise testing. Current part 36 certification test procedures and noise standards were not developed for aircraft that are designed to take off, land, or operate (including hover) close to people not directly participating in the operation.

The FAA has broad authority to address the noise of all aircraft.[94] This authority applies whether the aircraft are presented for traditional type certification under part 21 or, as small unmanned aircraft may, seek some other operational authority such as special airworthiness certification. Consequently, the FAA has begun to consider proposing test requirements and noise limits for unmanned aircraft that are not type certificated under part 21. The FAA is aware that expanding noise requirements beyond the category of traditional type certification applicants may have broad impacts on aircraft models newly subject to noise certification requirements. The FAA is also aware that a new regulatory framework might be necessary to identify the aircraft that would be included in noise certification, the limits of the noise they would be allowed to generate, and what entities would be responsible for testing and compliance, such as the manufacturer or the end user. Because this is a complex topic and will need to focus on issues of testing and certification that have yet to be proposed, the FAA has chosen not to promulgate any certification requirements as part of this rulemaking, but is considering future rulemaking actions that will present the available data and noise concerns for full public input.

D. Other Comments

Several comments were not explicitly relevant to the requirements of the proposed rule. For example, several commenters requested the FAA modify the requirements for small UAS operations under part 107, to address operations at or over National Parks and to reduce the number of ''no-fly zones.'' Other commenters suggested amending the requirements applicable to operating beyond visual line-of-sight, altitude restrictions, and speed limits under part 107. Some commenters suggested imposing equipage and design requirements, including transponders and ''lock down mechanisms.'' A few commenters believed certificated pilots should have more freedom to fly where they want. Another commenter opined small UAS should be able to fly ''whenever and wherever,'' except near airports and other sensitive places. One commenter wrote that everyone should have some type of certificate indicating ''they know the rules of the airspace,'' and it should be easy for these small UAS pilots to fly close to airports.

This rule expands operations over people and at night, as proposed, with the addition of allowing operations over moving vehicles. The Agency did not propose to amend other restrictions codified in part 107, such as the requirement that the small unmanned aircraft remain within visual line of sight and restrictions regarding airspace in which the operation occurs. Likewise, the proposed rule did not consider requiring equipage such as transponders or mechanisms to stop a small unmanned aircraft from operating. While the Agency may consider amending existing limitations or requirements in future rulemakings, these matters are outside the scope of the NPRM for this rule.

One commenter stated the Agency should not finalize the proposed rule until manufacturers design a jet engine that would not result in loss of engine performance if it ingests a small unmanned aircraft. This comment is beyond the scope of the proposed rule, as this rule did not propose to develop engine certification standards for manned aircraft.

A commenter wrote that commercial pilots and ''licensed pilots'' must not be granted operating privileges different from those allowed any individual or hobbyist operator. This rule only addresses operations conducted under part 107, which does not differentiate between the types of operations conducted. As a result, this comment is outside the scope of the NPRM for this rule.

Although this rule does not apply to operations that flyers conduct under 49 U.S.C. 44809 (''Exception for Limited Recreational Operations of Unmanned Aircraft''), the FAA received comments concerning recreational operations. Several commenters, indicating they are recreational operators or hobbyists, stated the proposed regulations are unreasonable, do nothing to improve safety, would stifle innovation of technology and sales of UAS, and would destroy the recreational UAS market. First Person View Freedom Coalition (FPVFC) recommended the FAA waive certain requirements in this rule for recreational pilots and their small UAS. Others recommended FAA establish a different set of rules for recreational operators than commercial operators. Part 107 does not specify purposes of operation to which the part applies. All persons operating under part 107 must meet all requirements of part 107 for the operation. To the extent that FPVFC suggests the rule should not apply to recreational operations, this comment is out of scope because any person operating a small UAS for recreational purposes may operate under the Limited Exception for Recreational Aircraft, as long as the operation fulfills all criteria of 49 U.S.C. 44809(a).

E. Regulatory Analysis—Benefits and Costs

Several commenters provided comments on the general and specific benefits and costs of the proposed rule. Commenting generally on the benefits of the commercial UAS industry, AUVSI stated, ''investment in the commercial UAS industry is growing significantly and is projected to increase rapidly in the coming years, contributing to the U.S. economy and creating tens of thousands of jobs.'' AUVSI also quoted a Department of the Interior (DOI) observation that, ''[a]cross nearly 19,000 drone flights flown to date, [DOI] has observed a rule of thumb that a drone can complete a given task in 1/7th the time and at 1/10th the cost of traditional means of accomplishing the same task.''

The FAA thanks AUVSI for providing statistics pertaining to the Department of the Interior UAS program. The FAA continues to work toward the integration of unmanned aircraft in the NAS and enabling economic opportunity for manufacturers of unmanned aircraft, part 107 operators, and providers of UAS-related services.

Deseret UAS pointed to a Morgan Stanley report which estimates that the market for Urban Air Mobility (UAM) could be at $1.5 trillion by 2040. The commenter also pointed to a Goldman Sachs report which estimates that the global UAM is expected to surpass $100 billion in the next 5 years. The commenter stated that operations over people and at night are necessary for UAM.

The FAA recognizes the market potential for UAM, and is in the process of type certification for six urban air mobility aircraft.[95] While these aircraft would operate over people and at night, it would not be under part 107 regulations. As currently written, part 107 regulates the operation and certification of unmanned aircraft weighting less than 55 pounds (including payload), thus UAM aircraft

[94] *See* 49 U.S.C. 44715(a) and (b).

[95] *https://www.aviationtoday.com/2020/01/14/six-urban-air-mobility-aircraft-well-along-type-certification-faas-merkle-says/.*

would not operate in accordance with part 107.

CDA stated that the NPRM failed to properly weigh risk against benefits and that the public benefits of expanding commercial UAS operations has had, and will continue to have, a significant economic impact on the United States. CDA reported that with UAS activity rising from $40 million in 2012 to a projected annual impact of $31—$46 billion in 2026, the benefits are substantial.

The FAA continues rulemaking efforts to provide relief from part 107 regulations by allowing operations that pose minimal risk. Accordingly, this rulemaking enables small UAS operations at night, over people, and over moving vehicles, therefore encouraging economic activity to occur that would otherwise only take place through a more costly and time-consuming waiver process.

The Consumer Technology Association (CTA) states it is imperative for the FAA to strike the appropriate risk-based balance between innovation and safety. CTA asserted that the cost-benefit analysis contained in the NPRM does not adequately account for many benefits associated with small UAS operations over people, including lives that could be saved by less restrictive rules governing small UAS operations over people. CTA asserted that it ''is undisputed that sUAS operations—whether search and rescue, medical supply delivery, or other—will save a substantial number of lives and pose a risk of injury to the public.'' CTA said these factors must be balanced when evaluating whether to restrict small UAS operations over people and, to date, such an analysis has not been undertaken. CTA encouraged the FAA to revisit the cost-benefit analysis to account for such benefits properly. CTA also noted that the FAA is required to consider ''all costs and benefits of available regulatory alternatives'' (under Executive Order 12866) and to support its analysis by ''the best available science'' and to ''identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends'' (under Executive Order 13563). CTA asserted that, although the NPRM lessens regulatory burdens, the FAA did not meet these required standards, because less restrictive alternatives exist and because the safety ''analysis'' includes ''presumptions not supported by scientific data.''

In its comments, DJI similarly pointed to lives saved by UAS. Based on news reports, DJI estimated that small UAS have saved at least 227 people ''from life-threatening peril'' in situations involving floods, fires, and missing persons. DJI also stated that it has learned from its customers that UAS make dangerous jobs—such as tower inspections, roof inspections, and firefighting—substantially safer. DJI wrote that regulations with a near-zero tolerance for minor risk will stifle innovation, impede beneficial operations, and be a net loss to public safety. CDA and an individual commenter similarly said that the risk-benefit calculus should account for the risks associated with the activities that commercial small UAS operations would replace—*i.e.,* the FAA should compare the safety benefit of using a small UAS rather than risking a human life.

In response to these commenters, in the part 107 final rule published in June 2016, the FAA qualitatively discussed the safety benefits and cost savings resulting from the substitution of small unmanned aircraft for manned activities, such as climbing towers or inspecting infrastructure, and for activities traditionally performed by manned aircraft. Thus, many of the safety benefits identified by commenters were enabled on publication of the part 107 final rule. Nevertheless, this final rule will aid rescue personnel to perform operations with more efficiency and expediency since they will no longer be required to avoid operations over people and over moving vehicles, so long as the operations are conducted with eligible small unmanned aircraft.

Also, the FAA agrees that enabling small UAS operations at night will result in lives saved. This final rule eliminates the burden of first obtaining a waiver before operating a small UAS at night, potentially enabling rescue operations that would otherwise not occur. DJI reports that 15 out of 65 rescues over a one-year period occurred at night using drones with thermal imaging capability.

The AMOA and AAMS, commenting jointly, noted that the FAA's cost-benefit discussion did not address the increased risk of proliferating numbers of small unmanned aircraft to low-altitude manned aircraft, such as rotorcraft. The commenter asked if FAA has concluded that there is no increased risk of harm to manned aircraft, crews, and passengers should the NPRM be finalized.

The FAA agrees that this final rule will result in an increase in the number of small unmanned aircraft operating in the airspace, particularly at night. However, this risk is mitigated by existing regulations finalized in the 2016 rule. Regulations contained in part 107 stipulate that: (1) Small unmanned aircraft must yield the right of way to all other users of the NAS and requires that the small unmanned aircraft always be the one to initiate an avoidance maneuver to avoid collision with any other user of the NAS, and (2) the operation of a small unmanned aircraft cannot be so close to another aircraft as to create a collision hazard.

Some commenters wrote that section 44809 of the FAA Reauthorization Act of 2018 requires FAA to develop a test for recreational operations that can be administered online and that this should be extended to part 107 remote pilot certification, thereby reducing the cost associated with the initial knowledge test.

The FAA notes that an application for a certificate must be in a form and manner prescribed by the Administrator under 49 U.S.C. 44702. A person who seeks to obtain a remote pilot certificate, with a small UAS rating that does not hold a part 61 certificate (other than a student pilot certificate) must take the part 107 aeronautical knowledge test at an approved knowledge testing center. Because of the need for testing security and applicant identification, part 107 initial knowledge testing for certification cannot be administered through an online testing platform. The requirement for a knowledge test applicant to verify their identity in person at a test center will remain, as will the requirement for a test proctor. Both of these requirements are consistent with part 107 and other regulatory frameworks for knowledge testing. The FAA Reauthorization Bill of 2018 requirement for the FAA to have an online test for limited recreational operators does not statutorily extend to part 107 remote pilot certification. The FAA clarifies that part 107 does not mandate formal training to obtain a remote pilot certificate, and any cost that a part 107 applicant incurs is at their discretion. The FAA contracts its testing delivery through a third party vendor that allows the FAA to enter into a contract that provides a zero cost model to the U.S. government and to the taxpayers. The testing vendor has many locations throughout the United States that are close to large and small population centers, therefore the requirement to take a knowledge test at a testing location is not an undue burden on applicants.

An individual commenter pointed out that the FAA notes the safety risk of the proposed rule to the public in the benefits section of the regulatory analysis, and then invites comments to speculate on the associated costs. Absent those comments, the commenter

asserted, ''the FAA assumes its safety precautions will be sufficient.'' The commenter also pointed out that the FAA said it may revise its regulatory impact analysis based on the data and comments it receives on the safety risks of the proposed rule. The commenter believed that the cost-benefit analysis could change ''tremendously'' if this negative externality were included. Another commenter acknowledged that there is a public need for the intended regulation, to encourage innovation and growth, but argued that it must be balanced against safety concerns. The commenter believed FAA has not addressed safety concerns in-depth. Specifically, the commenter said FAA has not established guidelines on how it will take account of life into its regulatory analysis. With respect to operations over people, the commenter said the FAA cannot focus on kinetic energy alone as an indicator of overall risk because it will not reflect real-world risks and disincentivize advancements in UAS technology that would otherwise increase safety. The commenter argued that FAA needs to factor in operational and technical mitigations in addition to kinetic energy. Another commenter encouraged the FAA to find a balance between safety and the cost of qualification for rules requiring qualification of manufactured UAS. The commenter asserted that inflated certification/qualification costs will serve as a barrier to entry that will stunt innovation.

The FAA acknowledges the commenters' concerns. However, the performance based requirements contained in this rule for the manufacture of small UAS would mitigate the risk of injury to individuals. Specifically, the four categories established by this rule mitigate the risks associated with operations over people. The lowest risk category, Category 1, sets a weight limit of 0.55 pounds for the small unmanned aircraft and everything otherwise attached and prohibits exposed rotating parts that could cause lacerations. Categories 2 and 3 similarly prohibit the small unmanned aircraft from having any exposed rotating parts that could cause lacerations, in addition to injury severity limits and prohibition on safety defects. Finally, in response to commenters' concerns that the FAA did not sufficiently consider reliability or probability, this final rule includes Category 4, which would allow small UAS with an airworthiness certificate to operate over people. While the FAA requested public comment for data concluding that the injury severity limits should be changed, no such comments with supporting data were provided. The FAA acknowledges commenter concerns that inflated qualification/certification costs will serve as a barrier to entry that will stunt innovation. However, the FAA is confident that innovative manufacturers are capable of recovering the costs associated with designing aircraft that will mitigate risk of injury to persons on the ground.

One commenter asked whether the analysis for the remote pilot operating instructions included instructions in multiple languages. The commenter suggested that, to address operational safety fully, manuals could provide instructions in multiple languages, which may change the FAA's page estimates for the remote pilot operating instructions. The commenter noted that requiring instructions in multiple languages would impose additional costs on manufacturers but would also provide benefits to operations and perhaps increase safety of the public.

The FAA values the commenters concerns that manufacturers would need to provide remote pilot operating instructions in multiple languages. The FAA is not requiring the applicant to provide remote pilot operating instructions in a particular format, nor is it prescribing the method for making the instructions available. For example, an applicant could choose to provide the remote pilot operating instructions as part of the packaging of a small UAS, make them available electronically, or provide them in some other way. Applicants with products currently on the market are free to choose whether to incorporate the instructions into existing materials, or create a new set of instructions that are specific to operations over people.

ASSURE commented on the cost of test methods related to operations over people. The commenter estimated that it would cost manufacturers between $30,000 and $35,000 to execute Transport Canada's Anthropomorphic Test Devices (ATD) tests and report results for certain multirotor and fixed-wing platforms ''up to the practical limitations of launchers that may or may not be able to reach vehicle terminal velocities especially for vehicles weighing more than 5lb and fixed-wing platforms.'' ASSURE stated that, while Transport Canada's approach is a ''solid first attempt at approaching a consistent and standardized use of automotive test techniques and injury metrics,'' the approach requires refinement that could potentially reduce costs and align with the ASSURE Task A14 injury metrics. ASSURE also wrote that the NPRM's performance-based metrics ''may cost similar amounts of funding before standardized injury metrics are established for energy based test methods.'' ASSURE stated that energy-based test methods have been used for some of the Pathfinder Programs; however, the test methods have little correlation to skull fracture, head injury or neck injury that is required to assess injury severity due to the wide variety of vehicle and individual impact orientations that could potentially result for small unmanned aircraft impacts.

The FAA thanks ASSURE for their comments and notes that ASSURE estimates the cost for a manufacturer to conduct its own means of compliance testing to be $55,000.[96] This cost includes approximately $35,000 for an ATD Hybrid III head and neck, $16,800 for a National Instruments data acquisition system, $1,400 for MiniTech extrusions and hardware, and approximately $950 for additional materials and supplies. While the FAA-provided test method that was also used during the Pathfinder Programs did not directly correlate to a particular type of injury risk, the method meets the requirements of a means of compliance for the injury severity limits. A commenter noted that the FAA provides a comprehensive regulatory evaluation to help determine the benefits, costs, and cost savings, but said the Agency could do more to facilitate a plan to evaluate the proposed rule once it is issued. Specifically, the commenter recommended that FAA conduct two evaluations of the NPRM to see if the rule generates cost savings as predicted in the economic analysis and maintains overall safety. The first evaluation would focus on implementation (to ensure the resources and requirements of the rule are being implemented) and the second evaluation would focus on the impact of the rule to determine whether it achieved its intended outcomes. The commenter also stated that safety standards and injury measures should be identified, collected, and assessed to measure outcomes accurately, and that the rule should be periodically reviewed as technology continues to change.

The FAA values the commenter's suggestion to evaluate this rule after publication. In response, the FAA notes that post reviews of rulemakings and regulations are conducted in response to Congressional and presidential requirements, or directives. The Section

[96] *http://www.assureuas.org/projects/deliverables/a14/ASSURE_A14_Final_Report_UAS_Ground_Collision_Severity_Evaluation_2017-2019.pdf.* Testing method is described in Appendix C of Annex A: pp 204–208.

610 review (required by the Regulatory Flexibility Act)[97] is one such review that occurs every ten years. The purpose of this review is to reexamine whether (1) the expected outcomes of the regulation have been achieved; (2) the Agency should retain, amend, or rescind the regulation; and/or (3) the actual benefits and costs of the implemented regulation correspond with estimates prepared at the time the regulation was issued. Reviews could occur more frequently as a result of petitions from parties affected, or in light of changes to specific technologies, industries or underlying standards.

DJI asserted generally that regulations that increase the cost of equipment or operational approvals will disproportionately impact small business.

The FAA acknowledges DJIs comment that regulations can disproportionately impact costs to small businesses. According to the Small Business Administration (SBA), smaller firms bear a regulatory cost 36 percent greater than the cost of regulatory compliance carried by larger firms.[98] These cost burdens include compliance, reporting, and recordkeeping.[99] According to part 107 waiver analysis conducted by AUVSI, from the time the part 107 rule was finalized in June 2016 through March 2020, the FAA granted 4,144 waivers.[100] A vast majority of the waivers were for § 107.29, daylight operations (3,813 waivers granted), followed by § 107.39 operations over people (125 waivers granted). These two categories account for 95 percent of the waivers granted to date, and demonstrates the desire among entities to be able to conduct these types of operations. The AUVSI analysis indicates that a majority of the waivers granted were for entities with fewer than 10 employees that generate a revenue of under $1 million annually. While this final rule creates additional costs to operators, it also creates costs savings. These cost savings and the enabling activities allowed by this rule are anticipated to outweigh costs imposed on smaller and larger entities alike.

Approximately 23 commenters, including the National Agricultural Aviation Association and the Golden Gate Bridge Highway and Transportation District, said either that they approve of an insurance requirement for small UAS operators or that operators should be liable in the case of an accident. Approximately 16 of the 23 commenters said that insurance should be required. Seven of these commenters specified that insurance should be required for small UAS operations over people or at night. One of those commenters said that the FAA should set the minimum coverage standards. Two commenters believed FAA should require $1 million in insurance. One commenter said that manufacturers should not be liable for the misuse of their products.

XIV. Effective and Compliance Dates

A. Implementation Timeline for Night Operations and Recurrent Training Requirements

Operations over people are permitted on the effective date of this rule, as long as the small UAS meets all eligibility requirements for the appropriate category. For example, an unmanned aircraft weighing less than 0.55 pounds, including everything attached, and with no exposed rotating parts that would cause a laceration may operate on the effective date. Section V discusses the requirements for Category 1 small unmanned aircraft. Similarly, as discussed in Section VII, small UAS with an airworthiness certificate issued under part 21 would be able to operate under part 107 on the effective date of the rule, provided the operating limitations for the small UAS do not prohibit operations over people.

Given that Categories 2 and 3 require a multi-step process to meet the eligibility requirements, the FAA does not anticipate that many, if any, small UAS will be able to operate immediately on the effective date. Means of compliance applicants may submit the means of compliance to the FAA either by email or through the U.S. mail. Applicants may submit their declaration of compliance through an online portal on the FAA website. On receipt, the FAA would review the submitted declaration of compliance for acceptance and notify the applicants of their acceptance status. Incomplete declarations of compliance will not be accepted. Section VI discusses the requirements for Categories 2 and 3. With regard to the operations over people waivers issued prior to the effective date of this rule, the FAA will review these on a case-by-case basis and determine next steps as appropriate.

On the effective date of this rule, persons are permitted to conduct operations at night, provided they successfully complete the updated initial aeronautical knowledge test, initial training, and recurrent training, as applicable, which addresses the requirements of operating at night and that the small unmanned aircraft has lighted anti-collision lighting visible for at least 3 statute miles that has a flash rate sufficient to avoid a collision. Section IX.B. of this preamble provides a discussion of this requirement. The updated knowledge area on night operations for initial and recurrent training will be available on March 1, 2021, and will be accessible through the FAA website. The initial aeronautical knowledge test will have the updated knowledge area on night operations and will be available on March 1, 2021 at the knowledge testing centers. However, remote pilots without a waiver from § 107.29 will need to wait until March 16, 2021 before operating at night.

Sixty days after the effective date of the rule, no person may operate a small UAS at night in accordance with a certificate of waiver issued prior to the effective date of the rule. Existing waivers from § 107.29 granted prior to the effective date will terminate 60 days after the effective date of the rule. Similarly, on the effective date of this rule, pilots will be subject to the recurrent training requirement finalized in this rule, rather than the recurrent knowledge test. Remote pilots conducting operations in accordance with a current night waiver will need to complete the updated night operations knowledge area either by retaking the initial aeronautical knowledge test or completing the recurrent online training within 60 days from the effective date of this rule. The other amendments described in Section XI will also take effect on the effective date of this rule. The FAA did not receive any comments specific to the effective and compliance dates of this final rule, with the exception of comments that discussed coordination with the Remote Identification final rule, as discussed in the following section.

B. Compliance With Remote Identification

The NPRM noted the FAA planned to finalize its policy concerning remote identification of UAS before finalizing

[97] Public Law 96–354, 94 Stat. 1164, 1169 (Sept. 16, 1980) codified at 5 U.S.C. 610. These reviews are referred to as Section 610 reviews.

[98] Nicole V. Crain and W. Mark Crain, ''The Impact of Regulatory Costs on Small Firms,'' *U.S. Small Business Administration, September 2010. Page. iv. https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf.* Accessed January 22, 2020.

[99] U.S. Chamber of Commerce Foundation. *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly. Final Report. March 2017. https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf.* Accessed January 22, 2020.

[100] *https://www.auvsi.org/sites/default/files/PDFs/Waiver%20Update%20Mar%202020_v3_PDF%20%281%29.pdf, https://public.tableau.com/shared/RBFRZM9PP?:display_count=y&:origin=viz_share_link&:showVizHome=no#1.* Accessed April 10, 2020.

the proposed changes in this rulemaking that pertain to operations over people and operations at night. Concurrent with publication of this final rule, this edition of the **Federal Register** also includes the Remote ID final rule.

Several commenters, including A4A, Vigilent, and NAAA, suggested implementing the requirements of the Remote ID rule before finalizing this rule. APPA, EEI, and NRECA, commenting together, agreed the FAA should expedite the release of a Remote ID rulemaking. However, APPA, EEI, and NRECA were concerned the utility industry would not benefit from the ''advances'' of small UAS operations over people due to the delays associated with the Remote ID rulemaking. A commenter believed this rule should be delayed until the FAA has implemented remote identification requirements and increased the number of operations over people waivers with the goal of gathering more data.

The NFL, MLB, NASCAR, and NCAA commented that the FAA should deploy a comprehensive ''Remote ID framework'' as soon as possible. The sports organizations strongly encouraged the ''agency's efforts to implement a Remote ID requirement for all drones that present any risk of use at a sporting event.'' API believed that without the capability of remote identification and tracking, the FAA and law enforcement will face serious challenges in locating offenders. EPIC argued that the open-air assembly prohibition should apply to all categories, and not just Category 3. It specifically stated that a ''modified version'' of this prohibition should apply to all operations over people.

In response to these comments, and others, this final rule prohibits sustained flight over open-air assemblies for Categories 1, 2, and 4, unless the operation is conducted using a standard remote identification unmanned aircraft or a remote identification broadcast module in compliance with § 89.110 or § 89.115(a) (remote identification operational and broadcast requirements for standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules). The FAA may waive this requirement as appropriate. However, conditions of any waiver issued may require the operator to notify local law enforcement prior to the operation. All small unmanned aircraft operations are subject to remote identification requirements upon the applicable remote identification compliance date, as specified in the Remote Identification for Unmanned Aircraft final rule. Airzus, Inc. believed that, until remote identification or other operational awareness efforts are codified, the FAA should consider the success of the LAANC system as a ''model for how self-reporting technologies can aid in furthering economic growth in the industry, while still emphasizing safety and flight awareness.'' A commenter recommended a public portal for reporting intended operations involving flights over people or at night without the need for special permission. Several commenters suggested requiring remote pilots to file a flight plan prior to operating over people: Flytcam suggested pilots should submit the locations and times of their operations into the DroneZone.[101] Concerned the elimination of waivers would erode the FAA's ability to identify operators of small UAS, a commenter recommended requiring an ''electronic license plate—basically a simple signal that broadcasts identifying information.''

DJI and AUVSI both commented that there should be no more delay, stating the Agency should issue Remote ID and this rulemaking simultaneously to keep pace with the integration of small UAS into the NAS. DJI, along with several individuals, wanted the rules allowing Category 1 operations to finalize as soon as possible, noting they should be excluded from Remote ID requirements as they would likely impose negligible risk.

As discussed previously, the FAA is publishing the Remote ID final rule simultaneously with this final rule, with the added open-air assembly prohibition as described in this section.

XV. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify its costs. In addition, DOT rulemaking procedures in subpart B of 49 CFR part 5 instruct DOT agencies to issue a regulation on a reasoned determination that benefits exceed costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). The FAA has provided a more detailed Regulatory Impact Analysis of this final rule in the docket of this rulemaking. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this rule.

In conducting these analyses, FAA has determined that this rule: (1) Has benefits that justify its costs, (2) is an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, (3) is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (4) will have a significant economic impact on a substantial number of small entities; (5) will not create unnecessary obstacles to the foreign commerce of the United States; and (6) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified previously. These analyses are summarized in this section.

A. Regulatory Evaluation

1. Assumptions and Data

The analysis of benefits and costs for the regulatory evaluation is based on the following assumptions.

- The analysis is conducted in 2020 constant dollars. Year 1 of the period of analysis, which would correlate with the effective date of the final rule, is used as the base year.
- The FAA uses a 10-year period of analysis to capture the recurring effects of the rule.
- The FAA uses a three percent and seven percent discount rate for the costs and benefits as prescribed by OMB in Circular A–4.[102]
- The costs and cost savings of this rule are based on the fleet forecast for small UAS published in the Federal Aviation Administration's FAA Aerospace Forecast 2020–2040.[103] Additionally, fleet forecasts for Category

[101] *https://faadronezone.faa.gov/.*

[102] OMB Circular A–4 (Sept. 17, 2003), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[103] FAA Aerospace Forecast Fiscal Years 2020–2040 at 52, *available at http://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2020-40_FAA_Aerospace_Forecast.pdf.*

1 small UAS and Category 4 small UAS are derived to more accurately reflect costs and cost savings for the final rule.

• Under the final rule, a means of compliance must be accepted by the FAA before it could be used by applicants to build UAS for operations over people and moving vehicles. Means of compliance are developed by persons or organizations to describe methods by which a UAS could be designed and produced to meet the performance requirements of this rule. The FAA anticipates that other entities, such as UAS manufacturers, could also submit a means of compliance to the FAA for acceptance and will incur additional costs. Further details on the costs to develop means of compliance are provided in the Regulatory Impact Analysis of this final rule in the docket of this rulemaking.

• The FAA estimates 31 existing models may satisfy the performance-based requirements of the rule for Categories 2 and 3 small UAS operations over people with little or no modification.[104] Applicants of these models would be subject to the cost of submitting a declaration of compliance to the FAA. The FAA estimates that applicants would likely submit declarations of compliance for eight additional models in each of the subsequent years of the analysis.

• The FAA assigns the United States Department of Transportation guidance on the hourly value of time and hourly value of travel time savings equal to $27.89 for the analysis period.[105]

• The FAA notes the analysis of this rule reflects industry conditions that predate the public health emergency concerning the coronavirus disease 2019 (COVID–19). While there is currently a lack of data to forecast the timing of recovery relative to implementation of the rule, the analysis provides information on the types of impacts that may be experienced in the future as the economy returns to baseline levels. The FAA also notes the expanded operations enabled by this rule will benefit the economy and provide regulatory relief for remote pilots.

2. Summary of Benefits

This rule will further integrate small UAS into the NAS by enabling operations over people and nighttime operations. These operations will benefit the economy and encourage innovation and growth across a variety of sectors, such as construction, education, infrastructure inspection, insurance, marketing, and event, film and sports photography.

Today, remote pilots who comply with part 107 can fly a small unmanned aircraft within a safe distance from people, but are not able to operate over people who are not participating in the operation. Without this rule, the only entities allowed to operate small unmanned aircraft over people in the NAS are public entities holding an active certificate of waiver or authorization (COA), entities with an FAA-issued exemption, entities that hold a waiver to the prohibition on operations over people provision of part 107, or small UAS that have received an airworthiness certificate from the FAA that does not prohibit operations over people who also operate with a COA. This rule will allow individuals to conduct operations of a small UAS over people in the NAS and at night under part 107, so long as the activity is conducted with a small UAS that complies with the provisions. The FAA quantifies cost savings from this rule in the following section along with a summary of important unquantified savings.

3. Summary of Costs and Savings

The costs of this rule include the FAA converting the administration of recurrent tests to administration of training; manufacturers conducting testing, analysis, or inspection to comply with the requirements relevant to manufacturing a small UAS for operations over people; and, remote pilots studying additional subject matter related to activities enabled by the final rule. The cost savings of this rule includes relief provided through online training for remote pilots, and relief from time expended by the FAA for processing waivers.

The FAA bases the analysis of this rule on a fleet forecast for small unmanned aircraft that includes base, low, and high scenarios. Accordingly, this analysis provides a range of net impacts from low to high based on these forecast scenarios. The FAA considers the base scenario as the primary estimate of net impacts of this rule. For the primary estimate, over a 10-year period of analysis this rule will result in present value net cost savings (savings less costs) of $688.27 million at a three percent discount rate, with annualized net cost savings of $80.69 million. At a seven percent discount rate, this rule will result in present value net cost savings of $551.31 million, with annualized net cost savings of $78.49 million. The following table summarizes the quantified costs and cost savings of this rule for the three forecast scenarios.

TABLE 2—COSTS AND SAVINGS OF FINAL RULE BY FORECAST SCENARIO

[$Millions] *

Forecast scenario	10-Year present value (3%)	Annualized (3%)	10-Year present value (7%)	Annualized (7%)
Base Scenario—Primary Estimate:				
Costs	146.44	17.17	119.98	17.08
Cost Savings	(834.71)	(97.85)	(671.28)	(95.58)
Net Cost Savings	(688.27)	(80.69)	(551.31)	(78.49)
Low Scenario:				
Costs	102.96	12.07	85.32	12.15
Cost Savings	(616.60)	(72.28)	(501.51)	(71.40)

[104] The proposed rule assumed a cutoff weight of 4.4 lbs based on the Micro UAS Aviation Rulemaking Committee (ARC) final report. Since publication of the ARC final report, the FAA has granted 109 waivers for operations of small UAS over people (as of 3/2/2020). These waivers give insight as to the type of vehicles conducting operations over people and show that a majority of the waivers granted have been for UA weighing 11.68 pounds or less. The part 107 aircraft registry was analyzed for the number of models in this weight range. Based on this analysis, 31 of the models registered (for those models in the registry that could be identified by model), weighed 11.68 pounds or less. A copy of the ARC's final report is available in the public docket for this rulemaking.

[105] Time savings is estimated to be median hourly wage plus benefits as described in the U.S. Department of Transportation Revised Departmental Guidance on Valuation of Travel Time in Economic Analysis (Sept. 27, 2016).

TABLE 2—COSTS AND SAVINGS OF FINAL RULE BY FORECAST SCENARIO—Continued

[$Millions] *

Forecast scenario	10-Year present value (3%)	Annualized (3%)	10-Year present value (7%)	Annualized (7%)
Net Cost Savings	(513.64)	(60.21)	(416.19)	(59.26)
High Scenario:				
Costs	207.17	24.29	169.27	24.10
Cost Savings	(1,158.84)	(135.85)	(927.41)	(132.04)
Net Cost Savings	(951.67)	(111.56)	(758.14)	(107.94)

* **Table notes:** Columns may not sum to total due to rounding. Savings are shown in parenthesis to distinguish from costs.

The following tables summarize quantified costs and cost savings by provision category for the three forecast scenarios.

TABLE 3.a—COSTS AND SAVINGS OF FINAL RULE BY PROVISION CATEGORY ($MILLIONS) *

[Base scenario—Primary estimate]

Category	10-Year present value (at 3%)	Annualized (at 3%)	10-Year present value (at 7%)	Annualized (at 7%)
Costs:				
Standards Development Costs for MOC	3.18	0.37	2.88	0.41
Applicant Costs for Testing and DOC	4.39	0.51	3.76	0.54
Remote Pilot Costs—Additional Content for Tests	138.57	16.24	113.06	16.10
FAA Costs	0.31	0.04	0.28	0.04
Total Costs	146.44	17.17	119.98	17.08
Cost Savings:				
Remote Pilot Savings—Training in lieu of Testing	(593.73)	(69.60)	(479.17)	(68.22)
Part 107 Operators—Reduced Waiver Requests	(209.58)	(24.57)	(167.10)	(23.79)
FAA—Reduced Waiver Processing	(31.40)	(3.68)	(25.01)	(3.56)
Total Cost Savings	(834.71)	(97.85)	(671.28)	(95.58)
Net Cost Savings	(688.27)	(80.69)	(551.31)	(78.49)

* **Table notes:** For this and the following tables, columns may not sum to total due to rounding. Savings are shown in parenthesis to distinguish from costs.

TABLE 3.b—COSTS AND SAVINGS OF FINAL RULE BY PROVISION CATEGORY ($MILLIONS)

[Low scenario]

Category	10-Year present value (at 3%)	Annualized (at 3%)	10-Year present value (at 7%)	Annualized (at 7%)
Costs:				
Standards Development Costs for MOC	3.18	0.37	2.88	0.41
Applicant Costs for Testing and DOC	4.39	0.51	3.76	0.54
Remote Pilot Costs—Additional Content for Tests	95.09	11.15	78.40	11.16
FAA Costs	0.31	0.04	0.28	0.04
Total Costs	102.96	12.07	85.32	12.15
Cost Savings:				
Remote Pilot Savings—Training in lieu of Testing	(443.11)	(51.95)	(362.47)	(51.61)
Part 107 Operators—Reduced Waiver Requests	(151.01)	(17.70)	(121.04)	(17.23)
FAA—Reduced Waiver Processing	(22.48)	(2.63)	(18.00)	(2.56)
Total Cost Savings	(616.60)	(72.28)	(501.51)	(71.40)
Net Cost Savings	(513.64)	(60.21)	(416.19)	(59.26)

TABLE 3.c—COSTS AND SAVINGS OF FINAL RULE BY PROVISION CATEGORY ($MILLIONS)

[High scenario]

Category	10-Year present value (at 3%)	Annualized (at 3%)	10-Year present value (at 7%)	Annualized (at 7%)
Costs:				
Standards Development Costs for MOC	3.18	0.37	2.88	0.41
Applicant Costs for Testing and DOC	4.39	0.51	3.76	0.54
Remote Pilot Costs—Additional Content for Tests	199.30	23.36	162.35	23.12
FAA Costs	0.31	0.04	0.28	0.04
Total Costs	207.17	24.29	169.27	24.10
Cost Savings:				
Remote Pilot Savings—Training in lieu of Testing	(822.92)	(96.47)	(659.49)	(93.90)
Part 107 Operators—Reduced Waiver Requests	(291.98)	(34.23)	(232.90)	(33.16)
FAA—Reduced Waiver Processing	(43.95)	(5.15)	(35.02)	(4.99)
Total Cost Savings	(1,158.84)	(135.85)	(927.41)	(132.04)
Net Cost Savings	(951.67)	(111.56)	(758.14)	(107.94)

The FAA also expects this rule will provide industry with important unquantified savings and efficiencies from reduced operational costs. The FAA did not identify data to quantify these operational cost savings due to the wide variety of small UAS applications and operations enabled by this rule. In addition, the rule provides flexibility and scalability through performance-based requirements that will support future industry innovation. The following table summarizes unquantified savings from the final rule.

TABLE 4—UNQUANTIFIED SAVINGS

Savings	Summary
Clearing people from areas of operations.	Reduced burden and costs for certain operators that will no longer need to clear people from an area of operation to avoid flight over people.
Circuitous routes	Reduced operational costs for certain operators that will no longer need to perform circuitous routing to avoid flight over people.
Fly over moving vehicles	Operational flexibility and reduced costs for certain operators that will no longer need to avoid operations over moving vehicles.
Special conditions in waivers	In addition to the administrative cost savings from operating without waivers (*i.e.,* reduced costs of submitting and processing waiver requests), certain operators may receive reduced operating costs from avoided special conditions often included in waivers that will not be required under this rule.

Operations of small UAS over people may result in an increased risk to safety. Although the FAA expects the probability of injuries that may occur from operations of small UAS over people is low, when that low probability is multiplied by an increased number of operations, some additional risk of injury exists. This final rule's performance-based requirements establish four categories of small UAS operations defined primarily by level of risk of injury posed. Compliance with the eligibility and operational requirements that apply to these categories mitigates the risks of operating over people.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the Agency determines that it will, the Agency must prepare a regulatory flexibility analysis as described in the RFA.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the Agency determines that it will, Section 604 of the Act requires agencies to prepare a Final Regulatory Flexibility Analysis describing the impact of final rules on small entities.

The FAA has determined this final rule will have a significant economic impact on a substantial number of small entities. Therefore, under the requirements in Section 604 of the RFA, the Final Regulatory Flexibility Analysis must address:

(1) A statement of the need for, and objectives of, the rule;

(2) A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the Agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) The response of the Agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule

in the final rule as a result of the comments;

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and,

(6) A description of the steps the Agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the Agency which affect the impact on small entities was rejected.

Based on these requirements, the FAA has prepared the following Final Regulatory Flexibility Analysis.

(1) A statement of the need for, and objectives of, the rule.

The FAA publishes this rule pursuant to the authority set forth in 49 U.S.C. 44807. Section 44807 directs the Secretary of Transportation to determine whether ''certain unmanned aircraft systems may operate safely in the national airspace system.'' If the Secretary determines that certain unmanned aircraft systems may operate safely in the NAS, then the Secretary must ''establish requirements for the safe operation of such aircraft systems in the national airspace system, including operation related to research, development, and testing of proprietary systems.'' [106]

The FAA also publishes this rule pursuant to 49 U.S.C. 40103(b)(1) and (2), which charge the FAA with issuing regulations: (1) To ensure the safety of aircraft and the efficient use of airspace; and (2) to govern the flight of aircraft for purposes of navigating, protecting and identifying aircraft, and protecting individuals and property on the ground. In addition, 49 U.S.C. 44701(a)(5) charges the FAA with prescribing regulations that the FAA finds necessary for safety in air commerce and national security. Lastly, 49 U.S.C. 46105(c) allows the Administrator to issue immediate orders to address an emergency related to safety in air commerce.

This rule is an important step in further integrating small UAS operations into the NAS. The FAA's overall objective in this rule is to ensure safety while encouraging new uses of small UAS in the NAS. This rulemaking finalizes performance-based requirements to allow small UAS to operate over people or at night under part 107 without obtaining a waiver or exemption. Currently under part 107, a remote pilot must obtain a waiver or exemption explicitly allowing operations over people or at night. As of February 14, 2020, the FAA has received 9,698 requests for waiver to permit operation at night, 3,555 requests to permit operating over people, and 1,623 requests to permit operating over people at night.[107] For operations over people, the FAA's performance-based requirements establish four categories of small UAS operations defined primarily by level of risk of injury posed. Additional eligibility requirements and operating limitations beyond those already in part 107 apply to certain categories of small UAS to mitigate the risks associated with each category.

This rule also removes the requirement for completing a recurrent aeronautical knowledge test at a knowledge testing center and replaces it with a requirement for online training. As a result, the remote pilot in command who does not also hold a certificate issued under part 61 would be relieved of costs associated with recurrent knowledge testing every 24 calendar months. This rule also requires a remote pilot applicant to either pass a knowledge test or complete online training containing knowledge areas on night operations, before undertaking these types of operations.[108]

(2) A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the Agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

While there were no public comments specific to the initial regulatory flexibility analysis, one commenter asserted regulations that increase the cost of equipment or operational approvals will disproportionately impact small business. The FAA acknowledges that regulations disproportionately impact costs to small businesses, and cites an SBA sponsored study stating small firms bear a regulatory cost 36 percent greater than the cost of regulatory compliance carried by larger firms.[109] These cost burdens include compliance, reporting, and recordkeeping.[110] In this particular rule, it follows that smaller applicants for a declaration of compliance will be disproportionately affected versus their larger counterparts in terms of costs associated with means of compliance testing. For the final rule, these costs are estimated to average between $11,000 to $26,000.

Other entities affected by the final rule are entities/operators of small UAS. AUVSI conducted an analysis on part 107 waivers issued by entity size. This analysis shows that over 87 percent of the waivers issued were issued to entities with fewer than 10 employees.[111] Assuming that the share of small entities granted waivers is similar to the distributional share of all entities operating under part 107, this final rule will have a positive impact on small entities by allowing night operations, operations over people, and operations over moving vehicles without waiver.

(3) The response of the Agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

The Chief Counsel for Advocacy of the Small Business did not submit comments to the proposed rule.

[106] 49 U.S.C. 44807(c).

[107] As of April 6, 2020, part 107 Non-Airspace Waivers totaled 36,130. Of these, 15,777 have been disapproved and 4,155 have been approved. Of the remaining waivers, 15,067 are in process, with another 1,131 withdrawn.

[108] Testing or training is contingent upon whether the remote pilot applicant is a part 61 or non-part 61 remote pilot. Non-part 61 remote pilot applicants are required to pass an initial knowledge test to be able to conduct night operations; part-61 remote pilot applicants have the flexibility to successfully complete either the knowledge test or online training to be able to conduct operations at night. For those individuals that have already received a remote pilot airman's certificate, online knowledge training is required before conducting night operations.

[109] Nicole V. Crain and W. Mark Crain, ''The Impact of Regulatory Costs on Small Firms,'' *U.S. Small Business Administration, September 2010. Page. iv. https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf.* Accessed January 22, 2020.

[110] U.S. Chamber of Commerce Foundation. *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly. Final Report. March 2017. https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf.* Accessed January 22, 2020.

[111] For those waivers that AUVSI was able to find information on entity size, 1,365 were issued to entities with less than ten employees; 107 were issued to entities with 10 to 99 employees; 67 were issued to entities with 100 to 999 employees; 20 were issued to entities with 1,000 to 9,999 employees, and 3 waivers were issued to entities with 100,000 or more employees.

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

This final rule impacts applicants seeking acceptance of a declaration of compliance from the FAA for small UAS eligible to conduct operations over people. The FAA analyzed the part 107 unmanned aircraft registry for aircraft weighing less than or equal to 11.68 pounds, which aligns with the weight of small unmanned aircraft that have been granted waivers for operating over people.[112] The registry indicates that small unmanned aircraft in this weight class are comprised of 31 different models which are built by eleven different manufacturers that are located in three different countries.[113] Using the AUVSI business size standard, one manufacturer is identified as small (fewer than 50 employees); two manufacturers are identified as medium (50–499 employees); and five manufacturers are identified as large (more than 499 employees). Entity size was not known for three of the manufacturers.[114] The table below shows key statistics for the eleven manufacturers by country of origin.

TABLE 5—SELECT STATISTICS FOR PART 107 UNMANNED AIRCRAFT WEIGHING 11.68 POUNDS OR LESS

Manufacturer country of origin	Number of manufacturers	Number of models	Entity size *	Number of UA in FAA registry	Share of UA <=11.68 lbs (%)
China	4	18	2 large, 1 medium, 1 unknown	226,785	86.6
France	1	3	unknown	4,649	1.8
United States	6	10	3 large, 1 medium, 1 small, 1 unknown	30,572	11.7
Total	11	31	5 large, 2 medium, 1 small, 3 unknown	262,006	100.0

* Source: AUVSI Air Platform Data. AUVSI defines entity size as follows: Large entities have more than 500 employees; medium entities have between 50 and 499 employees; small entities have less than 50 employees.

Note: This information is based on records in the unmanned aircraft registry as of October 2019 that weigh 11.68 pounds or less. The remaining records did not contain readily identifiable make/model information and are excluded from the analysis.

The final rule enables entities to conduct operations over people and at night using eligible small UAS. Part 107 waiver analysis by AUVSI shows that between June 2016 and March 2020, a total of 4,144 waivers have been granted by the FAA.[115] A vast majority of the waivers granted are for § 107.29, daylight operations (3,813 waivers granted), followed by § 107.39 operations over people (125 waivers granted). These two waiver categories account for 95 percent of the waivers granted to date, and demonstrates the desire among entities to be able to conduct these types of operations. The AUVSI analysis shows a majority of the waivers granted have been for entities with fewer than 10 employees that generate a revenue of under $1 million annually.

The final rule impacts the entire population of part 107 remote pilots, many of whom work for small entities or own their own business, by requiring all part 107 remote pilots to be tested or knowledge checked on additional subject matter. The rule also relieves a subset of the remote pilot population (*i.e.,* non-part 61 remote pilots) from the recurrent knowledge testing requirement. Instead of taking recurrent knowledge testing, this affected group will take recurrency training every 24 calendar months to maintain the privileges of the remote pilot airmen certificate. This is expected to create a cost savings for approximately 90% of the current remote pilot population.

(5) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

In order for the FAA to accept a declaration of compliance, this rule requires the applicant to declare that a small UAS meets applicable performance-based safety requirements by using a means of compliance by test, analysis, or inspection, or any combination of these options accepted by the FAA. An applicant could perform any necessary tests contained in the means of compliance in-house or they could rent a testing facility with the necessary equipment to show compliance with the injury limitation based on the transfer of kinetic energy on impact. The applicant would certify the results from this means of compliance testing on its declaration of compliance to the FAA. The FAA estimates approximately eleven entities could be affected by compliance requirements in year 1 of the rule. Using the AUVSI business size standard for UAS manufacturers, one manufacturer is identified as small (fewer than 50 employees); two manufacturers are identified as medium (50–499 employees); and five manufacturers are identified as large (more than 499 employees). Entity size could not be determined for three of the manufacturers. The rule also requires applicants of small UAS eligible for Category 2 or Category 3 operations to make available to the Administrator an FAA-accepted declaration of compliance and any other document, record, or report that the final rule requires, on request. The rule provides record retention requirements for manufacturers who submit either a declaration of compliance or a means of compliance to the FAA. With today's minimal cost of producing electronic documents and mass storage hardware devices, the FAA expects applicants would keep all relevant documents, records, or reports required in an electronic format and properly back up their storage systems. Therefore, this requirement would add minimal to no costs to the applicants because they

[112] *https://www.faa.gov/uas/commercial_operators/part_107_waivers/waivers_issued/.* As of 3/2/2020, 109 waivers have been granted for operations over people. A majority of these waivers were for unmanned aircraft weighing 11.68 pounds or less.

[113] Source: AUVSI Air Platform Database (accessed April 2020).

[114] The Small Business Administration has not defined the number of employees that would indicate that a manufacturer of small UAS is a small entity. The NAICS code for Unmanned Aircraft Manufacturing is 336411, which falls under the broad category of ''Aircraft Manufacturing.'' SBA defines entities with NAICS 336411 as small if it employs 1,500 employees or less. Based on the SBA definition all entities are small ones.

[115] *https://www.auvsi.org/sites/default/files/PDFs/Waiver%20Update%20Mar%202020_v3_PDF%20%281%29.pdf, https://public.tableau.com/shared/RBFRZM9PP?:display_count=y&:origin=viz_share_link&:showVizHome=no#1.* Accessed April 10, 2020. June 2016 marks the date for the publication of the final part 107 rule.

would already have computer systems, with sufficient memory available, to store and produce the documents this rule requires.

For Categories 2 and 3, this rule requires an applicant to label a small unmanned aircraft with each category for which the small UAS is eligible to operate. The applicant must ensure that the label is in English, legible, prominent, and affixed onto the small unmanned aircraft by some permanent means. In addition, remote pilots are required to ensure their small unmanned aircraft are properly labeled before conducting any operations over people. The FAA believes the cost of adding the labeling information for the category for which the small UAS is eligible to operate would be minimal, given that small unmanned aircraft typically come with a label containing information such as the name of the manufacturer, serial number, and model name or number. If the label has worn out due to use or age, the remote pilot could satisfy the rule by using a permanent marker, or etching the category into the body of the small unmanned aircraft.

The rule requires a small UAS applicant to establish and maintain a product support and notification process to notify the public and the FAA of any safety issues that would render the aircraft ineligible for operations over people. The FAA believes manufacturers of small UAS would have such a system already developed and in place to handle their warranties and to inform users of their small UAS about new developments and new products they are bringing to the marketplace. This rule does not require the owner of a small UAS to send in a warranty card or provide the manufacturer any personal contact information. Therefore, the FAA believes the cost of this requirement would be minimal. The FAA notes an applicant could be an individual that modifies a small UAS and then sells it. According to the rule, this individual would also be required to have a notification and support process in place. The FAA envisions this process would be scaled to production, so the individual who sells a single aircraft could establish a much smaller scale process. For example, the applicant could simply email the owner of the small UAS and advise them of any safety issues. The FAA also believes for a small-scale manufacturer or a modifier, the requirement to maintain a product support and notification process would also result in minimal costs.

The rule requires owners or operators of small UAS issued an airworthiness certificate under part 21 operating under part 107 to retain records of all maintenance performed on their aircraft and records documenting the status of life-limited parts, compliance with airworthiness directives, and inspection status of the aircraft. The records must be kept for the time specified in § 107.140 and must be available to the FAA and NTSB on request. This requirement only affects operations conducted under Category 4, and would result in minimal costs.

(6) A description of the steps the Agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the Agency which affect the impact on small entities was rejected.

The FAA considered both more and less costly alternatives as part of its NPRM because the RFA requires the Agency to consider significant regulatory alternatives that meet the Agency's statutory objectives and minimize the costs to small entities. The FAA rejected the costlier alternatives due to policy considerations and the undue burden imposed on small UAS operators. The less costly alternatives and the FAA's reasons for either rejecting those alternatives, or adopting them for the final rule, are discussed below. In addition, the FAA discusses performance-based means of compliance that may provide additional flexibility and minimize costs to small entities.

The FAA considered hands-on remote pilot flight training as part of the requirements for operating a small unmanned aircraft over people. The FAA has determined that it is unnecessary to require additional knowledge testing or training for operations over people beyond the initial testing and initial or recurrent training requirements of part 107. Questions and training specific to operations over people may be added to the testing and training in the existing areas of knowledge in §§ 107.73 and 107.74 without the need for an additional knowledge area. As stated previously, the FAA declines to require practical training for part 107 remote pilots. Additionally, the FAA does not find it necessary to tailor the subject areas to specific small UAS, because existing systems vary widely. Furthermore, the remote pilot is already required to comply with all applicable regulations, including the preflight familiarization and inspection requirements, to ensure that their small UAS is in proper working condition prior to operation.

The FAA considered allowing Category 3 operations on a closed- or restricted-access site without requiring notice that the operation was taking place. The FAA rejected this alternative due to the increased severity of an injury resulting from a small unmanned aircraft impacting a person with up to 25 ft-lbs of kinetic energy.

The FAA considered proposing a Category 4 to include operations in which a small UAS may operate over people, including flights over crowds or dense concentrations of people, if: (1) The manufacturer of the small UAS certifies the aircraft satisfies the same impact energy threshold as small UAS eligible to conduct Category 3 operations; (2) the small UAS complies with industry consensus standards; and (3) the operation is conducted in compliance with a documented risk mitigation plan. The FAA rejected this alternative due to the increased severity of an injury resulting from a small unmanned aircraft impacting a person with up to 25 foot-pounds of kinetic energy. However, comments to the proposed rule stated that demonstrable reliability of the small UAS should be an alternative path for operations over people. The FAA agrees. Therefore, this final rule includes a fourth category to allow small UAS that have been issued an airworthiness certificate under part 21 to operate over people under part 107, so long as the operating limitations of that airworthiness certification do not prohibit operations over people.

The FAA considered incorporating the standards of §§ 23.1401 or 27.1401 (''Anti-collision light system'') for night operations under part 107. Part 107 does not contain aircraft certification rules or standards, and the FAA concludes the reduced risk small UAS operations pose does not warrant application of such standards. In addition, the diverse range of aircraft that may operate under part 107 render prescriptive lighting requirements for all types of operations at night impractical. Prescriptive lighting requirements would be overly burdensome for both the FAA and manufacturers of small UAS, because they would be forced to make tradeoffs that affect both the weight of the aircraft and the aircraft's power source and supply. In response to comments to the proposed rule, the FAA always intended that the anti-collision lights for both civil twilight and night operations

should flash, rather than be static. Costs for anti-collision lights that flash at a sufficient rate to avoid a collision were included in the 2016 final rule.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has considered the ongoing work of international organizations and other countries. No international standards currently exist for the types of operations the FAA finalizes in this rule. In addition, this final rule would not create any obstacle to foreign commerce. The FAA will maintain its awareness of other countries' and international organizations' work in developing potential standards relevant to UAS operations.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $155 million in lieu of $100 million.

This rule does not contain a mandate that would result in expenditure by State, local, or Tribal governments or impose costs on the private sector of more than $155 million annually.[116] As a result, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (as implemented by 5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid Office of Management and Budget (OMB) control number.

This rule adds a new information collection, which includes the estimated burdens for the declaration of compliance, means of compliance, the development of remote pilot operating instructions, and recordkeeping to reflect compliance with applicable maintenance requirements. This rule eliminates information collection requirements from the 2016 final rule as a result of changes to the recurrent knowledge testing requirements. As previously discussed, this rule may also reduce the number of waiver applications that the FAA receives.

A detailed discussion of each of these information-collection requirements is included in this section. As required by the Paperwork Reduction Act of 1995, the FAA has submitted these information collection amendments to OMB for its review.[117]

1. Declaration of Compliance and Means of Compliance

Summary: The information collection addresses the submission of the declaration of compliance and the means of compliance to the FAA for the purpose of demonstrating that the small UAS fulfills the applicable standards for Category 2 and 3 operations. It also addresses applicants' compliance with the record retention requirements associated with submitting justification to establish compliance.

The declaration of compliance must include the following information:

- The applicant's name, physical address, and email address.
- The small UAS make and model name, and series, if applicable and serial number or range of serial numbers.
- Whether the declaration of compliance is an initial declaration or an amended declaration, and if amended, the reason for resubmittal.
- A process for notifying customers of conditions that could render the small UAS ineligible for operations over people.
- A certification that the applicant has demonstrated that the small unmanned aircraft satisfies the applicable requirements through an accepted means of compliance and will permit the Administrator to inspect its facilities, technical data, and any manufactured small UAS.

The means of compliance demonstrates through test, analysis, or inspection that the small UAS is eligible for operations pursuant to Category 2 or 3 or both. The applicant submitting the means of compliance must include the following information:

- The name of the person or entity submitting the means of compliance, the name of the main point of contact for communications with the FAA, the physical address, email address, and other contact information.
- A detailed description of the means of compliance.
- An explanation of how the means of compliance establishes achievement of the requirements identified in either § 107.120(a)(1) and (2) for Category 2 small unmanned aircraft or § 107.130(a)(1) and (2) for Category 3 small unmanned aircraft so that any small unmanned aircraft system designed, produced, or modified in accordance with such means of compliance meets those requirements.
- Any substantiating material the person wishes the FAA to consider as part of the request.
- A means of compliance submitted for acceptance by the FAA must include testing and validation procedures for persons responsible for the production or modification of the Category 2 or Category 3 small unmanned aircraft system to demonstrate how the small unmanned aircraft system meets the requirements of either § 107.120(a)(1) and (2) for Category 2 small unmanned aircraft or § 107.130(a)(1) and (2) for Category 3 small unmanned aircraft.

Use: The FAA will use the declaration of compliance and means of compliance to either accept or not accept that the manufacturer has demonstrated compliance with the requirements applicable to Category 2 or 3 or both operations.

[116] The Unfunded Mandates Reform Act of 1995 defines ''Federal private sector mandate'' as ''any provision in legislation, statute, or regulation that . . . would impose an enforceable duty upon the private sector . . . or would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with such duty.'' Public Law 104–4 section 658 (1995).

[117] The recordkeeping requirements prescribed by § 107.140(c)(2) through (5) will be submitted to OMB for review upon publication of this final rule.

Estimated Annual Burden: The table below shows the annual information collection burden in hours.

TABLE 6—ANNUAL BURDEN ESTIMATE FOR DECLARATION OF COMPLIANCE AND MEANS OF COMPLIANCE

[In hours]

Year	Initial	Pages	Hours per page	Hourly burden
1	32.55	50	1	1,628
2	8.40	50	1	420
3	8.40	50	1	420
Total				2,468

The cost for the information collection on an hourly basis is a fully-burdened wage of $96.92, for an annual cost of $157,737 in year 1 and $40,706 in each of years 2 and 3 for the small UAS manufacturers to submit their declarations. Over the 3-year analysis period, the total cost is approximately $239,150 in 2020 dollars.

2. Remote Pilot Operating Instructions

Summary: The information collection addresses the manufacturer's recordkeeping associated with the development and maintenance of remote pilot operating instructions for small UAS operating over people. The remote pilot operating instructions must address, at a minimum, all of the following:

- A system description that includes the required small UAS components, any system limitations, and the declared category or categories of operation.
- Modifications that will not change the ability of the small UAS to meet the requirements for the category or categories of operation the small UAS is eligible to conduct.
- Instructions for how to verify and change the mode or configuration of the small UAS, if they are variable.

Use: To operate a small unmanned aircraft safely over people, remote pilots would be responsible for knowing what category of operations their small UAS are eligible to conduct, and what technical and operational limitations apply to the operations. Accordingly, this rule requires manufacturers to provide remote pilot operating instructions with product-specific information.

Estimated Annual Burden: The table below shows the annual information collection burden in hours.

TABLE 7—THREE-YEAR BURDEN ESTIMATES FOR REMOTE PILOT OPERATING INSTRUCTIONS

[In hours]

Year	Operating instructions	Pages	Hours per page	Hourly burden
1	31	6	25	4,650
2	8	6	25	1,200
3	8	6	25	1,200
Total				7,050

The cost per hour for the information collection is a wage of $96.92, for an annual cost of $450,678 in year 1 and $116,304 in each of years 2 and 3 for small UAS manufacturers to develop and maintain remote pilot operating instructions. Over the 3-year analysis period, the total cost is approximately $683,286 in 2020 dollars.

3. Labeling of Unmanned Aircraft

Summary: Because a small UAS could be qualified to conduct more than one category of operations over people, this rule requires manufacturers to label small unmanned aircraft with each category of operations the small UAS is eligible to conduct. For example, a small UAS that is eligible to conduct both Category 2 and Category 3 operations would be labeled with both categories, as follows: ''Cat. 2, 3'' or ''Category 2, 3.'' The label could be painted onto, etched into, or affixed to the aircraft by some other permanent means.

Use: There are two purposes for the label. For the remote pilot, the purpose of the label is to list the categories of operations over people the small UAS is eligible to conduct, as indicated on the manufacturer's declaration of compliance. The other purpose of the label is for the FAA and law enforcement agencies to determine whether an operation is consistent with the requirements of the regulation. The labeling requirement will help remote pilots know what category of operations their small unmanned aircraft is eligible to conduct, and what technical and operational limitations apply to the operations. The labeling requirement will also assist the FAA in its oversight role because labeling provides an efficient means for an inspector to evaluate whether an operation is consistent with the category or categories of operation the small unmanned aircraft may conduct. Because Category 3 operations entail unique operating limitations, the label on small unmanned aircraft eligible to conduct Category 3 operations will indicate to remote pilots that they must

[118] The labeling requirement is not the sole means by which a remote pilot in command will be aware of the operating limitations applicable to Category 3 operations. Remote pilots in command must maintain awareness of updated regulations, as required by proposed §§ 107.73(a) and 107.74(a) in this rule. As a result, initial aeronautical knowledge testing and recurrent training implemented after the effective date of this final rule would include operations over people as a subject area on both the test and training.

adhere to the applicable operating limitations.[118]

Estimated Annual Burden: The table below shows the annual information collection burden in hours.

TABLE 8—THREE-YEAR BURDEN ESTIMATES FOR LABELING UNMANNED AIRCRAFT

[In hours]

Year	Number of platforms	Hours per redesign	Hourly burden
1	31	2	62
2	8	2	16
3	8	2	16
Total			94

The FAA assumes that manufacturers will redesign labels already affixed to the unmanned aircraft, and that the label redesign and redesign approval will take a maximum of two hours at an hourly wage of $96.92, for an annual cost of $6,009 in year 1 and $1,551 in each of years 2 and 3. Over the 3-year analysis period, the total cost is approximately $9,110 in 2020 dollars.

4. Maintenance Records

Summary: Owners of small UAS issued an airworthiness certificate under part 21 must retain records of all maintenance performed on their aircraft and records documenting the status of life-limited parts, compliance with airworthiness directives, and inspection status of the aircraft. The records must be kept for the time specified in § 107.140, and they must be available to the FAA and law enforcement personnel upon request.

Use: These records will be used to validate that the aircraft has been maintained in a manner that assures that it remains in a condition eligible to be operated over people in accordance with Category 4.

Estimated Annual Burden: The table below shows the annual information collection burden in hours.

TABLE 9—THREE-YEAR BURDEN ESTIMATES FOR RECORDKEEPING ASSOCIATED WITH MAINTENANCE

Year	Number of respondents	Affected small UAS	Hourly burden (0.5 per small UAS)
1	1	100	50
2	2	200	100
3	3	300	150
Total			300

Rows and Columns may not sum to total due to rounding.

The FAA expects remote pilots will engage in maintenance record upkeep and documentation. The fully-burdened hourly wage for a remote pilot is estimated to be $47.66.[119] Multiplying the total combined hourly burden of 300 hours by the fully burdened hourly wage of $47.66 yields a total cost of approximately $14,298 in 2020 dollars for the three year period.

The FAA will publish separate notice in the **Federal Register** seeking comment regarding this new information collection.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA determined that the categorical exclusion in FAA Order 1050.1F, paragraph 5–6.6.f. applies to this action. The FAA conducted analysis as part of its evaluation of this action to support the application of the categorical exclusion. The FAA has determined that none of the extraordinary circumstances in FAA Order 1050.1F, paragraph 5–2 exist.

The FAA has placed a copy of supporting documentation in the docket for this rule.

XVI. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism.[120] The Agency has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

[118] The labeling requirement is not the sole means by which a remote pilot in command will be aware of the operating limitations applicable to Category 3 operations. Remote pilots in command must maintain awareness of updated regulations, as required by proposed §§ 107.73(a) and 107.74(a) in this rule. As a result, initial aeronautical knowledge testing and recurrent training implemented after the effective date of this final rule would include operations over people as a subject area on both the test and training.

[119] SeAverage is based on information found at *https://www.thedroneu.com/blog/part-107-faq-drone-license/*. Accessed 6/17/2020.

[120] 64 FR 43255 (Aug. 4, 1999).

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use.[121] The Agency has determined that it will not be a ''significant energy action'' under the executive order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements.[122] The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action will have no effect on international regulatory cooperation. The European Union Aviation Safety Agency commented that it is available for discussion and alignment of regulations, concerned that the proposed regulations could ''set Europe and the US on different regulatory courses.'' One commenter expressed concern that Canada's current limitations on small UAS operations near people, buildings, or animals must not be adopted by the FAA. One commenter wrote that ''we need a training standard that is applicable across the globe,'' in order to ensure harmonization of the certification requirements.

The FAA participates in international discussions and regulatory meetings, but does not assume that all international regulations should be identical. Each State has its own individual and unique characteristics that shape its regulatory framework. The U.S. is working closely with its international partners to harmonize International Civil Aviation Organization (ICAO) policy. The FAA has determined that the safety requirements of this rule are not overly restrictive and allow operations over people with reasonable limits on those operations to mitigate risk and provide a level of safety for operations of small UAS within the airspace of the United States.

[121] 66 FR 28355 (May 18, 2001).

[122] 77 FR 26413 (May 4, 2012).

D. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,[123] and FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures,[124] the FAA ensures that Federally Recognized Tribes (Tribes) are given the opportunity to provide meaningful and timely input regarding proposed Federal actions that have the potential to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes; or to affect uniquely or significantly their respective Tribes. At this point, the FAA has not identified any substantial direct effects or any unique or significant effects on tribes resulting from this rule. As the FAA contemplated in the 2016 final rule, the FAA has conducted outreach to tribes and responded to those tribes seeking information about small UAS operations conducted within their territory.

The FAA continues to develop its involvement with tribes within the broader UAS integration effort.[125] In particular, the FAA has partnered with the Choctaw Nation in a pilot program under which State, local, and tribal governments test and evaluate the integration of civil and public UAS operations into the low-altitude NAS to promote the safe operation of UAS and enable the development of UAS technologies and their use in agriculture, commerce, emergency management, human transportation, and other sectors.[126]

The FAA has also conducted outreach to tribes to ensure they are familiar with the provisions of part 107 and that they are aware of FAA's plans for additional rulemakings to integrate UAS into the NAS. As part of that outreach, the FAA has:

- Provided material on the 2016 final small UAS rule to participants at the mid-year conference of the National Congress of American Indians (Spokane, Washington, June 27–30, 2016);
- Presented at a workshop at the National Tribal Transportation Conference (Anaheim, California October 4, 2016);
- Responded to inquiries from the Shoshone-Bannock Tribes and Muscogee (Creek) Nation regarding use of UAS (September and October 2016);
- Presented information on UAS at a meeting of the Tribal Transportation Self-Governance Program Negotiated Rulemaking Meeting (Shawnee, Oklahoma, October 18, 2016); and
- Presented information on UAS for public safety at the Osage Nation 2019 Public Safety Drone Conference (Tulsa, Oklahoma, November 5, 2019).

The FAA will continue to respond to tribes that express interest in or concerns about UAS operations, and will engage in government-to-government consultation with tribes as appropriate, in accordance with Executive Orders and FAA guidance.

[123] 65 FR 67249 (Nov. 6, 2000).

[124] FAA Order No. 1210.20 (Jan. 28, 2004), available at *http://www.faa.gov/documentLibrary/media/1210.pdf.*

[125] 81 FR 42064, 42189.

[126] Federal Aviation Administration, UAS Integration Pilot Program (May 7, 2018), available at *https://www.faa.gov/uas/programs_partnerships/uas_integration_pilot_program/.*

E. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This rule is an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this rule can be found in the rule's economic analysis.

XVII. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the internet by—

- Searching the Federal eRulemaking Portal at *https://www.regulations.gov;*
- Visiting the FAA's Regulations and Policies web page at *https://www.faa.gov/regulations_policies* or
- Accessing the Government Publishing Office's web page at *https://www.fdsys.gov.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the internet through the Federal eRulemaking Portal referenced earlier.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires FAA to comply with small entity requests for information or advice about compliance with statutes

and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects

14 CFR Part 11

Administrative practice and procedure, Reporting and recordkeeping requirements.

14 CFR Part 21

Aircraft, Aviation safety, Exports, Imports, Reporting and recordkeeping requirements.

14 CFR Part 43

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

14 CFR Part 107

Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements, Security measures, Signs and symbols.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 11—GENERAL RULEMAKING PROCEDURES

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

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40109, 40113, 44110, 44502, 44701–44702, 44711, 46102, and 51 U.S.C. 50901–50923.

■ 2. Amend § 11.201(b) by revising the entry ''Part 107'' to read as follows:

§ 11.201 Office of Management and Budget (OMB) control numbers assigned under the Paperwork Reduction Act.

* * * * *

(b) * * *

14 CFR part or section identified and described	Current OMB control No.
* * * * *	
Part 107	2120–0005, 2120–0021, 2120–0027, 2120–0767, 2120–0768, 2120–0775.
* * * * *	

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND ARTICLES

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

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(f), 106(g), 40105, 40113, 44701–44702, 44704, 44707, 44709, 44711, 44713, 44715, 45303.

■ 4. Amend § 21.1 by revising paragraph (a) introductory text to read as follows:

§ 21.1 Applicability and definitions.

(a) This part prescribes—

* * * * *

PART 43—MAINTENANCE, PREVENTATIVE MAINTENANCE, REBUILDING, AND ALTERATION

■ 5. The authority citation for part 43 continues to read as follows:

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(f), 106(g), 40105, 40113, 44701–44702, 44704, 44707, 44709, 44711, 44713, 44715, 45303.

■ 6. Amend § 43.1 by revising paragraph (b)(3) to read as follows:

§ 43.1 Applicability.

* * * * *

(b) * * *

(3) Any aircraft that is operated under part 107 of this chapter, except as described in § 107.140(d).

* * * * *

PART 107—SMALL UNMANNED AIRCRAFT SYSTEMS

■ 7. The authority citation for part 107 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 40101 note, 40103(b), 44701(a)(5), 46105(c), 46110, 44807.

■ 8. Revise § 107.1 to read as follows:

§ 107.1 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to the registration, airman certification, and operation of civil small unmanned aircraft systems within the United States. This part also applies to the eligibility of civil small unmanned aircraft systems to operate over human beings in the United States.

(b) This part does not apply to the following:

(1) Air carrier operations;

(2) Any aircraft subject to the provisions of 49 U.S.C. 44809;

(3) Any operation that the holder of an exemption under section 333 of Public Law 112–95 or 49 U.S.C. 44807 elects to conduct pursuant to the exemption, unless otherwise specified in the exemption; or

(4) Any operation that a person elects to conduct under part 91 of this chapter with a small unmanned aircraft system that has been issued an airworthiness certificate.

■ 9. Add § 107.2 to read as follows:

§ 107.2 Applicability of certification procedures for products and articles.

The provisions of part 21 of this chapter do not apply to small unmanned aircraft systems operated under this part unless the small unmanned aircraft system will operate over human beings in accordance with § 107.140.

■ 10. Amend § 107.3 by adding the definition of ''Declaration of compliance'' in alphabetical order to read as follows:

§ 107.3 Definitions.

* * * * *

Declaration of compliance means a record submitted to the FAA that certifies the small unmanned aircraft conforms to the Category 2 or Category 3 requirements under subpart D of this part.

* * * * *

■ 11. Amend § 107.5 by revising the section heading and paragraph (b) to read as follows:

§ 107.5 Falsification, reproduction, or alteration.

* * * * *

(b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for any of the following:

(1) Denial of an application for a remote pilot certificate or a certificate of waiver;

(2) Denial of a declaration of compliance;

(3) Suspension or revocation of any certificate, waiver, or declaration of compliance issued or accepted by the Administrator under this part and held by that person; or

(4) A civil penalty.

■ 12. Revise § 107.7 to read as follows:

§ 107.7 Inspection, testing, and demonstration of compliance.

(a) A remote pilot in command, owner, or person manipulating the flight controls of a small unmanned aircraft system must—

(1) Have in that person's physical possession and readily accessible the remote pilot certificate with a small UAS rating and identification when exercising the privileges of that remote pilot certificate.

(2) Present his or her remote pilot certificate with a small UAS rating and identification that contains the

information listed at § 107.67(b)(1) through (3) for inspection upon a request from—

(i) The Administrator;

(ii) An authorized representative of the National Transportation Safety Board;

(iii) Any Federal, State, or local law enforcement officer; or

(iv) An authorized representative of the Transportation Security Administration.

(3) Make available, upon request, to the Administrator any document, record, or report required to be kept under the regulations of this chapter.

(b) The remote pilot in command, visual observer, owner, operator, or person manipulating the flight controls of a small unmanned aircraft system must, upon request, allow the Administrator to make any test or inspection of the small unmanned aircraft system, the remote pilot in command, the person manipulating the flight controls of a small unmanned aircraft system, and, if applicable, the visual observer to determine compliance with this part.

(c) Any person holding an FAA-accepted declaration of compliance under subpart D of this part must, upon request, make available to the Administrator:

(1) The declaration of compliance required under subpart D of this part; and

(2) Any other document, record, or report required to be kept under the regulations of this chapter.

(d) Any person holding an FAA-accepted declaration of compliance under subpart D of this part must, upon request, allow the Administrator to inspect its facilities, technical data, and any manufactured small UAS and witness any tests necessary to determine compliance with that subpart.

■ 13. Amend § 107.19 by revising paragraph (c) to read as follows:

§ 107.19 Remote pilot in command.

* * * * *

(c) The remote pilot in command must ensure that the small unmanned aircraft will pose no undue hazard to other people, other aircraft, or other property in the event of a loss of control of the small unmanned aircraft for any reason.

* * * * *

■ 14. Amend § 107.29 by revising the section heading and paragraphs (a) and (b) and adding paragraph (d) to read as follows:

§ 107.29 Operation at night.

(a) Except as provided in paragraph (d) of this section, no person may operate a small unmanned aircraft system at night unless—

(1) The remote pilot in command of the small unmanned aircraft has completed an initial knowledge test or training, as applicable, under § 107.65 after March 1, 2021; and

(2) The small unmanned aircraft has lighted anti-collision lighting visible for at least 3 statute miles that has a flash rate sufficient to avoid a collision. The remote pilot in command may reduce the intensity of, but may not extinguish, the anti-collision lighting if he or she determines that, because of operating conditions, it would be in the interest of safety to do so.

(b) No person may operate a small unmanned aircraft system during periods of civil twilight unless the small unmanned aircraft has lighted anti-collision lighting visible for at least 3 statute miles that has a flash rate sufficient to avoid a collision. The remote pilot in command may reduce the intensity of, but may not extinguish, the anti-collision lighting if he or she determines that, because of operating conditions, it would be in the interest of safety to do so.

* * * * *

(d) After May 17, 2021, no person may operate a small unmanned aircraft system at night in accordance with a certificate of waiver issued prior to March 16, 2021 under § 107.200. The certificates of waiver issued prior to March 16, 2021 under § 107.200 that authorize deviation from § 107.29 terminate on May 17, 2021.

■ 15. Revise § 107.35 to read as follows:

§ 107.35 Operation of multiple small unmanned aircraft.

A person may not manipulate flight controls or act as a remote pilot in command or visual observer in the operation of more than one unmanned aircraft at the same time.

■ 16. Revise § 107.39 to read as follows:

§ 107.39 Operation over human beings.

No person may operate a small unmanned aircraft over a human being unless—

(a) That human being is directly participating in the operation of the small unmanned aircraft;

(b) That human being is located under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling small unmanned aircraft; or

(c) The operation meets the requirements of at least one of the operational categories specified in subpart D of this part.

■ 17. Amend § 107.49 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 107.49 Preflight familiarization, inspection, and actions for aircraft operation.

* * * * *

(d) If the small unmanned aircraft is powered, ensure that there is enough available power for the small unmanned aircraft system to operate for the intended operational time;

(e) Ensure that any object attached or carried by the small unmanned aircraft is secure and does not adversely affect the flight characteristics or controllability of the aircraft; and

(f) If the operation will be conducted over human beings under subpart D of this part, ensure that the aircraft meets the requirements of § 107.110, § 107.120(a), § 107.130(a), or § 107.140, as applicable.

■ 18. Effective March 1, 2021, amend § 107.61 by revising paragraph (d) to read as follows:

§ 107.61 Eligibility.

* * * * *

(d) Demonstrate aeronautical knowledge by satisfying one of the following conditions, in a manner acceptable to the Administrator:

(1) Pass an initial aeronautical knowledge test covering the areas of knowledge specified in § 107.73; or

(2) If a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meets the flight review requirements specified in § 61.56, complete training covering the areas of knowledge specified in § 107.74.

■ 19. Effective March 1, 2021, amend § 107.63 by revising paragraph (a)(2) to read as follows:

§ 107.63 Issuance of a remote pilot certificate with a small UAS rating.

* * * * *

(a) * * *

(2) If a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meets the flight review requirements specified in § 61.56, a certificate of completion of an initial training course under this part that covers the areas of knowledge specified in § 107.74.

* * * * *

■ 20. Effective March 1, 2021, revise § 107.65 to read as follows:

§ 107.65 Aeronautical knowledge recency.

A person may not exercise the privileges of a remote pilot in command with small UAS rating unless that person has accomplished one of the

following in a manner acceptable to the Administrator within the previous 24 calendar months:

(a) Passed an initial aeronautical knowledge test covering the areas of knowledge specified in § 107.73;

(b) Completed recurrent training covering the areas of knowledge specified in § 107.73; or

(c) If a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meets the flight review requirements specified in § 61.56, completed training covering the areas of knowledge specified in § 107.74.

(d) A person who has passed a recurrent aeronautical knowledge test in a manner acceptable to the Administrator or who has satisfied the training requirement of paragraph (c) of this section prior to March 1, 2021 within the previous 24 calendar months is considered to be in compliance with the requirement of paragraph (b) or (c) of this section, as applicable.

■ 21. Effective March 1, 2021, revise § 107.73 to read as follows:

§ 107.73 Knowledge and training.

An initial aeronautical knowledge test and recurrent training covers the following areas of knowledge:

(a) Applicable regulations relating to small unmanned aircraft system rating privileges, limitations, and flight operation;

(b) Airspace classification, operating requirements, and flight restrictions affecting small unmanned aircraft operation;

(c) Aviation weather sources and effects of weather on small unmanned aircraft performance;

(d) Small unmanned aircraft loading;

(e) Emergency procedures;

(f) Crew resource management;

(g) Radio communication procedures;

(h) Determining the performance of the small unmanned aircraft;

(i) Physiological effects of drugs and alcohol;

(j) Aeronautical decision-making and judgment;

(k) Airport operations;

(l) Maintenance and preflight inspection procedures; and

(m) Operation at night.

■ 22. Effective March 1, 2021, revise § 107.74 to read as follows:

§ 107.74 Small unmanned aircraft system training.

Training for pilots who hold a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meet the flight review requirements specified in § 61.56 covers the following areas of knowledge:

(a) Applicable regulations relating to small unmanned aircraft system rating privileges, limitations, and flight operation;

(b) Effects of weather on small unmanned aircraft performance;

(c) Small unmanned aircraft loading;

(d) Emergency procedures;

(e) Crew resource management;

(f) Determining the performance of the small unmanned aircraft;

(g) Maintenance and preflight inspection procedures; and

(h) Operation at night.

Subpart D—[Redesignated as Subpart E]

■ 23. Redesignate subpart D as subpart E.

■ 24. Add new subpart D to read as follows:

Subpart D—Operations Over Human Beings

Sec.

107.100 Applicability.
107.105 Limitations on operations over human beings.
107.110 Category 1 operations.
107.115 Category 2 operations: Operating requirements.
107.120 Category 2 operations: Eligibility of small unmanned aircraft and other applicant requirements.
107.125 Category 3 operations: Operating requirements.
107.130 Category 3 operations: Eligibility of small unmanned aircraft and other applicant requirements.
107.135 Labeling by remote pilot in command for Category 2 and 3 operations.
107.140 Category 4 operations.
107.145 Operations over moving vehicles.
107.150 Variable mode and variable configuration of small unmanned aircraft.
107.155 Means of compliance.
107.160 Declaration of compliance.
107.165 Record retention.

§ 107.100 Applicability.

This subpart prescribes the eligibility and operating requirements for civil small unmanned aircraft to operate over human beings or over moving vehicles in the United States, in addition to those operations permitted by § 107.39(a) and (b).

§ 107.105 Limitations on operations over human beings.

Except as provided in §§ 107.39(a) and (b) and 107.145, a remote pilot in command may conduct operations over human beings only in accordance with the following, as applicable: § 107.110 for Category 1 operations; §§ 107.115 and 107.120 for Category 2 operations; §§ 107.125 and 107.130 for Category 3 operations; or § 107.140 for Category 4 operations.

§ 107.110 Category 1 operations.

To conduct Category 1 operations—

(a) A remote pilot in command must use a small unmanned aircraft that—

(1) Weighs 0.55 pounds or less on takeoff and throughout the duration of each operation under Category 1, including everything that is on board or otherwise attached to the aircraft; and

(b) Does not contain any exposed rotating parts that would lacerate human skin upon impact with a human being.

(c) No remote pilot in command may operate a small unmanned aircraft in sustained flight over open-air assemblies of human beings unless the operation meets the requirements of either § 89.110 or § 89.115(a) of this chapter.

§ 107.115 Category 2 operations: Operating requirements.

To conduct Category 2 operations—

(a) A remote pilot in command must use a small unmanned aircraft that—

(1) Is eligible for Category 2 operations pursuant to § 107.120(a);

(2) Is listed on an FAA-accepted declaration of compliance as eligible for Category 2 operations in accordance with § 107.160; and

(3) Is labeled as eligible to conduct Category 2 operations in accordance with § 107.120(b)(1).

(b) No remote pilot in command may operate a small unmanned aircraft in sustained flight over open-air assemblies of human beings unless the operation meets the requirements of either § 89.110 or § 89.115(a) of this chapter.

§ 107.120 Category 2 operations: Eligibility of small unmanned aircraft and other applicant requirements.

(a) To be eligible for use in Category 2 operations, the small unmanned aircraft must be designed, produced, or modified such that it—

(1) Will not cause injury to a human being that is equivalent to or greater than the severity of injury caused by a transfer of 11 foot-pounds of kinetic energy upon impact from a rigid object;

(2) Does not contain any exposed rotating parts that would lacerate human skin upon impact with a human being; and

(3) Does not contain any safety defects.

(b) The applicant for a declaration of compliance for a small unmanned aircraft that is eligible for use in Category 2 operations in accordance with paragraph (a) of this section, must meet all of the following requirements

for the applicant's unmanned aircraft to be used in Category 2 operations:

(1) Display a label on the small unmanned aircraft indicating eligibility to conduct Category 2 operations. The label must be in English and be legible, prominent, and permanently affixed to the small unmanned aircraft.

(2) Have remote pilot operating instructions that apply to the operation of the small unmanned aircraft system. The applicant for a declaration of compliance must make available these instructions upon sale or transfer of the aircraft or use of the aircraft by someone other than the applicant who submitted a declaration of compliance pursuant to § 107.160. Such instructions must address, at a minimum—

(i) A system description that includes the required small unmanned aircraft system components, any system limitations, and the declared category or categories of operation;

(ii) Modifications that will not change the ability of the small unmanned aircraft system to meet the requirements for the category or categories of operation the small unmanned aircraft system is eligible to conduct; and

(iii) Instructions for how to verify and change the mode or configuration of the small unmanned aircraft system, if they are variable.

(3) Maintain a product support and notification process. The applicant for a declaration of compliance must maintain product support and notification procedures to notify the public and the FAA of—

(i) Any defect or condition that causes the small unmanned aircraft to no longer meet the requirements of this subpart; and

(ii) Any identified safety defect that causes the small unmanned aircraft to exceed a low probability of casualty.

§ 107.125 Category 3 operations: Operating requirements.

To conduct Category 3 operations, a remote pilot in command—

(a) Must use a small unmanned aircraft that—

(1) Is eligible for Category 3 operations pursuant to § 107.130(a);

(2) Is listed on a current declaration of compliance as eligible for Category 3 operations in accordance with § 107.160; and

(3) Is labeled as eligible for Category 3 operations in accordance with § 107.130(b)(1);

(b) Must not operate the small unmanned aircraft over open-air assemblies of human beings; and

(c) May only operate the small unmanned aircraft above any human being if operation meets one of the following conditions:

(1) The operation is within or over a closed- or restricted-access site and all human beings located within the closed- or restricted-access site must be on notice that a small unmanned aircraft may fly over them; or

(2) The small unmanned aircraft does not maintain sustained flight over any human being unless that human being is—

(i) Directly participating in the operation of the small unmanned aircraft; or

(ii) Located under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling small unmanned aircraft.

§ 107.130 Category 3 operations: Eligibility of small unmanned aircraft and other applicant requirements.

(a) To be eligible for use in Category 3 operations, the small unmanned aircraft must be designed, produced, or modified such that it—

(1) Will not cause injury to a human being that is equivalent to or greater than the severity of the injury caused by a transfer of 25 foot-pounds of kinetic energy upon impact from a rigid object;

(2) Does not contain any exposed rotating parts that would lacerate human skin upon impact with a human being; and

(3) Does not contain any safety defects.

(b) The applicant for a declaration of compliance for a small unmanned aircraft that is eligible for use in Category 3 operations in accordance with paragraph (a) of this section, must meet all of the following requirements for the applicant's small unmanned aircraft to be used in Category 3 operations:

(1) Display a label on the small unmanned aircraft indicating eligibility to conduct Category 3 operations. The label must be in English and be legible, prominent, and permanently affixed to the small unmanned aircraft.

(2) Have remote pilot operating instructions that apply to the operation of the small unmanned aircraft system. The applicant for a declaration of compliance must make available these instructions upon sale or transfer of the aircraft or use of the aircraft by someone other than the applicant who submitted a declaration of compliance pursuant to § 107.160. Such instructions must address, at a minimum—

(i) A system description that includes the required small unmanned aircraft system components, any system limitations, and the declared category or categories of operation;

(ii) Modifications that will not change the ability of the small unmanned aircraft system to meet the requirements for the category or categories of operation the small unmanned aircraft system is eligible to conduct; and

(iii) Instructions for how to verify and change the mode or configuration of the small unmanned aircraft system, if they are variable.

(3) Maintain a product support and notification process. The applicant for a declaration of compliance must maintain product support and notification procedures to notify the public and the FAA of—

(i) Any defect or condition that causes the small unmanned aircraft to no longer meet the requirements of this subpart; and

(ii) Any identified safety defect that causes the small unmanned aircraft to exceed a low probability of fatality.

§ 107.135 Labeling by remote pilot in command for Category 2 and 3 operations.

If a Category 2 or Category 3 label affixed to a small unmanned aircraft is damaged, destroyed, or missing, a remote pilot in command must label the aircraft in English such that the label is legible, prominent, and will remain on the small unmanned aircraft for the duration of the operation before conducting operations over human beings. The label must correctly identify the category or categories of operation over human beings that the small unmanned aircraft is qualified to conduct in accordance with this subpart.

§ 107.140 Category 4 operations.

(a) *Remote pilot in command requirements.* To conduct Category 4 operations—

(1) A remote pilot in command—

(i) Must use a small unmanned aircraft that is eligible for Category 4 operations pursuant to paragraph (b) of this section; and

(ii) Must operate the small unmanned aircraft in accordance with all operating limitations that apply to the small unmanned aircraft, as specified by the Administrator.

(2) No remote pilot in command may operate a small unmanned aircraft in sustained flight over open-air assemblies of human beings unless the operation meets the requirements of either § 89.110 or § 89.115(a) of this chapter.

(b) *Small unmanned aircraft requirements for Category 4.* To be eligible to operate over human beings under this section, the small unmanned aircraft must—

(1) Have an airworthiness certificate issued under part 21 of this chapter.

(2) Be operated in accordance with the operating limitations specified in

the approved Flight Manual or as otherwise specified by the Administrator. The operating limitations must not prohibit operations over human beings.

(3) Have maintenance, preventive maintenance, alterations, or inspections performed in accordance with paragraph (c)(1) of this section.

(c) *Maintenance requirements for Category 4.* The owner must (unless the owner enters into an agreement with an operator to meet the requirements of this paragraph (c), then the operator must) meet the requirements of this paragraph (c):

(1) Ensure the person performing any maintenance, preventive maintenance, alterations, or inspections:

(i) Uses the methods, techniques, and practices prescribed in the manufacturer's current maintenance manual or Instructions for Continued Airworthiness that are acceptable to the Administrator, or other methods, techniques, and practices acceptable to the Administrator;

(ii) Has the knowledge, skill, and appropriate equipment to perform the work;

(iii) Performs the maintenance, preventive maintenance, or alterations on the small unmanned aircraft in a manner using the methods, techniques, and practices prescribed in the manufacturer's current maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator;

(iv) Inspects the small unmanned aircraft in accordance with the manufacturer's instructions or other instructions acceptable to the Administrator; and

(v) Performs the maintenance, preventive maintenance, or alterations using parts of such a quality that the condition of the aircraft will be at least equal to its original or properly altered condition.

(2) Maintain all records of maintenance, preventive maintenance, and alterations performed on the aircraft and ensure the records are documented in a manner acceptable to the Administrator. The records must contain the description of the work performed, the date the work was completed, and the name of the person who performed the work.

(3) Maintain all records containing—

(i) The status of life-limited parts that are installed on, or part of, the small unmanned aircraft;

(ii) The inspection status of the aircraft; and

(iii) The status of applicable airworthiness directives including the method of compliance, the airworthiness directive number, and revision date. If the airworthiness directive involves recurring action, the record must contain the time and date of the next required action.

(4) Retain the records required under paragraphs (c)(2) and (3) of this section, as follows:

(i) The records documenting maintenance, preventive maintenance, or alterations performed must be retained for 1 year from when the work is completed or until the maintenance is repeated or superseded by other work.

(ii) The records documenting the status of life-limited parts, compliance with airworthiness directives, and inspection status of the small unmanned aircraft must be retained and transferred with the aircraft upon change in ownership.

(5) Ensure all records under paragraphs (c)(2) and (3) of this section are available for inspection upon request from the Administrator or any authorized representative of the National Transportation Safety Board (NTSB).

(d) *Compliance with parts 43 and 91 of this chapter.* Compliance with part 43 and part 91, subpart E, of this chapter fulfills the requirements in paragraphs (b)(4) and (c) of this section.

§ 107.145 Operations over moving vehicles.

No person may operate a small unmanned aircraft over a human being located inside a moving vehicle unless the following conditions are met:

(a) The operation occurs in accordance with § 107.110 for Category 1 operations; § 107.115 for Category 2 operations; § 107.125 for Category 3 operations; or § 107.140 for Category 4 operations.

(b) For an operation under Category 1, Category 2, or Category 3, the small unmanned aircraft, throughout the operation—

(1) Must remain within or over a closed- or restricted-access site, and all human beings located inside a moving vehicle within the closed- or restricted-access site must be on notice that a small unmanned aircraft may fly over them; or

(2) Must not maintain sustained flight over moving vehicles.

(c) For a Category 4 operation, the small unmanned aircraft must—

(1) Have an airworthiness certificate issued under part 21 of this chapter.

(2) Be operated in accordance with the operating limitations specified in the approved Flight Manual or as otherwise specified by the Administrator. The operating limitations must not prohibit operations over human beings located inside moving vehicles.

§ 107.150 Variable mode and variable configuration of small unmanned aircraft systems.

A small unmanned aircraft system may be eligible for one or more categories of operation over human beings under this subpart, as long as a remote pilot in command cannot inadvertently switch between modes or configurations.

§ 107.155 Means of compliance.

(a) *Establishment of compliance.* To meet the requirements of § 107.120(a) for operations in Category 2, or the requirements of § 107.130(a) for operations in Category 3, the means of compliance must consist of test, analysis, or inspection.

(b) *Required information.* An applicant requesting FAA acceptance of a means of compliance must submit the following information to the FAA in a manner specified by the Administrator:

(1) *Procedures.* Detailed description of the means of compliance, including applicable test, analysis, or inspection procedures to demonstrate how the small unmanned aircraft meets the requirements of § 107.120(a) for operations in Category 2 or the requirements of § 107.130(a) for operations in Category 3. The description should include conditions, environments, and methods, as applicable.

(2) *Compliance explanation.* Explanation of how application of the means of compliance fulfills the requirements of § 107.120(a) for operations in Category 2 or the requirements of § 107.130(a) for operations in Category 3.

(c) *FAA acceptance.* If the FAA determines the applicant has demonstrated compliance with paragraphs (a) and (b) of this section, it will notify the applicant that it has accepted the means of compliance.

(d) *Rescission.* (1) A means of compliance is subject to ongoing review by the Administrator. The Administrator may rescind its acceptance of a means of compliance if the Administrator determines that a means of compliance does not meet any or all of the requirements of this subpart.

(2) The Administrator will publish a notice of rescission in the **Federal Register**.

(e) *Inapplicability of part 13, subpart D, of this chapter.* Part 13, subpart D, of

this chapter does not apply to the procedures of paragraph (a) of this section.

§ 107.160 Declaration of compliance.

(a) *Required information.* In order for an applicant to declare a small unmanned aircraft is compliant with the requirements of this subpart for Category 2 or Category 3 operations, an applicant must submit a declaration of compliance for acceptance by the FAA, in a manner specified by the Administrator, that includes the following information:

(1) Applicant's name;

(2) Applicant's physical address;

(3) Applicant's email address;

(4) The small unmanned aircraft make and model name, and series, if applicable;

(5) The small unmanned aircraft serial number or range of serial numbers that are the subject of the declaration of compliance;

(6) Whether the declaration of compliance is an initial declaration or an amended declaration;

(7) If the declaration of compliance is an amended declaration, the reason for the re-submittal;

(8) The accepted means of compliance the applicant used to fulfill requirements of § 107.120(a) or § 107.130(a) or both;

(9) A declaration that the applicant—

(i) Has demonstrated that the small unmanned aircraft, or specific configurations of that aircraft, satisfies § 107.120(a) or § 107.130(a) or both, through the accepted means of compliance identified in paragraph (a)(8) of this section;

(ii) Has verified that the unmanned aircraft does not contain any safety defects;

(iii) Has satisfied § 107.120(b)(3) or § 107.130(b)(3), or both; and

(iv) Will, upon request, allow the Administrator to inspect its facilities, technical data, and any manufactured small unmanned aircraft and witness any tests necessary to determine compliance with this subpart; and

(10) Other information as required by the Administrator.

(b) *FAA acceptance.* If the FAA determines the applicant has demonstrated compliance with the requirements of this subpart, it will notify the applicant that it has accepted the declaration of compliance.

(c) *Notification of a safety issue.* Prior to initiating rescission proceedings pursuant to paragraphs (d)(1) through (3) of this section, the FAA will notify the applicant if a safety issue has been identified for the declaration of compliance.

(d) *Rescission.* (1) No person may operate a small unmanned aircraft identified on a declaration of compliance that the FAA has rescinded pursuant to this subpart while that declaration of compliance is rescinded.

(2) The FAA may rescind a declaration of compliance if any of the following conditions occur:

(i) A small unmanned aircraft for which a declaration of compliance was accepted no longer complies with § 107.120(a) or § 107.130(a);

(ii) The FAA finds a declaration of compliance is in violation of § 107.5(a); or

(iii) The Administrator determines an emergency exists related to safety in accordance with the authority in 49 U.S.C. 46105.

(3) If a safety issue identified under paragraph (c) of this section has not been resolved, the FAA may rescind the declaration of compliance as follows:

(i) The FAA will issue a notice proposing to rescind the declaration of compliance. The notice will set forth the Agency's basis for the proposed rescission and provide the holder of the declaration of compliance with 30 calendar days from the date of issuance of the proposed notice to submit evidentiary information to refute the proposed notice.

(ii) The holder of the declaration of compliance must submit information demonstrating how the small unmanned aircraft meets the requirements of this subpart within 30 calendar days from the date of issuance of the proposed notice.

(iii) If the FAA does not receive the information required by paragraph (d)(3)(ii) of this section within 30 calendar days from the date of the issuance of the proposed notice, the FAA will issue a notice rescinding the declaration of compliance.

(4) If the Administrator determines that an emergency exists in accordance with paragraph (d)(2)(iii) of this section, the FAA will exercise its authority under 49 U.S.C. 46105(c) to issue an order rescinding a declaration of compliance without initiating the process in paragraph (d)(3) of this section.

(e) *Petition to reconsider the rescission of a declaration of compliance.* A person subject to an order of rescission under paragraph (d)(3) of this section may petition the FAA to reconsider the rescission of a declaration of compliance by submitting a request to the FAA in a manner specified by the Administrator within 60 days of the date of issuance of the rescission.

(1) A petition to reconsider the rescission of a declaration of compliance must demonstrate at least one of the following:

(i) A material fact that was not present in the original response to the notification of the safety issue and an explanation for why it was not present in the original response;

(ii) The FAA made a material factual error in the decision to rescind the declaration of compliance; or

(iii) The FAA did not correctly interpret a law, regulation, or precedent.

(2) Upon consideration of the information submitted under paragraph (e)(1) of this section, the FAA will issue a notice either affirming the rescission or withdrawing the rescission.

(f) *Inapplicability of part 13, subpart D, of this chapter.* Part 13, subpart D, of this chapter does not apply to the procedures of paragraphs (d) and (e) of this section.

§ 107.165 Record retention.

(a) A person who submits a declaration of compliance under this subpart must retain and make available to the Administrator, upon request, the information described in paragraph (a)(1) of this section for the period of time described in paragraph (a)(2) of this section.

(1) All supporting information used to demonstrate the small unmanned aircraft meets the requirements of §§ 107.120(a), for operations in Category 2, and 107.130(a), for operations in Category 3.

(2) The following time periods apply:

(i) If the person who submits a declaration of compliance produces a small unmanned aircraft, that person must retain the information described in paragraph (a)(1) of this section for two years after the cessation of production of the small unmanned aircraft system for which the person declared compliance.

(ii) If the person who submits a declaration of compliance designs or modifies a small unmanned aircraft, that person must retain the information described in paragraph (a)(1) of this section for two years after the person submitted the declaration of compliance.

(b) A person who submits a means of compliance under this subpart must retain and make available to the Administrator, upon request, and for as long as the means of compliance remains accepted, the detailed description of the means of compliance and justification showing how the means of compliance meets the requirements of §§ 107.120(a), for operations in Category 2, and 107.130(a), for operations in Category 3.

■ 25. Amend § 107.205 by revising paragraph (b) and adding paragraph (j) to read as follows:

§ 107.205 List of regulations subject to waiver.

* * * * *

(b) Section 107.29(a)(2) and (b)—Anti-collision light required for operations at night and during periods of civil twilight.

* * * * *

(j) Section 107.145—Operations over moving vehicles.

Issued under the authority provided by 49 U.S.C. 106(f), 40101 note; and 44807, in Washington, DC.

Elaine L. Chao,

Secretary, Department of Transportation.

Steve Dickson,

Administrator, Federal Aviation Administration.

[FR Doc. 2020–28947 Filed 1–8–21; 4:15 pm]

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Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 1, 11, 47, et al.

Remote Identification of Unmanned Aircraft; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1, 11, 47, 48, 89, 91, and 107

[Docket No.: FAA–2019–1100; Amdt. Nos. 1–75, 11–63, 47–31, 48–3, 89–1, 91–361, and 107–7]

RIN 2120–AL31

Remote Identification of Unmanned Aircraft

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

ACTION: Final rule.

SUMMARY: This action requires the remote identification of unmanned aircraft. The remote identification of unmanned aircraft in the airspace of the United States will address safety, national security, and law enforcement concerns regarding the further integration of these aircraft into the airspace of the United States, laying a foundation for enabling greater operational capabilities.

DATES:

Effective dates: This rule is effective March 16, 2021, except for amendatory instruction 19, adding subpart C to part 89, which is effective September 16, 2022.

Incorporation by reference: The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of March 16, 2021.

Compliance dates: Compliance with §§ 89.510 and 89.515 is required September 16, 2022. Compliance with §§ 89.105, 89.110, and 89.115, and subpart C of part 89 is required September 16, 2023.

FOR FURTHER INFORMATION CONTACT: Ben Walsh, Flight Technologies and Procedures Division, Federal Aviation Administration, 470 L'Enfant Plaza SW, Suite 4102, Washington, DC, 20024; telephone 1–844–FLY–MY–UA (1–844–359–6981); email: *UAShelp@faa.gov.*

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List of Abbreviations Frequently Used in This Document

AC—Advisory Circular
ADS–B—Automatic Dependent Surveillance-Broadcast
AGL—above ground level
ARC—Aviation Rulemaking Committee
ATC—Air traffic control
BVLOS—Beyond visual line of sight
DOT—U.S. Department of Transportation
FAA—Federal Aviation Administration
GPS—Global Positioning System
ICAO—International Civil Aviation Organization
LAANC—Low Altitude Authorization and Notification Capability
LOS—line-of-sight
MOA—Memorandum of Agreement
NPRM—notice of proposed rulemaking
OMB—Office of Management and Budget
UAS—Unmanned aircraft system
UAS–ID ARC—UAS Identification and Tracking Aviation Rulemaking Committee
USS—UAS service supplier
UTM—Unmanned aircraft systems traffic management
VLOS—visual line of sight

I. Executive Summary

This rule establishes requirements for the remote identification of unmanned aircraft [1] operated in the airspace of the United States. Remote identification (commonly known as Remote ID) is the capability of an unmanned aircraft in flight to provide certain identification, location, and performance information that people on the ground and other airspace users can receive. The remote identification of unmanned aircraft is necessary to ensure public safety and the safety and efficiency of the airspace of the United States. Remote identification provides airspace awareness to the FAA, national security agencies, law enforcement entities, and other government officials. The information can be used to distinguish compliant airspace users from those potentially posing a safety or security risk. Remote identification will become increasingly important as the number of unmanned aircraft operations increases in all classes of airspace in the United States. While remote identification capability alone will not enable routine expanded operations, such as operations over people or beyond visual line of sight, it is the next incremental step toward enabling those operations.

Unmanned aircraft operating in the airspace of the United States are subject to the operating requirements of this rule, irrespective of whether they are operating for recreational or commercial purposes. The rule requires operators to seek special authorization to operate unmanned aircraft without remote identification for aeronautical research and other limited purposes.

Unmanned aircraft produced for operation in the airspace of the United States are subject to the production requirements of this rule. There are limited exceptions allowing the production of unmanned aircraft without remote identification, which include home-built unmanned aircraft and unmanned aircraft of the United States Government, amongst others.

A. Remote Identification Requirements

There are three ways to comply with the operational requirements for remote identification. The first way is to operate a standard remote identification unmanned aircraft that broadcasts identification, location, and performance information of the unmanned aircraft and control station. The second way to comply is by operating an unmanned aircraft with a remote identification broadcast module. The broadcast module, which broadcasts identification, location, and take-off information, may be a separate device that is attached to an unmanned aircraft, or a feature built into the aircraft. The third way to comply allows for the operation of unmanned aircraft without any remote identification equipment, where the UAS is operated at specific FAA-recognized identification areas. The requirements for all three of these paths to compliance are specified in this rule.

Except in accordance with the requirements of this rule, no unmanned aircraft can be produced for operation in the airspace of the United States after September 16, 2022, and no unmanned aircraft can be operated in the airspace of the United States after September 16, 2023.

1. Standard Remote Identification Unmanned Aircraft

Standard remote identification unmanned aircraft broadcast the remote identification message elements directly from the unmanned aircraft from takeoff to shutdown. The required message elements include: (1) A unique identifier to establish the identity of the unmanned aircraft; (2) an indication of the unmanned aircraft latitude, longitude, geometric altitude, and velocity; (3) an indication of the control station latitude, longitude, and geometric altitude; (4) a time mark; and (5) an emergency status indication. Operators may choose whether to use the serial number of the unmanned aircraft or a session ID (*e.g.,* an alternative form of identification that provides additional privacy to the operator) as the unique identifier. The required message elements for standard remote identification unmanned aircraft are discussed in section VIII.A of this preamble.

A person can operate a standard remote identification unmanned aircraft only if: (1) It has a serial number that is listed on an FAA-accepted declaration of compliance; (2) its remote identification equipment is functional and complies with the requirements of the rule from takeoff to shutdown; (3) its remote identification equipment and functionality have not been disabled; and (4) the Certificate of Aircraft Registration of the unmanned aircraft used in the operation must include the serial number of the unmanned aircraft, as per applicable requirements of parts 47 and 48, or the serial number of the unmanned aircraft must be provided to the FAA in a notice of identification pursuant to § 89.130 prior to the operation.

Persons operating a standard remote identification unmanned aircraft in the airspace of the United States must comply with the operational rules in subpart B of part 89 by September 16, 2023.

Operating requirements for standard remote identification unmanned aircraft are discussed in greater detail in section VII.C of this preamble.

[1] The FAA does not use the terms unmanned aircraft system and unmanned aircraft interchangeably. The FAA uses the term unmanned aircraft as defined in 14 CFR 1.1 to refer specifically to the unmanned aircraft itself. The FAA uses the term unmanned aircraft system to refer to both the unmanned aircraft and any communication links and components that control the unmanned aircraft. As explained in section V.A of this rule, the FAA is adding the definition of unmanned aircraft system to 14 CFR part 1.

The FAA acknowledges that UAS may have components produced by different manufacturers (*e.g.,* an unmanned aircraft could be manufactured by one manufacturer and the control station could be manufactured by another). In addition, unmanned aircraft that operate beyond the radio-line-of-sight may use third-party communication links. As finalized, the remote identification requirements in this final rule apply to the operation and the design and production of unmanned aircraft. Unmanned aircraft producers are responsible for ensuring that the unmanned aircraft comply with the design and production requirements of this rule even when the unmanned aircraft uses control station equipment (such as a smart phone) or communication links manufactured by a different person. The unmanned aircraft producer must address how any dependencies on control station functionality are incorporated as part of the remote identification design and production requirements.

2. Remote Identification Broadcast Modules

An unmanned aircraft can be equipped with a remote identification broadcast module that broadcasts message elements from takeoff to shutdown. The required message elements include: (1) The serial number of the broadcast module assigned by the producer; (2) an indication of the latitude, longitude, geometric altitude, and velocity of the unmanned aircraft; (3) an indication of the latitude, longitude, and geometric altitude of the unmanned aircraft takeoff location; and (4) a time mark. The required message elements for remote identification broadcast modules are discussed in section IX of this preamble.

Persons can operate an unmanned aircraft equipped with a remote identification broadcast module only if: (1) The remote identification broadcast module meets the requirements of this rule; (2) the serial number of the remote identification broadcast module is listed on an FAA-accepted declaration of compliance; (3) the Certificate of Aircraft Registration of the unmanned aircraft used in the operation includes the serial number of the remote identification broadcast module, or the serial number of the unmanned aircraft must be provided to the FAA in a notice of identification pursuant to § 89.130 prior to the operation; (4) from takeoff to shutdown the remote identification broadcast module broadcasts the remote identification message elements from the unmanned aircraft; and (5) the person manipulating the flight controls of the unmanned aircraft system must be able to see the unmanned aircraft at all times throughout the operation.

A person operating an unmanned aircraft equipped with a remote identification broadcast module in the airspace of the United States must comply with the operational rules in subpart B of part 89 by September 16, 2023.

The operating requirements for remote identification broadcast modules are discussed in greater detail in section VII.D of this preamble.

3. Unmanned Aircraft Without Remote Identification Equipment

This rule requires all unmanned aircraft operating in the airspace of the United States to have remote identification capabilities, except as described below.

Upon full implementation of this rule, most unmanned aircraft will have to be produced as standard remote identification unmanned aircraft. However, there will be some unmanned aircraft (*e.g.,* home-built unmanned aircraft and existing unmanned aircraft produced prior to the date of compliance of the production requirements of this rule) that might not meet the requirements for standard remote identification unmanned aircraft.

Persons operating an unmanned aircraft without remote identification in the airspace of the United States must comply with the operational rules in subpart B of part 89 by September 16, 2023. Unless operating under an exception to the remote identification operating requirements, a person operating an unmanned aircraft without remote identification must always operate within visual line of sight [2] and within an FAA-recognized identification area.

An FAA-recognized identification area is a defined geographic area where persons can operate UAS without remote identification, provided they maintain visual line of sight. Persons eligible to request establishment of FAA-recognized identification areas include community-based organizations recognized by the Administrator and educational institutions including primary and secondary educational institutions, trade schools, colleges, and universities. The FAA will begin accepting applications for FAA-recognized identification areas on September 16, 2022. The FAA will maintain a list of FAA-recognized identification areas at *https://www.faa.gov.* FAA-recognized identification areas are discussed further in section XII of this preamble.

4. Prohibition Against the Use of ADS–B Out and Transponders

This rule prohibits use of ADS–B Out and transponders for UAS operations under 14 CFR part 107 unless otherwise authorized by the FAA, and defines when ADS–B Out is appropriate for UAS operating under part 91. The FAA is concerned the potential proliferation of ADS–B Out transmitters on unmanned aircraft may negatively affect the safe operation of manned aircraft in the airspace of the United States. The projected numbers of unmanned aircraft operations have the potential to saturate available ADS–B frequencies, affecting ADS–B capabilities for manned aircraft and potentially blinding ADS–B ground receivers. Therefore, unmanned aircraft operators, with limited exceptions, are prohibited from using ADS–B Out or transponders. The prohibition against the use of ADS–B Out and transponders is discussed in section XVII of this preamble.

Persons must comply with the ADS–B Out and transponder prohibition as of March 16, 2021.

5. Design and Production

Standard remote identification unmanned aircraft and remote identification broadcast modules must be designed and produced to meet the requirements of this rule. The FAA recognizes that UAS technology is continually evolving, making it necessary to harmonize new regulatory action with technological advancements. To promote that harmonization, the FAA is implementing performance-based requirements to describe the desired outcomes, goals, and results for remote identification without establishing a specific means or process for regulated entities to follow.

A person designing or producing a standard remote identification unmanned aircraft or broadcast module for operation in the United States must show that the unmanned aircraft or broadcast module meets the requirements of an FAA-accepted means of compliance. A means of compliance describes the methods by which the person complies with the performance-based requirements for remote identification.

Under this rule, anyone can create a means of compliance; however, the FAA must accept that means of compliance before it can be used for the design or production of any standard remote identification unmanned aircraft or remote identification broadcast module. A person seeking acceptance by the FAA of a means of compliance for standard remote identification unmanned aircraft or remote identification broadcast modules is required to submit the means of compliance to the FAA. The FAA reviews the means of compliance to determine if it meets the minimum performance requirements and includes appropriate testing and validation procedures in accordance with the rule. Specifically, the person must submit a detailed description of the means of compliance, a justification for how the means of compliance meets the minimum performance requirements of the rule, and any substantiating material the person wishes the FAA to consider as part of the application. FAA-accepted consensus standards are one way, but not the only way, to show compliance

[2] Part 89 limits unmanned aircraft without remote identification and unmanned aircraft with remote identification broadcast modules to visual line of sight operations. Nothing in part 89 authorizes beyond visual line of sight (BVLOS) operations for any unmanned aircraft; such authority will spring from other FAA regulations.

with the performance requirements of this rule. Accordingly, the FAA encourages consensus standards bodies to develop means of compliance and submit them to the FAA for acceptance.[3]

The FAA indicates acceptance of a means of compliance by notifying the submitter of the acceptance of the proposed means of compliance. The FAA also expects to notify the public that it has accepted the means of compliance by including it on a list of accepted means of compliance at *https://www.faa.gov.* The FAA will not disclose commercially sensitive information from the means of compliance that has been marked as such. The FAA may disclose the non-proprietary broadcast specification and radio frequency spectrum so that sufficient information is available to develop receiving and processing equipment and software for the FAA, law enforcement, and members of the public.

See section XIII of this preamble for more information on means of compliance and FAA acceptance.

In addition, a person responsible for the production of standard remote identification unmanned aircraft (with limited exceptions) or remote identification broadcast modules is required to:

- Issue each unmanned aircraft or remote identification broadcast module a serial number that complies with the ANSI/CTA–2063–A serial number standard.
- Label the unmanned aircraft or remote identification broadcast module to indicate that it is remote identification compliant.
- Submit a declaration of compliance for acceptance by the FAA, declaring that the standard remote identification unmanned aircraft or remote identification broadcast module complies with the requirements of the rule.

A person producing a standard remote identification unmanned aircraft for operation in the airspace of the United States must comply with the requirements of subpart F of part 89 by September 16, 2022.

A person producing a remote identification broadcast module must comply with the requirements of subpart F of part 89 by March 16, 2021.

See the design and production requirements in section XIV of this preamble for more information about the production requirements for standard remote identification unmanned aircraft and remote identification broadcast modules, and the process for declarations of compliance.

B. Registration Requirements

The FAA proposed requiring all unmanned aircraft, including those used for limited recreational operations, to obtain a unique registration number. After reviewing comments and further consideration, the FAA decided not to adopt this requirement. Owners of small unmanned aircraft used in civil operations (including commercial operations), limited recreational operations,[4] or public aircraft operations, among others, continue to be eligible to register the unmanned aircraft under part 48 in one of two ways: (1) Under an individual registration number issued to each unmanned aircraft; or (2) under a single registration number issued to an owner of multiple unmanned aircraft used exclusively for limited recreational operations.

The FAA adopts the requirement tying remote identification requirements to registration requirements and the requirements to submit the unmanned aircraft's serial number and other information.

This rule also revises and adopts certain requirements originally established in the interim final rule on Registration and Marking Requirements for Small Unmanned Aircraft.[5] These requirements directly affect registration-related proposals made in the Remote Identification of Unmanned Aircraft Systems NPRM (''the NPRM'') (84 FR 72438, Dec. 31, 2019). See section XV of this preamble for more information about registration requirements.

C. Elimination of the Network-Based Remote Identification Requirement

In the NPRM, the FAA proposed requiring standard remote identification UAS and limited remote identification UAS to transmit remote identification message elements through a network connection.[6] To comply with this requirement, UAS would have had to transmit the remote identification message elements through the internet to a third-party service provider, referred to as a Remote ID UAS Service Supplier (USS). Remote ID USS would have collected and, as appropriate, disseminated the remote identification information through the internet.

In response to the NPRM, the FAA received significant feedback about the network requirement identifying both public opposition to, and technical challenges with, implementing the network requirements. The FAA had not foreseen or accounted for many of these challenges when it proposed using the network solution and USS framework. After careful consideration of these challenges, informed by public comment, the FAA decided to eliminate the requirement in this rulemaking to transmit remote identification messages through an internet connection to a Remote ID USS.

Without the requirement to transmit remote identification through the internet, limited remote identification UAS, as proposed, would have no means to disseminate remote identification information. As a result, limited remote identification UAS as proposed in the NPRM are no longer a viable concept. Nonetheless, the FAA recognizes the need for the existing unmanned aircraft fleet to be able to comply with remote identification requirements. To meet that need, the FAA incorporates a modified regulatory framework in this rule under which persons can retrofit unmanned aircraft with remote identification broadcast modules.

The FAA's decision to eliminate the network-based remote identification requirement is discussed in greater detail in section VII.A of this preamble.

D. Summary of Benefits and Costs

This rule requires remote identification of unmanned aircraft to address safety, security, and law enforcement concerns regarding the further integration of these aircraft into the airspace of the United States. The remote identification framework promotes compliance by operators of unmanned aircraft by providing UAS-specific data, which may be used in tandem with new technologies and infrastructure to provide airspace awareness to the FAA, national security agencies, law enforcement entities, and other government officials which can

[3] A means of compliance is not considered to be ''FAA-accepted'' until the means of compliance has been evaluated by the FAA, the submitter has been notified of acceptance, and the means of compliance has been published at *https://www.faa.gov* as available for use in meeting the requirements of part 89.

[4] The FAA is revising its regulations and guidance documents to delete references to ''model aircraft.'' Consistent with the exception for limited recreational operations of unmanned aircraft in 49 U.S.C. 44809, the FAA now refers to recreational unmanned aircraft or limited recreational operations of UAS.

[5] 80 FR 78593.

[6] As used in this rule, terms such as ''network,'' ''network-based requirement,'' ''network solution,'' ''network framework,'' and ''network transmission'' typically refer to the transmission of remote identification message elements through an internet connection to a Remote ID USS, as proposed in the NPRM.

use the data to discern compliant airspace users from those potentially posing a safety or security risk. In addition, as being finalized, the rule reduces obsolescence of the existing unmanned aircraft fleet.

This rule results in additional costs for persons responsible for the production of unmanned aircraft, owners and operators of registered unmanned aircraft, entities requesting the establishment of an FAA-recognized identification area, and the FAA. This rule provides cost savings for the FAA from a reduction in hours and associated costs expended investigating unmanned aircraft incidents.[7]

The analysis of this rule is based on the fleet forecast for small unmanned aircraft as published in the FAA Aerospace Forecast 2020–2040.[8] The FAA forecast includes base, low, and high scenarios. This analysis provides a range of net impacts from low to high based on these forecast scenarios. The FAA considers the primary estimate of net impacts of the rule to be the base scenario. For the primary estimate, over a 10-year period of analysis this rule would result in present net value costs of about $227.1 million at a three percent discount rate with annualized net costs of about $26.6 million. At a seven percent discount rate, the present value net costs are about $186.5 million with annualized net costs of $26.6 million.

The following table presents a summary of the primary estimates of the quantified costs and cost savings of this rule, as well as estimates for the low and high forecast scenarios. Additional details are provided in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

TABLE 1—COSTS AND SAVINGS OF FINAL RULE

[$Millions] *

Forecast scenario	10 Year present value (3%)	Annualized (3%)	10 Year present value (7%)	Annualized (7%)
Base Scenario—Primary Estimate:				
Costs	230.69	27.04	189.38	26.96
Cost Savings	(3.58)	(0.42)	(2.85)	(0.41)
Net Costs	227.11	26.62	186.53	26.56
Low Scenario:				
Costs	217.08	25.45	178.60	25.43
Cost Savings	(3.47)	(0.41)	(2.77)	(0.39)
Net Costs	213.61	25.04	175.83	25.03
High Scenario:				
Costs	250.18	29.33	204.90	29.17
Cost Savings	(3.74)	(0.44)	(2.98)	(0.42)
Net Costs	246.44	28.89	201.92	28.75

* **Table notes:** Columns may not sum to total due to rounding. Savings are shown in parenthesis to distinguish from costs. Estimates are provided at three and seven percent discount rates per Office of Management and Budget (OMB) guidance.

The final rule incorporates several important changes that reduce costs and provide additional flexibilities compared to the proposed rule. These include simplifying the approach to remote identification by requiring only broadcast transmission of data, and authorizing a remote identification broadcast module option that enables retrofitting of unmanned aircraft that do not meet the requirements for standard remote identification unmanned aircraft. These changes allow unmanned aircraft built without remote identification (*e.g.,* existing unmanned aircraft fleet, home built unmanned aircraft) to be operated outside of FAA-recognized identification areas. These changes also eliminate the requirement for a person to connect the unmanned aircraft to the internet. This shift allows unmanned aircraft with remote identification broadcast modules to operate in areas where the internet is unavailable. As a result, the final rule reduces compliance costs compared to the proposed rule.

The net costs of the final rule have decreased by about 60 percent as compared to the proposed rule. The NPRM stated that the primary estimate over a 10-year period of analysis for the proposed rule would have resulted in net present value costs of about $582 million at a three percent discount rate with annualized net costs of about $68 million. At a seven percent discount rate, the net present value costs for the proposed rule were about $474 million with annualized net costs of $67 million.

The FAA expects this rule will result in several important benefits and enhancements to support safety and security in the airspace of the United States. Remote identification provides information that helps address existing challenges faced by the FAA, law enforcement entities, and national security agencies responsible for the safety and security of the airspace of the United States. As unmanned aircraft operations increase, so does the risk of unmanned aircraft being operated in close proximity to manned aircraft, or people and property on the ground, or in airspace unsuitable for these operations. Remote identification provides a means to identify these aircraft and locate the person who controls them (*e.g.,* operators, pilots in command). It allows the FAA, law

[7] This analysis includes quantified savings to the FAA only. A variety of other entities involved with airport operations, facility and infrastructure security, and law enforcement would also save time and resources involved with unmanned aircraft identification and incident reporting, response, and investigation.

[8] FAA Aerospace Forecast Fiscal Years 2020–2040, available at *https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2020-40_FAA_Aerospace_Forecast.pdf.* The forecast provides a base (*i.e.,* likely) with high (or optimistic) and low (or pessimistic) scenarios.

enforcement, and national security agencies to distinguish compliant airspace users from those potentially posing a safety or security risk. It permits the FAA and law enforcement to conduct oversight of persons operating UAS and to determine whether compliance actions, enforcement, educational, training, or other types of actions are needed to mitigate safety or security risks and foster increased compliance with regulations. Remote identification data also informs the public and users of the airspace of the United States of the local operations that are being conducted at any given moment.

II. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code (49 U.S.C.). Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes the scope of the Agency's authority.

This rulemaking is promulgated pursuant to 49 U.S.C. 40103(b)(1) and (2), which direct the FAA to issue regulations: (1) To ensure the safety of aircraft and the efficient use of airspace; and (2) to govern the flight of aircraft for purposes of navigating, protecting and identifying aircraft, and protecting individuals and property on the ground. In addition, 49 U.S.C. 44701(a)(5) charges the FAA with promoting safe flight of civil aircraft by prescribing regulations the FAA finds necessary for safety in air commerce and national security.

Section 2202 of Public Law 114–190 requires the Administrator to convene industry stakeholders to facilitate the development of consensus standards for remotely identifying operators and owners of UAS and associated unmanned aircraft and to issue regulations or guidance based on any standards developed.

The Administrator has authority under 49 U.S.C. 44805 to establish a process for, among other things, accepting risk-based consensus safety standards related to the design and production of small UAS. Under 49 U.S.C. 44805(b)(7), one of the considerations the Administrator must take into account prior to accepting such standards is any consensus identification standard regarding remote identification of unmanned aircraft developed pursuant to section 2202 of Public Law 114–190.

In addition, 49 U.S.C. 44809(f) provides that the Administrator is not prohibited from promulgating rules generally applicable to unmanned aircraft, including those UAS eligible for the exception for limited recreational operations of unmanned aircraft. Among other things, this authority extends to rules relating to the registration and marking of unmanned aircraft and the standards for remotely identifying owners and operators of UAS and associated unmanned aircraft.

The FAA has authority to regulate registration of aircraft under 49 U.S.C. 44101–44106 and 44110–44113, which require aircraft to be registered as a condition of operation, and to establish the registration requirements and registration processes.

This rulemaking is also promulgated under the authority described in 49 U.S.C. 106(f), which establishes the authority of the Administrator to promulgate regulations and rules, and 49 U.S.C. 40101(d), which authorizes the FAA to consider in the public interest, among other things, the enhancement of safety and security as the highest priorities in air commerce, the regulation of civil and military operations in the interest of safety and efficiency, and assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

Finally, this rulemaking is also being issued consistent with DOT's regulatory policy which requires that DOT regulations ''be technologically neutral, and, to the extent feasible, they should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt.'' [9]

III. Background

The rapid proliferation of unmanned aircraft has created significant opportunities and challenges for their integration into the airspace of the United States. The relatively low cost of highly capable UAS technology has allowed for hundreds of thousands of new operators to enter the aviation community.

The complexities surrounding the full integration of UAS into the airspace of the United States have led the FAA to engage in a phased, incremental, and risk-based approach to rulemaking based on the statutory authorities delegated to the Agency. On December 16, 2015, the Administrator and Secretary jointly published an interim final rule in the **Federal Register** titled Registration and Marking Requirements for Small Unmanned Aircraft (''Registration Rule''),[10] which provides for a web-based aircraft registration process for small unmanned aircraft in 14 CFR part 48 that serves as an alternative to the registration requirements for aircraft established in 14 CFR part 47. The Registration Rule imposes marking requirements on small unmanned aircraft registered under part 48, according to which the small unmanned aircraft must display a unique identifier in a manner that is visible upon inspection. The unique identifier could be the registration number issued to an individual or to the small unmanned aircraft by the FAA Registry or the small unmanned aircraft's serial number if authorized by the Administrator and provided with the application for the certificate of aircraft registration.

On June 28, 2016, the FAA and DOT jointly published the final rule for Operation and Certification of Small Unmanned Aircraft Systems (''the 2016 Rule'') in the **Federal Register**.[11] This was an important step towards the integration of civil small UAS operations (for aircraft weighing less than 55 pounds) into the airspace of the United States. The 2016 Rule set the initial operational structure and certain restrictions to allow routine civil operations of small UAS in the airspace of the United States in a safe manner. Prior to the 2016 Rule, the FAA authorized commercial UAS operations, including but not limited to real estate photography, precision agriculture, and infrastructure inspection, under section 333 of Public Law 112–95. Over 5,500 operators received this authorization. The FAA also issued over 900 Certificates of Waiver or Authorization (COA), allowing Federal, State, and local governments, law enforcement agencies, and public universities to perform numerous tasks with UAS, including but not limited to search-and-rescue, border patrol, and research activities. The 2016 Rule allows certain operations of small UAS to be conducted in the airspace of the United States without an airworthiness certificate, exemption, or COA.

The 2016 Rule also imposed certain restrictions on small UAS operations. The restrictions included a prohibition on nighttime operations, limitations on operations conducted during civil twilight, restrictions on operations over people, a requirement for all operations to be conducted within visual line of sight, and other operational, airspace, and pilot certification requirements. Since the 2016 Rule took effect on August 29, 2016, most low-risk small UAS operations that were previously authorized on a case-by-case basis under

[9] 49 CFR 5.5(e).

[10] 80 FR 78594.

[11] 81 FR 42064.

section 333 of Public Law 112–95 became routine operations. With some exceptions,[12] these operations are now permitted without further interaction with the FAA if they comply with the requirements of part 107. Publishing part 107 was the first significant regulatory step to enable lower risk, less complex UAS operations in the airspace of the United States.

Part 107 opened the airspace of the United States to the vast majority of routine small UAS operations, allowing flight within visual line of sight while maintaining flexibility to accommodate future technological innovations. Part 107 allows individuals to request waivers from certain provisions, including those prohibiting operations over people and beyond visual line of sight. Petitions for waivers from the provisions of part 107 must demonstrate that the petitioner has provided sufficient mitigations to safely conduct the requested operation.

On October 5, 2018, Congress enacted Public Law 115–254, also known as the FAA Reauthorization Act of 2018. The FAA Reauthorization Act of 2018 amended part A of subtitle VII of title 49, United States Code by inserting a new chapter 448 titled Unmanned Aircraft Systems and incorporating additional authorities and mandates to support the further integration of UAS into the airspace of the United States, including several provisions that specifically deal with the need for remote identification of UAS. Section 376 of the FAA Reauthorization Act of 2018 requires the FAA to perform testing of remote identification technology, and to assess the use of remote identification for the development of unmanned aircraft systems traffic management (UTM).

Additional congressional action supports the implementation of remote identification requirements for most UAS. Section 349 of the FAA Reauthorization Act of 2018 goes so far as to indicate that the Administrator may promulgate rules requiring remote identification of UAS and apply those rules to UAS used for limited recreational operations.[13] The provision denotes Congress' acknowledgment that remote identification is an essential part of the UAS regulatory framework.

On February 13, 2019, the FAA published three rulemaking documents in the **Federal Register** as part of the next phase of integrating small UAS into the airspace of the United States. The first of such documents was an interim final rule titled ''External Marking Requirement for Small Unmanned Aircraft,'' [14] in which the FAA required small unmanned aircraft owners to display the registration number assigned by the FAA on an external surface of the aircraft. The second rulemaking document was a notice of proposed rulemaking titled ''Operation of Small Unmanned Aircraft Systems Over People,'' [15] in which the FAA proposed to allow operations of small unmanned aircraft over people in certain conditions and operations of small UAS at night without obtaining a waiver. The third rulemaking document was an advance notice of proposed rulemaking titled ''Safe and Secure Operations of Small Unmanned Aircraft Systems,'' [16] in which the FAA sought information from the public on whether, and under which circumstances, the FAA should promulgate new rules to require stand-off distances, additional operating and performance restrictions, the use of UTM, additional payload restrictions, and whether the Agency should prescribe UAS design requirements and require that unmanned aircraft be equipped with critical safety systems.

On December 31, 2019, the FAA published the Remote Identification of Unmanned Aircraft Systems NPRM. The FAA received approximately 53,000 comments on the NPRM. A significant amount of the comments were submitted by individuals, many of whom identified as recreational flyers. In addition, the FAA received numerous comments from UAS manufacturers, other aviation manufacturers, organizations representing UAS interest groups, organizations representing various sectors of manned aviation, State and local governments, news media organizations, academia, and others.

IV. Remote Identification of Unmanned Aircraft

A. Clarification of Use of the Term Unmanned Aircraft in This Rule

As a result of the comments concerning the use of the term unmanned aircraft system (UAS), the FAA clarifies that the term ''unmanned aircraft'' is used when referring to the aircraft, and UAS is used when referring to the entire system, including the control station.

The FAA acknowledges that UAS may have components produced by different manufacturers (*e.g.,* an unmanned aircraft could be manufactured by one manufacturer and the control station could be manufactured by another). In addition, unmanned aircraft that operate beyond the range of the radio signal being transmitted from the control station may use third-party communication links, such as the cellular network. As finalized, the remote identification requirements in this rule apply to the operation, and the design and production of unmanned aircraft. Unmanned aircraft producers are responsible for ensuring that the unmanned aircraft comply with the design and production requirements of this rule even when the unmanned aircraft uses control station equipment (such as a smart phone) or communication links manufactured by a different person. The unmanned aircraft producer must address how any dependencies on control station functionality are incorporated as part of the remote identification design and production requirements.

B. Purpose for the Remote Identification of Unmanned Aircraft

UAS are fundamentally changing aviation and the FAA is committed to working to fully integrate them into the airspace of the United States. The next step in that integration is enabling unmanned aircraft operations over people and at night. Remote identification of unmanned aircraft is a critical element to enable those operations that addresses safety and security concerns.

Remote identification is the capability of an unmanned aircraft in flight to provide identification, location, and performance information that people on the ground and other airspace users can receive. In its most basic form, remote identification can be described as an electronic identification or a ''digital license plate'' for UAS.

Remote identification provides information that helps address existing challenges of the FAA, law enforcement entities, and national security agencies responsible for the safety and security of the airspace of the United States. As a wider variety of UAS operations such as operations over people are made available, the risk of unmanned aircraft being operated in an unsafe manner, such as in close proximity to people and property on the ground, is increased. Remote identification provides a means to identify these aircraft and locate the person who controls them (*e.g.,* operators, pilots in command). It allows the FAA, law enforcement, and national security agencies to distinguish compliant airspace users from those potentially posing a safety or security risk. It permits the FAA and law

[12] *See, e.g.,* 14 CFR 107.41 (requiring prior FAA authorization for small unmanned aircraft operation in certain types of airspace).

[13] See 49 U.S.C. 44809.

[14] 84 FR 3669.

[15] 84 FR 3856.

[16] 84 FR 3732.

enforcement to conduct oversight of persons operating unmanned aircraft and to determine whether compliance actions, enforcement, educational, training, or other types of actions are needed to mitigate safety or security risks and foster increased compliance with regulations.

The requirements for the identification of manned and unmanned aircraft form an integral part of the FAA's regulatory framework. Prior to this rule, the requirements included aircraft registration and marking and electronic identification using transponders and Automatic Dependent Surveillance-Broadcast (ADS–B). This rule creates a new regulation, 14 CFR part 89, which establishes the remote identification requirements for unmanned aircraft. These requirements are particularly important for unmanned aircraft because the person operating the unmanned aircraft is not onboard the aircraft, creating challenges for associating the aircraft with its operator. In addition, the small size of many unmanned aircraft means the registration marking is only visible upon close inspection, making visual identification of unmanned aircraft in flight difficult or impossible.

As discussed in the NPRM, the remote identification framework is necessary to enable expanded UAS operations and further integration. This final rule scales that framework to support the next steps in that integration: Operations over people and operations at night. Though the NPRM discussed remote identification as a building block for UAS Traffic Management (UTM), the FAA has determined that, at this time, this rule will only finalize the broadcast-based remote identification requirements. See section VII.A of this preamble for a discussion on the FAA's decision to eliminate network-based remote identification requirements at this time. The broadcast-based approach of this rule contains the minimum requirements necessary to allow for remote identification of unmanned aircraft under the current operational rules.

C. Public Comments and FAA Response

1. General Support for Remote Identification

Comments: Many commenters expressed general support for the NPRM, including the Helicopter Association International, the League of California Cities, and, commenting jointly, the Michigan Department of Transportation Office of Aeronautics, Michigan Aeronautics Commission, and Michigan Unmanned Aircraft Systems Task Force. Most commenters in support of the rule cited improvements to safety and privacy. Commenters expressed that with UAS becoming increasingly widespread, the rule would make identification easier, increase the safety of airspace, particularly for manned aircraft operating at the same altitudes as unmanned aircraft, and protect citizens' privacy.[17]

The International Association of Amusement Parks and Attractions supported the rule, stating that the rule would enhance situational awareness and foster accountability of the operator and improved knowledge for the FAA, law enforcement, and operators of certain facilities identified by Congress in section 2209 of the FAA Extension, Safety and Security Act of 2016.[18] The Edison Electric Institute, American Public Power Association, and National Rural Electric Association, commenting jointly, expressed support for the rule and for FAA's real-time access to UAS location information, particularly over energy infrastructure. Various institutions of higher education expressed support for remote identification and mentioned it would assist law enforcement agencies affiliated with said institutions to better identify UAS operators, particularly where the UAS poses risk or nuisance to bystanders, facilities, or other aircraft.

The National Transportation Safety Board stated it had no technical objections provided the FAA can ensure that remote identification functions do not interfere with aviation safety.

FAA Response: The FAA acknowledges the support of commenters and finalizes this rule and related policies to implement a remote identification framework that provides near-real time information regarding unmanned aircraft operations and increases situational awareness of unmanned aircraft to the public, operators of other aircraft, law enforcement and security officials, and other related entities.

[17] Though remote identification potentially allows for greater ability of law enforcement to locate the person controlling an unmanned aircraft, this rule has not been promulgated for the purpose of addressing concerns about unmanned aircraft that violate privacy laws.

[18] Section 2209 requires ''the Secretary of Transportation to establish a process to allow applicants to petition the Administrator of the Federal Aviation Administration to prohibit or restrict the operation of an unmanned aircraft in close proximity to a fixed site facility.'' The FAA Extension, Safety and Security Act of 2016, Public Law 114–190, sec. 2209, 130 Stat. 615, 633–635 (2016).

2. General Opposition to Remote Identification

The FAA received a multitude of comments opposing remote identification. Many of the commenters opposed the concept, as a whole, while others expressed opposition to specific aspects, concepts, or proposed in the NPRM.

Comments: Among the comments expressing general disagreement with the proposed rule was one of the two form letters written and submitted by the First Person View Freedom Coalition (FPVFC) and 90 of its members. The commenters argued that the proposed rule would have many negative effects, including destroying the hobby of building and flying recreational remote controlled aircraft, making the sport of drone racing illegal, ending the ''multi-million [dollar] cottage industry around home built drones,'' outlawing ''acrobatic drone videography,'' imposing costs on both hobbyists and the drone industry by making current fleets obsolete, and making criminals of hobbyists. These commenters asked the FAA to rewrite the proposed rule with input from the FPVFC and Academy of Model Aeronautics (AMA). Similar concerns were common among many other commenters who opposed the NPRM in general terms. Instead of finalizing the rule as proposed, a member of the executive board for the AMA suggested the FAA adopt a ''technology agnostic'' approach to remote identification, so a variety of technical solutions could be used to meet the remote identification needs.

The most common objections to the proposed rule were that it would impose burdens and costs that would make it difficult or impossible for hobbyists to fly model aircraft; that it would impose an unnecessary financial burden on UAS or model aircraft owners; and that it would harm or end the recreational UAS hobby. Commenters noted that it would be very difficult to upgrade many existing UAS because of the burden of carrying and powering new equipment such as navigation receivers and remote identification transmitters. They argued that this would reduce available flight time and could affect safety of operations if the additional weight is excessive. The FPVFC form letter and many other comments included similar objections.

Many commenters, including 33 persons who submitted a form letter addressed as the ''Traditional Hobbyist Form Letter Campaign,'' argued that the proposed rule would not achieve its

objectives of providing safety for the airspace of the United States and protecting national security. Many of these commenters questioned whether the FAA provided an adequate justification for the proposed rule, with many commenters stating the FAA has not demonstrated that UAS are dangerous. The commenters questioned the need for the rule, often stating that existing regulations and standards are sufficient for protecting public safety. They mentioned that historically UAS have not been dangerous and have not caused fatalities and indicated the FAA should concentrate on enforcing current rules. A related and separate statement repeatedly made by commenters was that model aircraft are not dangerous. These comments often distinguish between model aircraft and other UAS, stating that model aircraft are not dangerous because they must remain in the pilot's visual line of sight to stay airborne due to lack of navigation equipment, flight planning capability, flight stabilization, first person view capability, or automation that is common on newer UAS. Some commenters saw the proposed rule as an attempt to privatize the airspace in which UAS and model aircraft operate.

Commenters indicated remote identification would have negative effects. Many stated the proposed rule would harm innovation in the UAS industry. Others believed it would harm the educational and research potential of UAS or model aviation. Commenters pointed to model aviation driving young people's interest in science, technology, engineering, and math fields and aviation; and providing educational benefits that relate to these fields. Those commenters believed the rule would contribute to exacerbating a national shortage of manned aircraft pilots.

Many commenters believed the rule would be unenforceable. A related argument was that only lawful flyers would follow the rules and that the rule would do nothing to change the behavior of bad actors. Some expressed concerns for widespread noncompliance with the rule.

A significant number of commenters opposed any regulation of UAS used for recreational operations.

A number of commenters believed remote identification requirements for UAS are stricter than ADS–B Out or transponder requirements for manned aircraft. Several commenters suggested permitting UAS operations without remote identification in uncontrolled airspace and away from airports, similar to the requirements for ADS–B Out that only apply in certain airspace. Commenters also stated that manned aircraft should be required to broadcast ADS–B Out in all airspace if all UAS are required to transmit remote identification. Several commenters also noted that manned aircraft were offered grants and rebates to help cover the cost of ADS–B implementation and had over 10 years to equip for ADS–B Out compared to the shorter implementation time proposed for remote identification.

FAA Response: The FAA acknowledges the significant number of comments opposing the proposed regulation and related policies. After further consideration of public comments, the FAA has modified some of the remote identification policies in the final rule, as further discussed throughout this preamble, to reduce the burdens on unmanned aircraft operators and producers while maintaining the necessary requirements to address the safety and security needs of the FAA, law enforcement, and national security agencies. The FAA does not agree with commenters who believed remote identification will harm innovation in the UAS industry. On the contrary, the Agency believes that this performance-based regulation provides opportunities for innovation and growth of the UAS industry by addressing the security concerns associated with unmanned aircraft flight at night and over people. In addition, the FAA does not agree that the remote identification requirements are stricter than ADS–B Out requirements. Remote identification has fewer technical requirements compared to ADS–B, and this rule provides accommodations for unmanned aircraft operations without remote identification.

The FAA does not agree that the requirements of this rule are unenforceable. In fact, the enforcement mechanism for this rule will in many respects parallel existing regulatory compliance activities for manned aviation. The Agency intends to meet its statutory and regulatory compliance and enforcement responsibilities by following a documented compliance and enforcement program that includes legal enforcement action, including civil penalties and certificate actions, as appropriate, to address violations and help deter future violations.

Many commenters opposed remote identification because they believed it would impact the recreational UAS community. The remote identification requirements apply to unmanned aircraft operating in the airspace of the United States irrespective of what the unmanned aircraft are being used for. However, the FAA has incorporated additional flexibilities into this rule to facilitate compliance with the remote identification requirements. For example, an operator of an unmanned aircraft without remote identification can now retrofit the unmanned aircraft with a remote identification broadcast module to identify remotely. See section VII.D of this preamble for further discussion of remote identification broadcast modules.

The Agency has also eliminated the requirement to transmit remote identification message elements through the internet to a Remote ID USS, which will decrease costs to operators by eliminating the potential for subscription fees. See section VII.A of this preamble for further discussion on the elimination of the limited remote identification UAS concept. The revised rule also increases the availability of FAA-recognized identification areas where operations may occur without remote identification equipment. See section XII of this preamble for further discussion on FAA-recognized identification areas. The FAA also revised the definition of amateur-built UAS as discussed in section V.D of this preamble. The term is now addressed in this rule as home-built unmanned aircraft.

3. Alternatives Proposed by Commenters

Many commenters, including the Academy of Model Aeronautics, AirMap, American Farm Bureau Federation, the Experimental Aircraft Association, Flite Test, Kittyhawk, and the Small UAV Coalition noted that the best path to widespread compliance is a simple, affordable solution. They recommended an application-based interface that would permit a UAS operator to self-declare an operational area and time either at the beginning, or in advance of, operations in areas where internet service might not be available, similar to current LAANC implementations. Some commenters suggested either a smart phone application or phone-in option where UAS operators could reserve a small block of airspace so other non-participating UAS could voluntarily re-route around that operations area.

The Academy of Model Aeronautics recommended providing a path to compliance using ground-based or application-based remote identification for the pilot in command rather than specific equipment mandates applicable to manufacturers. For non-autonomous UAS which require continuous pilot input and visual line of sight (*e.g.,* no programmable waypoints or other automation), the Charles River Radio Controllers also recommended a pre-flight registration via the internet where

operators would indicate their destination, flight parameters, and time of operation. Streamline Designs suggested permitting UAS that self-report location to operate in rural locations.

Wing Aviation suggested revising limited remote identification UAS to permit recreational operations within VLOS for UAS that are not highly automated and not available for sale to third parties, provided that operators declare their operational intent to a Remote ID USS. The intent information would include the flight area, maximum height AGL, earliest and latest operations times, and the actual or expected location of the ground control station, while also requiring the operator to share actual control station location if the internet is available. SenseFly also supported uploading a flight plan and stated that this type of identification would give adequate information, especially for a short-range flight, such as those limited to a 400-foot range. The U.S. Chamber of Commerce Technology Engagement Center recommended permitting remote identification UAS to continue to operate without a persistent connection to a Remote ID USS if operators declare their identifier and flight intent to provide situation awareness for other airspace users.

Kittyhawk stated that network-based solutions are the most agile, scalable, and information-rich, but also recommended providing a variety of options to better achieve remote identification compliance. They proposed a three-tier solution that would permit volume-based reservations without requiring network or broadcast remote identification information for UAS operations in VLOS below 200 feet in Class G airspace and 100 feet in controlled airspace, as well as UAS operations within VLOS below 400 feet with volume-based reservations and transmission of remote identification information by either broadcast or network.

One commenter suggested permitting the installation of Broadcom chips in UAS so they could be tracked similar to cellular phones. One commenter suggested the FAA supply RFID tags to track each UAS for a fee upon completion of their UAS knowledge test. Several commenters, including the American Property Casualty Insurance Association, suggested remote identification data could be stored locally and uploaded after flight in areas with no internet coverage. The New Hampshire Department of Transportation assumed that many retrofit UAS would become limited remote identification UAS and recommended permitting those UAS to operate when the internet is not available if equipped with an anti-collision beacon that is visible for at least 3 statute miles to increase conspicuity for manned aircraft.

FAA Response: The FAA considered the alternative approaches proposed by commenters and assessed whether they met the needs of the FAA, law enforcement, and national security agencies to ensure the safety and efficiency of the airspace of the United States sufficient to enable unmanned aircraft to fly over people and at night. The Agency agrees with commenters that a retrofit option could enable operators to meet the remote identification requirements of this rule. Therefore, the FAA adopts the concept in this rule by incorporating operating requirements, discussed in section VII.D of this preamble, and production requirements, discussed in section XIV.E.3 of this preamble, to permit the production and use of remote identification broadcast modules. A person may now equip an unmanned aircraft without remote identification with a remote identification broadcast module to enable the unmanned aircraft to identify remotely.

At this time, the FAA has determined that the other options proposed by commenters do not meet the needs of the Agency or are outside the scope of this rule. For example, the volume-based reservation proposal from Kittyhawk would affect airspace access and is outside the scope of identification. The FAA declines to require the installation of Broadcom chips as suggested by one commenter because the FAA is committed to performance-based requirements that do not require using a specific manufacturer's equipment. The recommendation to require unmanned aircraft to be equipped with anti-collision lighting when not transmitting remote identification information is unacceptable because it does not provide information about the identity of the unmanned aircraft or the control station location. The FAA also notes that providing flight intent information as a means to satisfy the remote identification requirements would not ensure that flight information is available in areas where there is no internet connectivity. However, the remote identification broadcast requirements in this rule ensure that remote identification information is available even in areas where the internet may not be available.

V. Terms Used in This Rule

The NPRM proposed to define a number of terms to facilitate the implementation of the remote identification of unmanned aircraft. In part 1, definitions and abbreviations, the FAA proposed to add definitions of unmanned aircraft system and visual line of sight to § 1.1. The FAA also proposed several definitions to be included in § 89.1, including the definitions for broadcast, amateur-built unmanned aircraft system, and Remote ID USS.

A. Definition of Unmanned Aircraft System

1. Discussion of the Final Rule

The FAA proposed that the term *unmanned aircraft system (UAS)* means an unmanned aircraft and its associated elements (including communication links and the components that control the unmanned aircraft) that are required for the safe and efficient operation of the unmanned aircraft in the airspace of the United States. The FAA adopts the term ''unmanned aircraft system'' as proposed.

2. Public Comments and FAA Response

Comments: Many commenters suggested that the definition be changed for a variety of reasons including a need to distinguish between various categories of UAS, particularly to distinguish between drones, quadcopters, and remote control model aircraft. Commenters raised issues such as the interchangeable nature of home-built kits and models with interchangeable parts. Commenters also cited a lack of clarity regarding when the communication links are considered part of the UAS. In addition, some commenters stated the definition of UAS was not detailed enough and recommended it be amended to list the specific components that are covered.

FAA Response: Congress established the definition of unmanned aircraft system in 49 U.S.C. 44801(12). Therefore, the FAA adopts the definition of unmanned aircraft system as proposed. The FAA also considers that any kit containing all the parts and instructions necessary to assemble a UAS would meet this definition. As further explained in section XIV.B.2 of this preamble, producers of complete kits offered for sale are subject to the production requirements of this rule.

B. Definition of Visual Line of Sight

1. Discussion of the Final Rule

The FAA proposed that the term *visual line of sight* means the ability of a person manipulating the flight

controls of the unmanned aircraft or a visual observer (if one is used) to see the unmanned aircraft throughout the entire flight with vision that is unaided by any device other than corrective lenses. The FAA recognized that this definition is consistent with how ''visual line of sight'' is currently used in part 107. The term is specifically described in § 107.31(a). The FAA proposed that because visual line of sight will now be used in multiple parts, providing a definition in § 1.1 would ensure that the term is used consistently throughout all FAA regulations. To account for the use of the term in proposed part 89 and the potential use of the term in other parts of 14 CFR, the FAA proposed to include a slightly modified version of the description used in part 107.

The FAA will not be adopting the definition in this rule because the concept may apply differently to various persons and conditions depending upon the type of operation. In addition, future rules, such as rules providing for routine unmanned aircraft BVLOS operations, may need to describe visual line of sight in a different manner or context in order to establish the difference between VLOS and BVLOS operations.

2. Public Comments and FAA Response

Comments: An individual commenter noted that the maximum distance one can operate under visual line of sight varies based on several factors such as the size and speed of the aircraft, terrain, and weather.

FAA Response: As noted, the FAA has determined not to adopt a definition for ''visual line of sight'' in this rule. The FAA recognizes that the concept of visual line of sight allows for variation in the distance to which an unmanned aircraft may fly and still be within visual line of sight of the person manipulating the flight controls of the UAS or the visual observer. The FAA believes this is appropriate given the performance-based nature of current UAS regulations.

C. Definition of Broadcast

The FAA proposed to define *broadcast* in part 89 to mean ''to send information from an unmanned aircraft using radio frequency spectrum.'' The definition was necessary to distinguish the concept from the transmission of remote identification information through the internet to a Remote ID USS. As explained in section VII.A of this preamble, the Agency has determined there is no longer a need to draw a difference between the terms ''broadcast'' and ''transmission'' because the FAA is eliminating the network framework and focusing on a broadcast-only solution for the time being. Therefore, the FAA will not be adopting the definition in this rule.

D. Definition of Home-Built Unmanned Aircraft

1. Discussion of the Final Rule

The FAA proposed that *amateur-built unmanned aircraft system* be defined in part 89 as ''an unmanned aircraft system, the major portion of which has been fabricated and assembled by a person who undertook the construction project solely for their own education or recreation.'' Under this proposal, the person building the amateur-built UAS would have been required to fabricate and assemble at least 50 percent of the UAS. After reviewing comments and further consideration, the FAA relabeled this definition as *home-built unmanned aircraft* and eliminated the fabrication and major portion requirements for the reasons explained in the responses to comments below. Accordingly, this rule finalizes the definition of home-built unmanned aircraft as an unmanned aircraft that an individual built solely for education or recreation.

This rule adopts the term home-built unmanned aircraft as opposed to home-built UAS to reflect the changes discussed in section IV.A of this preamble.

2. Public Comments and FAA Response

i. Fabrication and Assembly

Comments: The FAA received numerous comments arguing that the proposed definition of amateur-built unmanned aircraft system failed to account for common ways that amateur builders of unmanned aircraft put together UAS. These commenters noted that it is not common practice for builders of amateur unmanned aircraft to fabricate UAS components and that UAS are often assembled by hobbyists from a variety of different levels of kits or prefabricated components. Commenters also pointed out that many typical components of home-built UAS are electrical and difficult for the average hobbyist to fabricate on his or her own. Embry-Riddle Aeronautical University—Prescott Campus mentioned that its students assemble unmanned aircraft from parts purchased online but do not fabricate the parts that are necessary for the assembly of an unmanned aircraft. They noted that meeting the production requirements of the proposed rule would be overly burdensome for students.

Many commenters also requested a revised definition for amateur-built UAS that would account for changes to significant parts of a design of a UAS.

Many commenters took issue with the ''major portion'' (fabricating and assembling at least 50 percent or more of the UAS) requirement of the proposed definition for amateur-built UAS. The Small UAV Coalition believed manufacturer performance requirements should not apply to unmanned aircraft built for recreational operations or personal use. They believed these unmanned aircraft should not be defined based on what they perceived as an arbitrary percentage threshold, for parts or ambiguous ''fabrication assessments.'' The Berks County Aero Modelers & Lehigh Valley Radio Control Society asserted the ''51 percent rule for amateur build models'' was not practical and agreed with the UAS Identification and Tracking Aviation Rulemaking Committee recommendations to exempt amateur-built, non-autonomous model aircraft from the remote identification requirements.

FAA Response: The FAA agrees with these commenters and has eliminated the major portion requirement from the definition of home-built unmanned aircraft.

Comments: Some commenters encouraged the FAA to replace the amateur-built definition with terms commonly used in the recreational hobby industry such as ''bind and fly'' or ''ready to fly.'' Brands Hobby provided detailed descriptions of five levels of ''manufactured'' model aircraft in use today and noted concerns that the definition should include an ''almost ready to fly'' concept for amateur built aircraft. The Flite Test Community Association commented the definition would not accommodate the diverse types of products and kits in the model aviation community and suggested the FAA expand the definition of amateur-built UAS or allow the amateur-built community to comply with the rule through either an app-based solution or by installing a ''compliant standalone device.''

FAA Response: The FAA agrees that given the unique characteristics of UAS, the definition of home-built unmanned aircraft should cover the wide range of ways hobbyists build UAS. The FAA also believes that home-builders should have a method for remotely identifying so they can operate outside of FAA-recognized identification areas. The FAA has revised this rule to allow home-built unmanned aircraft to equip with remote identification broadcast modules to identify remotely. Section VII.D of this preamble discusses the

remote identification broadcast modules in greater detail.

Comments: A few commenters proposed to expand the definition of amateur-built UAS to all incomplete UAS, including ''scratch built from plans,'' models built from parts, or models built from kits of subassemblies and pieces that lack radio control receiver electronics. One commenter proposed focusing on intended use and asked the FAA to use the following definition: ''any UAS that requires some final assembly before flight that requires continual input from the operator throughout the entire flight from launch to recovery.'' The New Hampshire Department of Transportation mentioned that the definition of ''amateur built'' UAS should be broadened to include UAS built entirely from pre-fabricated parts, including parts such as electronics that cannot be fabricated. They also warned of compliance issues when operators replace a part for a UAS that they originally assembled from a kit containing 100 percent of the parts necessary to assemble a complete and functional UAS. The Academy of Model Aeronautics recommended the definition of amateur-built UAS should include UAS with parts purchased and assembled by an individual. In their view, there is no verifiable increase in safety risk for aircraft with less than 50 percent fabrication and construction by the builder and the rule should eliminate or greatly reduce the required percentage of self-manufactured components.

FAA Response: The FAA agrees with commenters that unmanned aircraft are not built by hobbyists with the same degrees of fabrication as amateur-built manned aircraft. This rule removes the major portion requirement; the definition now includes any unmanned aircraft that an individual built solely for education or recreation. This definition would include any level of assembly of the unmanned aircraft so long as that assembly was done solely for education or recreation of the individual building the UAS. The FAA considers that the individual constructing the home-built unmanned aircraft, even if through assembly alone, is not responsible for meeting the production requirements of the final rule. A hobbyist assembling an unmanned aircraft from a complete kit that contains all the parts and instructions to assemble an unmanned aircraft would not be responsible for meeting the production requirements of this rule. However, the company that produced that complete kit would be required to meet the production requirements. As discussed in section VII of this preamble, persons operating these unmanned aircraft continue to be subject to the operating rules of part 89, so a home-built unmanned aircraft without remote identification can only be operated in an FAA-recognized identification area, unless it can identify remotely in accordance with this rule (*e.g.,* by equipping the home-built unmanned aircraft with a remote identification broadcast module).

To distinguish this type of unmanned aircraft from its manned aircraft counterpart, this rule adopts the definition as *home-built unmanned aircraft* rather than as amateur-built unmanned aircraft system. As explained in section IV.A of this preamble, the remote identification requirements apply to the operation, and the design and production of unmanned aircraft. Therefore, this adopted definition is specific to unmanned aircraft, not the entire UAS.

ii. Education or Recreation

Comments: Commenters generally supported the requirement that amateur-built UAS be produced for educational or recreational purposes only. One commenter felt the term ''amateur-built'' should be replaced with the term ''STEM built.'' This commenter felt the change in terminology would establish a better mindset for the extensive revisions needed in the proposed rule to address the needs of the remote-controlled aviation community. Some commenters suggested that amateur-built be defined as UAS restricted to non-commercial use or with no flights over people or with limited weight. Several commenters felt the FAA should define ''amateur-built UAS'' based upon restricted operation such as limiting to recreational or educational flights with ''non-autonomous'' flight control, flights within line of sight, and flights restricted to uncontrolled airspace or requiring Low Altitude Authorization and Notification Capability (LAANC) approval for controlled airspace.

FAA Response: The FAA adopts the requirement that the unmanned aircraft be built for the education or recreation of the builder, as proposed. The FAA declines to add operating restrictions on the use of home-built unmanned aircraft, finding that existing operating rules are sufficient to ensure safety. For example, when a home built aircraft is flown under part 107, it is restricted in being able to fly over people, its weight cannot exceed 55 pounds, and it cannot enter certain classes of airspace without authorization. Similarly, a home-built unmanned aircraft flown recreationally under 49 U.S.C. 44809 remains subject to the requirements of that section, such as remaining within visual line of sight and complying with the requirement to receive authorization for flights in certain classes of airspace. In addition, home-built unmanned aircraft remain subject to the remote identification operating requirements of this rule.

iii. Other Comments Received

Comments: Some commenters suggested the definition of amateur-built UAS should include any UAS with limited capability or any model aircraft operated exclusively at an FAA-recognized identification area.

FAA Response: The FAA finds that commenters' definition would create far too wide of an exception to the remote identification production requirements, undermining the effectiveness of remote identification.

Comments: One commenter suggested changing the ''amateur-built'' definition to include any model aircraft produced without a radio receiver or flight control system.

FAA Response: The FAA considers that such aircraft would be considered home-built unmanned aircraft if they were assembled for educational and recreational purposes but does not choose to limit home-built unmanned aircraft to only the model aircraft mentioned by the commenter.

Comments: One commenter proposed the amateur-built definition should be based around the language used by the Academy of Model Aeronautics for radio-controlled aircraft.

FAA Response: Though the FAA expects many home-built unmanned aircraft will be similar to the radio-controlled aircraft described by the commenter, the FAA finds that the definition of home-built unmanned aircraft as adopted can encompass those aircraft as well as a wider range of unmanned aircraft, as long as such unmanned aircraft are built solely for education or recreation.

Comments: Many commenters expressed concern that the proposed definition of amateur-built unmanned aircraft would prohibit them from flying their existing model aircraft.

FAA Response: The FAA does not agree. Unmanned aircraft produced without remote identification (*e.g.,* those produced prior to the production compliance date of this rule) may be flown in an FAA-recognized identification area or may be upgraded or retrofitted to meet the remote identification requirements of this rule. FAA has also amended the final rule to allow for less costly compliance by allowing unmanned aircraft to be

equipped with a remote identification broadcast module.

Comments: One commenter suggested the rule differentiate between three classes of producers: ''mass manufacturers,'' ''small commercial,'' and ''experimental/hobbyist.'' The proposed description of ''experimental/hobbyist'' included three characteristics: (1) ''may build or buy dozens of aircraft, many for purposes of education, experimentation, or recreation''; (2) ''life span of the unmanned aircraft may be as little as one flight or it may last decades''; (3) ''components are regularly recycled.''

Wing Aviation LLC commented that in their view, there is no need for an amateur-built definition if the limited UAS concept is implemented with the changes they proposed.

FAA Response: Though the requirements for unmanned aircraft equipped with remote identification broadcast modules finalized in this rule are an option for people constructing home-built unmanned aircraft, the FAA considers that there may always be home-built unmanned aircraft that cannot be equipped with broadcast modules and may be used solely for flights within FAA-recognized identification areas, and therefore a definition for those unmanned aircraft built for educational or recreational purposes is still necessary.

For the foregoing reasons, the FAA will adopt the definition of home-built unmanned aircraft as an unmanned aircraft that an individual built solely for education or recreation.

E. Definition of Declaration of Compliance

The FAA did not propose to add a definition for declaration of compliance. However, to avoid potential confusion given the use of the term in both this final rule and in the part 107 rules for operations over people, the FAA determines that incorporating a new definition in § 89.1 is necessary to ensure sufficient clarity for the term as it is used in part 89. A *declaration of compliance* means a record submitted to the FAA by the producer of a standard remote identification unmanned aircraft or remote identification broadcast module to attest that all the requirements of subpart F of this part have been met.

F. Requests for Other Definitions

1. Discussion of the Final Rule

The FAA received comments on other terms that were not defined in the NPRM, but did not include them in the final rule for the reasons explained below.

2. Public Comments and FAA Response

Comments: The Experimental Aircraft Association proposed adding the terms ''traditional model aircraft,'' ''control line,'' and ''free flight'' to this rule.

FAA Response: The FAA declines to add these definitions in this rulemaking because these terms are not used in part 89 or any regulation modified by this rule.

Comments: The International Association of Fire Fighters and the American Farm Bureau Federation requested the FAA define internet availability and ''sufficient signal strength,'' citing a lack of clarity when determining whether a UAS would be required to connect to the internet or when a UAS would be expected to lose connection to the internet.

FAA Response: The FAA has decided not to include definitions for these terms because this rule does not adopt requirements related to internet connection.

VI. Applicability of Operating Requirements

A. Discussion of the Final Rule

The NPRM proposed to apply the remote identification operating requirements to all persons operating unmanned aircraft registered or required to be registered under part 47 or 48. The NPRM also proposed that the remote identification operating rules apply to all persons operating foreign civil unmanned aircraft in the United States. The proposed applicability did not include exceptions for specific types of operations (*e.g.,* recreational operations, operations conducted by governmental entities) but the operating rules did include deviation authority through which the Administrator would be able to authorize persons to conduct certain operations without remote identification. In addition, the operating rules would allow certain unmanned aircraft without remote identification to be operated in FAA-recognized identification areas.

The FAA received a significant number of comments recommending changes to the applicability of the operating requirements for remote identification. Commenters identified types of operations that they believed should be excepted from the requirement to identify remotely. After consideration of those comments, the FAA continues to support linking the remote identification rule with the registration rule. Because most unmanned aircraft are required by law to meet the aircraft registration requirements, the FAA determined that linking the remote identification and registration requirements is necessary to ensure that there is widespread coverage of the remote identification requirements of this rule. In § 89.101 the FAA adopts the requirement that all unmanned aircraft registered or required to be registered under part 47 or 48 must comply with the operating requirements of part 89. Persons operating foreign civil unmanned aircraft in the United States must also comply with the operating requirements.

In response to comments received, the FAA is clarifying in § 89.101 that the operating requirements do not apply to unmanned aircraft operations under part 91 that are transmitting ADS–B Out pursuant to § 91.225.

B. Public Comments and FAA Response

Comments: Many commenters supported the FAA's proposal to require unmanned aircraft operating in the airspace of the United States to have remote identification.

Many commenters requested revisions to the registration requirements so that unmanned aircraft of a particular size or weight do not have to be registered.

A number of commenters requested the applicability of the operating requirements in part 89 be determined based on the type of operation conducted. Many commenters specifically sought ''blanket exceptions'' from the operating requirements for operations that meet certain criteria (*e.g.,* safety record, weight, altitude, line of sight, airspace) and for operations conducted for specific purposes (*e.g.,* governmental, recreational, aeronautical research, education, public safety, and emergency operations). Others suggested that all UAS, regardless of size, should comply with remote identification.

Many commenters stated that any exception to the operating requirement should be based on the intended use, application, or capability of the unmanned aircraft rather than its size or weight. Some commenters recommended excepting UAS based on the terrain or areas of operation. Some commenters proposed requiring remote identification only within a specific distance of airports, large cities, and critical infrastructure, or where certain population density exists.

Some commenters requested the FAA except UAS used in agricultural operations from the requirements of the rule, and others asked for flexibility for UAS used in farming, ranching, and other business related operations.

Some commenters supported excepting Federal, State, or local government operations from the applicability of the operating

requirements, while others opposed excepting any government UAS. The FAA received many comments supporting and opposing broad exemptions for public safety and critical infrastructure operations. Many commenters indicated that a government exception is necessary because the transmission and broadcast of message elements could compromise the safety or security of public safety and emergency operations. Others believed that only sensitive governmental operations should be excepted from the remote identification requirements. The National Public Safety Telecommunications Council, AiRXOS, the Civil Air Patrol/United States Air Force Auxiliary, the International Association of Fire Fighters, and DRONERESPONDERS Public Safety Alliance, asked for a remote identification solution for ''trusted users'' such as State and local public safety agencies instead of excepting certain parties (*e.g.,* DOD) from having to comply with the operating requirements.

Multiple commenters requested the FAA except certain commercial operations from the operating requirements in subpart B. For example, several small businesses asked for an exception for operations limited to a certain altitude or conducted for a specific scope or purpose. Commenters also requested the FAA except operations conducted by persons with remote pilot certificates issued under part 107 because they are trained to follow aviation regulations and are certificated.

A significant number of commenters expressed opposition to requiring recreational unmanned aircraft to identify remotely.

A number of commenters requested an operational exception for UAS used for educational purposes, aeronautical research activities, and non-aviation related research done with a UAS for testing and filmmaking.

Many private UAS operators, small business, and governmental entities asked the FAA to except UAS operations in class G airspace from having to identify remotely. A number of commenters asked the FAA to consider the distance above ground level where the UAS are operating when determining the applicability of the rule.

Some commenters mentioned that UAS operations receiving air traffic services should be required to use ADS–B Out. Other commenters such as the Aerospace Industries Association, Airbus UTM, the Association for Unmanned Vehicle Systems International (AUVSI), General Atomics Aeronautical Systems, and Northeast UAS Airspace Integration Research mentioned that the proposed rule did not clearly state that UAS authorized by the FAA to use ADS–B Out or transponders are excepted from meeting the operating rules in part 89.

A number of commenters asked the FAA to clarify whether the remote identification requirements apply to operations occurring indoors, underground, or within a contained space, such as a netted outdoor enclosure.

FAA Response: The FAA's rationale for linking the applicability of the operating requirements to the registration requirements is the need to identify aircraft operating in the airspace of the United States, regardless of the type or purpose of the operation. Parts 47 and 48 implement the registration requirements codified in 49 U.S.C. 44101–44103. According to these statutory and regulatory requirements, no person may operate an unmanned aircraft in the airspace of the United States unless it has been registered by its owner, or unless the aircraft is excepted from registration (*e.g.,* aircraft of the national defense forces of the United States or unmanned aircraft weighing 0.55 pounds or less). Congress also clarified in 49 U.S.C. 44809(a)(8) that UAS used in limited recreational operations must be registered and marked in accordance with chapter 441 of Title 49 of the United States Code. Because most unmanned aircraft that will be operated in the airspace of the United States are required to meet the aircraft registration requirements, by law, the FAA determined linking remote identification to the registration requirements is in the interest of the safety and security of the United States airspace. In light of the above, as of September 16, 2023, all persons operating unmanned aircraft registered or required to be registered under part 47 or 48 must follow the remote identification operating requirements unless the operation meets one of the following: (1) The operation is not subject to the operating requirement in accordance with § 89.101(b); (2) the Administrator authorizes a deviation for aeronautical research or to show compliance with regulations, in accordance with § 89.120; or (3) the Administrator authorizes the operator to deviate from the operating requirements, in accordance with § 89.105. To ensure that there is appropriate identification of civil unmanned aircraft operated in United States airspace, these requirements also extend to all persons operating foreign civil unmanned aircraft in the United States.

Exception for Recreational Unmanned Aircraft. The FAA considered public comments requesting the Agency to except recreational unmanned aircraft operations from the remote identification operating requirements. The FAA does not agree with such a request. The FAA believes that successfully integrating unmanned aircraft into the airspace of the United States requires the identification of unmanned aircraft. Recreational unmanned aircraft represent a significant portion of unmanned aircraft operating in the airspace of the United States and, in accordance with 49 U.S.C. 44809(f), the FAA is not prohibited from promulgating rules generally applicable to unmanned aircraft, including those unmanned aircraft eligible for the exception for limited recreational operations of UAS. Among other things, the authority extends to rules relating to the standards for the remote identification of owners and operators of UAS and associated unmanned aircraft. Broad applicability of remote identification is necessary to ensure public safety and the safety and efficiency of the airspace of the United States. The remote identification framework provides UAS-specific data, which allows the FAA, national security agencies, and law enforcement entities to identify the pilots of UAS that are posing safety or security risks.

While the FAA is not excepting recreational unmanned aircraft from the remote identification requirements, this final rule allows persons to retrofit unmanned aircraft by equipping them with remote identification broadcast modules to allow them to identify remotely. This concept will facilitate compliance with the remote identification requirements for recreational and other operators. In addition, this rule also finalizes the FAA-recognized identification areas concept where unmanned aircraft without remote identification can be operated.

Other types of exceptions requested. The FAA carefully considered the requests to include exceptions for other types of operations (*e.g.,* operations below a specific altitude or in certain airspace, UAS without advanced capabilities, agricultural operations) and determined that granting such ''blanket exceptions'' is not appropriate The FAA has determined that the remote identification requirements should apply to unmanned aircraft to address safety, national security, and law enforcement concerns regarding expanded unmanned aircraft operations

at night and over people. A broad applicability of the remote identification requirements enhances the FAA's ability to monitor compliance with applicable regulations, assists the FAA in undertaking compliance, enforcement, and educational actions required to mitigate safety risk, and advances the safe and secure integration of UAS into the airspace of the United States. Though the FAA is not including additional ''blanket exceptions'' to the applicability of subpart B, the Agency has revised the rule to add flexibility and to provide various options to make it simpler for operators to comply with the remote identification requirements. For example, based on comments received, the FAA eliminated the limited remote identification concept and replaced it with the ability for unmanned aircraft to equip with remote identification broadcast modules. In § 89.105, the rule allows the Administrator to authorize deviations from the operating requirements. The Administrator could issue such deviations when he or she determines that there is a need, and that the deviation would not adversely affect safety or that appropriate mitigations are in place to provide a level of safety at least equal to that provided by this rule.

Weight-based applicability. While some of the registration requirements are driven by the weight of an aircraft, the FAA does not believe it is appropriate to use the unmanned aircraft size or weight, apart from the weight standards already incorporated into the registration requirements, as a basis for applicability of the remote identification requirements. As discussed earlier, tying remote identification to registration requirements ensures the broad coverage necessary to address the safety and security concerns associated with unmanned aircraft operations being performed at this time.

Unmanned aircraft operated by government entities. The operating requirements of subpart B of part 89 do not apply to aircraft of the Armed Forces of the United States because these aircraft are not required to be registered under part 47 or 48. Aircraft operated by other government entities (*e.g.,* Federal, State, the District of Columbia, territories, possessions, or Indian Tribal governments) are subject to the registration requirements in part 47 or 48 regardless of whether the aircraft is used in civil aircraft operations or public aircraft operations. Therefore, unmanned aircraft operations conducted by such government entities must comply with the operating requirements of this rule. Nevertheless, any covered government entity that wishes to use an unmanned aircraft without remote identification at a location other than FAA-recognized identification areas may request authorization from the Administrator under § 89.105 to deviate from the operating requirements or under § 89.120 to conduct aeronautical research or to show compliance with regulations.

Educational activities. The FAA does not agree with commenters that supported an operational exception for unmanned aircraft used for educational purposes. As previously mentioned, the applicability of the operating requirements is not based on the type or purpose of operation. Remote identification is necessary regardless of the operation or intended use of the unmanned aircraft. However, the FAA recognizes the need for educational institutions to be able to conduct unmanned aircraft activities, and has expanded the list of persons eligible to request establishment of an FAA-recognized identification area to include educational institutions. The FAA believes this change appropriately addresses the concerns expressed by educators regarding unmanned aircraft activities. In addition, the Agency is now allowing persons to equip unmanned aircraft with remote identification broadcast modules, which will facilitate compliance with the operating requirements.

Aeronautical research. The FAA considered comments requesting that aeronautical research activities be excluded from the operating requirements of part 89 and agrees with commenters because the deviation would contribute to the further development and improvement of UAS equipment and technologies. Therefore, as finalized, § 89.120 allows the Administrator to authorize operations without remote identification where the operation is solely for the purpose of aeronautical research or to show compliance with regulations.

Unmanned aircraft operated indoors, underground, or in enclosed spaces. The FAA regulates the navigable airspace of the United States. Therefore, this rule does not apply to unmanned aircraft operations conducted entirely indoors, underground, or inside an enclosed space such as a netted enclosure. The remote identification requirements apply when the unmanned aircraft exits the interior of a building or structure and is operated outside. While the remote identification operating requirements do not apply to unmanned aircraft operating indoors, certain design requirements for unmanned aircraft with remote identification, especially standard remote identification unmanned aircraft, may create operational challenges in these environments. For example, standard remote identification unmanned aircraft will not take off unless broadcasting the remote identification message elements. Depending on the particular design, some unmanned aircraft with remote identification may not be able to operate if they cannot broadcast the unmanned aircraft position because GPS is not available. Operators of unmanned aircraft intended to be used both indoors and outdoors should understand how their unmanned aircraft will perform when services like GPS may be unavailable.

Unmanned aircraft equipped with ADS–B Out. The FAA agrees with the commenters who stated that certain UAS operating under air traffic control and equipped with ADS–B Out and ATC transponders are already meeting the intent of the remote identification rule, and that remote identification may be redundant for such operations. The FAA adopts an exception to the remote identification operating requirements in § 89.101(b) for persons conducting unmanned aircraft operations under part 91 that are transmitting ADS–B Out pursuant to § 91.225. Operators of unmanned aircraft that meet the criteria are not required to comply with the operating requirements of part 89. The operation may be conducted under any type of flight plan that is acceptable for the intended operation. The FAA has provided a similar exception from the remote identification production requirements for unmanned aircraft certified under a part 21 design or production approval that are equipped with ADS–B Out. Notwithstanding the exception in § 89.101(b), nothing in this rule precludes unmanned aircraft from being equipped with both ADS–B Out and remote identification equipment. However, to ensure that unmanned aircraft do not place a strain on the ADS–B system, ADS–B Out may not be used to meet remote identification requirements outside of those unmanned aircraft operations for which it is required. The use of ADS–B Out in transmit mode is restricted to those unmanned aircraft operations for which it is required.

VII. Operating Requirements for Remote Identification

This rule establishes requirements for the remote identification of unmanned aircraft operated in the airspace of the United States. Remote identification is the capability of an unmanned aircraft, in flight, to provide certain

identification, location, and performance information that people on the ground and other airspace users can receive. An operator of an unmanned aircraft can comply with the operating requirements for remote identification in one of three ways:

(1) *Standard remote identification unmanned aircraft.* The first way to comply is referred to as ''standard remote identification'' and requires the operator to use an unmanned aircraft that broadcasts identification, location, and performance information for both the unmanned aircraft and the control station. *See* § 89.110 of this rule.

(2) *Remote identification broadcast module.* The second way to comply is for the operator to equip an unmanned aircraft with a ''remote identification broadcast module'' that broadcasts identification, location, and performance information about the unmanned aircraft, and the unmanned aircraft's takeoff location. *See* § 89.115(a) of this rule.

(3) *FAA-recognized identification area.* The third way to comply, and the only option available for most unmanned aircraft without remote identification capabilities (*e.g.,* an unmanned aircraft manufactured without remote identification equipment or an unmanned aircraft whose remote identification equipment or remote identification broadcast module is not working) is for the operator to fly his or her unmanned aircraft in certain specific geographic areas called ''FAA-recognized identification areas.'' These areas are established under this rule specifically to accommodate UAS that do not identify remotely. *See* § 89.115(b) of this rule.

The NPRM proposed various ways for an operator of UAS to identify remotely: (1) Operating a limited remote identification UAS; (2) operating a standard remote identification UAS; or (3) operating unmanned aircraft without remote identification at an FAA-recognized identification area. After reviewing public comments and giving further consideration, the FAA decided to eliminate the concept of a limited remote identification UAS and incorporate the ability to retrofit unmanned aircraft with remote identification broadcast modules that broadcast the remote identification information required by this rule. The FAA also decided to revise some of the parameters and requirements for operations of standard remote identification UAS and operations at FAA-recognized identification areas, as discussed below.

A significant change from the proposal is that the FAA decided to eliminate the requirement for UAS with remote identification to connect to the internet and to transmit the remote identification message elements through the internet connection to a Remote ID USS. While the FAA recognizes that there are potential benefits associated with establishing a network of Remote ID USS, the FAA believes that, for the time being and given the types of unmanned aircraft operations that are currently allowed, the broadcast remote identification solution fulfills agency and law enforcement needs to maintain the safety and security of the airspace of the United States. Accordingly, this rule now generally requires unmanned aircraft operators outside of an FAA-recognized identification area to use either standard remote identification unmanned aircraft or unmanned aircraft with remote identification broadcast modules to broadcast remote identification message elements.

A. Elimination of Network-Based Remote Identification Requirement

1. Discussion of the Final Rule

The FAA initially proposed requiring both standard remote identification UAS and limited remote identification UAS to transmit the remote identification message elements through an internet connection to a Remote ID USS. After careful consideration of public comments and the implementation challenges associated with requiring UAS to transmit to Remote ID USS, the FAA decided to eliminate this proposed requirement in this rule. Without the requirement to transmit remote identification through the internet, limited remote identification UAS as proposed is no longer a viable concept. In its place, the FAA is incorporating a regulatory framework under which persons can retrofit an unmanned aircraft with a remote identification broadcast module to satisfy the remote identification requirements of this rule. The requirements for remote identification broadcast modules are described in section VII.D of this preamble. The effects of this change on standard remote identification unmanned aircraft are discussed in section VII.A of this preamble.

Though the FAA recognizes that there are potential benefits associated with establishing a network of Remote ID USS, the FAA believes that, for the time being and given the types of unmanned aircraft operations that are currently allowed, the broadcast remote identification solution fulfills agency and law enforcement needs to maintain the safety and security of the airspace of the United States.

Original Concept for internet-Based Network. During the UAS–ID ARC, industry representatives proposed a concept for an internet-based network to complement the core functionality of a digital ''license plate'' broadcast-based solution. Under this concept, the aircraft's control station (often a mobile phone) would connect to the internet and transmit remote identification information to a third-party service provider. The network concept was attractive for several reasons, but primarily because of the ability to receive remote identification information through existing mobile telephony infrastructure without having to deploy equipment to ''listen'' for a radio frequency broadcast. The primary challenge with this concept is its reliance on Wi-Fi or cellular network service being available where an aircraft is flying; the concept would not work in areas lacking cellular telephone coverage. The ARC did not reach consensus on a single remote identification concept—broadcast or network.

Ultimately, the FAA proposed both broadcast and network requirements in the NPRM, in an attempt to balance the interests of all stakeholders. As part of the proposed network requirement, UAS would have had to transmit the remote identification message elements through the internet to a third-party service provider, referred to as a ''Remote ID USS.'' Remote ID USS would have collected and, as appropriate, disseminated the remote identification information through the internet.

The Remote ID USS concept was a critical component to the successful implementation of the network requirement, as a commercial endeavor at no cost to the United States Government. Prospective Remote ID USS would have been required to meet technical requirements and contractually agree to abide by certain performance standards and other requirements on matters including, but not limited to, privacy protections of data collected pursuant to part 89, disclosure or dissemination of data, and data retention. The successful implementation of the network concept relied on prospective USS' willingness to enter into no-cost contracts with the FAA to provide these services. The FAA has successfully used a similar construct to authorize small UAS operations around airports through its Low Altitude Authorization and Notification Capability (LAANC) program. Through this public-private

partnership arrangement, the government benefits from the speed and quality of industry innovation while industry benefits from profits derived from marketing other services or products.

Emerging Problems with the Concept for internet-Based Network. The FAA received significant feedback about the network requirements in response to the NPRM. Commenters expressed concerns that the network component could enable nefarious actors to perform a coordinated Distributed Denial of Service (DDoS) attack on Remote ID USS. Industry commenters also highlighted concerns about implementing the network requirement in the absence of a standardized interface for network connection and raised concerns about giving potential business intelligence to competitors or third parties with access to network information. Many commenters also expressed valid concerns about privacy, cybersecurity, and other security-related issues. Others expressed concerns about access and protection of data transmitted to, and stored by, a Remote ID USS. Some law enforcement agencies mentioned they would or could rely, for the time being, on a broadcast solution, rather than a network solution, for threat discrimination.

It has become apparent to the FAA that Remote ID USS may struggle in facing significant technical and regulatory requirements that go beyond existing industry consensus standards. Early in 2020, the FAA convened a Remote ID USS cohort to explore developing the network solution that is necessary to implement the proposed network requirements. The cohort identified several challenges with implementing the network requirements, which the FAA acknowledges it had not foreseen or accounted for when it proposed the network solution and Remote ID USS framework. For example, the cohort raised the challenge of developing and issuing technical specifications to govern remote identification interoperability when producers of UAS have not yet designed UAS with remote identification.

Based on the above, the FAA decided to take a simplified approach at this time to remote identification by only adopting the broadcast requirements in this rule. As adopted, this broadcast-only rule provides an initial remote identification framework and sets the foundation for future regulatory actions. As the FAA builds the regulatory constructs that support increasingly advanced concepts, such as BVLOS and UTM, the United States Government will be prepared to solve safety and security issues related to those concepts based on more mature understandings. At this stage, however, the unknowns regarding UAS integration make it impractical to expand this rule beyond a broadcast-only solution.

For these reasons, the Agency is revising all of part 89, including but not limited to the operating requirements and minimum performance requirements for standard remote identification unmanned aircraft, to eliminate all references to the network capability.

2. Public Comments and FAA Responses

Comments: Many commenters, including individuals, associations, and government organizations, expressed concerns with requiring UAS to connect to the internet and transmit to a Remote ID USS without a suitable alternative to continue operations when the internet is unavailable. Commenters noted that there are many areas in the United States, particularly remote and rural areas that do not have reliable internet access. Commenters mentioned that these are often some of the safest places to fly UAS due to low population density on the ground and less manned aircraft traffic.

Many commenters asked the FAA to provide a better explanation for why an internet connection would be required at all, particularly because under certain circumstances, the proposal allowed for a UAS to fly when not connected to the internet.

Depth from Above and others noted that network-based solutions provide an incomplete picture for the safety and security of standard remote identification UAS operations because standard remote identification UAS could operate, in certain scenarios, without internet access using only broadcast remote identification. The commenters suggested removing the network requirement to reduce cost and improve compliance.

The European Union Aviation Safety Agency noted that unmanned aircraft designed and manufactured to be compliant with the EU regulations may not be able to comply with this proposed rule because under the EU's regulations, broadcast remote identification is mandatory, whereas the network remote identification is optional.

Many commenters had questions about the meaning of internet availability. Commenters noted that many geographic areas might have internet connectivity but that the signal in some of those areas may not have enough strength to adequately support internet connected applications. Many commenters expressed concerns that rural UAS operators who have limited broadband or cellular access could be required to purchase increasingly expensive data plans or multiple data plans to ensure adequate coverage, which may increase costs and lead to compliance issues.

The National Rural Electric Cooperative Association (NRECA) mentioned the FAA was assuming there would be a network of Remote ID USS able to provide services in rural areas and indicated that deficiencies exist when market forces are left to provide services to rural areas. NRECA recommended the FAA consider an FAA-provided service for at least some parts of the country and a longer implementation timetable or pilot program.

Many commenters, including the American Civil Liberties Union, opposed the requirement to transmit to a Remote ID USS and expressed concerns with the security of UAS operations using network remote identification. The commenters listed a number of privacy and security concerns, including: Hacking into the controls of one or multiple UAS; deliberate interference with remote identification or Command and Control (C2) frequencies utilizing unlicensed spectrum; interference amongst the remote identification and C2 equipment; and cellular high speed packet access (HSPA) and long term evolution (LTE) interference with frequencies used for C2 or to downlink video from the unmanned aircraft to the control station. The American Civil Liberties Union suggested that requiring UAS to connect to the internet as a condition of takeoff is not justified because there is insufficient benefit relative to the related costs and privacy issues. Several commenters suggested ensuring that network remote identification is isolated from C2 frequencies to prevent the hijacking of UAS.

Many commenters, including the Medina County Office of Emergency Management and Homeland Security, expressed concerns about the potential to ground hundreds or thousands of UAS nationwide, including UAS performing public safety operations, if there is a dedicated denial of service or similar cyberattack which causes an outage of Remote ID USS. Other commenters expressed concerns about someone hacking a Remote ID USS or spoofing broadcast remote identification to make it appear erroneously as if there are UAS in flight. Several commenters stated that some government agencies

have discontinued their use of some foreign-made UAS due to security concerns and mentioned that it is not in the best interests of national security to require private users to transmit similar surveillance information through the internet. In some cases, operators are operating the types of UAS that the government has stopped using for security reasons.

Commenters expressed concerns about non-State actors as well as adversarial nations. Various commenters highlighted the national security implications of certain remote identification data becoming available to the public. Unmanned Systems Canada asked for the network requirement to be optional until each Remote ID USS can demonstrate sufficient security and reliability and stated that a properly licensed and registered UAS operation should not be grounded if a connection to a Remote ID USS is not available.

Commenters such as Juniper Unmanned mentioned that some commercial operations supporting critical infrastructure involve strict cybersecurity rules and prohibit internet connectivity during flight operations.

Many commenters involved in emergency response expressed concerns with relying on the internet to comply with the requirement to transmit. Similarly, several state government agencies and universities noted that their UAS enforcement and research activities would be greatly restricted if the FAA were to adopt the requirement for the UAS to connect to the internet and transmit to a Remote ID USS without a suitable alternative means of compliance that would permit the UAS to take off and operate when internet access is not available.

Zipline and the Alabama Department of Transportation noted that the requirement to connect to a Remote ID USS if the internet is available would prevent a person from using a UAS to support emergency response operations if the internet is available but the UAS cannot reliably interface with a Remote ID USS.

Many commenters expressed concerns with the requirement that Remote ID USS retain the remote identification message elements for 6 months from the date the remote identification message elements are received. Some commenters cited shorter FAA record retention periods for other information while others contended the 6-month term was not long enough. Various commenters expressed support for the record retention requirements, noting that access to the data is useful for law enforcement, regulatory compliance, and legitimate safety, security, compliance, accident, and incident investigation purposes.

The Consumer Technology Association and Wing Aviation, LLC stated that the final rule should restrict access to historical data by government, limit the collection and aggregation of remote identification data by third parties, and ensure privacy. The Small UAV Coalition urged the FAA to prohibit Remote ID USS from sharing information with Federal, State, or local governments absent a law enforcement or national security interest or consent of the UAS operator.

Many commenters noted the potential costs, complexity, and operational restrictions associated with network remote identification requirements and expressed concerns that they may foster a culture of non-compliance. Many commenters observed that the use of a subscription-based service would prove costly for some UAS operators. Many commenters stated that monthly subscription fees would be unfair to those who do not fly that regularly for a variety of reasons.

Many commenters expressed concerns about the cost of depending on internet service via cellular phones or other enabled devices that would be required to support network remote identification. They also expressed concerns about the costs of subscribing to a Remote ID USS. Both recreational and commercial operators expressed concerns about the cost of the data plans that would be required to serve multiple UAS. One UAS services company estimated increased monthly costs of $360 to $500 a month for cellular services. Several commenters noted that adding an additional device, such as an unmanned aircraft, to a cellular data plan to support direct transmission to the internet generally costs $30 to $70 a month, and one commenter noted this is likely to be the largest part of many users' overall operating costs.

The Alliance for Drone Innovation opposed a network requirement for remote identification, noting that many UAS in use today, including model aircraft, model helicopters, and racing aircraft, would be burdened with increased costs for equipment, data plans, and USS subscriptions because they do not currently have a way to connect to the internet. SenseFly expressed concerns about the cost that designers and producers of remote identification UAS will incur if they are required to make UAS compatible with different internet providers.

A significant number of commenters expressed privacy concerns with the proposed requirement to have UAS transmit remote identification data to Remote ID USS. Many individuals opposed having third parties collect information including, but not limited to, their name, address, and location. Some commenters also mentioned that the requirement to transmit their location could cause business and tactical issues, particularly for businesses or persons that want or need to ensure their flight data remains confidential or out of reach of most parties. Many commenters indicated that the pilot and flight data should only be made available to law enforcement and Federal entities.

Many commenters contended that the best way to ensure privacy is to encrypt certain remote identification data (*e.g.,* control station or unmanned aircraft location) and to make it available only to the FAA and law enforcement. Amazon Prime Air commented that the FAA could mitigate the potential loss of user privacy by requiring position and velocity data to be encrypted or by requiring security protocols that can provide law enforcement with real time access while enhancing privacy. A significant number of commenters opposed making the data transmitted to a Remote ID USS available to the general public.

Commenters expressed concerns that a UAS operator's data could be sold or provided to third parties. Other commenters were concerned about requiring companies to provide sensitive information to a Remote ID USS. Many expressed concerns that the information could be hacked. Other commenters expressed concern over where the privacy data would reside and what regulations would be in place to prohibit United States citizens' data from being sent and sold overseas.

Multiple commenters expressed the view that unfettered access by law enforcement to remote identification data could lead to specific monitoring of the media by law enforcement agencies and impact the freedom of the press.

Several commenters noted that cellular networks are optimized to work with ground-based equipment rather than airborne equipment and suggested that it is not practical to provide an internet connection to a UAS using terrestrial cellular networks due to reliability that is much lower than typical aviation requirements; the potential for numerous UAS to interfere with ground-based users; and the downward tilt and narrow vertical beam width of the cellular base transceiver station used to optimize battery life for ground-based user equipment.

Several commenters noted that their control stations connect to their unmanned aircraft only through Wi-Fi which makes an internet connection impossible when away from Wi-Fi access and others noted that they fly using tablets or unique monitors which do not include cellular access.

A number of commenters generally supported the broadcast requirement for remote identification. The commenters noted that many UAS are already capable of broadcasting UAS information or could be upgraded with equipment or software to meet the remote identification requirements, for a one-time cost. Commenters noted the various benefits of broadcast remote identification, such as independence; ease of compliance due to the capabilities of existing systems; tamper resistance; and simplicity regarding account management, data plans needed for large fleets, and cost. Commenters noted that broadcast remote identification is sufficient for law enforcement to determine the identity and location of the operator in VLOS operations.

Many commenters suggested the FAA should view broadcast-only remote identification as sufficiently safe and secure for achieving remote identification. The commenters stated that broadcast-only should be sufficient because standard remote identification UAS operations are permitted when the internet is not available, or when the UAS loses its connection to the Remote ID USS, as long as the unmanned aircraft is broadcasting. Many commenters also noted that broadcast remote identification may provide an affordable and effective path to compliance for many existing UAS that currently have the ability to broadcast telemetry data in the proposed radio frequency spectrum via the command-and-control link.

Various commenters noted that a broadcast solution is less expensive, simpler, and provides increased privacy when compared to network solutions; and that other UAS or manned aircraft without an internet connection will not be able to detect a limited remote identification UAS using only network remote identification.

Many commenters noted that European Union requirements permit operations with only broadcast remote identification. The EU Aviation Safety Agency noted that under EU regulations, ''broadcast'' is mandatory, while the ''network'' or ''limited'' remote identification is optional.

Discover Flying Club and Phirst Technologies suggested permitting a broadcast-only option for remote identification UAS, with governments or third party companies responsible for receiving and collecting remote identification data, as needed, in specific locations. The American Civil Liberties Union mentioned that broadcast remote identification is sufficient to meet security needs to identify hostile UAS and for public awareness.

In further support of a broadcast-only option, many commenters, such as Motorola Solutions, Inc., stated that natural disasters and search and rescue operations often take place in areas of limited internet coverage. They mentioned that instead of requiring ''trusted users'' to comply with remote identification, the FAA should allow them to operate broadcast-only. The Edison Electric Institute and other electric and power associations stressed the importance of broadcast remote identification to ensure the UAS continues to send out the message elements in the event of lost internet connectivity. The National Rural Electric Cooperative Association and the Northwest Electric Power Cooperative recommended creating a broadcast-only option for limited remote identification UAS to permit safe operation in remote areas.

Other commenters opposed a broadcast-only remote identification solution, stating that it could introduce unnecessary risks to law enforcement due to the potential for frequency congestion on unlicensed spectrum. Amazon Prime Air, Verizon, Skyward, and others noted weaknesses of the broadcast solution, such as broadcast coverage limitations due to altitude, terrain, interference, and power. Most of these commenters also recognized that broadcast may still be required for specific operations, such as in areas with no internet access or areas where a local, independent source of remote identification information is required for safety or security purposes. Many industry commenters were concerned with the requirement to broadcast their data, because it could impact their ability to keep their customers' flight information private and could potentially be used by their competitors.

Some commenters expressed support for a network-only remote identification solution, noting the advantages of network remote identification such as the capability for stronger authentication, availability regardless of proximity to the UAS, ability to share additional message elements, availability of internet access, and importance to further development of UTM and traffic deconfliction. AirMap agreed that network remote identification is appropriate when the internet is available, to support UTM, and to enable a greater volume of flights. AirMap indicated that operations with only network remote identification would permit tighter control of personally identifiable information (PII), eliminate the possibility of data scraping from aircraft broadcasts, help with operator location security, maintain the privacy of UAS delivery service customers, and offer tiered data access so that law enforcement has access to different data than the general public.

AT&T Services, CTIA—The Wireless Association, GSMA, and Qualcomm supported network remote identification, noting benefits such as greater security than broadcast on unlicensed frequencies, encryption, available cellular infrastructure already driven by external demand for increased data service, device authentication to support positive identification, and support for the development of UTM.

Some commenters supported the role of Remote ID USS to receive the required message elements, the framework of using a contractual MOA to govern the Remote ID USS, and the idea that LAANC served as a model for the concept.

FAA Response: The FAA has carefully considered the wide variety of perspectives received in public comments as well as the need for remote identification of unmanned aircraft. Throughout the process of integrating unmanned aircraft into the airspace of the United States, the FAA has taken a phased, incremental approach that fosters industry innovation while meeting the corresponding safety and security needs that are presented. The FAA believes this should be the case with remote identification of unmanned aircraft as well.

The FAA continues to work toward full integration of UAS into the airspace of the United States by partnering with industry to develop UTM and facilitate advanced unmanned aircraft operations, like BVLOS. However, the FAA has determined that a broadcast-based remote identification system that provides for immediate awareness of unmanned aircraft in the widest variety of settings will be adequate to support the phased, incremental approach, while allowing the UAS industry additional time to continue developing the network-based UTM ecosystem.

The FAA recognizes concerns related to an internet connectivity requirement, such as internet availability or connectivity issues; increased costs for UAS upgrades; internet data plans; Remote ID USS subscriptions; and

reduced air and ground risk when operating in remote areas with less air traffic and lower population density. The FAA acknowledges the ability to connect to the internet is dependent on a variety of factors including geographic coverage of cellular internet networks, wide-scale network disruptions, or natural disasters. The FAA agrees with commenters that unmanned aircraft operations should not be unnecessarily restricted when the internet is not available or not sufficient to establish and maintain a connection to a Remote ID USS provided the unmanned aircraft is broadcasting the required message elements.

There are some remote areas where an operator cannot connect to the internet, such as locations where cellular or other internet signals are not available or sufficient to establish and maintain a connection to a Remote ID USS. While loss of the broadcast capability is an indication of a remote identification equipment failure, loss of connectivity to the internet or a Remote ID USS could be attributed to a lack of internet availability that is outside the control of the unmanned aircraft operator. A functioning broadcast capability is necessary for remote identification information to be available in areas that do not have internet availability.

The FAA is not adopting the requirement to transmit message elements through the internet to a Remote ID USS in this rule at this time. While the FAA recognizes the potential benefits of network remote identification as stated by several commenters, the FAA believes a broadcast-only solution is sufficient, for the time being and given the types of unmanned aircraft operations that are currently allowed, to maintain the safety and security of the airspace of the United States given the types of operations that are authorized in the operating and airspace regulations.

Certain commenters suggested allowing unmanned aircraft operators to choose between either broadcast or network remote identification. These commenters suggested that while a Remote ID USS-dependent solution might be overly burdensome to certain types of recreational or small-scale commercial operators, some operators may prefer network remote identification. These commenters noted that network remote identification allows operators to better protect the privacy of their operations from the general public, which may have benefits for consumers receiving sensitive deliveries or to protect a company's confidential business information regarding where they operate. According to these commenters, allowing either broadcast or network remote identification would permit operators to transmit remote identification information via the mechanism most appropriate for their use, while ensuring that the public still had the capability of rapidly identifying nearby unmanned aircraft.

The FAA notes that this rule does not preclude industry from establishing Remote ID USS-like networks where entities can exchange remote identification information to facilitate a safer and more efficient airspace of the United States. The FAA encourages further development and maturation of UTM concepts, especially those that consider aviation safety national security, and law enforcement needs. However, as indicated in the NPRM, broadcasting the message elements has always been considered a critical aspect of remote identification, even in situations when the NPRM also allowed for network transmission. The FAA believes that broadcasting the message elements is fundamental to ensuring that remote identification information is always accessible to members of the public, and as such, the FAA does not agree with commenters' suggestions to allow unmanned aircraft operators to choose between broadcast and network remote identification.

The FAA agrees with the commenters who proposed that broadcast remote identification is sufficient to provide the required remote identification message elements to support typical unmanned aircraft operations and satisfy security requirements. Broadcast remote identification does not rely on internet availability, and is a secure method that is less susceptible to widespread failure caused by malicious actors or systems outages. Broadcast remote identification is also an independent, less expensive, and less complex method of providing the required remote identification message elements. The FAA has determined that a requirement for unmanned aircraft to broadcast remote identification information will provide the FAA, law enforcement, the general public, and other parts of the aviation community with real-time information about unmanned aircraft operations in any area in which broadcast signals can be received. The broadcast will permit detection of unmanned aircraft and will permit law enforcement and the general public that receives the broadcasted message elements to have information about the unmanned aircraft location as well as information about the control station or takeoff location. Personal wireless devices that are capable of receiving 47 CFR part 15 frequencies, such as smart phones, tablets, or other similar commercially available devices, will be able to receive broadcast remote identification information directly without reliance on an internet connection.

After reviewing the comments and further consideration, the FAA decided to modify the proposal and, as finalized, this rule only requires unmanned aircraft to broadcast the message elements. Accordingly, the FAA has eliminated all requirements for unmanned aircraft to connect to the internet to transmit to a Remote ID USS.

B. Limited Remote Identification UAS

1. Discussion of the Final Rule

The NPRM proposed that limited remote identification UAS would only have to transmit the remote identification message elements through an internet connection to a Remote ID USS. As discussed in section VII.A of this preamble, limited remote identification UAS are no longer a viable concept for this rule. Accordingly, this final rule has eliminated all proposed requirements related to limited remote identification UAS.

2. Public Comments and FAA Response

Comments: Only a few commenters supported the proposed limited remote identification UAS. Commenters who supported the proposed requirements wanted the FAA to move forward with implementing its proposed policies.

Many commenters were opposed to the concept and requirements for limited remote identification UAS and believed the FAA should not adopt those requirements. Commenters noted that many areas in the United States, particularly remote and rural areas, do not have reliable internet access due to cellular coverage limitations, signal obstructions caused by terrain and obstacles, poor connection quality, or temporary outages. Many commenters noted that the costs, complexity, and operational restrictions associated with network remote identification requirements may foster a culture of non-compliance. As a result, many commenters suggested eliminating or substantially altering limited remote identification UAS.

Several commenters suggested there was no need for the limited remote identification concept. DJI Technology appreciated the attempt to create a concept intended to impose a lower burden and ease for compliance for less capable UAS that pose less risk but suggested the limited remote identification UAS concept is virtually

useless as proposed. Degenkolb Engineers noted that any controller designed to meet limited remote identification UAS requirements could be upgraded to meet the standard remote identification UAS requirements at trivial cost.

Other commenters suggested the limited remote identification UAS concept would create unnecessary complexity and would not contribute to flight safety. They recommended permitting broadcast options for limited remote identification UAS, which could provide the unmanned aircraft location information to suitably equipped manned aircraft at any altitude without dependency on network solutions or command and control links.

Many commenters weighed in on specific aspects of limited remote identification UAS, including the proposed 400-foot range limitation, the requirement to fly within visual line of sight, and the requirement to land the aircraft in the event the connection with the Remote ID USS was lost.

FAA Response: A common theme in the public comments received regarding the limited remote identification UAS concept was a general dissatisfaction and disagreement with the operating and design requirements of the proposed concept. The FAA attempted to provide a regulatory framework to accommodate existing unmanned aircraft without remote identification so they could be modified or retrofitted in a manner to provide remote identification capabilities. The FAA agrees with the commenters who argued that limiting unmanned aircraft to operating only where internet connectivity is available limits the utility and marketability of such unmanned aircraft. However, the FAA does not agree with commenters who supported only a single concept for remote identification. The FAA believes that a remote identification option is necessary for owners of existing unmanned aircraft without built-in remote identification capability who do not wish to operate solely at FAA-recognized identification areas. For that reason, the FAA is incorporating into this rule a concept known as ''remote identification broadcast module'' to allow persons to retrofit an unmanned aircraft by equipping it with a broadcast module that enables compliance with the operating requirements of this rule. The remote identification broadcast module concept is discussed in section VII.D of this preamble.

The FAA acknowledges all of the comments related to limited remote identification UAS and took them into consideration as a part of its decision to eliminate the concept.

C. Standard Remote Identification Unmanned Aircraft

1. Discussion of the Final Rule

The FAA is adopting the requirements for standard remote identification unmanned aircraft in § 89.110, as discussed below. A key difference from the NPRM is that the Agency has decided to eliminate the requirement for the standard remote identification unmanned aircraft to transmit the remote identification message elements through the internet to a Remote ID USS. This rule only requires the standard remote identification unmanned aircraft to broadcast the remote identification message elements directly from the unmanned aircraft from takeoff to shutdown. The FAA is also updating the term to ''standard remote identification unmanned aircraft, as opposed to ''standard remote identification UAS'' for clarity purposes. See section IV.A for an in-depth discussion regarding the use of unmanned aircraft instead of UAS. The modifications in § 89.110 mainly reflect the change to the broadcast-only solution, or changes made for clarity purposes.

The FAA clarifies that unmanned aircraft without remote identification may be upgraded to standard remote identification unmanned aircraft if the upgrade enables the unmanned aircraft to meet all of the remote identification requirements of this rule.

i. Use of Standard Remote Identification Unmanned Aircraft

A person operating a standard remote identification unmanned aircraft that complies with § 89.110 can operate the unmanned aircraft outside of FAA-recognized identification areas. Standard remote identification unmanned aircraft can be used irrespective of the operating rules that apply to the specific flight. For example, a standard remote identification unmanned aircraft could be used in limited recreational operations conducted under 49 U.S.C. 44809, or operations conducted under part 91, part 107, part 135, or any other operating part.

ii. Elimination of Network Transmission Requirement

As previously stated, the FAA proposed to require standard remote identification UAS to transmit the remote identification message elements through the internet to a Remote ID USS and to broadcast the same message elements directly from the unmanned aircraft using radio frequency spectrum. After reviewing public comments and further consideration of a significant amount of comments, the FAA decided to amend the regulatory framework for standard remote identification unmanned aircraft by eliminating the requirement to transmit the message elements through the internet to a Remote ID USS. As adopted, § 89.110 is now a broadcast-only solution where standard remote identification unmanned aircraft are required to broadcast the message elements directly from the unmanned aircraft. The FAA determined that the requirement, as adopted, facilitates compliance with this rule and, at this time, meets the safety and security needs of the FAA, national security agencies, and law enforcement.

iii. Remote Identification Equipment and Message Elements

The person operating a standard remote identification unmanned aircraft must ensure the unmanned aircraft is broadcasting the standard remote identification unmanned aircraft message elements. This broadcast equipment must be functional from takeoff to shutdown of the unmanned aircraft and must not be disabled.

The operator of a standard remote identification unmanned aircraft must ensure the unmanned aircraft is broadcasting the message elements listed in § 89.305. The message elements broadcast by standard remote identification unmanned aircraft include a unique identifier; an indication of the control station's latitude, longitude, and geometric altitude; an indication of the unmanned aircraft's latitude, longitude, and geometric altitude; an indication of the velocity of the unmanned aircraft; a time mark; and an indication of the emergency status of the unmanned aircraft. The requirement to broadcast the remote identification message elements applies from takeoff to shutdown of the unmanned aircraft. The message elements for standard remote identification unmanned aircraft are discussed in more detail in section VIII.A of this preamble. The minimum performance requirements for standard remote identification unmanned aircraft are discussed in more detail in section VIII.B of this preamble.

The FAA adopts design and production requirements for standard remote identification unmanned aircraft in subpart F of part 89. The production requirements are meant to help a person comply with the operational requirements that apply to standard

remote identification unmanned aircraft. The Agency intends for compliance with the remote identification requirements to be simple and straightforward for individuals operating standard remote identification unmanned aircraft produced in accordance with an FAA-accepted means of compliance. For example, a standard remote identification unmanned aircraft must automatically broadcast the remote identification message elements, and its design must prohibit it from taking off if the broadcast equipment is not functional.

iv. Serial Number Requirements

A person may operate a standard remote identification unmanned aircraft if its serial number is listed on an FAA-accepted declaration of compliance, or the standard remote identification unmanned aircraft is covered by a design approval or production approval issued under part 21.

The serial number issued to the standard remote identification unmanned aircraft must be included in the application for registration of the unmanned aircraft under part 47 or 48 and may not be duplicative of a serial number associated with a different certificate of aircraft registration. For owners registering small unmanned aircraft exclusively for limited recreational operations under 49 U.S.C. 44809, more than one serial number may be included on a single Certificate of Aircraft Registration. The registration requirements that apply to standard remote identification unmanned aircraft are discussed in more detail in section XV of this preamble. Alternatively, the serial number of the unmanned aircraft must be provided to the FAA in a notice of identification pursuant to § 89.130 prior to the operation. The requirements that apply to foreign registered civil unmanned aircraft operating in the airspace of the United States are discussed in section XVI of this preamble.

2. Public Comments and FAA Response

Comments: The Air Line Pilots Association, International mentioned that only standard remote identification UAS should be permitted to access LAANC airspace.

FAA Response: Considering the requirement for all unmanned aircraft to broadcast remote identification information, the FAA finds that access to controlled airspace via the LAANC process does not require additional restrictions.

Comments: Some commenters strongly supported the requirement for standard remote identification UAS to transmit via a network and broadcast, noting that each system has strengths that address the other system's weaknesses to support safety, security, and future operational capabilities. Others supported the standard remote identification UAS requirements provided the rule maintains the option to continue to operate when there is no connection to the internet or transmission to a Remote ID USS.

FAA Response: For the reasons explained in section VII.A of the preamble, the FAA has decided to eliminate the network-based requirements from this rule at this time. Accordingly, in accordance with § 89.110(a), standard remote identification unmanned aircraft must broadcast the remote identification message elements directly from the unmanned aircraft.

Comments: Some commenters suggested the FAA consider requiring operators to comply with either a broadcast or a network requirement, but not both, unless requiring both is necessary for specific operations such as BVLOS. Commenters suggested the requirement to simultaneously broadcast remote identification data that is transmitted to the network does not add any substantial public safety or security benefit.

FAA Response: The FAA is not adopting the requirement to transmit message elements through the internet to a Remote ID USS in this rule. While the FAA recognizes the potential benefits of network remote identification, as stated by several commenters, the FAA believes a broadcast-only solution is sufficient, at this time, to maintain the safety and security of the airspace of the United States. The FAA agrees with the commenters who proposed that a broadcast-only solution is sufficient at this time to provide the required remote identification message elements to support typical unmanned aircraft operations and satisfy security concerns.

D. Remote Identification Broadcast Modules

1. Discussion of the Final Rule

This rule finalizes the regulatory framework that allows persons to equip unmanned aircraft with remote identification broadcast modules to enable them to identify remotely. *See* § 89.115(a) of this rule. As previously mentioned in section VII.D of this preamble, the remote identification broadcast module concept is a retrofit option that replaces the limited remote identification UAS regulatory framework of the proposed rule and provides flexibility to operators of unmanned aircraft that do not meet the requirements for standard remote identification unmanned aircraft. The concept allows unmanned aircraft built without remote identification (*e.g.,* existing unmanned aircraft fleet, home-built unmanned aircraft) to be operated outside of FAA-recognized identification areas because the broadcast modules enable the unmanned aircraft to broadcast the remote identification message elements required by this rule. Through this regulatory framework, the FAA is also allowing a pathway for existing unmanned aircraft that have certain broadcast capabilities and equipment already integrated to be upgraded to meet the requirements of a remote identification broadcast module.

The FAA decided to incorporate this concept into this rule after reviewing public comments and considering the significant concerns raised with respect to the limited remote identification UAS framework. The FAA determined a remote identification broadcast module facilitates compliance with this rule and, at this time, meets the safety and security needs of the FAA, national security agencies, and law enforcement. The concept is broadcast-based and does not require a person to connect to the internet to identify remotely, as the limited remote identification UAS proposal did. This shift allows unmanned aircraft with remote identification broadcast modules to operate in areas where the internet is unavailable. In addition, by making this a broadcast solution, the FAA has determined that the 400-foot range limitation included in the proposed requirements for limited remote identification UAS is no longer warranted and has removed the design constraint. However, the FAA has determined that persons manipulating the flight controls of UAS where the unmanned aircraft is equipped with remote identification broadcast modules must be able to see the unmanned aircraft at all times throughout the operation. Commenters generally supported a visual line of sight requirement for unmanned aircraft operations that do not meet the requirements for standard remote identification unmanned aircraft and therefore FAA is incorporating the restriction into the operating requirements for unmanned aircraft with remote identification broadcast modules.[19]

[19] The FAA emphasizes that this rule does not relieve any existing visual-line-of-sight

Continued

The requirements for unmanned aircraft with remote identification broadcast modules are discussed below.

i. Use of Remote Identification Broadcast Modules

The FAA adopts the requirements in § 89.115(a) for the operation of unmanned aircraft equipped with remote identification broadcast modules. A person may equip an unmanned aircraft with a remote identification broadcast module by securing or integrating a remote identification broadcast module to the unmanned aircraft or by other means (*e.g.,* software upgrade). The operating requirements for unmanned aircraft equipped with remote identification broadcast modules are the same irrespective of how the broadcast module is secured to the unmanned aircraft or integrated into the unmanned aircraft.

Remote identification broadcast modules allow operators of unmanned aircraft without remote identification (*e.g.,* existing unmanned aircraft and unmanned aircraft excepted under § 89.501(c) from the design and production requirements of this rule) to operate outside of an FAA-recognized identification area. For example, a home-built unmanned aircraft can be produced without remote identification and can be operated without remote identification in an FAA-recognized identification area. However, if an operator wishes to operate a home-built unmanned aircraft outside of an FAA-recognized identification area, he or she can do so by equipping the unmanned aircraft with a remote identification broadcast module.

A person may use an unmanned aircraft equipped with a remote identification broadcast module in operations conducted under any operating rule (*e.g.,* limited recreational operations conducted under 49 U.S.C. 44809, or operations conducted under part 91, part 107, part 135, or any other operating part). However, as discussed below, operations of unmanned aircraft equipped with remote identification broadcast modules are limited to visual line of sight of the person manipulating the flight controls of the UAS.

requirements. *See, e.g.,* 49 U.S.C. 44809(a)(3); 14 CFR 107.31 and 107.33. The purpose of the visual-line-of-sight provision of this rule is to impose a separate visual-line-of-sight requirement on unmanned aircraft operated with remote broadcast modules to ensure that these aircraft are operated within visual line of sight even if the existing operating requirements are changed through future integration efforts.

ii. Remote Identification Equipment and Message Elements

The operator of an unmanned aircraft with a remote identification broadcast module must ensure that the remote identification broadcast module is broadcasting the message elements listed in § 89.315 of this rule and that the remote identification broadcast module is listed on an FAA-accepted declaration of compliance. The message elements broadcast by remote identification broadcast modules include a unique identifier; an indication of the unmanned aircraft latitude, longitude, and geometric altitude; an indication of the unmanned aircraft take-off location latitude, longitude, and geometric altitude; an indication of the unmanned aircraft velocity; and a time mark. The requirement to broadcast the remote identification message elements applies from takeoff until shutdown of the unmanned aircraft.

The remote identification broadcast module message elements are identical to those for standard remote identification unmanned aircraft, with the exception of the unmanned aircraft take-off location and altitude, which replaces the control station location and altitude, and the emergency status which is only a required message element for the standard remote identification unmanned aircraft. The take-off location and altitude indications are intended to provide an approximate location of the UAS operator, based on an expectation that the UAS operator is located in close proximity to the unmanned aircraft take-off location and altitude. The FAA believes this is an appropriate assumption for VLOS operations. The requirement to indicate the take-off location and altitude enables the retrofit installation of remote identification broadcast modules on unmanned aircraft because the take-off location and altitude can be measured by a stand-alone broadcast module without any dependency on external systems or equipment.

Further, the FAA is not requiring that an unmanned aircraft with a remote identification broadcast module broadcast an indication of the emergency status of the unmanned aircraft. To indicate an emergency status, the remote identification equipment would likely need to be integrated into the unmanned aircraft and designed to recognize specific aircraft failure modes or off-nominal situations. Because remote identification broadcast modules can be installed on existing unmanned aircraft with different characteristics, the FAA finds that an emergency status indication for remote identification broadcast modules presents too many technological challenges to require at this time.

The message elements and minimum performance requirements for remote identification broadcast modules are discussed in more detail in section IX of this preamble.

iii. Broadcast Module Installation and Instructions

As previously mentioned, this rule allows a person to use an unmanned aircraft equipped with a remote identification broadcast module. The person installing the remote identification broadcast module must perform the retrofit in accordance with the instructions provided by the producer of the remote identification broadcast module to ensure that the broadcast module is compatible with the unmanned aircraft, that the installation is completed successfully, and that the remote identification functionality is compliant with all the requirements of this rule.

iv. Serial Number Requirements

The producer of remote identification broadcast modules must issue each module a serial number that complies with ANSI/CTA–2063–A in accordance with § 89.505. The serial number must be listed on an FAA-accepted declaration of compliance.

The serial number must be included in the application for registration of the unmanned aircraft under part 47 or 48 and may not be duplicative of a serial number associated with a different certificate of aircraft registration. For owners registering small unmanned aircraft exclusively for limited recreational operations under 49 U.S.C. 44809, more than one serial number may be included on a single Certificate of Aircraft Registration. The registration requirements that apply to unmanned aircraft with remote identification broadcast modules are discussed in more detail in section XV.A of this preamble. Foreign registered civil unmanned aircraft must provide the serial number of the unmanned aircraft or remote identification broadcast module to the FAA in a notice of identification pursuant to § 89.130 prior to the operation in the airspace of the United States. The requirements that apply to foreign registered civil unmanned aircraft operating in the airspace of the United States are discussed in section XVI of this preamble.

v. Operations Restricted to Visual Line of Sight

Operations of unmanned aircraft with remote identification broadcast modules must be conducted so that the person manipulating the flight controls of the UAS is able to see the unmanned aircraft at all times throughout the operation. Commenters generally supported a visual line of sight requirement for unmanned aircraft operations that do not meet the requirements for standard remote identification unmanned aircraft and therefore the FAA is incorporating the restriction into the operating requirements for unmanned aircraft with remote identification broadcast modules.

2. Public Comments and FAA Response

Comments: Many commenters recommended that the FAA permit an add-on component or module that comes from an FAA-approved manufacturer. These commenters recommended permitting stand-alone broadcast modules that could be serialized to enable off the shelf solutions and lower the cost for existing UAS and amateur-built UAS to meet the remote identification requirements via broadcast, network, or both. Some suggested a beacon or broadcast remote identification requirement with no network requirement.

Many commenters suggested the FAA allow remote identification add-on equipment that can be mounted on UAS that were originally manufactured without remote identification. Many commenters also recommended permitting modules that could be registered to a specific user and swapped between multiple UAS so existing UAS and amateur-built UAS can meet remote identification requirements. One commenter suggested the FAA move forward with a simple and minimally burdensome solution such as an add-on broadcast module for limited remote identification UAS instead of the proposed requirements. Another commenter suggested allowing the use of an external broadcast module that could be changed as technology changes or additional airspace is available and noted that the European Union and France permit external modules.

Many commenters supported a broadcast remote identification option that would permit operations in areas with no internet access or in the event of Remote ID USS outages.

The National Transportation Safety Board noted that broadcast remote identification may support aircraft-to-aircraft collision avoidance capability, but it was unclear whether a network remote identification could as well.

FAA Response: The FAA agrees with public comments and has revised this rule to include the remote identification broadcast module concept. An unmanned aircraft produced, built, or assembled without remote identification can now be equipped with a remote identification broadcast module that broadcasts the message elements required by this rule. Since an unmanned aircraft with a remote identification broadcast module is able to identify remotely, the unmanned aircraft can be operated outside of an FAA-recognized identification area.

E. Other Broadcast Requirements Applicable to Standard Remote Identification Unmanned Aircraft and Unmanned Aircraft With Remote Identification Broadcast Modules

1. Broadcast Directly From the Unmanned Aircraft

i. Discussion of the Final Rule

This rule requires standard remote identification unmanned aircraft and unmanned aircraft with remote identification broadcast modules to broadcast the remote identification message elements directly from the unmanned aircraft.

ii. Public Comments and FAA Response

Comments: Several commenters suggested permitting the control station to broadcast the required message elements.

FAA Response: The FAA does not agree with commenters because of the likelihood of decreased reception range caused by terrain or ground obstacles. In addition, if the unmanned aircraft were to go outside the range of the remote identification broadcast from the control station, persons near the unmanned aircraft may not be able to identify it. Therefore, the FAA maintains the requirement that the remote identification message elements must be broadcast directly from the unmanned aircraft.

2. Broadcast From Takeoff to Shutdown

i. Discussion of the Final Rule

The FAA proposed that a person would be able to operate a UAS with remote identification only if the UAS sends the remote identification message elements from takeoff to shutdown. The FAA requested comments regarding when automatic Remote ID USS connections should be required. Though the Remote ID USS connection is no longer required in this rule, the responses were instructive and helped inform the Agency's decision to modify the requirement, as it applies to the broadcast of message elements by standard remote identification unmanned aircraft and remote identification broadcast modules.

The FAA is finalizing this rule to require the broadcast of message elements directly from the unmanned aircraft from takeoff to shutdown.

ii. Public Comments and FAA Response

Comments: Commenters stated the remote identification requirements should only apply for the duration of the flight and should not apply to unmanned aircraft that are active but not flying. Many of these commenters cited difficulties in performing maintenance on unmanned aircraft if the connection was required at power up when the UAS is not intended to be flown. One individual suggested the connection requirement should apply when the unmanned aircraft is in motion.

Many commenters offered options to the proposed requirement. They proposed requiring UAS to broadcast from takeoff to landing, from start up to shutdown, and start up to landing. The responses were generally divided into two main considerations: When the UAS should start to broadcast and when it should cease to broadcast.

Commenters who believed the UAS should transmit the message elements from the time the UAS is started up mentioned that a certain amount of time is needed to establish connectivity to the network. Some suggested there is a need or value for law enforcement to gain awareness of the operation prior to flight. Others mentioned a UAS should not be required to broadcast any message elements while powered on, as long as actual flight is not intended or commenced (*e.g.,* when a person powers on the UAS to conduct maintenance or download data).

Some commenters believed the UAS should continue to broadcast until the UAS lands while others believed it should broadcast until the UAS is shutdown. Those supporting the landing cutoff noted the unmanned aircraft is no longer in the airspace of the United States upon landing and there is no longer a safety risk because the unmanned aircraft is no longer in the air. They also mentioned a person may want to keep the power on (*e.g.,* to conduct maintenance or download data) for some time prior to shutdown. Other commenters mentioned the broadcast should end upon shutdown because it would grant additional time for law enforcement and other security partners to locate the unmanned aircraft, after it

lands, which could help identify an operator.

FAA Response: The FAA agrees with comments supporting a broadcast requirement that begins at takeoff rather than start up because different unmanned aircraft have different startup sequences and may not all be capable of broadcasting remote identification elements at the same point in their startup process. Takeoff is the first part of an unmanned aircraft operation that is common to all unmanned aircraft, which is why FAA has decided to tie the requirement to begin broadcasting to takeoff. In addition, unmanned aircraft are often powered on for purposes other than flight, such as conducting maintenance or configuring the unmanned aircraft hardware and software. Finally, unmanned aircraft that are powered on indoors, where maintenance typically occurs, would likely not be able to generate some of the remote identification message elements, making such a requirement ineffective.

The FAA also agrees with comments supporting the extension of the broadcast requirement until the unmanned aircraft is shutdown because the additional data can assist the Agency and law enforcement to identify unmanned aircraft or operators engaged in unsafe or illegal operation. The FAA does not agree with commenters that believe once an unmanned aircraft lands there is no longer the potential for safety risk because in many cases, the safety risk is the result of careless or clueless operators that will continue the potentially unsafe behavior without FAA or law enforcement intervention. Requiring unmanned aircraft to broadcast the message elements until the unmanned aircraft is shutdown provides additional time for the FAA or law enforcement to locate an unmanned aircraft operator, even after the unmanned aircraft has landed. Therefore, after reviewing public comments and giving further consideration, the FAA decided to modify the proposal and adopts the requirement so unmanned aircraft must broadcast the required message elements from takeoff to shutdown.

3. In-Flight Loss of Remote Identification Broadcast

i. Discussion of the Final Rule

A standard remote identification unmanned aircraft must perform a self-test and provide a notification to the person manipulating the flight controls of the UAS if the remote identification equipment is not functioning properly. In addition, a standard remote identification unmanned aircraft must be designed to not take off if it fails the self-test.

A remote identification broadcast module must also perform a self-test and provide a notification to the person manipulating the flight controls of the UAS if the remote identification equipment is not functioning properly. Unmanned aircraft operators may only use remote identification broadcast modules that pass the self-test.

Both standard remote identification unmanned aircraft and remote identification broadcast modules must continuously monitor their performance while in use and provide an indication if the remote identification equipment is not functioning properly. If the remote identification equipment provides an indication of failure or malfunction during flight, the unmanned aircraft operator must land the unmanned aircraft as soon as practicable. The FAA notes that it does not expect unavailability of GPS or other types of location services (as the rule does not require GPS specifically) to result in a notification to the unmanned aircraft operator nor require the operator to land the unmanned aircraft as soon as practicable. The FAA expects that means of compliance will stipulate that only equipment failures or malfunctions would trigger a notification to the operator that the unmanned aircraft was no longer broadcasting the message elements.

When determining how and when to land the unmanned aircraft as soon as practicable, the FAA expects the person manipulating the flight controls of the UAS to operate in a manner that minimizes risk to other users of the airspace and people and property on the ground, while using aeronautical decision making to quickly and safely land the unmanned aircraft at a suitable landing area. The FAA recommends including UAS remote identification contingency planning, including plans for landing as soon as practicable, as part of a pre-flight assessment.

ii. Public Comments and FAA Response

Comments: Many commenters recommended clarification of the proposed requirement to ''land as soon as practicable'' in the event that remote identification information does not transmit or broadcast. Many other commenters noted it is more appropriate to notify the operator that remote identification equipment is not working properly than to forcibly ground a UAS by design.

To reduce the need for case-by-case authorizations, the Association of American Railroads and the United States Rail Subsidiaries of the Canadian National Railway Company requested amending proposed § 89.110(b) to state that ''land as soon as practicable'' does not apply when remote identification cannot be transmitted because there is a potential to interfere with critical communication systems, when law enforcement is responding to an emergency situation, disaster response, critical infrastructure protection, or in other situations with the potential to jeopardize public safety. Commenters suggested permitting emergency operations with specific stipulations, such as operating within VLOS, determining there is no undue risk to persons or property on the ground or risk to UAS or manned aircraft in flight, and notifying local law enforcement. A few commenters were concerned that improper application of these requirements would result in automatic power shut down in flight.

FAA Response: The requirement to ''land as soon as practicable'' does not require an immediate landing upon notification of a failure of the broadcast equipment, but instead requires remote pilots to use aeronautical decision making to quickly and safely land the unmanned aircraft while considering the suitability of the landing area and the safety of other aircraft, as well as persons and property on the ground.

While there may be some operations, such as emergency or disaster response, where continued unmanned aircraft operations, even in the presence of a broadcast equipment failure, may provide significant societal benefit, the FAA does not find that any particular activity warrants a specifically stated exception in the regulation from the requirement to land as soon as practicable. Instead, authorizations may be granted on a case-by-case basis if there is sufficient justification and an acceptable level of safety.

F. Unmanned Aircraft Without Remote Identification

1. Discussion of the Final Rule

The FAA proposed to allow unmanned aircraft without remote identification capabilities to operate in specific areas, referred to as FAA-recognized identification areas, or under a deviation authority granted by the Administrator. The FAA adopts the substance of this requirement with minor adjustments. Accordingly, the vast majority of unmanned aircraft operated in the airspace of the United States must identify remotely; however, unmanned aircraft without remote identification may operate if they meet certain requirements. Mainly, the

operation of unmanned aircraft without remote identification is allowed: (1) Under § 89.115(b) if the person manipulating the flight controls of the UAS is able to see the unmanned aircraft at all times throughout the operation, and within the boundaries of an FAA-recognized identification area; or (2) under § 89.120 when the Administrator authorizes operations without remote identification where the operation is solely for the purpose of aeronautical research or to show compliance with regulations.

2. Operations at FAA-Recognized Identification Areas

A person may operate an unmanned aircraft without remote identification if that operation is within the boundaries of an FAA-recognized identification area and the person manipulating the flight controls of the UAS is able to see the unmanned aircraft at all times throughout the operation. As the FAA explained in the NPRM, the phrase ''operated within an FAA-recognized identification area'' means that both the unmanned aircraft and the person manipulating the flight controls of the UAS must be located within the boundaries of the FAA-recognized identification area from takeoff to landing. However, this rule does not allow for the remote identification capability to be disabled, unless otherwise authorized by the Administrator. Therefore, a person operating a standard remote identification unmanned aircraft or an unmanned aircraft with a remote identification broadcast module must continue to identify remotely when operating in an FAA-recognized identification area.

i. Public Comments Regarding Operations at FAA-Recognized Identification Areas

Many commenters agreed with the concept of FAA-recognized identification areas. Others expressed concerns, however, that the FAA-recognized identification areas would be too limited to address adequately the needs of hobbyists who primarily fly amateur-built or home-built UAS. The commenters noted that these operators tend to have dozens of UAS, many of which do not have navigation equipment to determine location. Commenters also expressed concerns about increased cost of travel and membership in national and local community-based organizations. Many commenters, including commercial operators, modelers, UAS racers, and educational groups, believed the FAA-recognized identification areas would be the only option for certain persons to continue to fly UAS and stated the cost of upgrading a UAS to one with built-in remote identification could be cost prohibitive.

Many commenters expressed concerns that they will be confined to operating their existing UAS at an FAA-recognized identification area due to prohibitions or complexities of adding remote identification equipment to their existing UAS. Commenters expressed concerns about continued operations of existing UAS, particularly for recreational users operating under current rules, and asked the FAA to consider how to provide a cost-effective path to compliance, or otherwise ''grandfather'' those UAS, including amateur-built UAS and model aircraft, to support operations outside of FAA-recognized identification areas and otherwise prevent obsolescence.

Commenters also noted specific types of UAS are not permitted to operate at many existing flying fields that are likely to be FAA-recognized identification areas. These UAS include quad copters, racing UAS, and UAS conducting first person view (FPV) operations. Many commenters noted that crowding a large number of existing unmanned aircraft operators into a limited number of FAA-recognized identification areas could make it difficult to have sufficient space to fly or could increase collision and crash risk due to radio interference and proximity of aircraft when numerous unmanned aircraft are flown at once. The commenters noted the likely number of FAA-recognized identification areas would not provide sufficient capacity to accommodate operations of hundreds of thousands of current UAS that would not be permitted to fly elsewhere. In addition, several commenters noted increased UAS activity and noise at flying fields is likely to increase tension with neighboring communities. Some commenters also noted many existing flying fields have limited hours.

Dragonfly UAS and many other commenters noted many flying fields are consumed by surrounding development and recommended permitting a greater number of FAA-recognized identification areas to be approved over time and at private property sites.

Some commenters expressed concerns that existing recreational flying fields might not be eligible to become FAA-recognized identification areas and that this would negatively affect recreational flyers.

The government of the District of Columbia objected to permitting operations in an FAA-recognized identification area because there would be no mechanism to ensure those UAS without remote identification cannot be operated illegally in other locations. The National Business Aviation Association contended that limiting operations to FAA-recognized identification areas seems unrealistic and unmanageable.

A few commenters objected to relying on FAA-recognized identification areas and questioned whether this requirement would conflict with 49 U.S.C. 44809. Many individual, industry, and organizational commenters recommended eliminating the FAA-recognized identification area concept altogether. Others suggested that the FAA provide alternative paths for existing UAS without remote identification, including recreational UAS and traditional model aircraft, to comply with the remote identification requirements.

Many commenters believed the FAA-recognized identification area concept does not adequately address model aircraft events and other UAS competitions, including those that raise money for charity and impromptu flight events. These commenters noted many events take place in locations that are unlikely to request a designation or that are unlikely to be approved as an FAA-recognized identification area, such as airports serving manned aircraft or other public locations that are likely to be ineligible. Many commenters suggested the FAA implement a simple authorization process for UAS events, with some commenters recommending an application-based request and approval system similar to LAANC. The Drone Racing League noted they would be unable to provide any first-person view racing events in the United States due to the VLOS and FAA-recognized identification area requirements. They also requested the final rule permit commercial UAS events with input and specific authorization by the FAA, similar to other aviation events such as air shows.

Instead of being limited to operating in FAA-recognized identification areas, UAS Colorado recommended allowing community-based organizations to self-verify their fields and permit letters of agreement to operate on airports, and recommended developing a LAANC-style system to allow self-reporting of location for non-compliant UAS as well as organized events that are not in FAA-recognized identification areas.

ii. FAA Response

The FAA does not agree with the feedback from commenters who believe FAA-recognized identification areas are

unnecessary to accommodate operations of unmanned aircraft without remote identification or believe there are better pathways for accommodating the operation of UAS without remote identification. Other proposals for enabling operations without remote identification do not enable an observer to determine readily which unmanned aircraft are expected to be broadcasting, and which are not. The Agency determined there is a need for a space for unmanned aircraft without remote identification to continue to operate and therefore adopts a policy to allow operations of unmanned aircraft without remote identification when operated within the boundaries of an FAA-recognized identification area and within visual line of sight.

To address the commenters who expressed concerns with the policy that limited the types of entities that could request to establish an FAA-recognized identification area and the available time for making such requests, this rule expands the types of entities that can apply for the establishment of FAA-recognized identification area and removes the deadline for applications. These changes are discussed in sections XII.B and XII.C of the preamble. The FAA is effecting these changes in response to concerns regarding the availability and utility of FAA-recognized identification areas that allow continued operations of unmanned aircraft without remote identification. In addition, the FAA believes the concept incorporated into this rule allowing unmanned aircraft to equip with remote identification broadcast modules provides a practical way for unmanned aircraft without remote identification to be upgraded or modified to meet the remote identification requirements, which reduces the need to operate at FAA-recognized identification areas.

FAA-recognized identification areas are locations where unmanned aircraft without remote identification can operate, but these areas are not limited to only unmanned aircraft without remote identification; other unmanned aircraft may also be operated in these areas to the extent otherwise permitted in accordance with all applicable regulations. Therefore, unmanned aircraft with remote identification can also be operated within the boundaries of an FAA-recognized identification area.

Though FAA-recognized identification areas would not be authorized for temporary use, the FAA expects that instances such as air shows or temporary drone racing events would be handled, where warranted, through authorization from the Administrator to deviate from the remote identification operating rules.

3. Operations for Aeronautical Research

The second way a person can operate an unmanned aircraft without remote identification is pursuant to an authorization from the FAA Administrator for the purpose of aeronautical research or to show compliance with regulations. As explained in the NPRM, the FAA considers aeronautical research to be limited to the research and testing of the unmanned aircraft, the control systems, equipment that is part of the unmanned aircraft (such as sensors), and flight profiles, or development of specific functions and capabilities for the UAS. Producers and other persons authorized by the Administrator have the ability to operate unmanned aircraft prototypes without remote identification exclusively for researching and testing the unmanned aircraft design, equipment, or capabilities; or to conduct research, development, and testing necessary for UAS infrastructure, systems, and technologies, including but not limited future UTM and United States Government counter-UAS capabilities. A person may also be authorized by the Administrator to conduct flight tests and other operations with non-compliant remote identification equipment to show compliance with an FAA-accepted means of compliance for remote identification or airworthiness regulations. These types of unmanned aircraft operations could include flights to show compliance for issuance of type certificates and supplemental type certificates, flights to substantiate major design changes, and flights to show compliance with the function and reliability requirements of the regulations. This deviation authority does not extend to any other type of research using an unmanned aircraft.

As discussed in section XIV.B.5, UAS designed or produced exclusively for the purpose of aeronautical research are excepted from the production requirements of subpart F of this rule. The production exceptions are discussed in section XIV.B of this preamble.

i. Public Comments Regarding Operations for Aeronautical Research

Though some commenters objected to allowing UAS without remote identification to operate outside of FAA-recognized identification areas for only aeronautical research purposes, many organizations, companies, and individual commenters generally supported the concept, with numerous suggestions to ensure research, development, and innovation are not unnecessarily restricted. Other commenters noted that only permitting aeronautical research was unnecessarily stifling for UAS research initiatives that are ongoing in multiple fields, such as forestry, wildlife biology, geology, agriculture, hydrology, and other fields utilizing geographic information systems.

Some commenters suggested adding exceptions to accommodate education, such as training students, model airshows, and other educational events. Ax Enterprize mentioned that work testing UAS situation awareness systems should be permitted. Wing Aviation recommended the FAA to outline factors that weigh in favor of this authorization, such as a controlled access location with effective mitigations to ensure operation containment. SRP Aero asked how long it will take to grant an authorization to permit test flights of prototype UAS. A commenter from Evergreen State College asked the FAA to consider permitting research and emergency operations in remote areas.

The Association for Unmanned Vehicle Systems International, the General Aviation Manufacturers Association, the University of Maryland UAS Test Site, and the University of Alabama in Huntsville requested that the FAA specifically clarify what kinds of operations qualify under the ''aeronautical research'' exception to ensure it is not too restrictive, such as development activities, non-production and experimental prototypes, avionics interfaces, and concept of operations development. AiRXOS, the Commercial Drone Alliance, FlyGuys Inc., and others requested that commercial research be expressly listed as permitted under ''aeronautical research,'' and requested the FAA to clarify that research conducted in an FAA-recognized identification area does not require FAA approval. To prevent the restriction of research activities, the University of Texas—Austin recommended expanding the aeronautical research exception to cover other educational uses, and the Small UAV Coalition recommended expanding this exception to include commercial and academic research and development activities. Verizon and Skyward suggested FAA approval should not be required for research activities and suggested permitting FAA-recognized identification area applications for the purpose of research, development, testing, and product evaluation.

ii. FAA Response

In this rule, the FAA adopts the deviation authority to allow persons authorized by the Administrator to conduct operations without remote identification where the operation is solely for the purpose of aeronautical research or to show compliance with regulations. At this time, the FAA has decided that there is no need to expand the types of operations that qualify for a deviation from the operating rules and notes that the examples provided by commenters (*e.g.,* non-aeronautical research, data collection, or educational activities) can be conducted using unmanned aircraft with remote identification, or using unmanned aircraft without remote identification at an FAA-recognized identification area.

The FAA envisions that UAS operated for aeronautical research would typically be experimental, prototype, or testbed systems operated for specific purposes under special operating conditions and limited durations. These types of unmanned aircraft are not typically available to the general public for purchase or use.

The FAA does not believe it is necessary to provide additional information regarding what types of operations constitute ''aeronautical research'' beyond what was provided in the NPRM and this rule. FAA notes that intending to conduct aeronautical research simply authorizes the operator to apply for a deviation; if requests for a deviation show confusion as to the meaning of this term in spite of the guidance in this rule, FAA may issue additional guidance at that time.

VIII. Message Elements and Minimum Performance Requirements: Standard Remote Identification Unmanned Aircraft

The FAA proposed certain requirements for remote identification message elements and minimum performance requirements for standard remote identification UAS. The FAA adopts those requirements with the changes and adjustments described below.

A. Message Elements for Standard Remote Identification Unmanned Aircraft

The FAA proposed requiring certain minimum message elements necessary to meet the objectives of this rule. The proposed message elements were: (1) The UAS Identification; (2) an indication of the control station's latitude and longitude; (3) an indication of the control station's barometric pressure altitude; (4) an indication of the unmanned aircraft's latitude and longitude; (5) an indication of the unmanned aircraft's barometric pressure altitude; (6) a time mark; and (7) an indication of the emergency status of the UAS.

After reviewing public comments and further consideration, the FAA adopts the seven message elements proposed with some modifications and adds an eighth message element: Velocity. The FAA explains these requirements, including changes from the NPRM, in the following subsections.

1. Unmanned Aircraft Unique Identifier

i. Discussion of the Final Rule

The NPRM discussed that the UAS Identification message element establishes the unique identity of UAS operating in the airspace of the United States. The FAA proposed that this message element would consist of one of the following: (1) A serial number assigned to the unmanned aircraft by the person responsible for the production of the standard remote identification UAS; or (2) a session identification number (session ID) assigned by a Remote ID USS.

The FAA proposed to allow UAS operators to use a session ID assigned by a Remote ID USS as the UAS Identification instead of the unmanned aircraft serial number. The FAA explained that the association between a given session ID and the unmanned aircraft serial number would not be available to the public through the broadcast message. This association would be available to the issuing Remote ID USS, the FAA, and other authorized entities, such as law enforcement. Where a session ID would have been issued, the FAA explained that the Agency and authorized entities would have the means to correlate the session ID to the UAS serial number and would consequently be able to correlate the unmanned aircraft serial number to its registration data. The FAA also proposed that a UAS would be designed to broadcast its serial number regardless of whether the unmanned aircraft has been registered or not.

The FAA adopts the UAS Identification message element concept, but instead uses the more general term ''unique identifier'' in this rule and clarifies that the unique identifier is applicable to the unmanned aircraft and not the UAS. However, because the FAA has eliminated the Remote ID USS-related requirements, the FAA plans to develop an alternative strategy for assignment of session ID to UAS operators. The FAA is retaining the concept that the session ID will be uniquely identifiable such that law enforcement and the FAA will be able to correlate each session ID to a specific unmanned aircraft serial number, but that this ability will not be publicly available. The FAA will consider existing policies, such as the Privacy ICAO Address (PIA) program for aircraft equipped with ADS–B Out, when developing the session ID policy.

ii. Public Comments and FAA Response

Comments: Many commenters expressed support for the session ID concept to protect the privacy of operations while deterring irresponsible operators. Pierce Aerospace recommended a unique session ID be created by default to protect privacy. Qualcomm and Streamline Designs both supported session IDs assigned by a Remote ID USS but suggested permitting the operator to cycle through a set of temporary IDs or have a session ID assigned with a time limit rather than requiring a unique session ID for each flight, to minimize the burden of assigning unique identifiers for short flights typical of many UAS.

Kittyhawk supported the concept of assigning a session ID, and submitted survey data showing the importance of privacy for the majority of those pilots surveyed. Sky Eye Network recommended permitting the session ID option without an additional charge for operators due to the required Remote ID USS subscription to receive a session ID. The News Media Coalition supported the session ID concept to protect the privacy of journalists operating UAS, but was concerned about how to generate a unique session ID when operating in an area with no internet availability.

Some commenters, including the New Hampshire Department of Transportation and Unifly, suggested permitting registration numbers to be broadcast or transmitted for aircraft identification as well as serial numbers or session ID while controlling access to the UAS and pilot registration database, similar to vehicle license plates and current manned aircraft requirements. Unifly also noted that this would be consistent with European Regulation 2019/945 and the ASTM F3411–19 Standard Specification for Remote ID and Tracking.

One commenter was concerned about the requirement to broadcast or transmit the serial number as it may be difficult to keep the same serial number due to quality control issues in the event of major repairs to the UAS, such as repairs to the UAS or control station transmitters, or other parts.

AiRXOS and Motorola supported the session ID concept for most missions, but further recommended developing a ''trusted user'' process to allow law enforcement to flag missions for which Remote ID USS should not provide information to the general public. The Alabama Department of Transportation and the District of Columbia office of the Deputy Mayor for Public Safety and Justice commented that while session ID offers privacy to the UAS operator, it could be a hindrance for identification that unscrupulous operators may exploit, which may negate the security benefit.

Airlines for America (A4A) opposed the option for Remote ID USS to issue and assign session IDs. A4A thought session ID was not justified, stating that the combination of session ID and the UAS pilot being at a different location than the UAS provided additional privacy for UAS operators than other airspace users, which may be a disincentive to safe operating practices. Several other commenters suggested that the Session ID option could reduce accountability and inadvertently increase unsafe and irresponsible operations due to the added privacy.

The American Civil Liberties Union noted that session ID will not shield individuals from tracking by the government but will likely shield corporate operators from public scrutiny by removing public ability to track a UAS across multiple flight sessions. They suggested permitting session ID for individuals but not commercial operators, and that government UAS be subject to a higher level of scrutiny and disclosure. The Electronic Privacy Information Center (EPIC) suggested the FAA avoid session IDs to reduce potential UAS identification problems for the public and ensure that UAS identity is not masked.

FAA Response: Many commenters provided suggestions on how to implement the session ID concept, including cost models, how operators could use a session ID, or how Remote ID USS could issue them. The FAA finds that the performance-based requirements allow the unmanned aircraft community to innovate and find the solutions that work best but still meet the safety and security objectives of the rule.

Some commenters suggested the registration number also be allowed as a UAS Identification message element. The addition of the registration number would likely require operator input and be susceptible to misuse, omission, or errors, and would require validation by an external system and require the external system to have access to registration information, which would create privacy and security concerns. As noted by a commenter, sharing of the registration data might lead others to misuse that information. Hence, the FAA finds that adding the registration number to the identification message element does not provide enough benefits to warrant the added complexity and potential for misuse of its addition.

An individual commenter noted the difficulty of having the unmanned aircraft and control station both transmit the same serial number if a repair was needed that necessitated the remote identification equipment of one element needing replacement. The FAA expects that standard remote identification unmanned aircraft will incorporate remote identification equipment that is highly integrated into the various unmanned aircraft components. Therefore, such repair actions would be undertaken by a specialist or someone trained by the manufacturer and that person would be capable of ensuring the proper functionality of the remote identification equipment post repair.

The FAA agrees with many commenters that the session ID option strikes a balance between protecting the privacy of individual operations while still deterring irresponsible operators. The public can use remote identification messages with a session ID to report suspicious UAS operations to law enforcement, and law enforcement can, in coordination with the FAA, establish the identity of the responsible persons. The FAA agrees with commenters that session IDs must be traceable to enable the FAA and authorized entities to know the corresponding unmanned aircraft serial number or registration number for each individual session ID. The FAA does not agree, however, that session ID be the default option, and instead finds that both session ID and the serial number are equally acceptable. Thus, industry and individual operators are free to choose the option that best meets their needs.

The FAA proposed that a session ID would be assigned by a Remote ID USS. Because this rule does not retain the requirement for standard remote identification unmanned aircraft to have an internet connection to a Remote ID USS, the FAA plans to develop an alternative strategy for assignment of session ID to unmanned aircraft operators. The FAA will consider existing policies, such as the Privacy ICAO Address (PIA) program for aircraft equipped with ADS–B Out, when developing the session ID policy. Pursuant to the Department of Transportation's procedures regarding significant guidance documents,[20] FAA will seek public comment on the session ID policy prior to finalizing it.

2. An Indication of the Control Station's Latitude and Longitude

i. Discussion of the Final Rule

The FAA proposed that standard remote identification UAS broadcast and transmit to a Remote ID USS the latitude and longitude of its control station. The FAA did not propose a specific type of position source used to determine this information, to allow the greatest flexibility to designers and producers of UAS. The FAA proposed to require that the person manipulating the flight controls of the UAS be co-located with the control station; therefore, knowing the control station location would also provide the location of the person manipulating the flight controls of the UAS. This message element would be used by the FAA and authorized entities to locate the UAS operator when necessary for the safety, security, or efficiency of aircraft operations in the airspace of the United States. The FAA adopts this message element as proposed.

ii. Public Comments and FAA Response

Comments: A significant number of commenters, representing manned and unmanned aviation, manufacturers, users of unmanned aircraft, some State and local law enforcement agencies, and numerous individuals opposed the proposed requirement to provide the location of the control station to the public and cited a number of reasons including ensuring the safety of the person manipulating the flight controls of the UAS. Commenters expressed concerns about the privacy of their operations and that this information could increase the dangers for UAS operators and their property potentially resulting in assault, home invasion, and theft of their UAS and other equipment. Other commenters who opposed providing the ground control station location provided examples of confrontations, threats (including threats with firearms), and assaults that they or others have received during operations or referenced media reports of incidents involving confrontations, assaults of UAS operators, and people shooting at unmanned aircraft if their location becomes public. Many of these commenters supported the FAA and properly authorized law enforcement or government agencies gaining access to control station location information, but were concerned that making this

[20] *See* 49 CFR 5.41(a).

information available to the public would increase the danger for UAS operators and their property. See section X of this preamble for a discussion of privacy issues raised by commenters, and section XI of this preamble for a discussion of law enforcement access to remote identification information.

Commenters suggested that requiring the control station location would reduce the compliance rate. Others expressed concern for the safety of UAS operations if the remote pilot in command is distracted due to questions or a confrontation from a member of the public who has tracked the pilot using control station location information. Commenters noted that public availability of control station location information is contrary to current practices for manned aircraft pilots, such as locked cockpit doors as well as takeoffs and landings that occur at secure locations on airport property.

Many commenters suggested that instead of making the control station location publicly available, issues regarding UAS operations are best addressed by noting the session ID or operator ID and contacting appropriate law enforcement agencies who can use that information to initiate an investigation. Many commenters suggested that the location of the control station should be encrypted and available only to the FAA and law enforcement but not to the general public, or location data should be degraded or obfuscated if the general public is permitted access. Several commenters were concerned about the safety of UAS operators and other support staff engaged in law enforcement or emergency management operations, and asked the FAA to justify the safety or security reason for the public to have access to the control station location. Many commenters referenced the UAS Identification and Tracking Aviation Rulemaking Committee (UAS–ID ARC) recommendation that only the unmanned aircraft unique identifier should be available to the public and asked the FAA to explain why that recommendation was discarded.

Some commenters referred to the ASTM F3411–19 Standard Specification for Remote ID and Tracking, which supports making control station location available only to authorized users and permits the use of takeoff location in lieu of control station location. Others referenced international standards with similar requirements. Ax Enterprize suggested that UAS operator contact information is generally preferable to control station location information.

Several commenters expressed alternatives for providing the location of the control station. Instead of providing the control station location as proposed, Digital Aerolus recommended requiring the location of the control station ''when available'' to permit UAS operations in areas of poor GPS coverage, such as indoors, underground, or under bridges. Qualcomm suggested masking the control station location or assigning a separate session ID to the control station, so that this information is only available to the Remote ID USS, FAA, and law enforcement. The North Carolina Department of Transportation commented that control station location information should be available not only to law enforcement, but also to other first responders so UAS interference can be addressed quickly in emergency response situations such as hurricanes.

The Association for Unmanned Vehicle Systems International broadly supported making operator location publicly available but suggested the FAA consider ways to protect this potentially private or confidential information, such as an opt-out or a trusted operator status that would only reveal the location to law enforcement and government agencies.

FAA Response: While many commenters from a variety of backgrounds opposed the requirement to share the control station location publicly, the FAA finds that the requirement, as proposed, is necessary to meet the core objectives of this rulemaking effort to promote the safety and efficiency of the airspace of the United States. The inclusion of the control station location enables the remote identification message to create a direct link between an unmanned aircraft and its operator; promoting the accountability inherent in manned aviation. Some commenters raised the issue that the availability of this information could put remote pilots at greater risk of assault, theft, or other crimes. Though the FAA acknowledges the concerns expressed by commenters regarding personal safety, the FAA emphasizes that there are rules against interfering with an aircraft. The FAA finds that removal of the proposed requirement is not the appropriate solution, rather community outreach and other precautions are better suited to tackle these issues. Some commenters noted that sharing of the control station location is counter to the current practice of locking aircraft doors; however, the FAA finds that the analogous and appropriate practice would be to operate from a secure or restricted access location as necessary.

Many commenters suggested the FAA modify the proposed regulation to allow for the control station location to only be available to specific entities such as the FAA and law enforcement. Though some commenters suggested using encryption techniques to accomplish this, the FAA finds that implementation of such a nuanced requirement would be highly complex, costly, and impractical. The FAA does not intend to limit who can receive the broadcast messages, and allowing encryption of certain message elements would limit who can receive the broadcast messages only to those with the capability to decrypt the messages. Allowing encryption is inconsistent with the FAA's policy that the remote identification message elements should be publicly available information. Further, as some commenters suggested, different situations may necessitate certain emergency responders or other individuals to make contact with a remote pilot. In these situations, a privacy or encryption implementation may prohibit the on-scene individuals from having the critically needed information. In addition, an encryption requirement would present technical challenges leading to increased cost and complexity. For example, encryption key management could require standard remote identification unmanned aircraft, broadcast modules, and authorized receivers to have internet connectivity and specialized software, increasing the cost of this rule and potentially creating cybersecurity vulnerabilities. Therefore, the FAA adopts the control station location requirement as proposed.

The FAA acknowledges that location sensors such as GPS systems have physical limitations such as not being operational in certain urban environments. While some intermittent loss of position data is acceptable, this rule is being finalized in a performance-based manner and the FAA expects that industry will use a variety of inputs (such as GPS and cellular signals) to estimate position such that the unmanned aircraft is able to generate the complete remote identification message in its intended operating environment.

The FAA acknowledges that the UAS industry is rapidly evolving and that unmanned aircraft are controlled using a multitude of methods. The FAA, however, continues to require all unmanned aircraft operating in the airspace of the United States be controllable by a responsible person or remote pilot. Therefore, the FAA adopts this rule in a performance-based manner that allows industry to innovate and use

the appropriate solution that meets the requirements, yet is adapted to the control scheme of the particular unmanned aircraft. If the person is controlling the flight through non-physical flight controls, then that person's location would be used as the control station location. For example, if the UAS utilizes a wrist device, then the location of the wrist device could be used as the control station location. For camera tracking technologies, the unmanned aircraft could use its own location estimate plus the same tracking system to calculate the location of the remote pilot.

3. An Indication of the Control Station's Altitude

i. Discussion of the Final Rule

The FAA proposed that standard remote identification UAS have an indication of the control station's barometric pressure altitude, referenced to standard sea level pressure of 29.92 inches of mercury or 1013.2 hectopascals. This information can be used to approximate the control station's height above ground level. Understanding height above ground level is necessary to help locate an operator in circumstances under which the person manipulating the flight controls of the UAS is not at ground level, such as a person operating a UAS from the roof of a building.

In the NPRM, the FAA considered and rejected a requirement to indicate the control station's geometric altitude, which is a measure of altitude provided by GPS that is not affected by atmospheric pressure. The FAA stated that barometric pressure altitude is a more precise measurement than geometric altitude and is the standard altitude reference for aviation. The FAA requested comments regarding whether both barometric pressure altitude and geometric altitude of the control station should be part of the remote identification message elements.

After considering comments and engaging in further analysis, the FAA is finalizing the requirement that standard remote identification unmanned aircraft include an indication of control station altitude as a required message element, but replaces the requirement to indicate barometric pressure altitude with geometric altitude. There are several reasons for this change from the proposal. First, barometric pressure sensors are not as common on unmanned aircraft control stations as GPS-based altitude sensors, and they also require more calibration, testing, and maintenance. Second, geometric altitude is more compatible with the GPS technologies integrated into smart devices, which are often used as the control station for recreational unmanned aircraft. Third, a performance-based geometric altitude requirement allows industry to use the right combination of technologies to produce a sufficiently accurate altitude estimate for the intended environment. The FAA expects that UAS will use GPS to determine geometric altitude measured as height above ellipsoid referenced to the WGS–84 datum. The FAA also anticipates UAS could utilize cellular and other signals to complement the GPS signal and provide for a robust solution.

ii. Public Comments and FAA Response

Several commenters suggested that control station location provides sufficient detail and that identifying altitude is unnecessary and could render many devices such as tablets and cell phones obsolete for use as a control station. Other commenters supported the need to understand whether an operator is on the ground or on the roof.

Many commenters recommended that control station barometric altitude not be a required message element because many control stations do not have the capability to report this information accurately and compliance will be difficult and costly. UAS Colorado and Wing Aviation also noted the lack of available barometric pressure settings to adjust a sensitive altimeter as well as stating that this capability does not exist for UAS ground stations.

Many commenters recommended using geometric altitude for control stations, suggesting that it would be of greater usefulness, reliability, and less technically complex to integrate into UAS. One commenter suggested that barometric altitude is appropriate because geometric altitude may encounter difficulties with coverage and multipath errors in urban areas or areas with rising terrain or other obstacles.

Some commenters suggested requiring geometric altitude while permitting but not requiring barometric pressure altitude. Others suggesting permitting one or the other, while others recommended requiring both. Several commenters recommended a performance-based altitude requirement rather than specifying either barometric or geometric. Others recommended different requirements depending on whether the operation was for recreational or commercial purposes. One commenter suggested permitting use of the barometric pressure altitude of the unmanned aircraft at takeoff as a substitute to providing real time barometric pressure altitude.

FAA Response: After reviewing public comments and giving further consideration, the FAA adopts this message element to require geometric altitude for the control station instead of barometric pressure altitude, for the reasons described above.

The FAA declines to require both barometric pressure and geometric altitude as there are no significant benefits associated with such a requirement. Geometric altitude alone is sufficient to meet the safety and security needs being addressed by this rule. Further, requiring both forms of altitude indications would necessitate additional equipment, testing, and maintenance that would increase UAS costs. Also, the FAA declines to use the take-off altitude instead of the control station altitude as standard remote identification unmanned aircraft will already have a means to indicate the control station latitude and longitude. The FAA expects that providing an indication of the control station geometric altitude will not add significant cost or complexity to the remote identification equipment, and provides a substantially higher safety and security benefit, especially in urban areas.

4. An Indication of the Unmanned Aircraft's Latitude and Longitude

i. Discussion of the Final Rule

The FAA proposed that standard remote identification UAS provide the position of the unmanned aircraft using its latitude and longitude, which could be derived from a position source, such as a GPS receiver. The purpose of this message element is to associate a specific unmanned aircraft with its associated control station position. It would also be used to provide situational awareness to other aircraft, both manned and unmanned, operating nearby.

The FAA adopts this message element as proposed.

ii. Public Comments and FAA Response

Comments: Many commenters, including commenters from manned and unmanned aviation, manufacturers, users of unmanned aircraft, some State and local law enforcement agencies, and numerous individuals opposed the proposed requirement to provide the location of the unmanned aircraft to the public. Commenters expressed concerns about the privacy of their operations and that this information could increase the dangers for UAS operators and their property potentially resulting in assault, home invasion, and theft of their UAS and other equipment. Other commenters

who opposed providing the unmanned aircraft location provided examples of confrontations, threats (including threats with firearms), and assaults that they or others have received during operations or referenced media reports of incidents involving confrontations, assaults of UAS operators, and people shooting at unmanned aircraft if their location becomes public. Robotic Research opposed the requirement to share unmanned aircraft location, and stated they cannot publicly broadcast the position of their unmanned aircraft due to the sensitivity of their platforms and missions.

Instead of making the unmanned aircraft location public, many commenters, suggested the public should only have access to the UAS session ID or other identification to support reporting unsafe operations to the appropriate authorities. Some of these commenters suggested, if unmanned aircraft location is available to the public, it should be an approximated or obfuscated location and only available within a limited distance of the public requestor. Other commenters suggested using technology to limit the information available to the public. The Experimental Aircraft Association recommended permitting operators to opt-out of providing remote identification data accessible to the public if that data is only needed by the FAA and law enforcement.

Many commenters agreed that FAA, law enforcement, and other appropriate government agencies, including first responders should have access to unmanned aircraft location information. A few commenters noted that this proposed requirement would be similar to making airline information available. Some commenters supported sharing unmanned aircraft location information even if they are concerned about public access to control station location.

Airbus UTM and the Electronic Privacy Information Center recommended standardizing message formats for standard and limited remote identification UAS by requiring unmanned aircraft location information, to support better identification and operational capabilities. Pierce Aerospace recommended requiring unmanned aircraft and control station location for standard remote identification UAS, though they suggested an exception for amateur and recreational operations that abide by a volume-based UTM capability.

Many commenters stated transmitting unmanned aircraft location information would be burdensome because most model aircraft are not equipped with GPS or other navigation equipment and there are not many solutions currently available.

Commenters expressed concern about how this would affect indoor UAS operations, noting that GPS is not available or reliable indoors, and that these activities are not currently regulated but will become regulated by default, because new commercially built unmanned aircraft would be prohibited from flight, even indoors, by the manufacturing regulations proposed. American Fuel and Petrochemical Manufacturers were concerned this proposed requirement would eliminate unmanned aircraft tank inspections, which is one of the best use cases for UAS in the oil and gas industry.

Other commenters expressed concern about the effect of this requirement on operations that take place in locations with limited GPS. Digital Aerolus recommended requiring the location of the unmanned aircraft ''when available'' to permit UAS operations in areas of poor GPS coverage, such as indoors, underground, or under bridges. A commenter recommended either permitting transmission of the last known unmanned aircraft location or operator location, permitting operators to manually specify they are indoors to override the remote identification requirement when GPS is not available.

FAA Response: Though many commenters opposed the inclusion of the unmanned aircraft location message element due to privacy and safety concerns, the FAA finds this message element is a foundational part of remote identification. By including this message element, the remote identification message allows the FAA, law enforcement, and the public to have awareness of unmanned aircraft operations and correlate the location of unmanned aircraft with the location of their respective operators. The availability of this information will promote accountability and trust in the unmanned aircraft community overall. Further, remote identification in combination with community outreach will foster a better public understanding of the important role unmanned aircraft play in the economy and society overall. Some commenters raised the issue that the availability of this information could put remote pilots at greater risk of assault, theft, or other crimes. As noted previously, though the FAA acknowledges the concerns expressed by commenters regarding personal safety and the marginal risk created by broadcasting a control station's location, the FAA emphasizes that there are statutory prohibitions against interfering with an aircraft. Additionally, there are local, State, and Federal laws against assault, theft, and other crimes.

Many commenters suggested that this message element should only be available to specific entities and not be publicly available, but the FAA finds this would adversely impact the intended transparency of remote identification information and the effectiveness of this rule. The public availability of the unmanned aircraft location as well as all the other message elements allows persons to associate each element of the unmanned aircraft and control station with a unique identifier. The FAA notes that the broadcast range of remote identification information will have a finite limit based on signal strength limitations for unlicensed devices.

The FAA agrees with the comments that supported the inclusion of this message element and found the sharing of the unmanned aircraft location is similar to how airlines and other pilots share their aircraft locations publicly through ADS–B Out broadcasts. The FAA further agrees with these commenters that the accountability, safety, and security benefits exceed the suggested privacy impacts.

The FAA does not agree with the commenters who suggested that inclusion of this message element would hinder their ability to fly unmanned aircraft indoors or in specific outdoor environments due to lack of GPS coverage. The FAA expects that there will be a variety of ways for industry to implement the requirement to indicate the unmanned aircraft's latitude and longitude under different environmental conditions, including when a position source such as GPS, is unavailable. For example, when position information is not available, a means of compliance may specify that the remote identification equipment broadcast all zeros for the indication of latitude and longitude to show that the position is unknown. This would allow an unmanned aircraft to take off even when position information is unavailable. These design options will be described in each FAA-accepted means of compliance. Because of this flexibility, the FAA does not consider that this message element will negatively impact operations indoors. In addition, for unmanned aircraft intended to routinely operate in areas where there is no GPS coverage, operators may choose to use an unmanned aircraft that relies on a position source other than GPS. The FAA declines to include a requirement where the unmanned aircraft only broadcasts the message element of latitude and longitude when the

position source is ''available.'' The location of the unmanned aircraft is an essential element of remote identification, and the FAA considers that the addition of this language would add unnecessary design complexity and uncertainty over whether the unmanned aircraft was required to broadcast the position information. However, as noted previously, the FAA would consider means of compliance that include a standardized message for when that position source is unavailable.

The applicability of this rule does not extend to unmanned aircraft manufactured solely for indoor use. Further, the FAA adopts this requirement using a performance-based approach that allows industry to use technologies best suited for the intended environment. Location estimation can be done using GPS in combination with cellular and other signals to work in a greater number of urban and even indoor environments. Smart device manufacturers commonly employ these techniques. The FAA thus finds that the inclusion of this message element will not significantly hinder the ability for people to conduct operations in areas with poor GPS coverage.

5. An Indication of the Unmanned Aircraft's Altitude

i. Discussion of the Final Rule

The FAA proposed to require standard remote identification UAS indicate the unmanned aircraft's barometric pressure altitude referenced to standard sea level pressure of 29.92 inches of mercury or 1013.2 hectopascals. The purpose of this information would be to establish a standard altitude reference for UAS operating in the airspace of the United States. It can also be used to provide situational awareness to other aircraft, both manned and unmanned, operating nearby. As with control station altitude, the FAA requested comments on whether to require barometric pressure or geometric altitude.

After considering comments and engaging in further analysis, the FAA adopts the requirement that standard remote identification unmanned aircraft include an indication of the unmanned aircraft's altitude as a required message element. As with the message element indicating control station altitude, the FAA replaces the requirement to indicate barometric pressure altitude with geometric altitude. This change is made for the same reasons explained in the discussion of control station altitude message elements, above.

ii. Public Comments and FAA Response

Comments: Commenters provided many of the same comments for unmanned aircraft altitude as they did for control station altitude, including support for barometric, geometric, either barometric or geometric, both barometric and geometric, and neither. Airbus UTM agreed with the use of barometric rather than geometric altitude, because barometry is how altitude is typically defined in the airspace of the United States today, and the control station, Remote ID USS, or other service provider will be able to make adjustments based on locally reported barometric pressure to make more accurate comparisons to manned aircraft. One other commenter suggested that barometric altitude is more appropriate than geometric altitude, which may encounter difficulties with coverage and multipath errors in urban areas or areas with rising terrain or other obstacles.

Several commenters, including AirMap, suggested that geometric or GPS altitude be required instead of barometric pressure altitude. Commenters suggested that barometric pressure altitude should not be required or should be optional. The Small UAV Coalition and Streamline Designs suggested that FAA should not require unmanned aircraft barometric pressure altitude because most unmanned aircraft use geometric altitude almost exclusively, and many unmanned aircraft do not have barometric pressure altitude capability so compliance will be difficult and costly. ANRA Technologies noted that many unmanned aircraft use geometric altitude as their primary reference and suggested that should be the requirement, with barometric pressure altitude as an optional element. Because remote identification is not being used to ensure aircraft separation, Amazon Prime Air commented that permitting geometric altitude for standard remote identification UAS would not negatively impact safety or accountability, and would improve compliance by leveraging current designs in smart phones and other equipment with GPS receivers.

The Virginia Tech Mid-Atlantic Aviation Partnership recommended using geometric altitude instead of barometric pressure altitude due to errors in static pressure systems, complexity of adding those to the unmanned aircraft, and lack of critical need when remote identification is not intended for navigation or deconfliction. Another commenter asked the FAA not to require new sensors that would add more weight or require more power for the UAS, such as barometric sensors or a coordinated universal time clock, when similar information is already provided on UAS that have navigation and telemetry information.

Airlines for America and AiRXOS recommended requiring both the barometric and the geometric altitude to provide redundancy and better ensure safe separation of unmanned and manned aircraft; one commenter noted that manned aircraft use both barometric and geometric altitude, so these elements should be transmitted if the unmanned aircraft is capable. Wingcopter recommended using barometric altitude as the main information source but also using geometric altitude for comparison and error detection, especially to provide a higher level of safety for higher risk operations.

A commenter from the Johns Hopkins University noted that ground users, such as law enforcement, will need remote identification altitude information presented in a different format because they may not be experienced with barometric pressure altitudes. They recommended the FAA require transmission of both barometric and geometric altitude as well as a containment value and probability of exceedance, which could be met by fusing altitude and position data from multiple sources.

FAA Response: The FAA agrees with the commenters that supported using geometric altitude instead of barometric pressure altitude for the unmanned aircraft. The FAA believes that an indication of the unmanned aircraft geometric altitude provides sufficient information to meet the safety and accountability goals of remote identification. Further, the FAA agrees that barometric altimetry equipment is less prevalent than GPS-based geometric altimetry in UAS and could add unnecessary complexity both in integration as well as operation. To align with the change from barometric pressure altitude to geometric altitude for the control station altitude message element, the FAA adopts a requirement to indicate the geometric altitude of the unmanned aircraft rather than the barometric pressure altitude.

The FAA declines to require both geometric and barometric altitude reporting because geometric altitude alone meets the safety and security needs for this rule. While both forms of altitude reporting would add a layer of redundancy, the additional cost and complexity is not warranted for the core intended functions of remote identification information.

The FAA agrees with a performance-based requirement that is technology agnostic. The FAA envisions that industry could meet the altitude requirement by using a variety of technologies and signals including GPS and cellular, and still report geometric altitude using a common reference frame.

The FAA acknowledges that users of remote identification information such as law enforcement may not be experienced with different types of altitude reporting. The FAA envisions that standardized software would be available to these users to display the data in an easy to understand format that suits their unique needs. The FAA also finds that the requirements are sufficient to ensure standardized reporting by UAS in a manner that is processed by software to support display applications.

6. Time Mark

i. Discussion of the Final Rule

The FAA proposed to require a time mark identifying the Coordinated Universal Time (UTC) time of applicability of a position source output. A position source output is the latitude and longitude coordinates of the unmanned aircraft or control station, as applicable. The time of applicability is a record of the UTC time when the unmanned aircraft or control station was at a particular set of coordinates. The FAA adopts this requirement as proposed.

ii. Public Comments and FAA Response

Comments: No commenters objected to the FAA proposal to require a time mark as a remote identification message element. The Small UAV Coalition agreed with the requirement for a time mark. Digital Aerolus noted that internal UAS systems will gradually lose synchronization when location services are not available, and recommended updating the requirements to reflect this possibility by adding ''when location services are available'' or similar language. Unifly recommended permitting external ''add-on'' equipment such as a remote identification module that provides remote identification, GNSS, and time information.

FAA Response: The FAA agrees that synchronization may be a problem when location services are not available but finds that this situation would not be a limiting factor to the generation of remote identification messages because the message also includes location information. The FAA adopts the requirement as proposed.

7. An Indication of the Emergency Status of the UAS

i. Discussion of the Final Rule

The FAA proposed to require standard remote identification UAS to include a message element that specifies a code indicating the emergency status, which could include lost-link, downed aircraft, or other abnormal status of the UAS. The FAA adopts this requirement as proposed.

The FAA anticipates that an industry standard for remote identification would specify the different emergency codes applicable to unmanned aircraft affected by this rule. This message element could be initiated manually by the person manipulating the flight controls of the UAS or automatically by the UAS, depending on the nature of the emergency and the UAS capabilities. The purpose of this message element would alert others that the UAS is experiencing an emergency condition and would indicate the type of emergency.

The FAA expects that this message element may provide an indication of UAS that are lost-link, are in a low battery or low fuel state, or are in other off-nominal or failure modes that might result in unexpected behaviors that other airspace users or people in the vicinity would benefit from knowing. The FAA anticipates that the emergency status indication would be used by display applications available to pilots and the general public to indicate when a UAS is experiencing an off-nominal event, such as lost-link, that may not be clear by visual observation alone.

The FAA envisions that industry, through consensus standards bodies, will develop and incorporate specific implementations of the message element into a means of compliance that balances utility, safety, and privacy.

ii. Public Comments and FAA Response

Comments: One commenter supported sharing the emergency status of the UAS as proposed. Another commented recommended removing this requirement, questioning its utility. Other commenters requested that the requirement be explained in greater detail and specificity. Wing Aviation suggested UAS not be required to transmit non-critical, off-nominal conditions that do not affect compliance or security, and recommended amending the requirement to ''critical emergency status.'' Theia recommended that the emergency status of a downed UAS should not be shared with the public because of the safety and security risks.

FAA Response: The FAA acknowledges the request for greater specificity regarding what types of off-nominal situations should be included in the emergency status indication, but the FAA believes that the UAS industry is in the best position to determine this criteria, and any specificity provided by the FAA at this time may not provide flexibility for future changes as UAS technology evolves. As such, the FAA adopts the requirement as proposed without requiring any specific implementation.

8. Velocity

In the NPRM, the FAA asked for public comments on whether standard remote identification UAS should broadcast other message elements. A number of commenters recommended requiring speed or velocity as required message elements.

After reviewing these comments and further consideration, the FAA decided to require velocity as an additional message element for standard remote identification unmanned aircraft. By adding an indication of the unmanned aircraft's velocity, the remote identification message set will better align with existing remote identification standards, such as ASTM F3411–19 and international implementations, as well as provide a complete description of an unmanned aircraft's state to the FAA, law enforcement, and the public. The FAA envisions that the velocity message element would be a three-dimensional vector that conveys horizontal and vertical speed, as well as the direction of movement of the aircraft. The FAA notes that the velocity message element, when used to display unmanned aircraft flight information, includes both speed and direction information. The FAA is not prescribing specific requirements for UAS velocity, and expects this message element to be incorporated into a means of compliance which will be reviewed and evaluated as a part of the acceptance process.

9. Other Message Elements

As stated above, in the NPRM, the FAA asked for public comments on whether standard remote identification UAS should broadcast other message elements. As described below, the FAA received a number of comments on different message elements that could be included. After review and careful consideration, the FAA determined that, except for velocity (described above), the FAA would not adopt requirements for additional message elements.

Comments: Johns Hopkins University Applied Physics Lab supported the concept of a common message structure

and recommended this be further applied to Remote ID USS as well, to ensure that UAS are not compatible with only one Remote ID USS. One commenter agreed that message elements other than those proposed did not yield enough benefit to necessitate recording and transmitting. Wing Aviation recommended that required message elements be aligned to the ASTM F3411–19 Standard Specification for Remote ID and Tracking to reflect established industry consensus, specifically mentioning barometric altitude and emergency status.

A few commenters suggested requiring message elements to note if the remote pilot is part 107 certified, if the UAS is properly registered, and to add the LAANC approval code or COA identification. UPS Flight Forward suggested adding the direction of flight and mode of flight (manual, automated, autonomous) to the required message elements. The Stadium Managers Association also recommended adding message element(s) to help future-proof remote identification in the event of a UAS operating automatically or autonomously miles away from the control station, such as mode of flight, flight path, and intended destination. The Utah Department of Transportation recommended requiring speed, UAS attitude (pitch, roll, and yaw), and power status as a message element. The Air Line Pilots Association International, the Consumer Technology Association, the Port of Long Beach, and the Small UAV Coalition recommended requiring message elements reporting current velocity, direction, and route, such as magnetic course and ground speed, with the Small UAV Coalition noting that this would be consistent with remote identification proposals in the European Union. A few commenters suggested adding message elements for horizontal and vertical uncertainty estimates, and another suggested aircraft direction, speed, and vertical speed. Ax Enterprize suggested a message element to specify which Remote ID USS the UAS is connected to. SeeScan recommended requiring a detailed flight plan to be submitted to the Remote ID USS, including flight plan, name, certificate number, contact number, flight volume polygon, maximum altitude, nearest airport, date, time, and duration of flight.

The National Association of State Aviation Officials recommended the creation of options that provide flight data including airspeed, altitude, directional tracking, and battery or fuel life status information.

The American Association of Airport Executives suggested a message element to convey if the UAS has obtained an FAA airspace authorization. The Alabama Department of Transportation asked why LAANC authorizations and COA information were not included as message elements, believing that this information would help law enforcement and public safety agencies better differentiate illegal UAS operations from those with specific authorization to conduct operations in certain areas. Airports Council International-North America asked how UAS remote identification information would be fused with other critical UAS operational information, notably LAANC data, which would enable local authorities to determine whether UAS had received FAA approval to operate in the airspace where it is necessary.

The Electronic Privacy Information Center (EPIC) suggested several message elements to better convey the characteristics of all UAS and their missions, such as surveillance capabilities (audio, infrared, thermal sensors) and UAS purpose (recreational, commercial, government) with further subcategories such as commercial-delivery, media, or infrastructure inspection.

FAA Response: The FAA agrees that a common message structure is critical to the successful implementation of this rule. The FAA is committed to utilizing a performance-based approach to rulemaking where industry can develop and update means of compliance as needed.

The FAA agrees with the commenters that suggested adding unmanned aircraft velocity as a required message element, for the reasons explained above. The FAA finds that the other message elements proposed by commenters, while valuable in specific situations, are not essential to meeting the safety and security needs being addressed by this rule. Some of the message elements proposed by commenters are better aligned with remote pilots sharing their flight intent. The FAA agrees that the sharing of flight intent is valuable in promoting the safety and efficiency of the airspace of the United States, but finds that such a requirement is appropriate to consider once UTM has been further developed and implemented. Flight intent is a foundational concept of UTM, and the FAA envisions such requirements may be a part of a future rulemaking to enable wide scale use of the UTM ecosystem.

Some commenters suggested that FAA waiver and authorization information be included as a message element. The FAA declines to include this information for two reasons. First, part 89 applies to unmanned aircraft regardless of the operating rules that apply to the operation of that aircraft. Operations under 49 U.S.C. 44809 may not have any waiver or authorization information that would be applicable. In addition, requiring that this information be included would be technologically challenging because the remote identification capability is tied to the unmanned aircraft or broadcast module being used whereas waivers and authorizations are issued for a specific operation. An unmanned aircraft may be used for an operation that has been granted a waiver one day and then used under other circumstances in which the waiver would not apply. Similarly, airspace authorizations are granted for specific times and airspace and would be challenging to encode into the remote identification capability for either the standard remote identification unmanned aircraft or the remote identification broadcast module. Instead of requiring that this information be included in a remote identification transmission, the FAA envisions that authorized entities will be able to access this type of information through the FAA based on the unique identifier and other message elements included in the broadcast.

B. Minimum Performance Requirements for Standard Remote Identification Unmanned Aircraft

The FAA proposed to require standard remote identification UAS to meet the minimum performance requirements established in proposed § 89.310 by using an FAA-accepted means of compliance. Those requirements related to the control station location, automatic connection to a Remote ID USS, time mark, self-testing and monitoring, tamper resistance, connectivity, error correction, interference considerations, message transmission, message element performance requirements, and cybersecurity.

After reviewing public comments and further consideration, the FAA adopts these minimum performance requirements with some modifications to reflect, among other things, the elimination of Remote ID USS requirements. The FAA explains the adopted requirements, identifies changes from the NPRM, and responds to public comments in the following subsections.

1. Control Station Location

i. Discussion of the Final Rule

The FAA proposed to require all UAS with remote identification to generate

and encode a control station location that corresponds to the location of the person manipulating the flight controls of the UAS. The rationale for this requirement is to assist the FAA and law enforcement to locate the person manipulating the flight controls of the UAS. The FAA intended for an FAA-accepted means of compliance to outline a process for UAS designers and producers to determine which part or element of the control station should be incorporated into the remote identification message due to its close proximity to the person manipulating the flight controls of the UAS. The FAA adopts this requirement as proposed.

ii. Public Comments and FAA Response

Comments: Unmanned Systems Canada commented the requirement to encode the ground control station could be problematic for dual-pilot operations. This could conceivably require the installation of more than one remote identification device. Many commenters stated transmitting unmanned aircraft location information would be burdensome because most model aircraft are not equipped with GPS or other navigation equipment and there are not many solutions currently available. A few commenters stated there are gaps in GPS coverage that could prevent operators from complying with the requirement to provide control station information. An individual commenter suggested limiting the remote pilot in command to 100 feet of the takeoff point if the UAS cannot transmit control station location.

FAA Response: While a small number of commenters noted the confusion that may arise with multiple operators of the same unmanned aircraft or multiple unmanned aircraft operating in a relatively small area, the FAA finds that the inclusion of a unique identifier, which is part of the remote identification message, is sufficient to prevent such confusion. The FAA did not find a need to make changes to this requirement and will adopt it as proposed.

With respect to concerns regarding gaps in GPS coverage, the FAA acknowledges that location sensors such as GPS systems have physical limitations such as not being operational in certain urban environments. While some intermittent loss of position data is acceptable, the FAA adopts this rule in a performance-based manner and expects that industry will use a variety of inputs (such as GPS and cellular signals) to estimate position such that the UAS is able to generate the complete remote identification message in its intended operating environment.

The FAA declines to specify conditions, such as remaining within 100 feet of the take-off location, when standard remote identification unmanned aircraft cannot broadcast an indication of the control station location. If the unmanned aircraft can no longer broadcast the message elements, the person operating the unmanned aircraft must land as soon as practicable.

2. Automatic Remote ID USS Connection

The FAA proposed that from takeoff to landing, standard remote identification UAS would be required to maintain a connection to the internet automatically when available and would be required to transmit the message elements to a Remote ID USS through that connection. This minimum performance requirement is no longer applicable with the removal of the Remote ID USS connection requirements and has been removed.

3. Time Mark

i. Discussion of the Final Rule

The FAA proposed that standard remote identification UAS would be required to generate and transmit remote identification messages with the time mark message element. The FAA proposed that the time mark message element be synchronized to the time when all other message elements are generated. The purpose of this requirement is to ensure that position and other data contained in remote identification messages would have a usable time reference for the purposes of reconstructing unmanned aircraft flight profiles. The FAA adopts this requirement as proposed.

ii. Public Comments and FAA Response

The FAA did not receive any comments opposing this requirement.

4. Self-Testing and Monitoring

i. Discussion of the Final Rule

The FAA proposed to require UAS with remote identification to test the remote identification functionality automatically when the UAS is powered on and to notify the person manipulating the flight controls of the UAS of the result of the test. Further, the FAA proposed to prohibit these UAS from taking off if the remote identification equipment is not fully functional. Because a person would only be allowed to operate a standard remote identification UAS if its remote identification equipment is functional, the FAA envisioned that UAS designers and producers would build a notification system to alert potential operators of any remote identification equipment-related malfunction. This notification requirement would help operators comply with the operating requirements of part 89.

The FAA also proposed that the UAS be required to self-monitor the remote identification functionality continuously throughout the flight and provide notification of malfunction or failure to the person manipulating the flight controls of the UAS. With this capability, the person manipulating the flight controls of the UAS can make informed decisions about what actions to take to minimize risk to other users of the airspace and people and property on the ground. This requirement is necessary because a standard remote identification unmanned aircraft would be required to land as soon as practicable if it loses broadcast capability in-flight.

The FAA adopts this requirement with modifications. In the NPRM, the FAA proposed that the automatic test must occur when the UAS is powered on. This rule modifies the proposal to require the automatic self-test to occur prior to takeoff. The FAA believes this change provides greater flexibility to developers of means of compliance as well as UAS producers when meeting this requirement. In addition, the requirement to monitor the remote identification equipment functionality has been expanded from takeoff to landing to takeoff to shutdown to reflect the changes to the operating rules that require persons operating UAS with remote identification to broadcast the message elements from takeoff to shutdown, as discussed in section VII.E.2 of this preamble.

ii. Public Comments and FAA Response

Comments: Even though this requirement only specified a notification for equipment that fails or malfunctions during flight, many commenters emphasized that it is appropriate to notify the operator that remote identification equipment is not working properly rather than to forcibly ground an unmanned aircraft by design. The University of California, Irvine recommended restricting UAS from takeoff by operational regulation instead of hardware regulation. Unifly noted that in the event of loss of broadcast capability, the person manipulating the flight controls of the UAS should be responsible to not take off. Ax Enterprize agreed that the monitoring function should notify the remote pilot if remote identification fails. The FPVFC suggested an equipment solution for an indicator system, and recommended

permitting the unmanned aircraft to be flown as a non-equipped UAS if the self-test failed.

The Small UAV Coalition and one individual were concerned this requirement could add a potential failure point with possible loss of control during flight. In addition, they noted the proposed rule required remote identification equipment to be functional for any operation, even if that operation occurs within an FAA-recognized identification area. One individual suggested eliminating the requirement that UAS disable themselves under certain conditions, as it could introduce a hazardous situation if a UAS is performing multiple takeoffs and landings, as it would be required to detect a landing, check the internet connection, and prohibit takeoff if the connection is lost. This could cause a loss of power at a critical phase of flight.

DJI Technology, Inc. commented on its view that the NPRM reflected a fundamental change in philosophy, specifically that Americans cannot be trusted to act responsibly or in compliance with regulations. In addition, they stated the requirement raises technical challenges regarding design, application, and upgrades. They also noted potential legal liability concerns with the shift of responsibilities from the pilot to the manufacturer.

FAA Response: The FAA does not agree that the requirements represent a fundamental shift of responsibility from the operator to the manufacturer. Rather, the two requirements are complementary. A failed self-test at start up would result in the operator being notified that the remote identification equipment is not functioning properly, and the unmanned aircraft would not be able to take off. Though this may introduce a possible failure point if the self-test feature produces errors, the FAA does not agree that this requirement could introduce a loss of control situation. The requirement would inhibit take-off in the event of a remote identification equipment failure, but not prohibit an operator from having control of the unmanned aircraft mid-flight given the same failure. This design feature will help operators fulfill their responsibility to not takeoff with malfunctioning or failed remote identification equipment. Overall, the FAA anticipates that the manufacturing and operator requirements will significantly reduce instances of UAS operating in the airspace of the United States without properly functioning remote identification equipment.

5. Tamper Resistance

i. Discussion of the Final Rule

The FAA proposed to require that UAS with remote identification be designed and produced in a way that reduces the ability of a person to tamper with the remote identification functionality. The FAA envisioned the UAS would have tamper-resistant design features to hinder the ability to make unauthorized changes to the remote identification equipment or messages. The FAA adopts this requirement as proposed.

ii. Public Comments and FAA Response

Comments: Many commenters supported the inclusion of a tamper resistance requirement. Qualcomm Incorporated stated that a secure UAS should respond to a tamper event by noting the event and/or ceasing to operate. Airlines for America urged the FAA to include a provision to protect against deactivation of the remote identification system. Some commenters requested the FAA provide additional detail on tamper resistance requirements. Other commenters raised concerns about added weight and costs.

Some commenters opposed including tamper resistance requirements. Several commenters raised concerns about how this requirement would affect repairs, hardware upgrades, or home-built UAS. Other commenters raised concerns that the requirement for a tamper resistance remote identification UAS will create a cybersecurity threat because many commercially available UAS are made in foreign countries such as China. They also suggested this requirement will make it difficult or impossible to assess any cybersecurity threat.

FAA Response: Analysis of the comments regarding tamper resistance of the remote identification functionality found that while most commenters supported the requirement, a small number of commenters were against it. Several commenters favored the tamper resistance of the remote identification functionality, but argued that the requirement would result in UAS that could not be repaired, maintained, or receive hardware upgrades as this could constitute tampering with the UAS. This appears to be a misunderstanding, as only the remote identification equipment and functionality is covered by the tamper resistance requirement. Commenters opposed to the tamper resistance requirement mentioned additional weight or cost, while others speculated that tamper resistance may introduce a cybersecurity threat. The FAA does not agree with these assertions because the FAA considers this requirement to be performance-based. The FAA envisions industry will find ways to comply without increasing the weight or cost significantly (for example, anti-tamper stickers), or introducing additional cybersecurity or other threats.

6. Connectivity

For standard remote identification UAS, the FAA proposed that the UAS would be designed to not take off unless it is connected to the internet and transmitting the message elements to a Remote ID USS if the internet was available. As a part of this proposal, a standard remote identification UAS would have to continuously monitor its connection to the internet and the transmission of remote identification message elements to a Remote ID USS. If either is lost, the UAS would have to notify the person manipulating the flight controls of the UAS so he or she may take appropriate action, such as landing as soon as practicable. As discussed above in section VII.A of this preamble, the requirement for the UAS to be designed to connect to the internet is not included in this rule. Accordingly, the requirement to monitor the connection to the internet is no longer necessary and is not included in this rule.

7. Error Correction

i. Discussion of the Final Rule

The FAA proposed to require all UAS with remote identification equipment to incorporate error correction in the transmission and broadcast of the message elements. Error correction allows remote identification broadcast receivers, such as smart phones, and Remote ID USS to detect potential errors that may exist in the message and take the appropriate action. The FAA adopts this requirement as proposed, with a modification to remove references to transmitting message elements through the internet to a Remote ID USS.

ii. Public Comments and FAA Response

Comments: Most commenters agreed with the error correction requirements with some requesting additional specificity. Some offered slight changes in semantics, but still supported the requirement. One commenter stated the NPRM confused two concepts from wireless communications engineering. The first is error correction, which encompasses techniques intended to increase the sensitivity of the receiver, and focuses on minimizing rather than detecting errors. The second is error detection, which includes techniques intended to detect when a message is

correctly received, and focuses on detecting rather than minimizing errors.

FAA Response: The FAA declines to provide additional specificity regarding the error correction requirement because a performance-based requirement is appropriate to allow for flexibility in meeting this requirement as well as incorporating new techniques as technology evolves. Any specific error correction capabilities incorporated into a proposed means of compliance would be reviewed and evaluated as a part of the acceptance process.

The FAA appreciates the comment that highlighted the differences between error correction and error detection techniques, and suggested the FAA may have confused the two concepts. The FAA confirms that ''error correction'' was the intended minimum performance requirement in the NPRM and adopts this requirement.

8. Interference Considerations

i. Discussion of the Final Rule

Consistent with FCC regulations, which include exempted devices under 47 CFR 15.103, the FAA proposed to prohibit the remote identification equipment used in standard remote identification UAS from causing harmful interference to other systems or equipment installed on the unmanned aircraft or control station. The FAA adopts this requirement as proposed.

The design of the UAS must ensure that the broadcast remote identification equipment is independent of command and control interfaces. The FAA explained that, for example, the remote identification equipment could not cause harmful interference to the UAS command and control datalink and could not otherwise be in violation of FCC regulations. In addition, the remote identification equipment would not meet the requirements of this rule if its operation would be adversely affected by interference from other systems or equipment installed on the unmanned aircraft or control station, such as the UAS command and control datalink or a camera feed from the unmanned aircraft to a display at the control station. Therefore, the FAA expects that producers under subpart F will provide secure and reliable interfaces well protected from interference or attacks by malicious entities, and will validate minimum performance via the means of compliance acceptance process as well as through ongoing oversight, auditing, and monitoring of UAS producers that have an FAA-accepted declaration of compliance.

The FAA explained that a specific means of compliance may include requirements to use specific radio frequency emitters and receivers. The FAA envisioned that a proposed means of compliance could include an analysis of frequency congestion and interference considerations. The FAA did not propose a particular method by which interference considerations are identified or mitigated by designers or producers. Instead, the FAA would consider proposed methods for dealing with interference considerations and would verify that they are appropriate for the types of equipment and operations applicable to those means of compliance and do not run counter to any applicable regulations, including FCC regulations.[21]

ii. Public Comments and FAA Response

Comments: Commenters were generally supportive of this provision. One commenter suggested the FAA set the level of interference that rises to the level of 'harmful.'

FAA Response: As used in this rule, interference is considered harmful if it adversely affects a system's ability to operate safely. The FAA declines to specify a level of interference that would be considered ''harmful'' because different systems may be able to tolerate different levels of interference before their performance is adversely affected. Instead, FAA will allow developers of means of compliance to incorporate the appropriate interference requirements as needed. This approach is in line with the FAA's continued commitment to a performance-based rulemaking.

9. Message transmission

i. Discussion of the Final Rule

The FAA proposed that standard remote identification UAS be capable of transmitting message elements through an internet connection to a Remote ID USS. In addition, the FAA proposed to require that standard remote identification UAS be capable of broadcasting the message elements using a non-proprietary broadcast specification and radio frequency spectrum compatible with personal wireless devices in accordance with 47 CFR part 15. The FAA envisioned that remote identification would be broadcast using spectrum similar to that used by Wi-Fi and Bluetooth devices. The FAA did not, however, propose a specific frequency band. Rather, the FAA envisioned industry stakeholders would identify the appropriate spectrum to use for this capability and would propose solutions through the means of compliance acceptance process. The purpose of this requirement is to ensure that the public has the capability, using existing commonly available and 47 CFR part 15 compliant devices, such as cellular phones, smart devices, tablet computers, or laptop computers, to receive these broadcast messages.

The FAA considered the conditions of operation, the general technical requirements, and the performance limitations associated with the use of 47 CFR part 15 devices and has determined that these conditions, requirements, and limitations would be acceptable and compatible with the proposed use and expected performance of the broadcast capability of standard remote identification UAS. The FAA acknowledged that, under FCC regulation, 47 CFR part 15 devices, including those used for the remote identification broadcast, may not cause harmful interference and must accept any interference received.

To meet the proposed requirement of compatibility with personal wireless devices, the FAA explained that a means of compliance may take into consideration whether the remote identification capability would be compatible with current and older models of personal wireless devices still in common usage. The FAA intended the proposed requirement to ensure that the broadcast message from standard remote identification UAS would be accessible by most personal wireless devices in use.

In addition, for standard remote identification UAS, the FAA proposed that the broadcast device use radio frequency spectrum in accordance with 47 CFR part 15 that is compatible with personal wireless devices and must be designed to maximize the range at which the broadcast can be received, while complying with the 47 CFR part 15 and any other laws in effect as of the date the declaration of compliance is submitted for FAA acceptance, and must be integrated into the unmanned aircraft or control station without modification to its authorized radio frequency parameters. The purpose of this requirement is to ensure that producers use a means of compliance that specifies a broadcast technology or broadcast technology characteristics that maximize the broadcast range while still meeting the other minimum performance requirements under this rule. Maximizing the broadcast range would ensure that remote identification information would be available to the largest number of potential receiving

[21] FCC regulatory requirements are enforced by the FCC. It is the producer's responsibility to ensure that broadcast equipment meets all applicable FCC regulatory requirements.

devices within the limits permitted by law.

The FAA adopts the substance of this requirement as proposed, with modifications to reflect the removal of the network transmission requirement (see section VII.A of this preamble for a discussion of the removal of the network requirement). Accordingly, this rule changes the title of this requirement from ''message transmission'' to ''message broadcast'' in § 89.310(g).

ii. Public Comments and FAA Response

Comments: The FAA received numerous comments on the use of radio frequency spectrum in accordance with 47 CFR part 15 for the remote identification broadcast, including recommendations to require or allow the use of licensed spectrum as well as establishing government-allocated spectrum.

Many commenters expressed concerns regarding the broadcasting requirement, noting potential radio frequency spectrum issues, including potential for interference with UAS systems and other systems. A number of commenters suggested using licensed instead of, or in addition to, unlicensed spectrum for a variety of reasons, including distance and reliability.

FAA Response: The FAA acknowledges that the use of part 15 devices for remote identification broadcasts may result in reduced distance and reliability as compared to solutions leveraging licensed spectrum. The FAA finds that such solutions, however, would necessitate specialized equipment to receive the broadcasts that would be incompatible with the concept of remote identification data being widely accessible to the public using existing smart devices.

Comments: The Alliance for Telecommunications Industry Solutions recommended the FAA confirm the broadcast identification concept is a local broadcast directly from the unmanned aircraft to receivers in physical proximity without a network requirement. CTIA—The Wireless Association also asked the FAA to consider requiring an interoperable encryption and authorization mechanism for all remote identification broadcasts, and to consider incorporating a 15 digit IMEI number as the ANSI standard serial number, which could support tracking lost or stolen UAS and registration within a central equipment identity register.

FAA Response: The FAA reaffirms the remote identification broadcast requirement, as adopted, is a local broadcast that would be receivable to smart devices and other compatible receivers within a limited proximity to the aircraft.

The FAA declines to include additional capabilities specifically to facilitate the tracking of lost or stolen UAS to the remote identification rules, but does acknowledge a limited capability might exist based on the rules as adopted. This use-case is not the focus of this rule, and any changes as suggested would be out of scope of this rulemaking.

Comments: AERO Corporation supported the requirement to broadcast, and suggested a remote identification transponder similar to ADS–B Out.

FAA Response: The FAA notes that broadcast equipment, while somewhat similar in general concept to ADS–B Out, is also different in many significant ways. Moreover, as detailed in section XVII of this preamble, ADS–B Out is not a form of remote identification.

Comments: The Small UAV Coalition recommended removing the requirement for the broadcast device to be designed to maximize the range and replacing it with a performance-based requirement for minimum range for the intended operation.

FAA Response: The FAA considered all comments regarding the use of licensed spectrum and determined that using unlicensed 47 CFR part 15 frequencies is the most practical way to ensure interoperability and access to the greatest number of potential users.

The FAA does not agree with the recommendation to remove the requirement that the broadcasting device be designed to maximize range, as removal of this requirement would allow systems to be designed that broadcast at short ranges that are incompatible with the objective of providing remote identification information to as many receivers as possible located nearby the unmanned aircraft. The method of compliance must address how it maximizes range for the applicable unmanned aircraft and expected operating environments.

10. Interoperability

i. Discussion of the Final Rule

To achieve interoperability among standard remote identification UAS that may be produced using different means of compliance, the FAA proposed that for standard remote identification UAS, a means of compliance must require that the message elements be broadcast using a non-proprietary specification for remote identification. For the broadcast to be interoperable with personal wireless devices, the message elements for standard remote identification UAS would have to be broadcast using a message format available to the public. The FAA explained that a known message format is necessary for the receiving personal wireless devices to decode the messages and make the message elements available for use by software applications on the receiving devices.

The FAA adopts this requirement as proposed.

ii. Public Comments and FAA Response

Comments: Some commenters suggested using existing broadcast-based systems, such as Wi-Fi Aware or similar systems rather than network-based systems. Others requested additional specificity. One commenter suggested that the FAA specify all aspects of the link, to include frequency, power, antenna patterns, modulation and data format. Other commenters were concerned that the interoperability requirement would limit the acceptable types of broadcast to Wi-Fi and Bluetooth and that this could limit operational deployment in the short term. AiRXOS recommended an additional performance requirement related to interoperability. The Small UAV Coalition suggested that the rule make clear that message encryption is permitted.

FAA Response: Interoperability for standard remote identification UAS and the requirement that the message elements be broadcast using a non-proprietary specification for remote identification are necessary for the receiving wireless devices to decode the messages and make the contents of the remote identification messages usable to the public. The FAA does not require a specific message format because the current performance-based requirement allows the UAS industry to collaborate and innovate to optimize the message format. As broadcast technologies evolve, the specified message format may need to evolve as well, and the requirement adopted in this rule allows for that without a need to update the regulations. In addition, reflecting the removal of the network transmission requirement, and to provide the necessary interoperability to ensure publicly receivable remote identification information, the FAA clarifies that encryption of the required message elements is not permitted.

11. Cybersecurity

i. Discussion of the Final Rule

The FAA proposed to require all UAS with remote identification equipment to incorporate cybersecurity protections for the transmission and broadcast of the message elements, as appropriate.

The FAA did not propose any specific cybersecurity protection methods that would be required to be incorporated into an FAA-accepted means of compliance. Instead, the cybersecurity protection methods incorporated into a proposed means of compliance would be reviewed and evaluated as a part of the acceptance process.

The proposed minimum performance requirement related to cybersecurity is removed from this rule because of the deletion of the requirement for standard remote identification UAS to connect to the internet and transmit information to a Remote ID USS. As discussed in the NPRM, the cybersecurity requirement applied to both the transmission and broadcast of the remote identification message elements, and the requirement to broadcast the remote identification messages is retained in this rule. However, the FAA believes that with the removal of the internet connectivity requirement, cybersecurity requirements for the broadcast functionality are no longer warranted.

While this rule no longer requires standard remote identification UAS to have an internet connection for the purpose of remote identification, the FAA acknowledges that many UAS could have internet connection capabilities to support other design features or capabilities not related to remote identification. The FAA encourages designers and producers of remote identification UAS that can connect to the internet to incorporate cybersecurity protections to ensure that those other design features or capabilities are protected from cyber threats.

ii. Public Comments and FAA Response

Comments: The FAA received many comments supporting cybersecurity in general, but that also requested the FAA provide greater specificity or adopt specific standards. The vast majority of these comments related to transmission of message elements through the internet to the Remote ID USS.

The FPVFC noted that if a radio frequency broadcast remote identification system is used, there are no cybersecurity concerns.

FAA Response: As described in section VII.A of this preamble, this rule does not require transmission of message elements through the internet to a Remote ID USS. In addition, the FAA agrees with the FPFVC that broadcasting the message elements does not raise cybersecurity concerns. Accordingly, the proposed minimum performance requirement related to cybersecurity is removed from this rule, for the reasons described above.

12. Other Performance Requirements

i. Discussion of the Final Rule

In the NPRM, the FAA identified several potential requirements that it considered, but ultimately decided were not necessary to include in the proposed minimum performance requirements, and requested comments on whether and why any of those should be required. The list included:

- Other message elements such as certain UAS operator contact information or other aircraft or control station information such as velocity, direction, route, or altitude above ground level.
- Equipment interface requirements such as the appropriate connections between GPS receivers, altimeters, and the remote identification message compiler; the communication protocol between the aircraft and the control station through which remote identification message data is exchanged; or protocols and interfaces between UAS, internet providers, and Remote ID USS.
- Flight data recording features to store remote identification information within the UAS.
- Requirements for connection indications such as a separate indication of whether the UAS is connected to the internet and its connection to a specific Remote ID USS, an indication of the transmission latency, or a notification of the specific Remote ID USS to which the UAS is connected.
- Transmission or broadcast requirements during a command and control lost-link event.

After reviewing comments and further consideration, the FAA decided to require velocity as an additional message element for standard remote identification unmanned aircraft, as discussed in section VIII.A.8 of this preamble. The FAA is not adopting in this rule any of the other minimum performance requirements described in this section that were identified for potential inclusion.

ii. Public Comments and FAA Response

Comments: Airbus UTM suggested minimum performance requirements for the remote identification broadcast to include range, reliability, and authenticity. uAvionix suggested a requirement for minimum broadcast power. Ciconia Aviation Services suggested a minimum radio transmission range of 1.5 to 2 kilometers for UTM and possibly other manned interfaces. Wing Aviation LLC suggested defining loss to mean persistent (not temporary) loss of signal, contending that remote identification is not critical to flight safety and a brief interruption should not trigger an immediate contingency. The Aviators Code Initiative recommended establishing a maximum power output for broadcast equipment. Droneport Texas LLC requested that any additional performance requirements beyond those in the NPRM undergo a public comment process in accordance with the Administrative Procedure Act.

DroneBusiness Center suggested changing the performance standard requirement to a consensus standard approach. ANRA Technologies and Small UAV Coalition suggested using ASTM standards. Ax Enterprize noted that that ASTM F3411–19 Standard Specification for Remote ID and Tracking has taken the position that remote identification is strictly for security, not safety functions, thereby excluding detect-and-avoid. They suggested a prescriptive definition of ''real-time'' and ''near real-time.'' They also proposed Trustworthy Multipurpose Remote Identification Protocol which is intended to satisfy several requirements including, but not limited to, verifying that messages are from the stated sender and the UAS Identification is in a registry, looking up public and private information, and structuring that information for readability.

The FPVFC suggested UAS equipment interfaces should be determined by industry, and the performance requirements for self-testing and monitoring, error correction, interference considerations, message element performance requirements, and cybersecurity are too vague. They were also concerned that UAS would be grounded if the requirements are too rigid. Unmanned Systems Canada stated the performance standard is unreasonable and more restrictive than altitude requirements on manned aviation. One individual commenter stated that requirements on modelers is greater than the requirements on manned aircraft operations, and others stated the proposed rule mandates technology that is not yet available or mature.

FAA Response: The FAA finds that the message elements proposed by commenters, while valuable in specific situations, are not essential to meeting the safety and security needs being addressed by this rule. In addition, the performance requirements as finalized meet the needs of remote identification while remaining sufficiently performance-based to allow for technological innovation.

C. Message Elements Performance Requirements for Standard Remote Identification Unmanned Aircraft

The FAA proposed to require that all UAS with remote identification meet certain minimum requirements regarding the transmission of the message elements including the minimum performance requirements related to positional accuracy, barometric pressure accuracy, message latency, and message transmission rate. The FAA invited comments on whether the proposed minimum performance requirements for the message elements are appropriate and requested that commenters provide feedback and recommendations, supported by data, to sustain their position. The FAA also proposed that standard remote identification UAS must transmit and broadcast identical message elements.

The message element minimum performance requirements proposed in the NPRM are considered design requirements, not operational performance requirements. A standard remote identification UAS must demonstrate that it meets minimum performance requirements for these message elements under test conditions specified in an FAA-accepted means of compliance. The test conditions must be representative of those that are likely to be encountered during typical UAS operations. The FAA acknowledges and accepts that the actual in-service performance may vary from the performance established under test conditions. The operator of a standard remote identification is not required to monitor the actual in-service performance of the UAS.

After reviewing public comments and further consideration, the FAA is adopting the message element performance requirements that were proposed, with some modifications. The FAA explains these requirements, including changes from the NPRM, in the following subsections.

1. Transmit and Broadcast Identical Message Elements

The FAA proposed that the UAS be required to transmit through the internet to a Remote ID USS and broadcast identical message elements. As described above, the FAA eliminated the requirement to transmit remote identification message elements to a Remote ID USS. As a result, performance requirements related to the requirement to transmit and broadcast identical message elements have been removed from this rule.

2. Positional Accuracy

i. Discussion of the Final Rule

The FAA proposed positional accuracy requirements that are compatible with commercial off the shelf position sources, such as GPS receivers integrated into many existing UAS, smart phones, or other smart devices. For an unmanned aircraft, the position source is considered to be equipment onboard the aircraft that computes a geometric position (latitude and longitude). The position source can be a separate sensor or can be integrated into other systems. While the FAA anticipated that most unmanned aircraft would use a GPS receiver as the position source, other equipment could be used as long as it is capable of producing the required message elements and meets the proposed accuracy requirement. For a control station, the position source is considered to be equipment that is either integrated into the control station or separate from, but in close proximity to, the control station.

For standard remote identification UAS, the FAA proposed that the reported position of the unmanned aircraft and control station would have to be accurate to within 100 feet of the true position, with 95 percent probability.

The FAA is adopting this requirement as proposed.

ii. Public Comments and FAA Response

Skydio commented that the proposed unmanned aircraft location accuracy and latency requirements, including the prohibition on takeoff and the requirement to land as soon as practicable, are unjustified in areas of limited or degraded GPS based on the known deficiencies of GPS and the advantages of computer vision-enabled UAS, and recommended increasing the accuracy requirement from 100 feet to 500 feet to accommodate these UAS operations. Ciconia Aviation Services suggested that current devices are capable of greater than 100 feet accuracy for UAS position, and suggested requiring 30-foot accuracy as well as 0.1 seconds latency and a 4 Hz transmission rate to support conflict management and collision avoidance.

FAA Response: The FAA considered comments that suggested both increased and decreased positional accuracy compared to the proposed requirement, while still other comments asserted that the positional accuracy proposed was not possible under certain conditions where GPS was limited or degraded. The FAA emphasizes that GPS is one possible position source, but using GPS is not a requirement and there may be other types of position sources that perform better in different operating environments. As such, this rule adopts the proposed requirement that the reported position of the control station and unmanned aircraft be accurate to within 100 feet of the true location, with 95 percent probability.

The positional accuracy requirement is a design requirement and not an operational performance requirement, and the specific test method for ensuring that the UAS design meets this accuracy requirement will be reviewed and evaluated as a part of the means of compliance acceptance process. Depending on the unmanned aircraft operating environment, the actual in-service accuracy may be better or worse than accuracy demonstrated under the test conditions of an FAA-accepted means of compliance.

3. Geometric Altitude Accuracy

i. Discussion of the Final Rule

The FAA proposed that for standard remote identification UAS, the reported barometric pressure altitude for the unmanned aircraft and the control station must be accurate to within 20 feet of the true barometric pressure altitude for pressure altitudes ranging from 0 to 10,000 feet. The FAA sought comments from UAS designers and producers and other interested individuals on whether the proposed barometric pressure altitude accuracy requirement is consistent with current and anticipated future UAS performance capabilities. As discussed in section VIII.A.3 of this preamble, after considering comments and engaging in further analysis, the FAA decided to adopt the requirement that standard remote identification include an indication of control station altitude as a required message element, replacing the requirement to indicate barometric pressure altitude with geometric altitude. As a result, the FAA removed the minimum performance requirements for an indication of barometric pressure altitude and instead adopts minimum performance requirements for an indication of geometric altitude as follows.

Though the barometric pressure altitude accuracy requirement was the same for both the control station and the unmanned aircraft, the transition to a geometric altitude indication warrants different accuracy requirements for the control station and the unmanned aircraft. For the unmanned aircraft, the FAA is adopting a geometric altitude accuracy requirement that is compatible with commercial off the shelf position

sources, such as GPS receivers integrated into many existing unmanned aircraft. The reported geometric altitude for the unmanned aircraft must be accurate to within 150 feet of the true geometric altitude, with 95 percent probability. The FAA expects that future unmanned aircraft will take advantage of technological advancements in geometric altitude accuracy to provide even greater accuracies as technologies evolve.

For the control station, the FAA is adopting a geometric altitude accuracy requirement that is compatible with the performance requirements being established for cellular service providers under the E911 mandate that allows emergency service providers to accurately locate the geographic position of the mobile device. The reported geometric altitude for the unmanned aircraft must be accurate to within 15 feet of the true geometric altitude, with 95 percent probability. The FAA anticipates that most standard remote identification unmanned aircraft will be designed to be paired with an existing smart phone or smart device to provide the control station location information. If the unmanned aircraft design does not use a smart phone or smart device as the position source for the control station location, the FAA believes the geometric altitude accuracy requirement is compatible with the performance of modern GPS receivers.

The geometric altitude accuracy requirement is a design requirement and not an operational performance requirement, and the specific test method for ensuring that the unmanned aircraft design meets this accuracy requirement will be reviewed and evaluated as a part of the means of compliance acceptance process.

ii. Public Comments and FAA Response

Many commenters weighed in on various aspects of the barometric pressure altitude accuracy, including technical capabilities of currently available technology. These comments are no longer applicable because the FAA eliminated this requirement. The FAA appreciates these comments, however, because they helped inform the FAA's analysis with respect to the accuracy requirement for the geometric altitude indication for the control station and unmanned aircraft.

4. Remote Identification Message Latency

i. Discussion of the Final Rule

The FAA proposed a latency of no more than one second for the remote identification message set for standard remote identification UAS. This is the time between when a position is measured by the unmanned aircraft or control station position source and when it is emitted by the remote identification equipment. The FAA proposed the latency requirement to apply to both the transmitted message set and the broadcast message set. The FAA noted that the latency requirement does not apply to any systems external to the UAS, such as broadcast receivers or information display devices.

The FAA is adopting this requirement as proposed with respect to the broadcast message set. As discussed in section VII.A of this preamble, the FAA eliminated the requirement to transmit message elements through the internet to a Remote ID USS. Accordingly, the FAA is promulgating this rule without reference to latency requirements for internet-based transmissions.

ii. Public Comments and FAA Response

Comments: The majority of the comments the FAA received regarding latency raised concerns about the technical feasibility or cost associated with internet-based transmission latency. An individual commented that latency in transmitting data, particularly regarding the location of the UA, would render such data immediately obsolete.

FAA Response: With the removal of the requirement for a standard remote identification UAS to connect to the internet and transmit the message elements to a Remote ID USS, the majority of these comments are not applicable. The FAA finds that this requirement is appropriate for the broadcast of the remote identification message elements and is adopting the requirement as proposed.

The FAA does not agree with the individual commenter who expressed concern regarding the latency issues in transmitting data. The FAA notes that remote identification messages that meet the requirements must be transmitted no more than one second after being generated, and a message must be transmitted at least every second. The FAA finds that these two requirements ensure that the data is sufficiently current for purposes of remote identification.

5. Remote Identification Message Transmission Rate

i. Discussion of the Final Rule

The FAA proposed a transmission rate of at least 1 message per second (1 hertz) as the minimum transmission rate for the remote identification message elements for standard remote identification UAS. The proposed transmission rate applied to both the message elements transmitted to a Remote ID USS and broadcast, and is the minimum rate at which the remote identification message would be either broadcast or transmitted to a Remote ID USS by the remote identification equipment.

The FAA is adopting this requirement as proposed with respect to the broadcast message set. As discussed in section VII.A of this preamble, the FAA eliminated the requirement to transmit message elements through the internet to a Remote ID USS. Accordingly, the FAA is adopting this rule without reference to a transmission rate requirement for internet-based transmissions.

ii. Public Comments and FAA Response

The FAA did not receive any comments with data to support a change from the proposal.

IX. Message Elements and Minimum Performance Requirements: Remote Identification Broadcast Modules

The FAA is promulgating this rule with a regulatory framework that allows persons to equip unmanned aircraft with remote identification broadcast modules to enable them to identify remotely. Further discussion on the operational requirements for remote identification broadcast modules is available in § 89.115(a) of this rule.

As previously discussed in section VII.D of this preamble, the remote identification broadcast module is a retrofit-option that replaces the limited remote identification UAS regulatory framework and provides flexibility to achieve remote identification for operators of unmanned aircraft that do not qualify as standard remote identification unmanned aircraft. The required message elements and minimum performance requirements for remote identification broadcast modules are discussed in this section.

A remote identification broadcast module must broadcast the following message elements: A unique identifier (the serial number assigned to the remote identification broadcast module); an indication of the unmanned aircraft latitude, longitude, and geometric altitude; an indication of the unmanned aircraft take-off location latitude, longitude, and geometric altitude; an indication of the unmanned aircraft velocity; and a time mark. The message elements for remote identification broadcast modules are the same as those for standard remote identification unmanned aircraft, with the exception of the control station location and altitude, the emergency

status indication, and the Session ID. Remote identification broadcast modules must include the unmanned aircraft take-off location and altitude as a message element instead of control station location and altitude. In addition, remote identification broadcast modules cannot use a Session ID as the unique identifier.

Otherwise, the following required message elements are identical to those required for standard remote identification unmanned aircraft:

- A unique identifier.
- An indication of the unmanned aircraft latitude, longitude, and geometric altitude.
- An indication of the unmanned aircraft velocity.
- A time mark.

A discussion of the message elements and the need for them is in section VIII.A of this preamble.

The minimum performance requirements and message elements performance requirements for remote identification broadcast modules are similar to those for standard remote identification unmanned aircraft, but are modified to accommodate the use of broadcast modules on unmanned aircraft produced without remote identification. For a discussion of the minimum performance requirements and the need for them see section VIII.B of this preamble. For a discussion of the message elements performance requirements and the need for them see section VIII.C of this preamble.

One of the differences between the requirements for standard remote identification unmanned aircraft and remote identification broadcast modules is that the latter includes takeoff location as a message element in lieu of control station location. Because the remote identification broadcast module may be a separate module secured to the unmanned aircraft or implemented through a software upgrade using existing equipment on the unmanned aircraft, a requirement to broadcast an indication of the control station location may not be feasible. However, the FAA maintains that knowledge of the remote pilot's location is a necessary component of remote identification. Therefore, the FAA is requiring that the remote identification broadcast module provide an indication of the unmanned aircraft takeoff location as a proxy for the remote pilot's location.

The FAA expects this message element to be a static message element that does not change for the duration of the unmanned aircraft flight operation. The FAA declines to prescribe how the takeoff location is determined by the remote identification broadcast module, but anticipates the equipment will be designed in a manner that allows the latitude and longitude of the takeoff location to be determined and stored as part of the broadcast module initialization prior to takeoff. The FAA is also adopting a requirement to indicate the geometric altitude of the unmanned aircraft take-off location—instead of the altitude of the control station. This information will help to determine whether the takeoff location was from ground level or some other elevation.

Under the final rule, the takeoff location message element broadcast by remote identification broadcast modules may not be distinguishable from the control station location message element broadcast by standard remote identification unmanned aircraft. As such, a smart phone app being used by a member of the public to display remote identification information may not be able to immediately distinguish between whether an indication is a takeoff location or control station location solely from FAA's requirements. The FAA notes, however, that smart device apps that display remote identification information may be able to recognize this distinction by detecting the emergency status message element which is only broadcast by standard remote identification unmanned aircraft. Moreover, as discussed elsewhere in the preamble, the FAA notes that industry consensus standards may include message element requirements above and beyond the FAA's minimum performance requirements, and such a standard could include methods for differentiating these message elements.

Other differences between the minimum performance requirements for standard remote identification unmanned aircraft and remote identification broadcast modules include removing the design requirement that the unmanned aircraft cannot take off if it fails the self-test or is not broadcasting the message elements. There are also changes to the interference considerations to accommodate use of broadcast modules on compatible types of unmanned aircraft, and adjustments to the accuracy requirement for the indication of the take-off location geometric altitude.

To meet the minimum performance requirements established in this rule, the equipment must be capable of recording the geometric position and geometric altitude of the unmanned aircraft takeoff location for these indications to be broadcast by the remote identification equipment. The aircraft takeoff location must meet the positional accuracy requirements as discussed in section VIII.C.2 of this preamble. The takeoff location altitude must meet the geometric altitude accuracy requirements applicable to the unmanned aircraft as discussed in section VIII.C.3 of this preamble.

X. Privacy Concerns on the Broadcast of Remote Identification Information

A. Discussion of the Final Rule

As explained in the proposed rule, remote identification message elements that are broadcast would be publicly available to any device capable of receiving the broadcast. The proposed rule explained that though the message elements themselves would be publicly accessible information, the ability to cross-reference that information with non-public registry data would not be publicly available. This information would be limited to the FAA and available only to government agencies for the purpose of security or enforcement of laws, unless otherwise required by law to be released. This policy remains unchanged for this rule.

B. Public Comments and FAA Response

Comments: Many commenters were confused regarding the accessibility of certain registration information. Commenters expressed concerns over access to registration information potentially being open to the general public and wanted to restrict access to law enforcement. Other individuals commented that the registration system should not divulge the name of the registrant, and should include only the unmanned aircraft serial number, FAA aircraft registration number, phone number, and location of the UAS pilot. A commenter was concerned that using a serial number issued under ANSI/CTA–2063–A poses a concern for potential Personal Identifying Information (PII) leakage. Commenters mentioned that the serial number would allow an unmanned aircraft to be linked back to prior owners after resale. They also argued that competitors could track historical information on UAS usage (*e.g.,* by a delivery company). The Consumer Technology Association expressed the importance of protecting the privacy, confidentiality, and data of users through the proper storage of personally identifiable information.

Many commenters felt that both the registration and remote identification broadcast information should only be available to government, law enforcement, and emergency services. Some commenters specifically referenced the 1989 murder of Rebecca Schaeffer, which led to passage of the

1994 Driver's Privacy Protection Act. Several commenters offered the example of the privacy protections required for automobile license plate numbers as well as manned aircraft registry privacy provisions, and suggested that UAS identification should be afforded similar protections. A commenter suggested that sharing remote identification information with the public should be a Federal crime similar to driver's license and license plate information. Qualcomm suggested only granting public access to a limited set of message elements.

Several commenters suggested the FAA consider the privacy of commercial and recreational users differently. These commenters suggested doing so by requesting recreational operators to provide less information in comparison to commercial ones, noting the potential security and safety resources available to large commercial operators.

Though the Small UAV Coalition expected the accountability that comes with the remote identification final rule would deter irresponsible operations, including invasions of privacy by UAS, it mentioned the privacy interests of both UAS end-users and operators should also be protected. The Small UAV Coalition suggested the rule include limitations on: (1) The type of entities that can access historical message element data stored by a Remote ID USS (directly or indirectly); (2) the purposes for accessing this data; and (3) the correlation of public information such as remote identification message elements with non-public information like registration data.

Numerous commenters believed remote identification of UAS does not include privacy and personally identifiable information protection, and others commented that the NPRM conflicted with existing privacy regulations at the State or Federal levels and could violate Constitutional rights. Kittyhawk submitted survey data showing the importance of privacy for the majority of those pilots surveyed. The Consumer Technology Association submitted survey results showing 90 percent of UAS owners were not comfortable with publicly sharing remote identification information such as pilot location, identification information, and historical flight data; and nearly 40 percent were less likely to purchase a UAS if that is required. Some commenters expressed fear that their personal data could be misused by those who are ''enraged by drones'' and otherwise harbor antipathy toward UAS operators. Other comments were concerned about the possibility of the broadcasted information being vulnerable to hackers or available for data mining and misuse of registrants' information, as well as the need to properly protect the data because of proprietary techniques and maneuvers of a company. Several commenters were also concerned about protecting the safety of young pilots and women, and were concerned that criminals may use the data to track them. Many commenters expressed privacy concerns if remote identification message elements became public, including issues related to confrontation leading to assaults or thefts as well as concerns that persons may be able to track where delivery unmanned aircraft have dropped packages.

One commenter suggested that if FAA makes the real-time location data available to the public, they should also have a data log that shows who looked up the pilot's location. Another commenter also wanted FAA to use an open standard of flight logs, and adherence to the flight regulations set by the FAA, stating that ''like operating a motor vehicle, we do not need private companies tracking our movements to create a safe and orderly system.''

FAA Response: Though the remote identification message elements broadcast from unmanned aircraft are publicly available information, registration data pertaining to individuals is protected in accordance with the requirements of the Privacy Act (5 U.S.C. 552a). Therefore, registry information pertaining to individuals will only be disclosed outside DOT if a Privacy Act exception applies. In addition to other disclosures generally permitted under the Privacy Act, DOT has published System of Records Notice (SORN) DOT/FAA 801, which identifies the specific circumstances under which the DOT discloses individuals' registry information to the public under the Privacy Act's routine use exception. 81 FR 54187, August 15, 2016.

For those individuals who register small unmanned aircraft under 14 CFR part 48, the only registration information generally available to the public includes the registrant's country, state, city, postal code, and number of unmanned aircraft registered. For individuals and entities who register unmanned aircraft, including small unmanned aircraft, under part 47, the registry information generally available to the public includes the registrant's name, street address, country, state, city, postal code, and additional information about the registered unmanned aircraft. For both categories of unmanned aircraft registration, these are the same data elements that have always been publicly available, and are unchanged by this rule. Serial numbers of unmanned aircraft are not included in the information publicly available from the registry for those who register under part 48. As with all other information maintained within the registry, the FAA has implemented the required privacy and security measures to protect data maintained in the registry system. Therefore, the FAA does not believe that there are compelling concerns regarding PII data leakage from serial numbers.

Because the serial number is not generally available to the public, members of the public will be unable to correlate a broadcasted serial number with identifying information of the individual who owns the UAS through the public facing registry. In addition, in accordance with routine use (1) contained in SORN DOT/FAA 801, the FAA will not routinely disclose identifying information of individuals who register under 14 CFR part 48 to the public unless a member of the public provides the unmanned aircraft registration number, which is not one of the data elements that the unmanned aircraft will broadcast. Members of the public cannot generally receive a part 48 registrant's name or address if their request to the FAA identifies only the serial number, rather than the registration number.

Any correlation of other information held by the FAA that would identify any individual member of the public beyond the public remote identification message elements will be strictly limited to authorized FAA and other government and law enforcement personnel who are operating in their official capacities pursuant to all legal limitations and authorized use of the information. This correlation may occur with data such as unmanned aircraft registration information held by the FAA, authorizations to operate UAS under 14 CFR part 107 and 49 U.S.C. 44809, and any waivers from the operating requirements of 14 CFR part 107. All personnel, whether FAA or other government or law enforcement, allowed to access the data will need to be authorized and will access the information only through approved, secured channels when necessary to perform proper actions authorized by law in accordance with all due process and other legal and constitutional requirements.

UAS operators will broadcast the serial number or session ID of their unmanned aircraft. However, that serial number is non-identifying unless it is correlated with the information in the FAA aircraft registration databases. Access to the part 48 database is strictly

controlled, and no member of the public may have access to FAA's database; information within the database is disclosed to members of the public only in accordance with the Privacy Act. As with correlating information related to session IDs, access will be limited to authorized official personnel who are engaged in approved duties with proper legal foundation and authority. For persons with concerns about broadcasting the unmanned aircraft serial number, a session ID may be used and broadcasted instead of the serial number to help protect the privacy of the individual user or the confidentiality of a business. These message elements for standard remote identification unmanned aircraft are discussed in more detail in section VIII.A of this preamble.

The only information that will be broadcast or otherwise available publicly is the remote identification message elements as described in subpart D of part 89. As these message elements will be broadcast directly from the unmanned aircraft, they are public data.

In connection with this rule, DOT has conducted a Privacy Impact Assessment (PIA) further analyzing the privacy impact of this rule on individuals. This PIA is published on the DOT website and has been included in the docket for this rulemaking.

XI. Government and Law Enforcement Access to Remote Identification Information

A. Discussion of the Final Rule

In addition to aiding the FAA in its civil enforcement of FAA regulations, the FAA anticipates that law enforcement and Federal agencies will find remote identification information useful for enforcement of laws, public safety, and security purposes. The FAA envisions pairing remote identification data with certain registration data, when necessary, for accredited and verified law enforcement and Federal agencies. The information could be used to identify, locate, or contact the person manipulating the flight controls of the UAS during an incident response. This information will help with preliminary threat discrimination.

For example, when correlated with registration information, remote identification of UAS also enables law enforcement officers to determine some information about who the unmanned aircraft owner is before engaging with the person manipulating the flight controls of the UAS. In addition, once located, a law enforcement officer can speak with the person manipulating the flight controls of the UAS to gain potential insight into his or her intentions, and allow the officer to either educate the person manipulating the flight controls of the UAS or begin an investigation. Though remote identification of UAS may not deter all nefarious actors, this rule allows the swift interdiction of clueless and careless persons manipulating the flight controls of the UAS and can help law enforcement and security partners focus their efforts on truly nefarious actors. This information will also aid in any subsequent criminal or civil enforcement action.

B. Public Comments and FAA Response

1. Law Enforcement Access to Remote Identification Information

Comments: Several commenters expressed support for law enforcement—including Federal, State, and local agencies—as well as the FAA, having access to remote identification information. The Stadium Managers Association commented that remote identification information should be made available to law enforcement and that information available to the general public should be limited, particularly in the case of stadiums. The University of Washington—NSF RAPID Facility, Pierce Aerospace, and many individual commenters believed the remote identification message should be encrypted or otherwise protected to ensure that only law enforcement, and not the general public, had access to the information. A number of commenters, including the American Association of Airport Executives, supported the need for law enforcement to have access to remote identification information, but believed that the proposed rule did not outline in enough detail how, when, why, and to what extent the data would be available to law enforcement or even to the general public.

A few commenters expressed support for law enforcement and other entities having access to remote identification information in controlled airspace or while operating near sensitive security locations, but opposed having information other than aircraft location made available while operating in Class G airspace.

Commenters mentioned a need to clarify who would grant access to the information. Airlines for America stated the FAA should provide details of the standard(s) and processes verifying and accrediting law enforcement for UAS enforcement and allow the public to provide comments on such standards and processes. Some commenters believed that no one should have access to their remote identification information, including law enforcement.

A form letter from the Academy of Model Aeronautics stated the safety of law enforcement officers depends on having remote identification information available in real-time. The Academy of Model Aeronautics expressed concerns that many local law enforcement agencies do not have the resources to outfit their officers with smart phones or other technology capable of receiving remote identification information.

A significant number of commenters, while not necessarily objecting to having information provided to law enforcement, questioned the value of the remote identification rule entirely. These commenters asserted that only law-abiding UAS operators would comply with remote identification requirements and those persons who intend to violate the law will not comply with remote identification requirements at all. Based on this assumption, these commenters questioned the value of the rule and its necessity. The Stadium Managers Association was skeptical of remote identification's ability to assist law enforcement in locating and apprehending UAS pilots given the amount of time they believed it will take to identify the unmanned aircraft and then locate the pilot some distance away from the aircraft.

FAA Response: A remote identification broadcast is, by nature and intent, public. Though remote identification provides situational awareness to law enforcement, it will also provide the public with basic information about a particular unmanned aircraft to facilitate reporting to law enforcement, if appropriate. This information will be anonymous, however. Under this rule, the FAA will not grant members of the public access to information that could be correlated to a particular unmanned aircraft or operation. This is similar to the public ADS–B Out broadcast emitted by manned aircraft. As in the case with ADS–B Out, it is possible that members of the public could develop systems for tracking and aggregating information about UAS flights, but those systems would not include personal information from the FAA's databases.

The FAA finds that remote identification information plays a critical role in threat discrimination by law enforcement and national security entities regardless of class of airspace. Law enforcement officials have made clear that it can be very difficult to make a decision about the risk posed by a person manipulating the flight controls

of the UAS with the limited information available from visually observing an unmanned aircraft. Remote identification information will enable better threat discrimination, an immediate and appropriate law enforcement response, and a more effective follow-on investigation. This is because remote identification information can be correlated with unmanned aircraft registry information to inform law enforcement officers about the registered owner. This information, along with the real-time location of the unmanned aircraft operator, provides critical input to a law enforcement officer's decision on whether intervention is appropriate. The remote identification message is broadcast over unlicensed radio frequency spectrum and therefore would be accessible by any device capable of receiving that broadcast. Though the FAA does not consider that such a device would be costly, this rule does not place any compliance requirements on local law enforcement agencies, leaving them free to choose not to use remote identification as a tool.

The FAA's regulatory approach is based on the fundamental assumption that regulated entities will comply with the rules; the FAA does not assume noncompliance. Acknowledging that not all entities will comply with regulations, the FAA is promulgating this rule to be a tool to help relevant authorities distinguish between compliant and noncompliant actors. The FAA recognizes that certain nefarious actors may not comply with remote identification requirements; however, the fact that an unmanned aircraft or an unmanned aircraft operation is noncompliant is an important data point for law enforcement to consider as they engage in a threat analysis. A noncompliant actor will stand out, allowing law enforcement to shift its attention appropriately. Even if the noncompliant actor has no nefarious intent, there is value in this type of threat discrimination. A careless or clueless operator may be introducing unnecessary risk into the airspace of the United States without realizing it. Remote identification allows appropriate authorities to identify the operator for follow up or education on how to operate safely and in compliance with the FAA's rules.

2. Law Enforcement Uses of Remote Identification Information

Comments: Commenters expressed concerns regarding potential abuse of remote identification information by law enforcement. Some commenters described the proposed remote identification system as a central database, and believed that the information would be used inappropriately when provided to local law enforcement. The Academy of Model Aeronautics expressed concern that there is nothing in the NPRM about how remote identification information will be integrated with the rest of the data that law enforcement routinely uses. The Academy of Model Aeronautics believed this is a critical point because law enforcement officers are trained to use personal identifying information about the person they have in front of them. Many commenters believed that all remote identification information for all unmanned aircraft flights would be provided to all law enforcement organizations regardless of need. These commenters argued that law enforcement, particularly local law enforcement, does not need this type of information for every pilot and every flight regardless of origin, destination, and other factors. Other commenters argued that law enforcement does not need information regarding every flight in real time, noting that law enforcement does not have access to real-time driving information for every vehicle on the roads. Commenters questioned local law enforcement agencies' need for this information, particularly as the Federal Government is the sole regulator of airspace.

Wing Aviation asserted that persistent surveillance without cause is not consistent with community expectations of privacy and due process, nor is it necessary to support compliance, accident investigation, or security. If agencies intend to use retained data for other purposes, Wing Aviation believed that request should be subject to administrative, civil, or criminal procedures.

Many commenters believed that Federal, State, and local law enforcement agencies would use the data provided to identify, harass, and arrest remote operators. Some commenters believed this was a particular possibility if law enforcement believed that the UAS operator was using unmanned aircraft-mounted camera systems to expose law enforcement's behavior or activities to the public. Still other commenters believed that the proposal creates the potential for illegal tracking, unwarranted surveillance, and harassment of American citizens by Federal, State, and local law enforcement. An individual commenter asked the FAA to clarify if remote pilots operating small UAS under part 107 have the same protection as manned pilots from outside interference, and if such interference would carry ''hefty penalties.'' The commenter noted that he had been ''accosted by law enforcement even when operating [his] UAS responsibly.'' The commenter suggested that an emphasis be placed on ensuring that law enforcement officers do not interfere with remote pilots during flight operations. Multiple commenters expressed the view that unfettered access by law enforcement to remote identification information could lead to both a compromise of personally identifiable information and potential abuses. Many individual commenters believed that law enforcement should not be granted access to any remote identification information without probable cause and a warrant.

The Consumer Technology Association stated that remote identification requirements should include due process protections and articulate a legal standard for law enforcement and security officials seeking access to database information, if they will have access with less than a subpoena or warrant. To ensure accountability and prevent abuse, the Consumer Technology Association advocated the FAA should maintain a record that documents every instance where officials access the remote identification database, with this information (who requested access, when was it requested, and for what purpose) subject to the Freedom of Information Act.

Other commenters were concerned about the inappropriate policing of UAS activities. Several commenters used examples of having incorrect altitude readings above the 400-foot limit for part 107 operations of unmanned aircraft broadcast and questioned what type of enforcement action would result at the Federal, State, or local level. Commenters also asked who would validate the data, determine whether violations had been committed, and assess fines or other penalties.

Further, several commenters expressed the view that unfettered access by law enforcement to remote identification information could lead to specific monitoring of the media by law enforcement agencies, impacting freedom of the press.

FAA Response: The FAA emphasizes that any use of remote identification data by law enforcement agencies is bound by all Constitutional restrictions and any other applicable legal restrictions. The purpose of this rule is to provide a tool for identifying an unmanned aircraft and locating its operator. One of those uses is to help

local law enforcement engage in threat discrimination while discharging their lawful law enforcement duties. This rulemaking does not speak to the use of information by law enforcement agencies or how remote identification data will be correlated with other law enforcement data. Real-time information is critical for law enforcement and national security purposes because compliance is a useful tool for threat discrimination.

The FAA considers that the remote identification requirements are analogous to surface transportation vehicles. Though real-time driving information is not available for every vehicle on the road, an indication of certain compliance status is viewable to law enforcement for all vehicles by way of visible markings such as a license plate, registration marking, and inspection marking. Similarly, a vehicle not in compliance with license plate display, registration, or inspection would be apparent to law enforcement, and the driver is co-located with the vehicle. There is currently no standardized system to query such information for unmanned aircraft for law enforcement and national security purposes, and this rule would meet that need.

3. Law Enforcement Training on Remote Identification Information

Comments: A number of commenters discussed the necessity for public safety training to recognize questionable operations. Several commenters, including the National Sheriffs' Association, were concerned that law enforcement will need training as to what is, and is not, a legal UAS operation. Some commenters believed that information gathered from remote identification would be used by local law enforcement to enforce local regulations that conflict with FAA regulations pertaining to use of the airspace of the United States. Individual commenters discussed the confusion of local law enforcement regarding operations permitted under part 107 and believed that access by these organizations to remote identification information would be used to further harass persons conducting such legitimate operations.

Several individual commenters also raised concerns about flight safety if they were interrupted, interfered with, interrogated, or harassed by law enforcement while conducting a lawful unmanned aircraft operation. These commenters believed the FAA needed to provide greater training to law enforcement. Commenters emphasized the need for law enforcement to learn how to interact with a UAS pilot appropriately to ensure the safety of the operation, including the safe landing of the aircraft if necessary. The National Sheriffs' Association called specifically on the FAA to work with more than Federal law enforcement agencies, by providing training or assistance to State and local agencies as to what is, and is not, a UAS threat. One commenter also cited the need for an easy-to-use system to report illegal UAS operations.

The executive director of the Academy of Model Aeronautics (AMA) asked who was going to fund, train, and equip law enforcement to use the remote identification system. AMA believes that the remote identification rule should not be implemented without further research and data, to include the impact on privacy.

The Coconino County Sheriff's Office asked the FAA, prior to adoption of any rule on remote identification, to seek further clarification in consultation with Federal, State, local, and tribal law enforcement representatives regarding the provision of equipment and training for local law enforcement for access to remote identification information.

FAA Response: The FAA is actively engaged in significant outreach and education to law enforcement on many matters related to UAS, including educating the public safety community on understanding how to distinguish between, and respond to, authorized and unauthorized or unsafe UAS operations. The FAA also maintains an updated toolkit for public safety and government users. Further, law enforcement personnel can contact Law Enforcement Assistance Program (LEAP) Special Agents, who regularly assist law enforcement on matters related to FAA regulations. The desire of a commenter for an easy-to-use system to report illegal unmanned aircraft operations is outside the scope of this rulemaking. The purpose of this rule is to provide a tool for locating and identifying an unmanned aircraft and locate its operator. One of those uses is to help local law enforcement engage in threat discrimination while discharging their law enforcement duties. This rulemaking does not speak to the use of information by law enforcement agencies, or how remote identification data will be correlated with other law enforcement data.

XII. FAA-Recognized Identification Areas

A. Discussion of the Final Rule

As discussed in section VII.F.2 of this preamble, FAA-recognized identification areas are locations where unmanned aircraft may operate without remote identification equipment. The FAA proposed subpart C to outline the requirements for establishment of FAA-recognized identification areas. After consideration, the FAA is making changes to this subpart in the final rule. This rule expands eligibility to apply for establishment of an FAA-recognized identification area to include educational institutions in addition to community-based organizations (CBOs), and also removes the 12-month limitation on time to submit applications. The FAA is also clarifying the application review criteria and required information for application. The criteria will be described in greater detail in the advisory circular on FAA-recognized identification areas, which will be published following this rulemaking.

Finally, this rule removes the prohibition on re-application for FAA-recognized identification areas for (1) locations that have expired, or (2) locations that have been terminated, so long as the conditions that led to termination are no longer in effect.

This rule promulgates the other provisions of subpart C as proposed.

B. Eligibility

1. Discussion of the Final Rule

In the NPRM, the FAA discussed the purpose of FAA-recognized identification areas and acknowledged that after the production compliance date, unless a UAS fell into an exception such as amateur-built UAS, most UAS would have remote identification. Because the FAA recognized that certain UAS, such as amateur or home-built UAS, would not be able to equip, the FAA proposed that a CBO recognized by the Administrator would be eligible to apply for the establishment of a flying site as an FAA-recognized identification area to enable operations of UAS without remote identification within those areas.[22] This rule maintains eligibility for CBOs. In addition, to better accommodate science, technology, engineering, and math programs and encourage participation in aviation for educational purposes, the rule expands that eligibility to also include education institutions, including institutions of primary and secondary education, trade schools, colleges, and universities.

[22] The FAA clarified in the proposed rule that the concept of FAA-recognized identification areas is different and independent from the fixed-site concept in 49 U.S.C. 44809(c)(1) and a fixed site would not automatically be approved as an FAA-recognized identification area.

2. Public Comments and FAA Response

Comments: Commenters, including AOPA, the Massachusetts Department of Transportation and the Air Line Pilots Association, supported the idea of FAA-recognized identification areas generally. Many commenters, including the National Agricultural Aviation Association supported CBOs being eligible to apply for FAA-recognized identification areas. However, some commenters raised concerns that limiting eligibility to CBOs was too restrictive, and that many individuals would not want to join a CBO to fly. Flite Test Community Association said they have surveyed hobbyists and 65 percent of respondents indicated they would not join a CBO even if it were free.

Many commenters such as Signatory Higher Education Associations and Institutions of Higher Education, Wing Aviation LLC, and the North Carolina Department of Transportation supported the idea that in addition to CBOs, other persons should be eligible to apply for FAA-recognized identification areas. Several commenters, including State and local governments, such as the Minnesota Department of Transportation, and several individual commenters suggested that educational institutions and State and local governments should be eligible to apply for FAA-recognized identification areas. Commenters reasoned that educational institutions are well-positioned to ensure UAS operations comply with regulations and campus safety, security, and privacy policies. In addition, commenters argued that not allowing universities to request and control FAA-recognized identification areas would pose an unnecessary impediment to science and engineering opportunities for university students, faculty, and staff. Some commenters such as the Alliance for Drone Innovation and AiRXOS contended that expanding eligibility to educational institutions is necessary to spur innovation and promote workforce development and public safety.

Commenters emphasized that certain universities and other entities such as State and local governments could not qualify to become CBOs in accordance with 49 U.S.C. 44809(h) due to the 501(c)(3) requirement and because they are not membership-based associations. Organizations such as the National Association of State Aviation Officials, City of Albuquerque Parks and Recreation Department, Experimental Aircraft Association, Southern Company, The Commercial Drone Alliance, and University of Texas Austin UAV Committee made similar comments in support of expanding eligibility. Some commenters highlighted section 350 of the FAA Reauthorization Act of 2018 as evidence that Congress intended for the FAA to create allowances for recreational UAS that are operated by an institution of higher education for educational purposes.

FAA Response: The FAA agrees with commenters that eligibility to apply for establishment of an FAA-recognized identification area should be expanded to include educational institutions. Community-based organizations will continue to be eligible to apply.

The FAA is including educational institutions—including primary and secondary educational institutions, trade schools, colleges, and universities—in recognition of the critical role they play in providing pathways to aviation careers, whether through science, technology, engineering, and math curricula; the building and flight of unmanned aircraft; or other educational activities. The FAA determined it is appropriate to allow educational institutions to request the establishment of FAA-recognized identification areas. The FAA believes that extending the ability to request establishment of FAA-recognized identification areas to educational institutions will provide additional convenient locations for those associated with the educational institution to be able to operate unmanned aircraft without remote identification and reduce costs associated with travel time to other FAA-recognized identification areas.

Comments: Several commenters advocated for wider expansion of eligibility for FAA-recognized identification areas beyond just CBOs and educational institutions. Several commenters requested the FAA consider expanding eligibility to State and local governments. Many individual respondents believed the proposed eligibility criteria would force local governments and schools to work through a non-governmental organization to request FAA-recognized identification area designations on public property. One commenter noted there are many local organizations not affiliated with a CBO that operate from local private and municipal fields. Commenters stated that limiting eligibility to CBOs would discourage student model flyers who predominately learn at parks, schools, and gyms, and could disadvantage low-income and urban enthusiasts who cannot afford CBO dues.

FAA Response: The FAA considers that expanding eligibility to CBOs and educational institutions at all levels is sufficient to meet the needs of student model flyers and declines to expand eligibility to State and local governments. Expanding eligibility to State and local governments could expand the scope of FAA-recognized identification areas to an extent that would undermine the effectiveness of remote identification. The purpose of FAA-recognized identification areas is to help accommodate traditional model aircraft, many of which are home-built unmanned aircraft and may not meet remote identification requirements, and not to provide sites for State or local governments to operate.

Comments: The New Hampshire Department of Transportation stated that anyone should be able to request an FAA-recognized identification area by certifying that they are responsible for the area and will operate within FAA regulations. A large number of individual commenters believed that private individuals should be able to register their private property as an FAA-recognized identification area. Some commenters also asserted this restriction infringes on private property rights. The American Association of Airport Executives recommended that local governments should control the use of FAA-recognized identification areas through local laws and ordinances. The Experimental Aircraft Association suggested that if the FAA adopted a system like the FAA's Web-based Operations Safety System (WebOPSS) to automate the application process, a CBO intermediary would be unnecessary.

FAA Response: The FAA declines to extend eligibility to request FAA-recognized identification areas to any individual or individual property owner, regardless of affiliation. As discussed in the NPRM, the FAA intends most UAS to identify remotely. The operation of unmanned aircraft without remote identification equipment at FAA-recognized identification areas is primarily for those who are truly unable to use either standard remote identification UAS or remote identification broadcast modules. The benefits of requiring remote identification generally are undermined if the FAA-recognized identification area eligibility criteria are expanded to a point where every backyard could be a potential site. Permitting private individuals to seek FAA-recognized identification areas would undermine the FAA's primary goal in establishing the remote identification requirements: Enabling

the identification of unmanned aircraft operating in the airspace of the United States by the FAA, law enforcement, and other government officials. That goal cannot be met if every individual is able to operate without remote identification by requesting an FAA-recognized identification area.

Comments: Many commenters equated a ''community-based organization'' with the Academy of Model Aeronautics (AMA) and expressed concern that the FAA would favor the AMA when establishing FAA-recognized identification areas. These commenters argued that model aircraft flyers would be compelled to join Academy of Model Aeronautics-affiliated clubs to pursue their hobby. Some commenters requested the FAA automatically establish FAA-recognized identification areas at all existing AMA flying sites.

FAA Response: The FAA considers that CBOs and educational institutions can perform an important function in promoting safety in recreational UAS flying. These organizations must submit applications for any sites for which they request establishment of FAA-recognized identification areas. Only by submitting an application and providing the FAA with the information requested will the FAA be able to appropriately and objectively evaluate each site to determine its eligibility. The FAA is not pre-approving any existing flying sites as FAA-recognized identification areas with the publication of this rule.

C. Time Limit for Submitting an Application To Request an FAA-Recognized Identification Area

1. Discussion of the Final Rule

The FAA proposed that applications for establishment of an FAA-recognized identification area would have to be submitted within 12 calendar months from the effective date of a final rule. Under the proposal, at the end of that 12-calendar month period, no new applications for FAA-recognized identification areas would be accepted. This rule eliminates the 12 calendar month limitation on applications, and the FAA will begin accepting applications September 16, 2022.

2. Public Comments and FAA Response

Comments: Though a few commenters suggested varying timeframes over 12 months for the application period, the vast majority of commenters opposed the 12-month application time period limitation. Commenters including the Airports Council International-North America, AiRXOS, AirMap, the Consumer Technology Association, DJI, New Frontier Airspace, the North Carolina Department of Transportation, Wing Aviation, and others strongly opposed the 12-month application period. Some commenters, including AUVSI and AOPA, expressed concern that the 12-month limit on new FAA-recognized identification areas would adversely affect science, technology, engineering, and mathematics access, especially for those young persons interested in aviation as a career. Academic respondents, such as the Mobile County Public School, Mobile County Public School JROTC, the University of Maryland UAS Test Site, the Virginia Tech Mid-Atlantic Aviation Partnership, University of Texas at Austin, the Minnesota Department of Transportation, and Embry-Riddle Aeronautical University opposed the 12-month limit on similar grounds—as did a number of private organizations. The New Hampshire Department of Transportation and many individual respondents opposed the 12-month window as potentially limiting not only recreational opportunity, but also economic growth.

Many commenters pointed out that the need to establish and change the parameters of an FAA-recognized identification area would continue after the 12-month period had passed, asserting that land development, re-zoning, community encroachment, sale of property or loss of lease, demographics, and other factors regularly necessitated that flying clubs cease operations and re-locate. Commenters also expressed concern that the 12-month period would result in the elimination of traditional radio controlled flying through attrition. Nearly all commenters felt that the 12-month limit should be eliminated, and that recreational UAS without remote identification should be permitted to operate—at least at selected sites—in perpetuity.

FAA Response: Based on the comments received, the FAA has determined that there will be a continued need for FAA-recognized identification areas for certain types of unmanned aircraft such as home-built unmanned aircraft and that these areas will not phase out as originally conceived. Though the FAA considered that the addition of the remote identification broadcast module option and elimination of the proposed network requirements would reduce the need for FAA-recognized identification areas, the FAA still foresees an ongoing need for these areas for some operators such as some home-built UAS that cannot equip and educational science, technology, engineering, and math programs. Due to this ongoing need, the FAA has decided to remove the 12 calendar month limitation on applications to establish an FAA-recognized identification area.

In addition, comments about the potential impacts on education and the recreational community were persuasive.

The FAA will begin accepting applications for FAA-recognized identification areas September 16, 2022.

D. Process To Request an FAA-Recognized Identification Area and FAA Review for Approval

1. Discussion of the Final Rule

The NPRM proposed in § 89.210 that certain information be provided to the FAA as part of an application for an FAA-recognized identification area. With the exception of minor adjustments to reflect the expansion of organizations eligible to apply as discussed previously in this section, the FAA will adopt this list as proposed. Applications for establishment of an FAA-recognized identification area must include: (1) The name of the community based organization or educational institution eligible under § 89.205; (2) the name of the individual making the request on behalf of eligible persons (*i.e.,* the CBO or educational institution per § 89.205); (3) a declaration that the individual making the request has the authority to act on behalf of the community-based organization or educational institution; (4) the name and contact information, including telephone number(s), of the primary point of contact for communications with the FAA; (5) the physical address of the proposed FAA-recognized identification area; (6) the location of the FAA-recognized identification area in a form and manner prescribed by the Administrator; (7) if applicable, a copy of any existing letter of agreement regarding the flying site; (8) a description of the intended purpose of the FAA-recognized identification area and why the proposed FAA-recognized identification areas is necessary for that purpose; and (9) any other information required by the Administrator. The advisory circular on the FAA-recognized identification area application process will be published following this rulemaking.

In § 89.215 of the NPRM, the FAA proposed that the Administrator may consider certain criteria when reviewing a request for establishment of an FAA-recognized identification area. This rule clarifies the criteria proposed in § 89.215 to explain how the FAA may evaluate the requested location of an

FAA-recognized identification area. In § 89.215(a), the FAA clarifies that it may consider the existence of flight or airspace restrictions and special flight rules, including any restrictions or regulations limiting UAS flight for safety, efficiency, national security, or homeland security, which may overlap with a requested or established FAA-recognized identification area. The Agency may also consider the need for an FAA-recognized identification area in the proposed location and proximity of other FAA-recognized identification areas to determine whether to grant or deny an application. The effectiveness of remote identification relies upon the majority of operators remotely identifying, therefore, these considerations are necessary to prevent undermining of that effectivity. The FAA has removed the separate criteria of the effects on airspace capacity, determining that the criteria is already encompassed in the consideration of the safe and efficient use of the airspace by other aircraft.

The FAA is adopting the other criteria (*e.g.,* the safe and efficient use of airspace by other aircraft and the safety and security of persons or property on the ground) as proposed. The FAA will issue an advisory circular to provide additional guidance on FAA-recognized identification areas, which will be published following this rulemaking.

2. Public Comments and FAA Response

Comments: The FAA received comments on the information required for application as well as the criteria used to evaluate potential FAA-recognized identification areas. Some commenters, including the Airports Council International–North America, requested that FAA-recognized identification areas also be bound by height above ground level and that information be required in addition to latitude and longitude boundaries.

FAA Response: The FAA declines to include height above ground level in the required application criteria as unnecessary. Operations in FAA-recognized identification areas will continue to be bound by the constraints of the operating rules followed by each UAS operator in those areas (*e.g.,* part 107, 49 U.S.C. 44809, etc.). These operating rules contain altitude restrictions and adherence to airspace requirements that sufficiently bound the maximum altitude in which UAS would be operating in these areas without including height above ground level.

Comments: Some commenters argued that geographic boundaries are too complex a request and that the default boundary shape should be circular. They suggested that the application should only require the latitude and longitude coordinates of the center point of the circular area for the FAA-recognized identification area boundary.

FAA Response: The advisory circular on FAA-Recognized Identification Areas will provide additional guidance for how the FAA may accept descriptions of the location and boundary shapes. The FAA adopts this application requirement for geographic boundaries as ''the location of the FAA-recognized identification area in a form and manner prescribed by the Administrator.'' The FAA expects that a CBO or educational institution requesting establishment of an FAA-recognized identification area would need to have a clear understanding of the boundaries of the area they are requesting and that the FAA may require specific details about that location's geographic boundaries. The application information and criteria established in this rule do not preclude circular FAA-recognized identification areas; however, the FAA foresees a need for increasingly specific boundary information to depict these areas accurately for the public. The advisory circular for FAA-recognized identification areas will provide additional guidance, and will be published following this rulemaking.

Comments: Some commenters including the Commercial Drone Alliance supported the criteria for evaluation proposed in the NPRM and recommended that FAA take all four factors into consideration for every application. Other commenters requested additional requirements prior to the establishment of an FAA-recognized identification area. The Association of American Railroads and Association of Airport Executives recommended that critical infrastructure operators be allowed to review and comment on FAA-recognized identification area applications near critical infrastructure, for example within 5 miles of an airport. Multiple organizations including The Airports Council International-North America and International Association of Amusement Parks and Attractions recommended FAA use a public notification process such as the **Federal Register** along with a 30 day public comment period, as part of the FAA review and approval process for FAA-recognized identification areas to get input from local communities, citizens, and other stakeholders such as existing airspace users, critical infrastructure operators, public and private infrastructure owners, and neighborhoods affected by FAA-recognized identification areas.

FAA Response: The FAA does not consider that public notice and comment is appropriate for the approval of FAA-recognized identification areas. The existence of an FAA-recognized identification area does not change airspace requirements for the area; all operating rules and airspace requirements and restrictions remain in effect whether an FAA-recognized identification area is established or not. The FAA-recognized identification area merely indicates that unmanned aircraft in that location are not required to be equipped with remote identification broadcast. Because the decision to establish an FAA-recognized identification area does not alter airspace requirements, the FAA finds that public notice and comment is not necessary.

Comments: Flite Test Community Association recommended that the application process for FAA-recognized identification areas could be implemented similarly to the process for part 107 waivers. Commenters mentioned the FAA could identify default risk and safety thresholds and if the requested locations of the FAA-recognized identification areas meet those thresholds the location could be granted automatic approval.

FAA Response: The FAA notes the granting of part 107 waivers is not automatic and operational waivers are reviewed on a case-by-case basis. The Small UAV Coalition recommended the FAA should not simply approve or disapprove applications as submitted, but should grant approval if attributes of the proposed FAA-recognized identification area such as geographic boundaries can be altered to address FAA concerns. The FAA considers this to be unnecessary because applicants for FAA-recognized identification areas would be able to re-apply with different geographic boundaries if the initial application is denied.

Comments: Many other commenters looked for greater specificity in the criteria and processes for requesting and approving an FAA-recognized identification area. Commenters argued that it is more effective for them to build an FAA-recognized identification area to FAA-established requirements than to risk FAA disapproval because their application did not meet the generalized criteria of § 89.215. In particular, commenters sought clarity regarding the term ''critical infrastructure.''

FAA Response: The FAA has revised the criteria to clearly state that the FAA may consider the existence of flight or airspace restrictions and special flight rules, including any restrictions or regulations limiting UAS flight for

safety, efficiency, national security, or homeland security that overlap with the request. The FAA considers that this criteria would include any airspace restrictions over critical infrastructure. The advisory circular on FAA-Recognized Identification Areas will provide greater specificity in the criteria and process for establishment of an FAA-recognized identification area, and will be published following this rulemaking.

E. Official List of FAA-Recognized Identification Areas

1. Discussion of the Final Rule

The FAA stated it would maintain a list of FAA-recognized identification areas at *https://www.faa.gov,* and that the location of FAA-recognized identification areas would be made available to the public. The list would enable operators of unmanned aircraft without remote identification, and the public, to stay informed about these locations where unmanned aircraft without remote identification may be flown. In addition, law enforcement and security personnel would be able to identify if a suspect unmanned aircraft without remote identification is legally operating within an FAA-recognized identification area. Though no comments were received on this aspect of the proposal, the FAA believes it is appropriate to retain flexibility concerning the means by which FAA will publish the locations of approved FAA-recognized identification areas and ensure the information is made available in a useful format for the flying public and other stakeholders. The FAA clarifies in this rule that it will publish the location of FAA-recognized identification areas on a publicly accessible website in a form and manner to be prescribed by the Administrator. This may take the form of a list or another format, such as a graphical depiction. Additional guidance will be provided in the advisory circular on FAA-Recognized Identification Areas, which will be published following this rulemaking.

2. Public Comments and FAA Response

The FAA received no public comments on this topic.

F. Amendment of the FAA-Recognized Identification Area

1. Discussion of the Final Rule

In § 89.220 the FAA proposed that any change to the information submitted in a request for establishment of an FAA-recognized identification area be submitted to the FAA within 10 calendar days of the change, including changes to the point of contact or organizational affiliation of an FAA-recognized identification area. The geographic boundaries of the FAA-recognized identification area will not change unless they have been approved in accordance with § 89.215. The FAA would review and approve or deny any requested changes to the geographic boundaries using the same criteria used for a request for establishment of an FAA-recognized identification area. Any change submitted to the Administrator may result in the termination of the FAA-recognized identification area pursuant to proposed § 89.230 or modification of the FAA-recognized identification area if the FAA-recognized identification area no longer meets the criteria or eligibility requirements. After reviewing the public comments, the FAA adopts the time period to amend information as proposed. The FAA finds that 10 calendar days is a reasonable amount of time for the holder of the FAA-recognized identification area to submit administrative changes to the FAA, and that this process does not impact operations within the site.

2. Public Comments and FAA Response

Comments: Many members of AMA provided comments that stated the need to change geographic boundaries over time due to club movement, population encroachment, or lease expiration, among other reasons. They requested that FAA not only consider amendments to the geographic boundaries of an FAA-recognized identification area, but also consider entire new geographic areas if the current flying site needs to move.

FAA Response: The FAA agrees with commenters and acknowledges that there may be situations that require an FAA-recognized identification area's boundaries to be altered or completely relocated. The FAA will allow for submission of revised geographic boundaries but will evaluate the revised location against the criteria in § 89.215. The FAA considers that changes to geographic location that would require entirely new geographic boundaries can also be submitted as a new application for an FAA-recognized identification area and would be subject to the same criteria. With the removal of the 12 calendar month limitation, the FAA finds that this requirement is not overly burdensome. One commenter suggested allowing applicants to transfer the affiliation of an approved FAA-recognized identification areas from one CBO to another, which may be necessitated by CBO reorganization. The FAA finds that such a change in affiliation may be acceptable but would require the new CBO to submit an application and indicate the change, and for the FAA to review and approve the application.

Comments: An individual commenter stated the allowance of only 10 days to submit amended information for an FAA-recognized identification area is too short for volunteer-based clubs that may only meet once every 30 days.

FAA Response: The FAA adopts the time period to amend information as proposed. The FAA finds that 10 calendar days is a reasonable amount of time for the holder of the FAA-recognized identification area to submit administrative changes to the FAA, and that this process does not impact operations within the site. The FAA envisions that CBOs that meet infrequently would likely make such administrative changes during these meetings or members could communicate with each other through other means and still provide the FAA notice within the required timeframe.

G. Duration of an FAA-Recognized Identification Area, Expiration, and Renewal

1. Discussion of the Final Rule

Under § 89.225, the FAA proposed a term of 48 calendar months after the date of approval for FAA-recognized identification areas. The FAA explained that a person wishing to renew the FAA-recognized identification area would have to submit a request for renewal no later than 120 days before the expiration date. In the proposal, if a request for renewal is submitted after that time but prior to the expiration date, the Administrator could choose not to consider the request. Requests for renewal submitted after the expiration date of the designation would not be considered by the Administrator. The FAA has determined that 48 calendar months is a reasonable term for a renewal interval. A 48 calendar month renewal period gives the FAA the opportunity to update its FAA-recognized identification area database to delete abandoned and non-operational sites, and therefore, the FAA is keeping the site duration term as proposed. The proposed rule included the restriction that once an FAA-recognized identification area had expired, it could not be re-established. This rule removes that restriction.

1. Public Comments and FAA Response

Comments: Commenters did not agree on whether FAA-recognized identification areas should ever expire. Some noted that many fixed flying sites

are used (and reused) on a short-term basis for infrequent events such as competitions. Many commenters noted that current flying sites are leased from private property owners and are subject to renewal. Some commenters felt the 48 month renewal requirement is burdensome, while others disputed that sites should require any renewal to retain their approval status. One commenter argued that expiration should only occur if a characteristic used to approve the FAA-recognized identification area has changed. Several commenters asserted that the renewal period should be longer than 48 months. The Small UAV Coalition and an individual commenter recommended extending the renewal period to 60 months to align with the duration of AMA-affiliated fixed site land leases. The commenter also recommended allowing FAA-recognized identification areas to continue to operate while the renewal is being considered, to include any period of time where the FAA's determination is under appeal. One individual commenter recommended a 60-month duration but with annual reviews for changes in site parameters. The Aircraft Owners and Pilots Association and two individual commenters recommended the FAA change the renewal period to 120 calendar months. They commented that 48 months is too burdensome for both community-based organizations and the FAA as well. Commenters generally objected to provisions such as expiration and the prohibition on re-applying for an FAA-recognized identification area in the location of an expired or terminated FAA-recognized identification area. Commenters asserted the FAA's assumption that non-equipped UAS would dwindle is faulty and demonstrates a flawed understanding of the modeling community.

Commenters stated that the requirement to request renewal of FAA-recognized identification areas no later than120 days before the expiration date was onerous or unnecessary. The Small UAV Coalition did not raise concerns with the renewal time period requirement.

FAA Response: The FAA has determined that 48 months is a reasonable term for a renewal interval. A 48-calendar month renewal period gives the FAA the opportunity to update its FAA-recognized identification area database to delete abandoned and non-operational sites. In addition, the 48-month renewal period gives the FAA the opportunity to validate that these sites are still necessary and continue to meet the applicable safety and security criteria. The FAA has determined that a 48-calendar month term balances the safety and security needs to periodically review FAA-recognized identification areas against the administrative overhead associated with conducting the review. The FAA finds that commenter suggestions for longer time periods (60 months or 120 calendar months) do not allow for sufficiently frequent review. For the reasons detailed above, the FAA has also determined the requirement to submit a renewal request for FAA-recognized identification areas is also reasonable. The FAA determines that the requirement to request renewal no later than 120 days before the expiration period is necessary to provide the FAA time to process the renewal.

Comments: Commenters objected to the restriction on re-establishment of FAA-recognized identification areas that have expired. AiRXOS commented that the FAA provided no reasonable explanation for prohibiting applicants from applying to reestablish a previously approved FAA-recognized identification area that had expired, and noted that it does not appear to be a risk-based provision.

FAA Response: The FAA agrees with commenters that these areas will not phase out as initially conceived. In addition to removing the 12-calendar month limitation for application, the FAA will allow applicants to re-apply for an area that had expired. The FAA envisions that the process to re-apply be the same as the process for new applications, because the application would be evaluated against the same criteria.

H. Requests to Terminate an FAA-recognized Identification Area

1. Discussion of the Final Rule

As proposed in § 89.230(b)(1), if the holder of an FAA-recognized identification area seeks to terminate the site prior to the expiration date, the organization would do so by submitting a request for termination to the Administrator. In the proposed rule, that site would no longer be eligible to be an FAA-recognized identification area in the future. This rule removes this restriction and allows voluntarily terminated FAA-recognized identification areas to be submitted to be re-established.

2. Public Comments and FAA Response

Comments: Commenters objected to the proposed restriction against the re-establishment of an FAA-recognized identification area that was voluntarily terminated.

FAA Response: The FAA agrees. This rule allows applicants to re-apply for an area that has been terminated by the previous holder of the FAA-recognized remote identification area. The FAA envisions that the process to re-apply be the same as the process for new applications, because the application would be evaluated against the same criteria and the 12-calendar month limitation on new applications is no longer applicable.

I. Termination by FAA and Petitions To Reconsider the FAA's Decision To Terminate an FAA-Recognized Identification Area

1. Discussion of the Final Rule

The FAA proposed in § 89.230(b)(2) that the FAA would be able to terminate an FAA-recognized identification area for cause or upon a finding, including but not limited to: (1) The FAA-recognized identification area may pose a risk to aviation safety, public safety, or national security; (2) a finding that the FAA-recognized identification area is no longer associated with a community-based organization recognized by the Administrator; or (3) a finding that the person who submitted a request for establishment of an FAA-recognized identification area provided false or misleading information during the submission, amendment, or renewal process.

The FAA proposed that a person whose FAA-recognized identification area has been terminated by the Agency would be able to petition for reconsideration by submitting a request for reconsideration within 30 calendar days of the date of issuance of the termination as required in proposed § 89.230.

This rule adopts this section with minor changes to clarify the rationale for terminating an FAA-recognized identification area and the criteria to petition to reconsider the FAA's decision to terminate an FAA-recognized identification area.

As proposed, once an FAA-recognized identification area is terminated by the FAA, a CBO would not be able to reapply to have the associated area reestablished as an FAA-recognized identification area. In this rule, the FAA clarifies that except as provided in petitions for reconsideration, if the FAA terminates an FAA-recognized identification area based upon a finding that the FAA-recognized identification area may pose a risk to aviation safety, public safety, or national security, that flying site will no longer be eligible to be an FAA-recognized identification area for as long as those conditions

remain in effect. The FAA is also adding ''homeland security'' to the list of considerations in § 89.230(b)(2) that may necessitate termination, for consistency with other changes made in § 89.215. The FAA agrees that if at some point there is reasonable expectation that the reason for terminating the FAA-recognized identification area is no longer relevant, then an FAA-recognized identification area application should be open to consideration.

2. Public Comments and FAA Response

Comments: Many commenters, including AOPA and the Utah Department of Transportation, did not agree with the termination and expiration of FAA-recognized identification areas generally and specifically were concerned with the inability to re-establish these sites. PRENAV and some individual commenters suggested CBOs should be allowed to reapply to have a flying site reestablished as an FAA-recognized identification area following a failed appeal. These commenters noted the conditions which led to the FAA's decision to terminate an FAA-recognized identification area may have changed at some point after the termination.

FAA Response: The FAA agrees that if the conditions that led to the termination are no longer in effect, a previously-established FAA-recognized identification area should be allowed to be re-established and has modified this final rule, accordingly. However, if those conditions that led to termination are still present, the FAA would not re-establish the site. The FAA is committed to not allowing FAA-recognized identification areas in locations that would pose a risk to aviation safety, public safety, or national security.

Comments: A number of commenters expressed concern with the termination and appeal process, in particular over whether due process was being sufficiently applied. AOPA suggested the FAA allow for a decision reconsideration process so that CBOs may address and resolve any relevant outstanding safety issues that lead to the FAA termination decision. AOPA further proposed that impacted parties should be able to seek an administrative hearing concerning the FAA's decision to terminate an FAA-recognized identification area under part 13, expressing concern that without an administrative hearing there was no guarantee that all the relevant facts would be considered, nor that an impartial decision on the matter would be reached.

FAA Response: The absence of an FAA-recognized identification area does not prohibit UAS from operating in the area so long as those UAS are able to identify remotely. However, the FAA recognizes that the termination of an FAA-recognized identification area could affect persons flying unmanned aircraft without remote identification because, for example, the persons would have to fly their unmanned aircraft at another FAA-recognized identification area or would have to retrofit their unmanned aircraft with a remote identification broadcast module. As discussed in this rule, § 89.230(b) establishes the grounds for termination of an FAA-recognized identification area. Because of the effect of the termination on persons operating unmanned aircraft, the FAA included a reconsideration process in § 89.230(c) to ensure due process by providing a reasonable time frame for eligible persons to submit a petition to the Administrator requesting reconsideration of the decision by stating the reasons justifying the request and including any supporting documentation. The FAA believes this process is reasonable and adequate because the termination of an FAA-recognized identification area does not ground unmanned aircraft that can remotely identify, persons can choose to retrofit their unmanned aircraft with remote identification broadcast modules if they want to continue flying in that airspace, and they can continue to fly their unmanned aircraft without remote identification at other FAA-recognized identification areas.

Comments: Some individual commenters were unsatisfied with the wording of this section. One individual commenter requested the FAA amend the wording to specify that a ''FAA-recognized identification area representative or CBO representative'' rather than a ''person'' can submit a petition. This commenter felt the current wording was not broad enough to encompass a CBO or property owner or lessee.

FAA Response: The FAA clarifies that the word ''person'' carries the meaning ascribed to it in 14 CFR 1.1, and includes corporate entities and other organizations as well as individuals. The FAA agrees that if at some point there is reasonable expectation that the reason for terminating the FAA-recognized identification area is no longer relevant, an FAA-recognized identification area application should be open to consideration. The advisory circular will contain further details regarding FAA-recognized identification areas, including the process for termination and appeal. The advisory circular on FAA-recognized identification areas will be published following this rulemaking.

XIII. Means of Compliance

A. Performance-Based Regulation

The FAA adopts the regulatory framework for remote identification with performance-based requirements rather than prescriptive text to provide a flexible regulation that allows a person to develop a means of compliance—which may include industry consensus standards—that adjusts to the fast pace of technological change, innovation, design, and development while still meeting the regulatory requirements. Performance-based requirements describe outcomes, goals, or results without establishing a specific means or process for regulated entities to follow.[23] The FAA recognizes that UAS technology is continually evolving, making it necessary to harmonize regulatory action with technological growth. Setting performance requirements is one way to promote that harmonization.

The FAA encourages consensus standards bodies to develop means of compliance and submit them to the FAA for acceptance. These bodies generally incorporate openness, balance, due process, appeals process, and peer review. The FAA has an extensive history of working with consensus standards bodies such as ASTM International (ASTM), Society of Automotive Engineers (SAE), and Institute of Electrical and Electronics Engineers (IEEE). Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTAA)[24] directs Federal agencies to use consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical. The FAA intends to rely increasingly on consensus standards as FAA-accepted means of compliance for UAS performance-based regulations for remote identification, consistent with FAA precedent for general aviation aircraft and other initiatives taken with respect to UAS.

The approach aligns with DOT regulatory policy, which requires that DOT regulations be ''be technologically neutral, and, to the extent feasible, they should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt.''[25] This approach is also consistent with the direction of the Office of

[23] *See* OMB Circular A–4.

[24] Public Law 104–113; 15 U.S.C. 3701 *et seq.*

[25] 49 CFR 5.5(e).

Management and Budget (OMB) Circular A–119, which favors the use of performance-based regulations and voluntary consensus standards. OMB Circular A–119 states that, for cases in which no suitable voluntary consensus standards exist, an agency may consider using other types of standards. In addition, an agency may develop its own standards or use other government-unique standards, solicit interest from qualified standards development organizations for development of a standard, or develop a standard using the process principles outlined in section 2e of the Circular.[26] OMB Circular A–119 cautions regulators to avoid standards with biases in favor of a few large manufacturers that create an unfair competitive advantage.

1. Discussion of the Final Rule

As promulgated in this rule, a person may use a means of compliance to meet the remote identification minimum performance requirements. The FAA has determined that the use of an FAA-accepted consensus standard as a means of compliance provides stakeholders the flexibility to comply with the remote identification requirements. However, the FAA recognizes that consensus standards are one way, but not the sole means, to show compliance with the performance requirements of this rule. The FAA emphasizes that, though a means of compliance developed by a consensus standards body (*e.g.,* ASTM, SAE, Consumer Technology Association (CTA), etc.) may be available, any individual or organization can submit its own means of compliance to the Administrator for consideration and potential acceptance under subpart E of this rule.

The FAA adopts subpart E essentially as proposed in the NPRM. However, the Agency is making certain modification to subpart E to reflect the revisions made to the remote identification framework in subpart B and subpart D. The FAA is eliminating all references to limited remote identification UAS in subpart E because of the decision not to move forward with that concept. The Agency is also incorporating the remote identification broadcast module solution into subpart E to enable the development of means of compliance used to produce the broadcast modules. For more information on these changes, see sections VII.A and VII.D of this preamble.

2. Public Comments and FAA Response

Comments: The Association for Unmanned Vehicle Systems International (AUVSI) and other commenters believed that the FAA's proposal is not performance-based; they mentioned that the rule is based on prescriptive technology mandates. AUVSI asked the FAA to adopt performance-based requirements that comply with international standards and avoid requiring specific technology mandates.

FAA Response: The FAA does not agree with this assertion because this rule mainly describes outcomes, goals, and results without establishing a specific way to achieve it. The FAA recognizes that UAS technology is continually evolving, making it necessary to harmonize regulatory action with technological growth. By establishing performance requirements in part 89, the FAA is promoting harmonization and is providing a flexible regulation that allows a person to develop a means of compliance that adjusts to the fast pace of technological change, innovation, design, and development while still meeting the regulatory requirements.

B. Applicability and General Comments

In § 89.401, the FAA describes the applicability of subpart E. The FAA did not receive significant comments on this section and adopts the section mostly as proposed. The Agency is revising the regulatory text to delete references to the limited remote identification UAS, and incorporate the remote identification broadcast module concept.

C. Submission of a Means of Compliance

1. Discussion of the Final Rule

In accordance with § 89.405, any person may submit a means of compliance for acceptance by the FAA. Section 89.405 also establishes the information that has to be submitted to seek the FAA's acceptance of a means of compliance, and requires a means of compliance to include testing and validation procedures.

The FAA adopts this section mostly as proposed. The Agency is revising the regulatory text to delete references to limited remote identification UAS, and incorporate the remote identification broadcast module concept so that persons can file a means of compliance for the latter.

2. Public Comments and FAA Response

Comments: Some commenters questioned the value and use of the means of compliance process. Others believed that the proposed requirements for the submission of the means of compliance were vague. A number of commenters asked the FAA to clarify what information must be submitted for the FAA to accept a means of compliance under subpart E. Some asked the FAA to include standards or performance metrics for persons to follow when submitting a means of compliance for FAA-acceptance. Other commenters asked the FAA to consider ''best practices'' when evaluating submissions. Commenters also asked the Agency to publish guidance material or examples of FAA-accepted means of compliance and related documents.

Multiple commenters asked the Agency to identify the standards and organizations it would work with to develop and accept the means of compliance under part 89.

FAA Response: The FAA does not agree with commenters who believe the means of compliance process is vague. Section 89.405 describes the information that must be submitted by any person seeking the FAA's acceptance of a means of compliance. The FAA has determined this information is necessary to assess whether a proposed means of compliance (*e.g.,* a standard) meets all of the remote identification requirements of subpart D and subpart E of this rule and whether it can be used for the design and production of standard remote identification unmanned aircraft or remote identification broadcast modules.

The process is an essential component of the remote identification framework because an FAA-accepted means of compliance is used by designers and producers of standard remote identification unmanned aircraft or remote identification broadcast modules to ensure that the unmanned aircraft or broadcast modules meet the minimum performance requirements of this rule.

Consistent with its statements in the NPRM, the Agency is not planning on publicly disclosing the details or specification of any FAA-accepted means of compliance or related documents because they may contain proprietary data or commercially valuable information. The FAA is, however, publishing an advisory circular on the Means of Compliance Process for Remote Identification of Unmanned Aircraft Systems, that provides further guidance on the process. The advisory circular addresses the process and information that must be submitted under subpart E and is available in the public docket for this rulemaking.

Comments: Multiple commenters believed the requirements in subpart E will impose financial and

[26] OMB Circular A–119, Section 5d.

administrative burdens, and will prevent or dissuade persons from submitting a means of compliance for FAA acceptance.

FAA Response: The FAA acknowledges that the rule imposes certain costs related to the development and submission of a means of compliance. These costs are justified by the benefits that will result from the rule, and both costs and benefits are evaluated and addressed in the regulatory evaluation available in section XXII.A of this preamble.

Comments: Many commenters, including some that identified as home-builders, expressed concerns about the submission requirements and mentioned that the process is geared towards large manufacturers. They mentioned that small manufacturers, non-commercial manufacturers, or home-builders could have difficulties in submitting means of compliance. Some commenters believed that only manufacturers can submit a means of compliance for FAA-acceptance.

FAA Response: As being promulgated, § 89.405(a) allows any person to submit a means of compliance. This includes, but is not limited to consensus standard bodies, designers and producers of unmanned aircraft, or other persons (*e.g.,* universities or individuals.) The FAA noticed a common misunderstanding among commenters who believed that producers of standard remote identification unmanned aircraft or remote identification broadcast modules must develop and submit their own means of compliance for FAA acceptance. This is not the case. A producer must use an FAA-accepted means of compliance, but it can be any FAA-accepted means of compliance (*e.g.,* one developed by a third party).

While this rule allows a home-builder to submit a means of compliance for FAA-acceptance, the Agency does not expect many home-builders to do so because home-built unmanned aircraft are explicitly excepted from the design and production requirements of subpart F. Even when a home-builder chooses to voluntarily opt into the design and production requirements of subpart F to produce a home-built standard remote identification unmanned aircraft, the FAA does not envision that many home-builders will file their own means of compliance. The FAA expects most will use an FAA-accepted means of compliance submitted by another person, such as a consensus standards body.

Comments: Wingcopter and other commenters mentioned that the testing and validation requirements in § 89.405(c) are complex and might make it difficult for persons to comply with the regulation. The commenters specifically questioned whether the means of compliance framework applies to UAS produced under part 21. The commenters said it was confusing because the certification specifications, special conditions, or Technical Standard Order requirements of part 21 cover testing and validation in addition to compliance demonstrations as part of the type certification process. Commenters specifically asked the FAA to clarify that the testing and validation requirements for certificated unmanned aircraft are addressed through the type certification process of part 21 instead of the requirements in part 89.

FAA Response: The FAA has determined that the testing and verification procedures are essential because an FAA-accepted means of compliance is used for the production of standard remote identification unmanned aircraft and remote identification broadcast modules. The requirement enables the person responsible for the production of the unmanned aircraft or remote identification broadcast module to demonstrate to the FAA through analysis, ground test, or flight test, as appropriate, how the unmanned aircraft or broadcast module performs its intended functions and meets the requirements in subpart D.

The FAA clarifies that the means of compliance framework applies to standard remote identification unmanned aircraft manufactured under parts 89 and 21. While unmanned aircraft that are certified under the airworthiness certification processes of part 21 may have other identification requirements in addition to those included in this rule, the requirements in subpart D of part 89 (which can be met through an FAA-accepted means of compliance issued under subpart E) will be applied during the type or supplemental type certification process for standard remote identification unmanned aircraft certificated and produced under part 21.

Comments: A multitude of commenters urged the FAA to revise the rule to allow for the submission of a means of compliance for remote identification retrofit equipment. Commenters support allowing manufacturers to produce these means of compliance to produce retrofit equipment and argued it would help increase compliance with the remote identification operating requirements.

FAA Response: As discussed in sections VII.A and VII.D of this preamble, after reviewing public comments and giving further consideration, the FAA is incorporating the remote identification broadcast module concept into this rule. Accordingly, the Agency is revising this rule by incorporating minimum performance requirements for remote identification broadcast modules. With the changes effected in this rule, persons can now develop means of compliance for remote identification broadcast modules and submit them to the FAA for acceptance. The procedural requirement for submission and acceptance of means of compliance remains the same as with standard remote identification unmanned aircraft. Such FAA-accepted means of compliance can be used for the production of remote identification broadcast modules under subpart F. With these revisions, operators are now able to equip their existing unmanned aircraft with remote identification broadcast modules to comply with the operating requirements of subpart B.

Comments: The Motion Picture Association asked the FAA to develop an alternate means of compliance particularly for UAS operated indoors or those unable to utilize certain means to determine location reliably (*e.g.,* GPS).

FAA Response: The FAA regulates the navigable airspace of the United States. Because this rule does not apply to indoor operations of unmanned aircraft, the FAA has determined that there is no need to incorporate the alternate means proposed by the Motion Picture Association. See section VI.B for more information on the applicability of operating requirements.

D. Acceptance of a Means of Compliance

1. Discussion of the Final Rule

Section 89.410 prescribes the requirements for accepting a means of compliance. This section requires that a person must demonstrate to the Administrator that the means of compliance submitted for assessment and potential acceptance addresses all of the requirements of subpart D and E, and that any standard remote identification unmanned aircraft or remote identification broadcast module designed and produced in accordance with such means of compliance would meet the performance requirements of subpart D. Section 89.410 also clarifies that the Administrator will evaluate a means of compliance that is submitted to the FAA and may request additional information or documentation, as needed, to supplement the means of compliance. The Administrator will notify the person submitting the means

of compliance whether the means of compliance has been accepted or not.

The FAA adopts this section mostly as proposed. The Agency is revising the regulatory text to delete references to limited remote identification UAS and incorporate the remote identification broadcast module concept.

2. Public Comments and FAA Response

Comments: The National Association of State Aviation Officials, Skydio Inc., the Consumer Technology Association (CTA), and others asked the FAA to commit to a deadline to review all submissions of means of compliance. Commenters indicated that without deadlines, the review process could be lengthy, impede the ability of designers and producers of UAS to bring products to market quickly, and inhibit innovation. Some commenters suggested specific deadlines. For example, Skydio Inc. asked the FAA to render a decision within 90 days of the submission unless there is a justified reason for the delay. Commenters also mentioned that the FAA should notify submitters, in writing, of the reason of any delay in reviewing the application.

FAA Response: A means of compliance must be accepted prior to being listed on a declaration of compliance for the design and production of a standard remote identification unmanned aircraft or remote identification broadcast module. The FAA acknowledges that the review process and response time will vary, and will be dependent on the complexity of the application and the technology employed. In certain circumstances the Administrator may need additional information or documentation to supplement the filing to be able to make a determination. Therefore, the FAA cannot commit to a specific timeline for review because the process is dynamic, however the Agency is committed to working with stakeholders and allocating the necessary resources to review submissions of means of compliance in a timely manner.

Comments: Various commenters mentioned that the Agency should explain the grounds for rejecting a means of compliance, so submitters can understand the issues and correct defects.

FAA Response: The FAA will evaluate the means of compliance to ensure completeness and compliance with the requirements of subpart D or E. Consistent with § 89.410(c), if the Administrator determines the person has not provided sufficient evidence to demonstrate that the means of compliance meets the requirements of subpart D or E, the Agency will notify the person that the Administrator has not accepted the means of compliance and provide the reasons for the decision.

Comments: Streamline Designs LLC and others asked the FAA to file a notice of availability in the **Federal Register** whenever it accepts a means of compliance submitted by a standards body.

FAA Response: As discussed in the NPRM and as promulgated in this rule, the FAA will indicate acceptance of a means of compliance by notifying the submitter and publishing a notice in the **Federal Register** identifying that a means of compliance is accepted. All FAA-accepted means of compliance will be listed on *https://www.faa.gov.* The FAA will not disclose proprietary information in the document and will only provide general information stating that FAA has accepted the means of compliance. The FAA may disclose the non-proprietary broadcast specification and radio frequency spectrum so that sufficient information is available to develop receiving and processing equipment and software for the FAA, law enforcement, and the public.

Comments: The Air Line Pilots Association, Int'l and various commenters expressed concerns with the ability of the FAA to handle the workload created by this rule. Commenters specifically mentioned issues regarding cost, timeliness, and availability of resources. For example, they argued that the FAA and other stakeholders would need to invest a significant amount of money and identify substantial resources.

FAA Response: As stated earlier, the FAA is committed to the implementation of remote identification and is developing internal procedures and allocating the appropriate resources to facilitate the review and acceptance processes under part 89. The FAA is committed to working with internal and external stakeholders to ensure that the process for submitting and obtaining FAA-acceptance of a means of compliance is conducted in an effective and timely manner.

Comments: Many commenters, including Amazon Prime Air, AUVSI, GSMA, ASTM International, Drone Delivery Systems, and others urged the FAA to accept the American Society for Testing and Materials (ASTM) international F3411–19 Standard Specification for Remote ID and Tracking as a means of compliance under this rule and requested the FAA work with ASTM to develop a rigorous standardized test plan. Drone Delivery Systems mentioned it supported the ASTM F3411–19 Standard Specification for Remote ID and Tracking for commercial UAS but that they did not expect it to become the requirement for every UAS.

FAA Response: The FAA recognizes that FAA-accepted consensus standards are one way, but not the sole means, to show compliance with the performance requirements of part 89. The FAA encourages ASTM and all other consensus standards bodies and interested parties to submit a means of compliance for FAA acceptance in accordance with the requirements of subpart E. The FAA emphasizes that, though a means of compliance developed by a consensus standards body may be available, any individual or organization is able to submit its own means of compliance to the Administrator for consideration and potential acceptance. Only FAA-accepted means of compliance can be used to produce standard remote identification unmanned aircraft and remote identification broadcast modules.

The FAA acknowledges those comments requesting the FAA adopt ASTM F3411–19 as a remote identification means of compliance as part of this final rule. The FAA recognizes the significant work that ASTM and its members have put into the development of ASTM F3411–19. The FAA notes that some aspects of ASTM F3411–19 may need to be revised or updated as a result of the requirements of this final rule. Once that process has occurred, the FAA looks forward to evaluating ASTM F3411–19 as a potential means of compliance for remote identification of unmanned aircraft.

E. Rescission of FAA Acceptance of a Means of Compliance

1. Discussion of the Final Rule

According to § 89.415, the Administrator may rescind its acceptance of a means of compliance if that means of compliance no longer meets the requirements of subpart D or E. The FAA will publish a notice of rescission in the **Federal Register**.

The FAA adopts this section as proposed.

2. Public Comments and FAA Response

Comments: Some commenters expressed concerns that UAS might no longer comply with this rule if the means of compliance used by the manufacturer for the production of the standard remote identification UAS or the remote identification broadcast module is rescinded. Commenters

believed the requirement could inhibit the production of UAS and broadcast equipment and stifle UAS research and development, especially if the means of compliance becomes obsolete a couple of years after it has been accepted.

FAA Response: An FAA-accepted means of compliance will remain in effect until the FAA rescinds its acceptance after the Administrator determines that the means of compliance does not meet the requirements in subpart D or E. This means that a standard remote identification unmanned aircraft or a remote identification broadcast module that is produced under a means of compliance that remains accepted by the FAA—however old it may be—complies with the requirements of this rule as long as it continues to meet all of the requirements of subparts D and E. The filing of new means of compliance for the manufacturing of new or upgraded standard remote identification unmanned aircraft or remote identification broadcast modules that addresses technological advancements does not render the older versions obsolete.

In the event the means of compliance is rescinded, the FAA's acceptance of any declaration of compliance that relies on the no longer accepted means of compliance may be rescinded as well. The FAA may allow the submitter of the FAA-accepted declaration of compliance to amend the declaration of compliance to include another FAA-accepted means of compliance, as long as the standard remote identification unmanned aircraft or remote identification broadcast module produced and listed on the declaration of compliance complies with the newly-listed means of compliance. The FAA will not rescind its acceptance of a declaration of compliance that is promptly amended to list another FAA-accepted means of compliance. However, failure to amend the declaration of compliance may result in the rescission of the FAA's acceptance of the declaration of compliance in accordance with subpart F.

F. Record Retention Requirements

1. Discussion of the Final Rule

The FAA adopts § 89.420 as proposed. According to this section, a person who submits a means of compliance must retain all documentation and substantiating data submitted to the FAA for acceptance of the means of compliance; records of all test procedures, methodology, and other procedures, as applicable; and any other information necessary to justify and substantiate how the means of compliance enables compliance with the remote identification requirements. The person must retain these records for as long as the means of compliance is accepted, plus an additional 24 calendar months. The person is also required to make the records available for the Administrator's inspection.

The record retention requirement in § 89.420 applies to all persons holding FAA-accepted means of compliance. These could be, for example, consensus standards bodies; designers and producers of remote identification unmanned aircraft of all sizes; or other persons (*e.g.,* universities or individuals.)

2. Public Comments and FAA Response

Comments: Drone Delivery Systems and other commenters indicated that the record retention requirements in subpart E of this rule would increase unmanned aircraft costs. Some mentioned that the requirements would be overly burdensome for home-builders and small to medium size designers and producers of UAS.

FAA Response: The costs related to the record retention requirement in subpart E are justified by the benefits that will result from the rule, and both costs and benefits are evaluated and addressed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

The FAA clarifies that home-builders do not have to submit a means of compliance under subpart E. Home-builders are also not required to comply with the design and production requirements of subpart F unless they voluntarily opt into such requirements to build a home-built standard remote identification unmanned aircraft. If a home-builder opts into the design and production requirements, the home-builder can develop and use its own means of compliance or can use an FAA-accepted means of compliance held by another person (*e.g.,* a consensus standard). The home-builder would not need to comply with the data retention requirements of subpart E unless it chooses to submit its own means of compliance under subpart E.

Comments: Streamline Designs LLC and others asked which data the holders of an FAA-accepted means of compliance have to retain.

FAA Response: Section 89.420 lists the data that the holders of FAA-accepted means of compliance have to retain. Further guidance is also provided in the advisory circular for means of compliance process for remote identification of unmanned aircraft systems, which is available in the public docket for this rulemaking.

XIV. Remote Identification Design and Production

The FAA adopts the design and production requirements for remote identification of unmanned aircraft in subpart F. The essence of subpart F remains as proposed but the Agency is revising the regulation to reflect the elimination of the limited remote identification UAS concept and the incorporation of the remote identification broadcast module concept. The FAA is also reorganizing various sections in subpart F to clarify the production requirements that apply to unmanned aircraft produced under a design and production approval issued under part 21; unmanned aircraft designed and produced under a declaration of compliance issued under part 89; and remote identification broadcast modules.

A. Applicability of Design and Production Requirements

1. Discussion of the Final Rule

According to § 89.501, subpart F prescribes the requirements for the design and production of unmanned aircraft with remote identification produced for operation in the airspace of the United States and remote identification broadcast modules. It also prescribes procedural requirements for the submission, acceptance, and rescission of declarations of compliance and certain rules governing persons submitting declarations of compliance for FAA acceptance.

2. Public Comments and FAA Response

Comments: Multiple commenters mentioned that the applicability of subpart F extends beyond the statutory authority of the FAA. They believed subpart F prohibits the manufacturing of UAS for indoor operations and in places other than the airspace of the United States and asked the Agency to except such UAS from the requirements of subpart F.

FAA Response: The FAA does not agree with commenters and the suggested production exception for unmanned aircraft operated indoors is unnecessary. The Agency regulates aircraft operated in the navigable airspace of the United States—not unmanned aircraft operations conducted indoors. As indicated in § 89.501, the production requirements apply to unmanned aircraft with remote identification operated in the airspace of the United States.

Comments: Aerospace Industries Association and others asked the FAA

to clarify who is a ''manufacturer'' under subpart F to help people identify whether they need to comply with the design and production requirements. Airlines for America, the Experimental Aircraft Association, and others questioned whether the FAA has statutory authority to regulate the foreign manufacturing of UAS as well as the importation and sale of UAS, particularly those without an airworthiness certification. A commenter asked the FAA to clarify how it would ensure foreign producers comply with the requirements of subpart F within the timeframes established in the rule, and without burdening operators.

FAA Response: The FAA clarifies that it does not regulate the sale or importation of unmanned aircraft. The requirements in subpart F apply to the production of remote identification broadcast modules and the production of unmanned aircraft with remote identification operated in the airspace of the United States. Any person, whether in the United States or a foreign country, producing such unmanned aircraft or broadcast modules must file a declaration of compliance, provide certain information, and agree to abide by the production requirements and certain terms and conditions (*e.g.,* inspection, audit, product support and notification, instructions). If the person produces an unmanned aircraft or broadcast module that is not covered by an FAA-accepted declaration of compliance, the unmanned aircraft or broadcast module would not meet the remote identification requirements of part 89, and the operation would be restricted to an FAA-recognized identification area when conducted in the airspace of the United States. This regulatory framework is necessary to ensure that standard remote identification unmanned aircraft and remote identification broadcast modules used in the airspace of the United States can broadcast the remote identification message elements required by this rule, irrespective of where the unmanned aircraft or broadcast module is produced.

Persons producing unmanned aircraft identified in § 89.501(c), as discussed below, are not subject to the requirements of subpart F, and do not need to follow the production requirements or file a declaration of compliance.

Comments: The Small UAV Coalition, Wing Aviation, and other commenters mentioned that the manufacturing requirements should only apply to certain UAS, such as highly automated unmanned aircraft used for commercial purposes or sold to third parties. The Small UAV Coalition described ''highly automated'' as a UAS with a combination of ''geo-awareness, self-flying, and self-navigation capabilities.''

Some commenters asked the FAA to modify the applicability of subpart B based on a risk-based approach that maximizes opportunities for compliance and enhances the safety and security outcomes for airspace users. Wing Aviation indicated that risk factors associated with UAS operations are most closely correlated with careless, clueless, or higher-risk operations, and indicated that the design and production requirements would impose unnecessary restrictions on self-built UAS, which typically pose a lower risk. Multiple commenters also mentioned that the design and production requirements would preclude many hobbyists from designing, building, and flying their own UAS. The Experimental Aircraft Association (EAA) and many individuals indicated that the design and production requirements should not apply to traditional model aircraft given their low risk profile and lack of need for specialized equipment. Many recreational UAS owners expressed concerns that only FAA-approved ready-to-fly UAS would be allowed for sale and this would increase the financial burden to UAS operators.

Some commenters mentioned that the design and production requirements should apply to manufacturers of a certain size or to ''mass manufacturers'' of UAS. A significant number of commenters opposed requiring manufacturers of single units, UAS used in recreational operations, UAS used for experimental purposes, or similar UAS from having to comply with subpart F. Another commenter mentioned that the FAA should create an expedited process (*e.g.,* with less documentation requirements) to allow persons manufacturing few UAS to have a simpler means to comply with the design and production requirements.

FAA Response: The FAA does not agree with comments that the design and production requirements should be based on the performance or capacity of the unmanned aircraft, the number of unmanned aircraft produced, the size or weight class, or the risk of the operation. The FAA also does not agree that the requirements should only apply to highly automated aircraft intended for sale to third parties or for commercial use.

The design and production requirements of this rule apply to most unmanned aircraft operating in the airspace of the United States. They are necessary to ensure that standard remote identification unmanned aircraft and remote identification broadcast modules used in the United States broadcast the remote identification message elements to enable compliance with the operating requirements of subpart B. The FAA has determined that it is in the interest of safety and security to require most unmanned aircraft to identify remotely when operating in the airspace of the United States. Accordingly, it has determined that the design and production requirements should be a rule of general applicability.

The FAA acknowledges that certain exceptions are warranted and adopts these exceptions in § 89.501(c), as further discussed below.

B. Exceptions to the Applicability of Design and Production Requirements

1. Exceptions: In General

i. Discussion of the Final Rule

The FAA has determined that—as a general rule—the design and production requirements should apply to unmanned aircraft operated in the airspace of the United States and should not be based on the intended use of the aircraft because the FAA's need to identify unmanned aircraft operating in the airspace of the United States is independent of the purpose of the operation or the perceived or actual risk associated with an unmanned aircraft operation.

As promulgated in this rule, § 89.501(c) establishes the exceptions to the applicability of subpart F. The design or production requirements do not apply to: home-built unmanned aircraft; unmanned aircraft of the United States Government; unmanned aircraft that weigh 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft; and unmanned aircraft designed or produced exclusively for the purpose of aeronautical research or to show compliance with regulations.

The FAA is making conforming changes to § 89.501(c). Section 89.501(c)(1) was revised to replace the term ''amateur-built unmanned aircraft system'' with the term ''home-built unmanned aircraft,'' which is consistent with the terminology change addressed in section V.D of this preamble. Furthermore, in § 89.501(c)(3), the FAA inadvertently included the wrong threshold by saying the exclusion would apply to unmanned aircraft that weigh less than 0.55 pounds. The FAA is correcting this error and clarifying that the exception applies to unmanned aircraft ''that weigh 0.55 pounds or less on takeoff, including everything that is

on board or otherwise attached to the aircraft.''

ii. Public Comments and FAA Response

Comments: The FAA received many comments addressing exceptions to the design and production requirements. The Boeing Company asked the FAA to remove the proposed exceptions for home-built UAS, UAS of the United States Government, and UAS designed or produced for aeronautical research or to show compliance with regulations, unless the UAS are intended exclusively for operations at FAA-recognized identification areas. Boeing believed that, when operated in civil airspace, those excepted UAS should be subject to the same rules and requirements as other UAS to ensure safe operations for all.

Multiple commenters also mentioned that the design and production requirements should apply to all UAS. Some commenters indicated that the FAA could create tiers of design and production requirements so that the requirements that apply to certain UAS (*e.g.,* home-built UAS and UAS used in recreational operations) are less strict than those that apply to other UAS (*e.g.,* UAS used in commercial operations).

FAA Response: The FAA considered extending the design and production requirements to all unmanned aircraft operating in the airspace of the United States. However, the Agency identified a need to except certain unmanned aircraft from the design and production requirements of this rule. As discussed above, home-built unmanned aircraft, unmanned aircraft of the United States Government, and unmanned aircraft designed or produced exclusively for the purpose of aeronautical research or to show compliance with regulations, are included in the exceptions to the design and production requirement the FAA is adopting in this rule. These exceptions, as well as the exception for unmanned aircraft that weigh 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft, are discussed in detail in sections XIV.B.2 through XIV.B.5 of this preamble.

Comments: A number of commenters opposed requiring UAS used in recreational operations or traditional model aircraft to comply with the requirements of subpart F. The commenters argued that these aircraft are typically used in low risk profile operations.

FAA Response: The FAA does not agree with comments that the design and production requirements of subpart F should not apply to unmanned aircraft used in recreational operations or to traditional model aircraft given the low risk profile of the operations. The design and production requirements of subpart F are implemented to ensure unmanned aircraft have the remote identification capabilities necessary to enable operators to comply with the operational requirements in subpart B, which apply to most unmanned aircraft operating in the airspace of the United States.

2. Exceptions: Home-Built Unmanned Aircraft

i. Discussion of the Final Rule

The FAA chose to exclude home-built unmanned aircraft from the design and production requirements because persons building these unmanned aircraft may not have the necessary technical knowledge, ability, or financial resources to design and produce an unmanned aircraft that meets the minimum performance requirements of this rule. The FAA believes requiring home-built unmanned aircraft to comply with the performance requirements for remote identification would place an undue burden on homebuilders. The Agency expects home-built unmanned aircraft will represent a very small portion of the total number of unmanned aircraft operating in the airspace of the United States. The FAA's position is that nothing in this rule prohibits a person from building a home-built standard remote identification unmanned aircraft for educational or recreational purposes. However, in that case, the person would be subject to all of the requirements of subpart F, even if the unmanned aircraft would otherwise be considered a home-built unmanned aircraft.

ii. Public Comments and FAA Response

Comments: The Utah Department of Transportation and many others supported the FAA's proposal to except home-built UAS from the design and production requirements of subpart F. However, numerous commenters believed the requirements in subpart F apply to home-built UAS and urged the FAA to revise the rule to except home-built UAS from having to meet the design and production requirements of subpart F. Many commenters mentioned that the requirement to show compliance with subpart F is too expensive and time-consuming for homebuilders, and persons building UAS for recreational purposes or science, technology, engineering and math education needs.

FAA Response: As the FAA explained in the NPRM, and as being promulgated in § 89.501(c)(1) of this rule, home-built unmanned aircraft are excepted from the design and production requirements of subpart F, unless the homebuilder is specifically intending to produce a home-built standard remote identification unmanned aircraft.

The remote identification design and production requirements are different from the operating requirements. While some producers may be excepted from the design and production requirements under subpart F, operators would still have to comply with the remote identification operating requirement prescribed in subpart B of this rule. So, while home-built unmanned aircraft are not subject to the design and production requirements of subpart F, all operators of unmanned aircraft (including home-built unmanned aircraft) in the airspace of the United States must comply with the operating requirements of subpart B if the unmanned aircraft is registered or required to be registered under part 47 or 48. This means that the operator of a home-built unmanned aircraft that is not produced as a standard remote identification unmanned aircraft under subpart F must operate within FAA-recognized identification areas, must equip their unmanned aircraft with a remote identification broadcast module to operate outside of FAA-recognized identification areas, or must request authorization from the Administrator to deviate from the operating requirements of subpart B to operate without remote identification.

Comments: The FPVFC asserted that the requirements, as proposed, would make it unlawful for individuals to produce home-built UAS.

FAA Response: This is incorrect. As explained in the NPRM and as adopted in this rule, this rule establishes certain operational, design, and production requirements for unmanned aircraft. Nothing in the rule prohibits the production of home-built unmanned aircraft. Under § 89.501(c)(1), home-built unmanned aircraft are excepted from having to comply with the design and production requirements of subpart F. However, designers or producers of home-built unmanned aircraft can choose to comply with the design and production requirements by voluntarily opting into subpart F and building home-built standard remote identification unmanned aircraft.

Comments: Some commenters expressed concerns with the exception for home-built UAS. These commenters said that the exception could increase the demand for UAS kits and lead to an increase in UAS being built without remote identification. The Motion Picture Association (MPA) expressed concerns with excepting home-built

UAS from the design and production requirements because they could have the ability to fly several miles from the control station using a remotely viewable camera, even though they are not equipped with remote identification capabilities. The MPA asked the FAA to add a technological requirement to the home-built UAS exception in § 89.501(c) to clarify that the exception would not apply to highly-capable aircraft.

FAA Response: The FAA determined that the exception for home-built unmanned aircraft is necessary because many homebuilders do not have the necessary technical knowledge, ability, or financial resources to design and produce unmanned aircraft that meet the minimum performance requirements of this rule. The FAA also determined that the risks of excepting home-built unmanned aircraft from the design and production requirements are mitigated by the fact that the operators of home-built unmanned aircraft must still comply with the operating rules of subpart B.

Comments: Several commenters asked the FAA for an alternate way for home-built UAS to comply, noting that hobbyists often build UAS from parts, including foam and balsa wood, rather than kits from recognized manufacturers. Other commenters mentioned that kit-built UAS are considered home-built and should be excepted from the design and production requirements, while other commenters mentioned that kit-built UAS should have some type of remote identification, particularly if they are operated outside an FAA-recognized identification area. For example, DJI Technology, Inc. asserted that excepting UAS from the remote identification requirements when a person fabricates and assembles more than 50 percent of the UAS makes no difference to safety and would not address approximately 80 percent or more of home-built aircraft as they are built today. DJI recommended a focus on the performance of the resulting UAS, basing the need to comply with remote identification on the risk the UAS creates due to its performance.

The Academy of Model Aeronautics supported excepting persons assembling UAS from kits that contain 100 percent of the parts and instructions from having to comply with the design and production requirements. They recognized that many of these kit UAS would only be flown at FAA-recognized identification areas. Droneport Texas LLC stated that UAS kit designers or producers and suppliers should be able to provide 100 percent of the parts and instructions that are necessary for assembly of a fully functioning UAS without remote identification capabilities. The New Hampshire Department of Transportation suggested that the rule would motivate designers and producers of UAS to produce kits with less than 100 percent of the necessary parts to shift responsibility for subpart F compliance to homebuilders who would be reluctant or unable to comply.

FAA Response: As further discussed in section V.D of this preamble, the FAA originally proposed to use the term *amateur-built unmanned aircraft system* for the exception in § 89.501(c)(1) and defined it as ''an unmanned aircraft system the major portion of which has been fabricated and assembled by a person who undertook the construction project solely for their own education or recreation.'' Under the proposal, the person building the amateur-built unmanned aircraft would have been required to fabricate and assemble at least 50 percent of the UAS. Following comments received, the FAA relabeled the exception as *home-built unmanned aircraft* and eliminated the fabrication and major portion requirements. This rule adopts the definition of home-built unmanned aircraft that an individual built solely for education or recreation.

The FAA recognizes that homebuilders may produce unmanned aircraft from scratch, may use partial kits in the building process, or may assemble unmanned aircraft from a complete kit produced by another person or entity. The exception for home-built unmanned aircraft in § 89.501(c)(1) of this rule applies to persons producing unmanned aircraft from scratch or using partial kits to build unmanned aircraft without remote identification solely for education or recreation. These persons do not have to comply with the design and production requirements in subpart F.

As commenters noted, many unmanned aircraft, especially model aircraft, are produced with various levels of completion, such as ready-to-fly or almost ready-to-fly. Unmanned aircraft kits that are produced without key components of the unmanned aircraft, such as the engine or electric motor, flight control servos, or RF receiver, are not considered complete kits and the producers of these partial kits are not subject to the production requirements in subpart F.

However, the exception in § 89.501(c)(1) does not apply to the manufacturing of a complete unmanned aircraft kit because the complete kit is essentially a deconstructed unmanned aircraft. The FAA considers that any kit containing all the parts and instructions necessary to assemble an unmanned aircraft must have remote identification capabilities; therefore, a person or entity producing complete kits is subject to the production requirements of this rule. A different determination would grant a way to circumvent the intent of the design and production requirements of this rule. Accordingly, the person or entity producing the complete kit must comply with the design and production requirements of this rule, and must ensure that the complete kit contains all necessary parts and instructions for homebuilders to assemble a standard remote identification unmanned aircraft, even if the unmanned aircraft is considered home-built for other purposes. A homebuilder assembling an unmanned aircraft from a complete kit is not the designer or producer of the unmanned aircraft for purposes of subpart F of this rule. Therefore, the homebuilder does not need to comply with the design and production requirements in subpart F. Nevertheless, the operator of a home-built unmanned aircraft—whether produced from scratch or assembled from a partial kit or a complete kit—must comply with the operating requirements in subpart B of part 89.

3. Exceptions: Unmanned Aircraft of the United States Government

i. Discussion of the Final Rule

The FAA chose to exclude unmanned aircraft of the United States Government from the design and production requirements because of the need for the Federal Government of the United States to produce aircraft without remote identification to meet certain operational missions.

The production requirements and operational requirements are independent of each other. Even though subpart F establishes an exception for unmanned aircraft of the United States Government, an entity of the Federal Government of the United States operating an unmanned aircraft must assess whether it is subject to the operational requirements of part 89. The entity will have to comply with the remote identification operating requirements if it operates an unmanned aircraft that is registered, or required to be registered under part 47 or 48. Only the aircraft of the national defense forces of the United States are excepted from the aircraft registration requirements and are therefore not required to comply with the operating requirements of subpart B. This means that all other entities of the Federal Government of the United States, as

well as all entities of the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments or an Indian Tribal government, that wish to operate an unmanned aircraft without remote identification at a location other than an FAA-recognized identification area would be required to seek authorization from the Administrator to deviate from the operating provisions of subpart B of part 89.

ii. Public Comments and FAA Response

Comments: The Utah Department of Transportation requested that the FAA clarify which aircraft are covered by the exception in § 89.501(c)(2) by deleting the phrase ''aircraft of the United States Government'' and replacing it with ''aircraft of the United States Military.''

FAA Response: The FAA adopts the language as proposed because aircraft of the Federal Government of the United States are excepted from the design and production requirements of subpart F. This includes, but is not limited to, aircraft of the United States Military.

Comments: Multiple commenters expressed concerns with the proposed exception for UAS of the United States Government because they believe it could cause public distrust. The commenters mentioned that a better approach would be to create requirements (*e.g.,* specific operational or pilot-related requirements) to enable sensitive operations to be conducted safety while still identifying in a general or broader manner.

FAA Response: The FAA has determined the exception is necessary so that the United States Government can produce unmanned aircraft without remote identification equipment, or can deviate from the design and production requirements of this rule. The exception is necessary to facilitate certain operational missions of the United States Government. The FAA believes that—unlike with the Federal Government—a State, the District of Columbia, territories, possessions, or Indian Tribal governments are unlikely to produce their own unmanned aircraft. However, the FAA acknowledges that these governments may have a need to deviate from the operating requirements of this rule when conducting sensitive operations. This is why this rule incorporates a deviation option. Through this deviation, governments can request authorization from the Administrator to deviate from the operating provisions of subpart B.

4. Exceptions: Unmanned Aircraft That Weigh 0.55 Pounds or Less on Takeoff, Including Everything That Is On Board or Otherwise Attached to the Aircraft

i. Discussion of the Final Rule

The FAA chose to exclude unmanned aircraft that weigh 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft from the design and production requirements because, most of these unmanned aircraft may not be subject to the registration or recognition of ownership requirements of part 48, and therefore would not need to comply with the operating requirements of subpart B of part 89.

As discussed in section XV of this preamble, if an unmanned aircraft weighing 0.55 pounds or less is operated under part 91, 107, or 135, an exemption issued under 49 U.S.C. 44807, or any other regulatory part requiring the aircraft to be registered, the design and production of such unmanned aircraft would have to comply with subpart F of part 89 and the operation of the unmanned aircraft would have to comply with subpart B.

ii. Public Comments and FAA Response

Comments: Several commenters suggested that the FAA should except small UAS from the remote identification requirements because many cannot carry additional equipment to comply with the rule. Commenters asked the FAA to expand this exception to cover UAS that end up exceeding the 0.55 pound threshold as a result of the installation of remote identification equipment. A commenter stated that UAS that weigh less than 0.55 pounds should be allowed up to an additional 0.1 pounds of add-ons to enable compliance with this rule.

Some commenters believed only large UAS would be capable of carrying remote identification equipment. Similarly, others believed that the Agency should only require large UAS to identify remotely. Therefore, many commenters suggested the FAA implement remote identification requirements based on the weight or size of the unmanned aircraft. For example, a commenter mentioned that a UAS weighing less than 20 pounds and with a wingspan of less than 80 inches should be excepted from the remote identification requirements of this rule.

FAA Response: The FAA does not agree with comments urging the Agency to expand the exception in § 89.501(c)(3) to unmanned aircraft that exceed the 0.55 pounds threshold as a consequence of installing remote identification equipment. The exception covers a subgroup of unmanned aircraft that is not subject to the registration requirements of part 48 because they weigh 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft. Because aircraft that exceed the weight threshold have to register (or file a confirmation of identification for foreign civil unmanned aircraft) and comply with the operating requirements of subpart B, the FAA determined these unmanned aircraft should also comply with the design and production requirements of this rule.

5. Exceptions: Unmanned Aircraft Designed or Produced Exclusively for the Purpose of Aeronautical Research or To Show Compliance With Regulations

i. Discussion of the Final Rule

The FAA chose to exclude unmanned aircraft designed or produced exclusively for the purpose of aeronautical research or to show compliance with regulations from the design and production requirements of this rule. This exclusion fosters innovation and encourages research, development, and testing activities related to the unmanned aircraft, the unmanned aircraft's control systems, equipment that is part of the unmanned aircraft (such as sensors), and the unmanned aircraft's flight profiles, as well as the development of specific functions and capabilities for the unmanned aircraft. The FAA determined that the exception is also necessary so that unmanned aircraft prototypes can show compliance with FAA regulations. This exception includes regulations related to FAA-accepted means of compliance or declarations of compliance for remote identification, and airworthiness regulations including but not limited to flights to show compliance for the issuance of type certificates and supplemental type certificates, flights to substantiate major design changes, and flights to show compliance with the function and reliability requirements of the regulations. The exception further supports research, development, and testing necessary for UAS infrastructure, systems, and technologies, including but not limited to future UTM and United States Government counter-UAS capabilities.

ii. Public Comments and FAA Response

Comments: A number of commenters asked the FAA to expand the scope of the exception in § 89.501(c)(4) so that UAS could be produced without remote identification for other purposes such as educational activities; science,

technology, engineering, and math-related activities; and recreational operations. Wing Aviation, LLC mentioned that the FAA should clarify whether this exception applies to UAS designed or produced for an operation approved by the Administrator under proposed § 89.120 (the operating requirements for operations at FAA-recognized identification areas and operations for aeronautical research).

FAA Response: The FAA does not agree with the request to expand the activities covered under the exception in § 89.501(c)(4). The term ''educational activity'' is broad and conceivably covers areas beyond the design and production of the unmanned aircraft and its component parts. Many educational activities are covered by the home-built exception in § 89.501(c)(1) of this rule. The aeronautical research exception is meant to allow the testing of prototype UAS, unmanned aircraft component parts, and related infrastructure, systems, and technologies without the requirement that the producer meet all of the design and production requirements of the rule. Persons operating UAS built without remote identification under this exception must comply with the operating requirements in subpart B of this rule.

C. Requirement To Issue Serial Numbers

1. Discussion of the Final Rule

As promulgated in § 89.505, no person may produce a standard remote identification unmanned aircraft under part 21 or 89, or a remote identification broadcast module, unless the unmanned aircraft or broadcast module is issued a serial number that complies with ANSI/CTA–2063–A. A producer of an unmanned aircraft with an integrated broadcast capability may update the serial number as part of the software upgrade to install the remote identification broadcast module. The ANSI/CTA–2063–A standard is incorporated by reference into this regulation, and is available for review and download, free of charge, at the time of publication of this rule.

The FAA adopts the use of the ANSI/CTA–2063–A standard because using a single accepted format for serial numbers helps ensure consistency in the broadcast of the message element. The FAA adopts this section essentially as proposed, but is making certain modification to the regulation to eliminate the limited remote identification UAS concept and incorporate the remote identification broadcast module concept.

The NPRM sought comments regarding the adoption of ANSI/CTA–2063–A as the serial number standard for remote identification. The FAA specifically requested comments on whether ANSI/CTA–2063–A can be effectively used as a serial number standard for larger unmanned aircraft. The Agency particularly sought feedback from designers and producers of unmanned aircraft that assign serial numbers in accordance with ANSI/CTA–2063–A and inquired about the type and number of unmanned aircraft that the serial numbers are being assigned to.

2. Public Comments and FAA Response

i. General Comments Regarding The Requirement To Issue a Serial Number to Unmanned Aircraft With Remote Identification

Comments: Droneport Texas LLC, Wing Aviation, LLC, and others urged the FAA to modify the serial number requirement so that it only applies to UAS intended to be flown in the airspace of the United States, BVLOS, or for commercial use. Along these lines, a number of commenters opposed requiring producers of UAS used for limited recreational operations to comply with the serial number requirement in § 89.505. They mentioned that many of the unmanned aircraft will fly within FAA-recognized identification areas or VLOS, and therefore believed there is no need to require such aircraft to comply with the serial number requirement. The Drone U, Brands Hobby, University of Utah and many individuals also asked the FAA to eliminate the serial number requirement or to except UAS used for limited recreational operations from having to comply.

Many stated that this requirement would be impossible to comply with for those with amateur-built aircraft, as they do not come with serial numbers. Some of the commenters believed the requirement would potentially destroy the value of recreational UAS and threaten recreational operations of UAS and supporting industries. The Executive Director of the Academy of Model Aeronautics stated that a serial number requirement would destroy the historical accuracy of scale replicas of manned aircraft. The DRONERESPONDERS Public Safety Alliance worried that many current models from popular manufacturers do not have serial numbers that comply with the proposal.

FAA Response: Aircraft registration and identification is consistent with preserving aviation safety. The FAA has determined that the serial number requirement must apply to all aircraft and broadcast modules subject to subpart F, and should not be based on the purpose or intent of the operation of the unmanned aircraft. The serial number requirement is necessary because it enables the unique identification of unmanned aircraft operating in the airspace of the United States. The requirement is particularly necessary to identify every unmanned aircraft that is registered under a single registration number issued under 14 CFR part 48 to the owner of multiple unmanned aircraft used exclusively for limited recreational operations in accordance with 49 U.S.C. 44809. This is particularly important when these unmanned aircraft are flown outside of FAA-recognized identification areas.

Home-built unmanned aircraft are excluded from the design and production requirements under subpart F. Producers of home-built unmanned aircraft do not have to comply with § 89.505, which requires producers of standard remote identification unmanned aircraft or remote identification broadcast modules to issue serial numbers that comply with ANSI/CTA–2063–A.

Comments: Some commenters asked the FAA to clarify which serial number enables compliance with § 89.505 because, in theory, every component of a UAS could have a serial number of its own. Commenters wanted the FAA to clarify which serial number would an owner retain, including for registration purposes, if the UAS parts were swapped in any way—whether due to an accident, suffering damages, or for general improvements. Watts Innovations LLC mentioned that many UAS use common components such as flight controllers, radio, and motors, and that there should be one ANSI/CTA–2063–A serial number for each component of the UAS.

FAA Response: This rule does not require a producer to assign a serial number to individual components. Producers subject to the design and production requirements must comply with the requirements under subpart F of part 89. To comply with § 89.505, the producer must issue an ANSI/CTA–2063–A compliant serial number to the standard remote identification unmanned aircraft, as a whole, or the remote identification broadcast module. That serial number has to be listed in the FAA-accepted declaration of compliance corresponding to the standard remote identification unmanned aircraft or the remote identification broadcast module. That same serial number also has to be

included in the unmanned aircraft's registration, and must be broadcast in accordance with the operating requirements of this rule.

Comments: The General Aviation Manufacturers Association suggested that a serial number not be required for those UAS already required to be equipped with ADS–B.

FAA Response: The FAA agrees that the requirement to issue a serial number should only apply to producers of standard remote identification unmanned aircraft and remote identification broadcast modules. Unmanned aircraft that are only equipped with ADS–B Out would not be required to have a serial number assigned by the producer under § 89.505.

Comments: A number of commenters urged the FAA to establish an alternative mechanism to enable UAS produced prior to the effective date of this rule or with a serial number that does not conform to the ANSI/CTA–2063–A standard to comply with § 89.505. Multiple commenters asked the FAA to allow the installation and use of remote identification add-on equipment on those UAS. Commenters mentioned that the serial number of the remote identification add-on equipment could be used to meet the serial number requirement in § 89.505.

Other commenters believed that the serial number requirement in § 89.505 would make the existing UAS fleet obsolete.

FAA Response: As explained earlier, the requirements for remote identification have been modified to allow persons to produce a retrofit solution, known as remote identification broadcast modules, to equip unmanned aircraft without remote identification to enable them to identify remotely. See section VII.D of this preamble for more information on the operating requirements for remote identification broadcast modules. Remote identification broadcast modules that comply with all requirements in part 89 can be produced after the effective date of this rule. The availability of remote identification broadcast modules helps facilitate the early adoption of remote identification by operators of unmanned aircraft.

In accordance with the serial number requirement in § 89.505, a producer would assign an ANSI/CTA–2063–A compliant serial number to each remote identification broadcast module. An unmanned aircraft produced without remote identification that is retrofitted with a remote identification broadcast module would broadcast the ANSI/CTA–2063–A compliant serial number and would be able to fly outside of FAA-recognized identification areas.

Even without the broadcast solution, an existing unmanned aircraft that is not retrofitted with a remote identification broadcast module is not obsolete or grounded. A person may continue to operate such existing unmanned aircraft at FAA-recognized identification areas. See section VII.F.2 of this preamble for more information on operating unmanned aircraft without remote identification. This rule does not require any person to assign an ANSI/CTA–2063–A compliant serial number to any existing unmanned aircraft produced prior to the compliance date of the design and production requirements.[27]

ii. Comments Addressing ANSI/CTA–2063–A and Other Alternatives

Comments: The District of Columbia office of the Deputy Mayor for Public Safety and Justice, senseFly, Ax Enterprize, Wing Aviation, LLC, and many other commenters expressed support for the FAA's proposal to adopt ANSI/CTA–2063–A as the serial number standard for remote identification of UAS. In contrast, Watts Innovations LLC and some individuals indicated the requirement to issue a serial number that complies with ANSI/CTA–2063–A is unnecessary, especially for recreational UAS and home-built UAS.

Numerous AMA members said homebuilders should be allowed to select a personal serial number (*e.g.,* a serial number that does not conform to the ANSI/CTA–2063–A standards) for their home-built UAS. Some commenters recommended the FAA not require an ANSI serial number standard or permit existing unmanned aircraft to be exempted from this requirement. A commenter added that current popular manufacturers do not follow the ANSI/CTA–2063–A serial number standard, so adopting that standard would place many manufacturers in noncompliance, unless granted exemptions. The commenter believed that this proposal could force operators to purchase new UAS before the expiration of their current fleet in the absence of a clear path to retrofit.

The Coconino County Sheriff's Office expressed concern about current serial numbers not complying with the ANSI/CTA–2063–A standard, but suggested that compliant serial numbers could perhaps be issued by the FAA at the time of registration or re-registration. One commenter stated the FAA should permit the use of user-generated serial numbers at least until industry makes available modular dongles that transmit serial numbers compliant with ANSI/CTA–2063–A. Another individual suggested the FAA provide a mechanism allowing for serial number equivalent assignment during registration of amateur-built UAS using an approved open source code.

Commenters questioned whether the requirement applied to the legacy UAS fleet. Other commenters mentioned that producers should be able to provide the serial number through a software upgrade. Some of these commenters raised concerns with a software upgrade because UAS manufacturers might not have the ability to track whether the upgrade was successfully installed for the UAS to meet the serial number requirement.

FAA Response: The broadcast of a serial number is an essential component of remote identification. The FAA has decided to maintain its position to adopt the ANSI/CTA–2063–A standard, and require applicable producers to assign ANSI/CTA–2063–A compliant serial numbers to standard remote identification unmanned aircraft and remote identification broadcast modules. While ANSI/CTA–2063–A was specifically developed to provide a serial number format for small unmanned aircraft serial numbers, the FAA has determined that ANSI/CTA–2063–A is appropriate to issue serial numbers under this rule regardless of the size of the unmanned aircraft or broadcast module because it enables the issuance of unique serial numbers, and promotes worldwide standardization of unmanned aircraft remote identification requirements. The use of ANSI/CTA–2063–A would provide a single accepted format for serial numbers. It would also help ensure consistency and avoid duplication in the broadcast of this message element at any given moment. The ANSI/CTA–2063–A standard is available for viewing and download free of charge as of the publication of this final rule.

The FAA reaffirms that subpart F of this rule does not apply to the production of home-built unmanned

[27] Producers may choose to assign an ANSI/CTA–2063–A compliant serial number to an unmanned aircraft produced prior to the compliance date of the design and production requirements of this rule (*e.g.,* through a software upgrade). The assignment of the serial number—by itself—does not make the unmanned aircraft a standard remote identification unmanned aircraft or a compliant unmanned aircraft that is properly equipped with a remote identification broadcast module. Persons who wish to ''upgrade'' an unmanned aircraft produced prior to the compliance date of this rule to make it a standard remote identification unmanned aircraft or an unmanned aircraft equipped with a remote identification broadcast module may do so by meeting all design and production requirements in subpart F. Subpart F contains the design and production requirements for a standard remote identification unmanned aircraft and a remote identification broadcast module.

aircraft. Accordingly, individuals constructing home-built unmanned aircraft are not required to obtain ANSI/CTA–2063–A serial numbers for their aircraft. As previously discussed, the serial number requirement in § 89.505 does not apply to existing unmanned aircraft. Unmanned aircraft without remote identification can continue to operate, as long as they comply with the operating requirements under subpart B of this rule.

The FAA is permitting the production and use of remote identification broadcast modules that may be retrofitted in unmanned aircraft without remote identification to meet the requirements of this rule. If operators of unmanned aircraft without remote identification, such as home-built unmanned aircraft or existing unmanned aircraft, want to operate outside of FAA-recognized identification areas, they would need to equip their unmanned aircraft with remote identification broadcast modules to comply with the operational requirements of this rule.

In addition, the ANSI/CTA–2063–A standard has been available since before the publication of this rule, and nothing in this rule prohibits a producer from voluntarily assigning a compliant serial number to existing unmanned aircraft (*e.g.,* through a software upgrade). A producer of unmanned aircraft with integrated broadcast capability may update the serial number as part of the software upgrade to install the remote identification broadcast module—this way existing unmanned aircraft may be issued an ANSI/CTA–2063–A compliant serial number and comply with the remote identification requirements.

Comments: Multiple commenters expressed concerns with their ability to access the ANSI/CTA–2063–A standard and the economic burdens of obtaining it.

FAA Response: As of the publication of this rule, the ANSI/CTA–2063–A standard is available for viewing and download free of charge, so the FAA does not believe its adoption will pose financial hardships.

Comments: Various individuals said the FAA should obtain a ''manufacturer code'' so they can issue ANSI/CTA–2063–A compliant serial numbers to the existing fleet of UAS. Other commenters indicated the FAA should provide a compliant serial number when the unmanned aircraft is registered or if the producer of the unmanned aircraft did not assign a serial number to the unmanned aircraft. Some commenters believe the FAA should create an automatic process to enable producers to obtain a manufacturer code to enable them to issue serial numbers via the FAA or ICAO website. Some commenters questioned whether they would have sufficient time to comply with the requirement.

FAA Response: The FAA has determined there is no need for the Agency to issue serial numbers to the existing unmanned aircraft fleet, at this time. As discussed in this rule, an existing unmanned aircraft that does not meet all requirements of subpart F can continue to fly at FAA-recognized identification areas. It can also be retrofitted with a remote identification broadcast module to fly elsewhere. The remote identification broadcast module would need to have a serial number issued by the producer in accordance with § 89.505.

This rule does not establish a specific process to issue serial numbers. Producers may develop or follow any process that enables them to issue and assign ANSI/CTA–2063–A compliant serial numbers to the standard remote identification unmanned aircraft or remote identification broadcast modules.

Comments: Some commenters highlighted that ANSI/CTA–2063–A covers the issuance of serial numbers for small UAS. The National Agricultural Aviation Association and others asked the FAA to revise the rule so that the serial number requirement applies to UAS of a particular size or larger. The Small UAV Coalition and others asked the FAA to revise § 89.505 to require compliance with the ANSI serial number standard at the time of production of the UAS. Another commenter suggested the requirement be to use ''an accepted industry standard on serial numbers.'' A commenter asked the FAA to use a standard that provides a scalable format for serial numbers and a scalable process for producers to request or assign serial numbers.

FAA Response: While ANSI/CTA–2063–A was specifically developed to provide a serial number format for small unmanned aircraft serial numbers, the FAA has determined that ANSI/CTA–2063–A is appropriate to issue serial numbers under this rule regardless of the size of the unmanned aircraft or broadcast module because it enables the issuance of unique serial numbers, and promotes worldwide standardization of unmanned aircraft remote identification requirements. The use of ANSI/CTA–2063–A provides a single accepted format for serial numbers, helping to ensure consistency in the broadcast of this message element. The FAA believes this standard provides for flexibility and scalability, noting that the ''Manufacturer's Serial Number'' field of the full serial number allows for over a quadrillion different number and letter combinations. The FAA notes that ANSI/CTA–2063–A is the current version of the standard as of the date of this rule and declines to include a policy for accepting new serial number standards. Any future changes to the requirement to issue serial numbers that comply with ANSI/CTA–2063–A would require a new rulemaking activity.

The incorporation by reference approach requires pointing to a specific standard and the FAA must evaluate each standard to ensure it is consistent with the remote identification requirements and appropriately supports the transmission of the message elements. While this rule adopts ANSI/CTA–2063–A, the Agency may consider revisions to this standard—as well as other serial number standards—and may incorporate them into the regulation at a later time.

iii. Incorporation by Reference

As promulgated in § 89.505, the producer of a standard remote identification unmanned aircraft or remote identification broadcast module must issue a serial number to the unmanned aircraft or broadcast module that complies with ANSI/CTA–2063–A, *Small Unmanned Aerial Systems Serial Numbers* (September 2019). The Office of the Federal Register (OFR) has regulations concerning incorporation by reference. 1 CFR part 51. These regulations require that, for a final rule, agencies must discuss in the preamble to the rule the way in which the materials that the Agency incorporated by reference are reasonably available to interested persons, and how interested parties can obtain the materials. In addition, in accordance with 1 CFR 51.5(b), the Agency must summarize the material in the preamble of the final rule.

In accordance with the OFR's requirements, the FAA states that the ANSI/CTA–2063–A standard outlines the elements and characteristics of serial numbers used by small UAS. Each serial number is comprised of three basic components: The manufacturer code, the length code, and the manufacturer's serial number. Thus, each serial number is unique to a specific unmanned aircraft and can also be used to identify the manufacturer of the unmanned aircraft.

Interested persons can view and download ANSI/CTA–2063–A at: *https://www.cta.tech* by creating a free account and searching under ''Research and Standards.'' The ANSI/CTA–2063–

A standard is available for review and download, free of charge, at the time of publication of this rule.

D. Labeling Requirements

1. Discussion of the Final Rule

According to § 89.525, no person may produce a standard remote identification unmanned aircraft under the declaration of compliance process of part 89 or a stand-alone remote identification broadcast module unless the unmanned aircraft or the broadcast module displays a label indicating that it meets the requirements of part 89. The label must be in English and be legible, prominent, and permanently affixed to the unmanned aircraft or the broadcast module. For existing unmanned aircraft that are upgraded to have remote identification broadcast module capabilities integrated into the aircraft, the FAA envisions that the label would be affixed to the unmanned aircraft. In those instances, the producer may provide the label to the operator and instructions on how to affix them to the unmanned aircraft. Standard remote identification unmanned aircraft produced under a design or production approval issued under part 21 have to comply with the labeling requirements of part 21, as applicable.

The FAA is adopting the labeling requirement in § 89.525 essentially as proposed. The section was revised to eliminate the limited remote identification UAS concept and replace it with the remote identification broadcast module concept.

2. Public Comments and FAA Response

Comments: The FAA received many comments supporting the proposed labeling requirements. Commenters that agreed with this requirement included Edison Electric Institute, American Public Power Association, National Rural Electric Association, Alliance for Drone Innovation, the Northwest Electric Power Cooperative, Streamline Design, and many individual commenters. Some commenters asked the FAA to require producers to label their product compliance levels at the time of purchase.

The FAA also received numerous comments opposing the labeling requirement. DJI Technology, Inc. and other commenters indicated that the requirement was unnecessary and would complicate compliance with the regulation. Commenters noted that some small UAS may not have room for multiple labels (*e.g.,* a remote identification label in addition to the registration markings.) Others mentioned that the labeling requirement could potentially limit the physical space for collision-avoidance sensors and other features in small UAS because a significant portion of the unmanned aircraft could be covered with multiple labels.

Many commenters raised concerns regarding the impact of the labeling requirement on home-built unmanned aircraft or UAS used for recreational operations. Some commenters believed that the labeling requirement may reduce the performance and appearance of scale model aircraft. Many individual commenters expressed concerns that the labeling requirement would raise the costs of building, owning, or operating UAS for recreational purposes. Commenters requested the final rule be revised so that the labeling requirement only applies to UAS used for commercial operations.

FAA Response: The FAA is adopting the labeling requirement because there is a need for unmanned aircraft operators, FAA inspectors, investigators, and law enforcement to know the remote identification capabilities of a specific unmanned aircraft. The labeling requirement is necessary because it communicates information that would otherwise not be known by looking at the aircraft. A producer label enables the operator to determine what the operator can or cannot do with the unmanned aircraft. If the unmanned aircraft has no label, the presumption is that it has no remote identification capabilities, so the operator must either equip the unmanned aircraft with a remote identification broadcast module or operate the aircraft within an FAA-recognized identification area. The costs related to the labeling requirement are justified by the benefits that will result from the rule, and both costs and benefits are evaluated and addressed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

The FAA does not agree with commenters who believed the labeling requirement would impact performance and limit surface area availability for other sensors. This rule is performance-based and there is no prescriptive requirement for how the labeling must be done. There is no requirement on font type, size, or location of the label. The label will adjust to the size of the unmanned aircraft. Also, a standards body or any person may create a labeling standard to meet all labeling requirements with a single label (*e.g.,* remote identification, registration, operations over people, etc.).

Comments: Commenters including FPVFC and SenseFly asked the FAA to clarify how retrofitted UAS or UAS with remote identification add-on equipment would meet the labeling requirement. The Commercial Drone Alliance, FlyGuys, Inc., and ANRA Technologies suggested that if the rule allows for retrofit UAS or UAS with remote identification add-on equipment, then these aircraft would also have to meet all remote identification standards, including labeling.

FAA Response: As previously discussed, the FAA modified this rule to allow for the production and use of remote identification broadcast modules to identify remotely. Section 89.525(b) establishes the labeling requirements for remote identification broadcast modules. The requirements are similar to those that apply to standard remote identification unmanned aircraft.

Comments: Wingcopter mentioned that the labeling requirements should be moved to part 21 for UAS with a type certificate or production certificate issued under part 21.

FAA Response: The FAA revised subpart F to clarify which remote identification requirements apply to standard remote identification UAS produced under a design approval or production approval issued under part 21. While these aircraft are not subject to the labeling requirements in § 89.525, they must be labeled in accordance with the applicable requirements of part 21.

E. Production Requirements

This rule finalizes the design and production requirements in subpart F. These requirements apply to the production of new standard remote identification unmanned aircraft or remote identification broadcast modules. The FAA clarifies that a person must also follow these requirements to upgrade an unmanned aircraft to meet the remote identification requirements for standard remote identification unmanned aircraft or for unmanned aircraft with remote identification broadcast modules.

The essence of subpart F remains the same but the Agency made a number of changes to eliminate the limited remote identification UAS concept and replace it with the remote identification broadcast module concept. The FAA also restructured the sections to clarify which production requirements apply to standard remote identification unmanned aircraft produced under part 21, and which requirements apply to standard remote identification unmanned aircraft and remote identification broadcast modules produced under an FAA-accepted declaration of compliance under subpart F.

1. Production Requirements: Standard Remote Identification Unmanned Aircraft Produced Under a Design or Production Approval Issued Under Part 21

i. Discussion of the Final Rule

The FAA added § 89.510 and made various changes to subpart F to clarify the production requirements that apply to standard remote identification unmanned aircraft produced under a design approval or production approval issued under part 21.

First, type certificated unmanned aircraft must meet the serial number requirement in § 89.505.

Second, type certificated unmanned aircraft must meet the production requirements in § 89.510. The unmanned aircraft must be designed and produced to meet the minimum performance requirements for standard remote identification unmanned aircraft systems established in § 89.310 in accordance with an FAA-accepted means of compliance; or be equipped with Automatic Dependent Surveillance-Broadcast (ADS–B) Out equipment that meets the requirements of § 91.225. Nothing in the rule precludes producers from producing unmanned aircraft that have both the remote identification and ADS–B capabilities identified in the regulation.

Lastly, type certificated unmanned aircraft must meet all applicable requirements of part 21, including but not limited to, any applicable labeling or record retention requirements. The minimum performance requirements for remote identification in subpart D of part 89 will be addressed as part of the type certification process for unmanned aircraft.

ii. Public Comments and FAA Response

Comments: Many commenters conflated the declaration of compliance process under part 89 with the FAA airworthiness certification process under part 21. They referred to the ''certification'' process as a rather burdensome approach to determine whether a UAS complies with the remote identification requirements.

Some commenters asked the Agency to clarify whether the design and production requirements of subpart F apply to UAS certified under part 21. Some commenters believed the requirements do not apply but felt the regulatory text was not sufficiently clear. The commenters mentioned that subpart F of part 89 includes requirements already covered by the part 21 certification process and indicated that the lack of clarity could cause confusion, could lead to additional administrative burdens, and could delay the airworthiness certification of UAS under part 21.

UPS Flight Forward, United Parcel Service Co., and UPS Airlines indicated that the FAA should implement a technology-based solution that includes design requirements and a comprehensive system of oversight for the design and production of unmanned aircraft. UPSFF and UPS Airlines mentioned that the FAA should clarify how the requirements in the NPRM would affect or play into the approval of a type certificate for a UAS under part 21. UPSFF and UPS Airlines also requested clarification on whether all FAA-accepted means of compliance under subpart E were acceptable as part of the certification basis under 14 CFR 21.17.

FAA Response: UAS certificated under part 21 do not have to meet all of the design and production requirements in subpart F of part 89 because the requirements are redundant with some requirements that have to be met as part of the certification processes of part 21. Therefore, the FAA revised the subpart to clarify which requirements of subpart F apply to UAS certificated under part 21 and which apply to all other UAS produced under a declaration of compliance issued under part 89.

The FAA clarifies that the minimum performance requirements in subpart D of part 89 (which can be met through an FAA-accepted means of compliance issued under subpart E) will be applied during the type or supplemental type certification process for standard remote identification UAS under part 21.

The FAA also clarifies that the declaration of compliance process related to the production of all other UAS under subpart F is not a certification process. Therefore, an FAA-accepted declaration of compliance is not a type certificate or an airworthiness certificate.

2. Production Requirements: All Other Standard Remote Identification Unmanned Aircraft

i. Discussion of the Final Rule

The FAA adopts the production requirements in § 89.515 that apply to standard remote identification unmanned aircraft produced *without* a design approval or production approval issued under part 21. The essence of the requirements remains as proposed in the NPRM. The FAA made some changes for clarity and to remove the limited remote identification UAS concept from the regulation.

According to § 89.515, an unmanned aircraft produced under an FAA-accepted declaration of compliance under part 89 must be designed and produced to meet the minimum performance requirements for standard remote identification unmanned aircraft systems established in § 89.310 in accordance with an FAA-accepted means of compliance.

The producer of the unmanned aircraft must meet certain inspection requirements for production of the unmanned aircraft; audit requirements; and product support and notification requirements.

ii. Public Comments and FAA Response

Comments: Various commenters mentioned that the FAA should add detailed technical specifications (*e.g.,* weight and the size of transmitters) to the design and production requirements.

FAA Response: The FAA does not agree with the commenters. This rule establishes minimum performance requirements for remote identification. It does not establish prescriptive production requirements on matters such as weight or size of the broadcast equipment, because the Agency wants producers to have the flexibility to adjust their designs based on the available technologies and market demand.

Comments: ALPA, National Agricultural Aviation Association (NAAA), CTIA—The Wireless Association, and other commenters expressed support for requiring remote identification UAS to meet the proposed minimum performance requirements. CTIA—The Wireless Association and NAAA, however, requested the FAA modify certain minimum performance requirements. NAAA asked the FAA to certify all UAS and UAS components. They believed that there should be prescriptive measures to determine whether a UAS is airworthy. For example, they mentioned that some of the requirements should include where to place the registration number and the need to equip the UAS with ADS–B In.

FAA Response: The FAA promulgates this rule as a performance-based rule to grant producers flexibility to demonstrate that a standard remote identification unmanned aircraft or remote identification broadcast module was designed and produced to meet the minimum performance requirements in subpart D to enable the unmanned aircraft or broadcast module to broadcast the required remote identification message elements.

At this time, the FAA does not agree with commenters asking the Agency to certify all standard remote identification unmanned aircraft and remote

identification components. As discussed in section XIV.E.1 of this preamble, the declaration of compliance process under subpart F is not a certification or airworthiness process and an FAA-accepted declaration of compliance is not a type certificate or an airworthiness certificate. A different determination would be extremely burdensome (*e.g.,* cost and time) for designers and producers. The FAA notes, however, that standard remote identification unmanned aircraft produced under a design approval or production approval issued under part 21 are subject to all applicable requirements and airworthiness determinations under part 21, as required in § 89.510. The FAA also notes that if a manufacturer has been issued a production certificate or other approval to produce an unmanned aircraft, part 89 precludes production of that unmanned aircraft unless the unmanned aircraft complies with the minimum performance requirements for remote identification contained in that part or is subject to an exception from the requirements in subpart F (*e.g.,* the unmanned aircraft is equipped with ADS–B Out equipment.)

Comments: American Tower Corporation and others asked the FAA to permit UAS producers to set certain limits (AGL, Fly Zone, restriction areas) for the UAS they produce. The commenters believed this approach would grant flexibility to producers, would foster innovation, and would provide operators with greater options to meets their individual needs.

FAA Response: As previously discussed, this rule is performance-based and allows the production of unmanned aircraft that exceed the minimum performance requirements. While the operators must abide by the operating rules in subpart B, nothing in the rule precludes producers from implementing stricter standards or imposing additional equipment restrictions (*e.g.,* geo-fencing technology).

Comments: Some individuals recommended the FAA eliminate subpart F and limit the rule to operational requirements. Others asked the FAA to remove requirements related to producer certification and standards, and mentioned that the burden for complying with remote identification should rest on the operators of UAS instead of producers.

FAA Response: The success of the remote identification frameworks rests on having both operational and production requirements. Producers must follow requirements to ensure that standard remote identification unmanned aircraft and remote identification broadcast modules meet the minimum performance requirements and broadcast the message elements required by this rule. Operators must use such unmanned aircraft or broadcast modules to ensure they identify remotely when operating in the airspace of the United States.

Comments: Commenters recommended that the FAA align the production requirements and UAS designations with ICAO guidance, especially regarding the aircraft make, model, and serials taxonomy. Many commenters mentioned that the United States should strive for international harmonization of the remote identification requirements.

FAA Response: The FAA follows Order 8000.71 ''Aircraft Make, Model, and Series Taxonomy'' which establishes key definitions for the FAA's Make, Model, and Series (MMS) taxonomy and is based on the international standard taxonomy for MMS developed by the Commercial Aviation Safety Team/ICAO Common Taxonomy Team. The FAA recognizes that UAS technology is continually evolving, making it necessary to harmonize regulatory action with technological growth. The FAA regularly reaches out to its international partners on a bilateral and multilateral basis to harmonize regulations to the maximum extent possible. By establishing performance requirements, the FAA is promoting that harmonization and is providing a flexible regulation that allows persons to develop means of compliance that adjust to the fast pace of technological change, innovation, design, and development, and use them to design and produce unmanned aircraft that meet the remote identification requirements of this rule.

Comments: Many commenters expressed concerns with the cost of complying with the design and production requirements. Commenters requested the FAA revise the requirements of subpart F to reduce the impact and burden on producers and recreational flyers. Some commenters believed the requirements would substantially increase the cost of production of UAS, and could impact innovation and the United States UAS market as a whole.

FAA Response: Though the FAA does agree that the production requirements may impose additional burden on producers and increase production costs, the FAA is committed to the added safety and security benefits provided by remote identification and to the role it will play in the development of future UAS rules and concepts.

The FAA has revised the design and production requirements under subpart F to allow for a simpler compliance process by introducing the remote identification broadcast module. Comments specific on the design and production of the remote identification broadcast module are discussed in section XIV.E.3 of this preamble. Based on comments received and information from unmanned aircraft producers, part of the existing fleet of unmanned aircraft could be modified to enable compliance with remote identification requirements with relative simplicity and minimal cost (*e.g.,* by securing a remote identification broadcast module or doing a software upgrade through the internet).

The Agency clarifies that subpart F applies to producers and not operators (*e.g.,* recreational flyers). A recreational flyer who is also a producer of unmanned aircraft would be excepted from the design and production requirement in accordance with § 89.501(c) if he or she is building a home-built unmanned aircraft. See section XIV.B.2 of this preamble for a discussion of the home-built exception.

Comments: Many commenters argued against involving original equipment manufacturers (OEM) in the rule requirements. First Person View Freedom Coalition believed OEM should not be involved with the NPRM on remote identification; another commenter stated the FAA should eliminate all OEM requirements. One individual commenter suggested the FAA needs to create a system, create the standards, and allow producers of devices to choose to adopt and self-certify rather than requiring OEM to meet the production requirements. Kittyhawk.io, Inc. stated that OEM should not have that much responsibility for remote identification and control over its function, suggesting that the inclusion of OEM requirements and producers having a central role in access to the airspace presents not only complexity in execution, but also national security risks. WhiteFox Defense Technologies, Inc. added that the requirements should be revised to allow for UAS to be retrofitted with remote identification modules manufactured by third-parties other than the UAS OEM.

FAA Response: The FAA does not agree with the arguments not to involve OEM in the development of the remote identification of unmanned aircraft. Partnering with the manufacturers or OEM is important to the success of unmanned aircraft remote identification. This will support the primary intent of this rule: To provide

a safe and secure airspace for manned and unmanned aircraft operations. OEMs are essential to the advancement and proliferation of the remote identification technology and incorporation into UAS products. Without the commitment and involvement of the UAS OEM, the safety and security benefits gained from remote identification will never fully develop or be implemented into the airspace of the United States. The FAA recognizes the need for the existing unmanned aircraft fleet to be able to comply with remote identification requirements and, to meet that need, this rule allows persons to retrofit unmanned aircraft with remote identification broadcast modules to allow them to identify remotely.

3. Production Requirements: Remote Identification Broadcast Modules

i. Discussion of the Final Rule

After considering public comments, the FAA decided to allow for the production and use of remote identification broadcast modules to enable unmanned aircraft without remote identification to comply with the remote identification requirements of part 89. Section 89.520 establishes the production requirements for remote identification broadcast modules. This section prescribes that no person is allowed to produce a remote identification broadcast module unless it is designed and produced to meet the minimum performance requirements for a remote identification broadcast module established in § 89.320 using an FAA-accepted means of compliance.

The producer of the remote identification broadcast modules must meet certain inspection requirements for production of the module; audit requirements; and product support and notification requirements. These requirements are aligned with similar requirements for standard remote identification unmanned aircraft. The FAA added an additional requirement for producers of remote identification broadcast modules in § 89.520(b)(4). Producers must provide instructions for installing and operating the remote identification broadcast module to any person operating an unmanned aircraft with the remote identification broadcast module. The producer must also explain how the person would obtain the ANSI/CTA–2063–A compliant serial number assigned to the broadcast module. The instructions could be made available on a website or through any other venue, as long as the person installing and operating the remote identification broadcast module has access to the instructions. The FAA expects these instructions would provide details about how to ensure the remote identification broadcast module is correctly installed, secured, or upgraded into the unmanned aircraft, and details to prevent the broadcast module from interfering with the aircraft flight characteristics or flight controls, as applicable. The instructions must describe any limitations associated with use of the broadcast module, such as certain features or characteristics of an unmanned aircraft that would prevent the broadcast module from meeting the required minimum performance requirements.

Persons producing remote identification broadcast modules must comply with the declaration of compliance process in subpart F. This is the same process that applies to the production of standard remote identification unmanned aircraft *without* a design approval or production approval issued under part 21.

The FAA envisions that some manufacturers would develop remote identification broadcast modules that can be installed on many different types of unmanned aircraft, whereas other manufacturers may produce broadcast modules that are compatible with only certain models of unmanned aircraft, either because of size, shape, power requirements, or other design features. The FAA does not require manufacturers to produce remote identification broadcast modules that work with all types of unmanned aircraft, but if the broadcast module is designed to meet the minimum performance requirements when installed on only certain models or types of unmanned aircraft, those limitations should be stated prominently in the installation instructions.

ii. Public Comments and FAA Response

Comments: A multitude of commenters indicated that the proposal precluded the production and use of add-on remote identification equipment and the retrofitting of older UAS with remote identification equipment. Some commenters believed the proposed requirements would make existing RC models, components, and electronics obsolete and un-flyable. AiRXOS indicated that the proposal did not address owner-initiated modifications, retrofits, compliance with maintenance schedules, and use of approved replacement parts.

A significant number of commenters asked the FAA to incorporate requirements for the production of an add-on remote identification device that can be used to retrofit a UAS manufactured without remote identification equipment (*e.g.,* existing UAS). FPVFC and others recommended allowing UAS to fly using add-on components or add-on subassemblies manufactured to perform in a manner consistent with the requirements and capabilities of remote identification. They mentioned that a single module should be allowed to be plugged into all of the owner's UAS, and meet the safety requirements by associating individual serial numbers with operators.

Commenters provided a number of reasons in favor of the add-on equipment including, but not limited to, extending the life of the current UAS fleet, enhancing compliance with remote identification, and cost considerations. Some commenters mentioned that without the add-on equipment, operators would likely have to buy new UAS and producers would spend additional resources developing and producing complete UAS rather than the add-on equipment and component pieces.

Various commenters mentioned that some UAS might not be able to be retrofitted with remote identification equipment. For example, certain small UAS might exceed the weight limitations after retrofitting while others might not have sufficient space to install the remote identification equipment. Commenters also mentioned that adding remote identification equipment to UAS, particularly certain small UAS, could impact the performance of the unmanned aircraft and reduce its flight capacity or capabilities (*e.g.,* duration and distance).

One commenter expressed concerns that the design and production requirements would preclude owners from upgrading the remote identification electronics. This commenter, along with many others, mentioned that the requirements would preclude a party from installing remote identification electronics into a third-party airframe. This commenter stated that, as proposed, the rule does not support the development and growth of an FAA-certified avionics equipment industry.

Many commenters mentioned the lack of a retrofit option could price many hobbyists out of the hobby. Commenters said the rule would require almost every RC enthusiast to register as a manufacturer or to buy new UAS.

FAA Response: After reviewing public comments and giving further consideration, the FAA has decided to incorporate the remote identification broadcast module concept into this rule. See section VII.D of this preamble for a

discussion on the operating requirements for unmanned aircraft equipped with remote identification broadcast modules. Accordingly, the FAA adopts the production requirements for broadcast modules in § 89.520. While these requirements are new, they are mostly identical to the production requirements for standard remote identification unmanned aircraft. The main differences are that the remote identification broadcast module must be designed and produced to meet the minimum performance requirements established in § 89.320 and that the producer must provide instructions for the installation and operation of the broadcast modules. All requirements for remote identification broadcast modules, including but not limited to the instruction requirements, apply to both remote identification broadcast modules secured to the unmanned aircraft and remote identification broadcast modules implemented through a software upgrade using existing equipment on the unmanned aircraft. See section IX of this preamble for a discussion of the minimum performance requirements for remote identification modules.

Comments: The Consumer Technology Association and other commenters mentioned that the FAA should permit producers to continue selling non-compliant UAS if retrofit modules were available to bring the aircraft into compliance with the remote identification requirements.

FAA Response: As stated earlier, this rule only applies to the design and production of standard remote identification unmanned aircraft and remote identification broadcast modules. The FAA clarifies that the Agency does not regulate the importation or sale of unmanned aircraft.

Comments: Commenters, including senseFly, Recreational consumers, National Association of State Aviation Officials, National Alliance of Forest Owners, and many individuals indicated it would still be expensive to retrofit existing UAS with remote identification equipment. Theia stated the costs needed to obtain a declaration of compliance are unknown but could be substantial depending on final requirements; they urged the FAA to provide reduced cost declaration of compliance for entities that build, operate, and insure their own airframes.

FAA Response: The FAA acknowledges that this rule imposes certain costs on the designers and producers of standard remote identification unmanned aircraft and remote identification broadcast modules. These costs are justified by the benefits that will result from the rule, and both costs and benefits are evaluated and addressed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

4. Product Support and Notification for Standard Remote Identification Unmanned Aircraft and Remote Identification Broadcast Modules

i. Discussion of the Final Rule

This rule finalizes the requirement that persons responsible for the production of standard remote identification unmanned aircraft or remote identification broadcast modules must maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes the unmanned aircraft or broadcast module to no longer meet the requirements of subpart F within 15 calendar days of becoming aware of the defect or condition, as stated in paragraph (b)(3) of § 89.515 and paragraph (b)(3) of § 89.520.

The FAA specifically sought comments on whether it should require producers to notify the public and the FAA of any defect or condition that causes the unmanned aircraft to no longer meet the requirements of subpart F within 15 calendar days of the date the person becomes aware of the defect or condition.

ii. Public Comments and FAA Response

Comments: The District of Columbia office of the Deputy Mayor for Public Safety and Justice expressed its support for a 15 calendar day notice period. AiRXOS recommended the requirement be ''as soon as possible based on the assessment of the increased level of risk but no later than 15 days,'' and for the FAA to establish a formal notification process similar to Airworthiness Directives.

Airlines for America (A4A) recommended a shorter period of 3 calendar days to notify the FAA and the public if a defect or condition might create an immediate safety or security issue. In contrast, Droneport Texas LLC proposed a 60-calendar day notice period, and some individuals proposed a 90-calendar day term.

FAA Response: The FAA received a wide range of comments suggesting notification periods ranging from 3 to 90 days. Given the lack of agreement on a time frame, the FAA is adopting the notification period to be within 15 calendar days, as proposed. The FAA is requiring producers to notify the public and the FAA of any defect or condition that causes the unmanned aircraft to no longer meet the requirements of subpart F within 15 calendar days of the date the person becomes aware of the defect or condition. The FAA looked at overall impact to security, safety and cost and has determined that 15 calendar days provides a reasonable time for the producers to evaluate and confirm the presence of a defect that requires public notification.

F. Accountability

1. Discussion of the Final Rule

In addition to the audit requirements prescribed in § 89.515 for standard remote identification unmanned aircraft and § 89.520 for remote identification broadcast modules, the FAA requested comments regarding the appropriate time intervals for conducting independent audits, including any time intervals specified in industry standards related to independent audits of aviation systems as part of the design and production requirements.

The FAA is adopting the audit requirements because the Agency has determined it is necessary for producers to maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes the remote identification unmanned aircraft or broadcast module to no longer meet the requirements of subpart F.

2. Public Comments and FAA Response

Comments: Many commenters opposed including a requirement for audits or FAA facility inspections and argued they are unnecessary and burdensome for the industry. The Alliance for Drone Innovation, DJI Technology, Inc., and others recommended the FAA undertake random spot compliance checks by purchasing and testing products on the market to determine whether these products comply with the requirements rather than having to perform the proposed compliance audits. Some commenters believe that competitors, product reviewers, and safety watchdogs would also check product compliance independently and report non-compliance or deviations to the FAA. Others mentioned that the requirements are unnecessary because the FAA, law enforcement, and the public can assess compliance by analyzing the broadcast and transmitted data because it would be accessible by the public. Other comments mentioned that the requirements would burden smaller producers and, in particular, individual UAS builders.

FAA Response: The FAA does not agree that there is no need for audits or inspections. The FAA also does not agree with the recommendation of using spot testing, product reviews, or public assessment for compliance in lieu of auditing requirement. Producer audits and inspections help ensure continued compliance with applicable requirements and are consistent with other types of producer inspections performed by the Agency and its authorized representatives. These inspections assist the FAA validation procedures, processes, and methods used to demonstrate that the designers and producers of unmanned aircraft and their produced remote identification unmanned aircraft and remote identification broadcast modules meet the requirements of subpart F.

Comments: AiRXOS and many individuals believed that the audit requirement is unnecessary and difficult to enforce, particularly with regards to the production of UAS used for research and development and home-built UAS. AiRXOS and others asked the FAA to impose the audit and inspection requirement only on commercial manufacturers. Some commenters asked the FAA to conduct independent audits of all original equipment manufacturers within the first 12 months of operation.

The FPVFC, multiple commercial UAS manufacturers, and a number of persons identifying as homebuilders opposed the requirement to allow the FAA to inspect facilities and witness any test necessary to determine compliance with subpart F of part 89. Many commenters mentioned that the FAA has no authority to enter facilities or individuals' homes and argued that the requirement is unenforceable. FPVFC specifically challenged the FAA to articulate any other lawful recreational activity that would permit the government's inspection of a participating civilian's home or places, papers, etcetera, without a warrant, even if the activity were otherwise federally regulated. FPVFC believed the requirement is beyond the FAA's authority, that it raises 4th Amendment issues, and detracts from the FAA's goals of regulating the national airspace.

FAA Response: In accordance with § 89.501(c), the requirements of subpart F of this rule do not apply to home-built unmanned aircraft or unmanned aircraft designed or produced exclusively for the purpose of aeronautical research or to show compliance with regulations. This means that persons producing such unmanned aircraft are not subject to the requirements unless they voluntarily opt into subpart F.

The FAA considers the audit and inspection requirements to be essential elements of the declaration of compliance process. Standard remote identification unmanned aircraft produced in accordance with § 89.515 and remote identification broadcast modules produced in accordance with § 89.520 do not undergo part 21 certification. The requirements of the declaration of compliance process, including the audits, are meant to foster accountability and to ensure that the unmanned aircraft and broadcast modules meet the requirements of subpart F.

The audits are also necessary because this rule requires producers to maintain a product support and notification system and procedures to notify the public and the FAA of any defect or condition that may cause a standard remote identification unmanned aircraft or remote identification broadcast module to no longer comply with the requirements of this rule. To satisfy these obligations, persons responsible for the production of unmanned aircraft would have to monitor their manufacturing processes, unmanned aircraft operational usage (to the extent the producer has access to such information), and collection of accident and incident data.

As for inspections, the FAA has determined whenever the Agency identifies a safety issue that warrants review of a producer's data, records, or facilities, it is in the interest of safety and security of the airspace of the United States for producers subject to subpart F to grant the FAA access to such data, records, or facilities and all data and reports from the audits and investigations.

Therefore, the FAA has determined the audit and inspection requirements are integral to ensuring compliance and conducting oversight of the production. Since most unmanned aircraft can be used for a number of purposes, the FAA has determined these requirements apply to all designers and producers of remote identification unmanned aircraft subject to subpart F.

Comments: Commenters expressed concerns that certain producers—particularly foreign—might not share certain information with the FAA or comply with certain requirements of the final rule.

FAA Response: No person may produce a standard remote identification unmanned aircraft or remote identification broadcast module unless the person complies with all of the design and production requirements of subpart F and obtains an FAA-accepted declaration of compliance authorizing the production of standard remote identification unmanned aircraft or remote identification broadcast modules for use in the airspace of the United States. Failure to comply with any of the requirements—including the audit or inspection requirements—constitutes grounds for the FAA to rescind its acceptance of a declaration of compliance. Any standard remote identification unmanned aircraft or a remote identification broadcast module listed under the rescinded declaration of compliance would not be able to operate outside of an FAA-recognized identification area.

Comments: Some commenters expressed concerns that the auditing requirement could place a burden on UAS producers, particularly small and new producers.

FAA Response: The FAA acknowledges that this rule imposes costs on the designers and producers of unmanned aircraft. These costs are justified by the benefits that will result from the rule, and both costs and benefits are evaluated and addressed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

Comments: Wingcopter suggested that the FAA should exclude the manufacturers of UAS produced under a design approval or production approval issued under part 21 from having to comply with the audit requirements under part 89 because part 21 already includes requirements for audits and control of the quality system and production system.

FAA Response: The FAA agrees with Wingcopter; as previously discussed, the FAA has modified the rule to clarify which requirements of subpart F apply to unmanned aircraft produced under a design approval or production approval issued under part 21. The audit and inspection requirements in subpart F do not apply to aircraft certified under part 21 because they are subject to their own audits for quality system and production system controls under part 21.

Comments: Droneport Texas LLC, Watts Innovations LLC, and others believed the audits should be risk-based, and the frequency should be determined by each UAS manufacturer-based on the complexity of the UAS produced. A commenter mentioned that, unless an audit by the FAA is being conducted for cause and in agreement with the host nation (if required), a regular audit not being conducted at the request of manufacturers should be scheduled no sooner than 2 calendar years from the

date of the previous audit. The first audit should require a minimum of 60 calendar days prior notice from the inspecting organization. The commenter mentioned that an audit for legal cause should be conducted using best practices from the United States Department of Justice and the justice agency of the host nation (if required).

FAA Response: The audit requirements in subpart F apply to designers and producers of remote identification unmanned aircraft. As previously stated, this includes any local or foreign producers or designers that intends to produce unmanned aircraft for use in the airspace of the United States. The FAA does not agree with the suggestion for setting audit frequency. The FAA did not impose a timeframe for the independent audits. It expects the person responsible for the production of the standard remote identification unmanned aircraft or remote identification broadcast module to apply industry best practices to determine when and how often independent audits are needed. The FAA has determined the audits should occur on a regular basis and as many times as necessary. This grants flexibility to the producer to adjust the recurrence of the audits, based on the circumstances to ensure continuous compliance with the requirements of this rule.

G. Filing a Declaration of Compliance

1. Discussion of the Final Rule

As discussed in section V.E of this preamble, the FAA is adding a new definition in § 89.1 to ensure clarity regarding the meaning of a ''declaration of compliance.''

In addition, § 89.530 prescribes the requirements for submitting a declaration of compliance for FAA acceptance. Section 89.530 prescribes the eligibility requirements for submitting a declaration of compliance, and details the information required in that submission, whether for a standard remote identification unmanned aircraft or a remote identification broadcast module. The FAA has updated the information required in § 89.530 to include the FCC Identifier of the 47 CFR part 15-compliant radio frequency equipment used and integrated into the standard remote identification unmanned aircraft or the remote identification broadcast module.

In this rule, the FAA has revised the section to eliminate all references to limited remote identification UAS and incorporate the remote identification broadcast module concept. Section 89.530(c) prescribes the information that must be submitted in a declaration of compliance for remote identification broadcast modules.

2. Public Comments and FAA Response

i. Submission

Comments: Various commenters questioned the purpose and use of a declaration of compliance. Some believed that the declaration of compliance process is complex and that it makes it difficult for persons to determine whether an unmanned aircraft complies with the remote identification requirements. Commenters mentioned that the requirements of subpart F should be simple and easy to follow, should not deter potential producers from venturing into the market, and should not stifle innovation.

FAA Response: The FAA believes a declaration of compliance is an essential part of the remote identification framework. An FAA-accepted declaration of compliance allows a person to produce standard remote identification unmanned aircraft or remote identification broadcast modules. It serves as an assurance that producers are using an FAA-accepted means of compliance for the production of the unmanned aircraft or broadcast module to meet the minimum performance requirements of this rule and are complying with all other design and production requirements of subpart F. Various commenters questioned the use of the audit requirement and mentioned that the FAA could have difficulties inspecting producers and ensuring the audits are performed.

The FAA has determined that the audit requirement is necessary, similar to the audit requirement under part 21, to ensure continued compliance with remote identification requirements. The FAA believes the audits would have to occur on a recurrent basis (as many times as necessary), and whenever the FAA provides notice of noncompliance or of potential noncompliance, to ensure and demonstrate the standard remote identification unmanned aircraft or the remote identification broadcast module meets the requirements of subpart F. A producer submitting a declaration of compliance for FAA acceptance must make certain assurances and meet certain requirements regarding inspections, audits, product support and notification, and instructions. Failure to comply with any of these requirements is grounds for rescission of the FAA's acceptance of the declaration of compliance, which directly impacts where the unmanned aircraft can be operated. An unmanned aircraft listed under a declaration of compliance that has been rescinded is only able to operate at an FAA-recognized identification area. Similarly, a remote identification broadcast module listed under a declaration of compliance that has been rescinded cannot be used to meet the remote identification requirements.

Comments: Various commenters questioned the ability of the FAA to enforce the requirements of subpart F, especially when anyone can modify a UAS after it has been produced.

FAA Response: The production requirements of subpart F apply when a person produces a standard remote identification unmanned aircraft or remote identification broadcast modules. The production requirements do not apply to third parties who subsequently modify the standard remote identification unmanned aircraft or the remote identification broadcast module. However, these modifications could render the standard remote identification unmanned aircraft or remote identification broadcast module non-compliant for purposes of meeting the requirements of subpart B.

Comments: The NTSB expressed concerns with the declaration of compliance process and mentioned that it would be unlikely for producers under subpart F to conduct robust failure analysis equal to the level required for certified aircraft under part 21. The NTSB mentioned that an unforeseen combination of factors could affect an aircraft in flight and cause a fly-away or other hazardous events. The NTSB urged the FAA to consider potential unintended consequences of the proposed requirements.

FAA Response: As stated earlier, the FAA adopts the regulatory framework for remote identification with performance-based requirements rather than prescriptive ones to provide a flexible regulation The FAA appreciates the NTSB's concerns but believes they are addressed because the minimum performance requirements include a specific requirement that the remote identification equipment must not interfere with any other system or equipment installed on the unmanned aircraft, and must not interfere with the remote identification equipment. In addition, though the declaration of compliance process is simpler than the aircraft certification process of part 21, it provides the basic information necessary for the FAA to determine that a producer has complied with all applicable requirements and can produce standard remote identification unmanned aircraft and remote identification broadcast modules that

meet all of the minimum performance and production requirements for remote identification.

Comments: Multiple commenters asked the FAA to adopt a risk-based approach to certification where the type of certification required (*e.g.,* self-certification, partial certification, full certification) is based on the risk of the operations conducted. The American Petroleum Institute and other commenters believed the declaration of compliance process amounts to self-certification and might not provide appropriate rigor and oversight.

FAA Response: The FAA does not agree with proposed risk-based approach for certification because the remote identification requirements are operational requirements and applicable to all unmanned aircraft irrespective of risk of the operation.

The FAA clarifies that the declaration of compliance process is not a self-certification process and does not confer airworthiness. An FAA-accepted declaration of compliance is not a type certificate or an airworthiness certificate. The process is simpler than the aircraft certification process of part 21 because it provides the basic information necessary for the FAA to determine that a producer has complied with all applicable requirements and can produce standard remote identification unmanned aircraft and remote identification broadcast modules that meet all of the minimum performance and production requirements for remote identification.

Comments: The NAAA and others indicated that all UAS with remote identification and component pieces should be subject to the airworthiness certification process. Wingcopter indicated that part 21 includes design and production requirements for certificated aircraft. They asked the FAA to clarify whether subpart F applies to all UAS or only those produced without design approval or production approval issued under part 21. The commenter also suggested that the FAA should revise part 21 to include remote identification requirements and mentioned that UAS certificated under part 21 should not be subject to the declaration of compliance process in subpart F.

FAA Response: The production of unmanned aircraft under the part 89 declaration of compliance process is not a type certification or airworthiness certification process. The FAA considered Wingcopter's request to add remote identification requirements to part 21 and to clarify that unmanned aircraft certificated under part 21 are not subject to the declaration of compliance process in subpart F of part 89. The FAA has determined that it does not need to add remote identification requirements to part 21. Remote identification requirements are included in part 89. As previously discussed, the Agency revised subpart F of part 89 of this rule to clarify which design and production requirements apply to unmanned aircraft under a design approval or production approval issued under part 21. The revisions also clarify that the requirements in §§ 89.525 through 89.545 for labeling and for the processes related to the submission, acceptance, rescission, reconsideration, and record retention of declarations of compliance only apply to unmanned aircraft produced without a design approval or production approval issued under part 21 and for remote identification broadcast modules. Unmanned aircraft undergoing certification under part 21 must meet the certification processes and requirements of part 21 and the requirements in § 89.510.

Comments: A number of comments asked the FAA to modify the production requirements to allow persons to file declarations of compliance for the production of remote identification add-on equipment that can be installed on UAS manufactured without remote identification capabilities. Commenters indicated that not doing so would place a significant burden on small and new producers.

FAA Response: The FAA agrees with commenters and has modified this rule by incorporating the remote identification broadcast module concept. The production requirements for remote identification broadcast modules are included in § 89.520 of this rule. Remote identification broadcast modules must also comply with the serial number, labeling, and record retention requirements in subpart F. The processes related to the submission, rescission, reconsideration, and record retention in subpart F also apply to the remote identification broadcast module. The costs related to the incorporation of the remote identification broadcast module are justified by the benefits that will result from the rule, and both costs and benefits are discussed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

ii. Information Required for a Declaration of Compliance

Comments: Northeast UAS Airspace recommended that producers list the UAS model number in the declaration of compliance along with the compliant firmware or software version instead of the serial number.

FAA Response: The FAA does not agree with the recommendation to revise the requirements so that producers have to list the unmanned aircraft model number in the declaration of compliance along with the compliant firmware or software version instead of the serial number. Besides the make and model, a producer must list in the declaration of compliance all of the serial numbers that will be assigned to standard remote identification unmanned aircraft or remote identification broadcast modules under the declaration of compliance. Each standard remote identification unmanned aircraft or remote identification broadcast module produced under a declaration of compliance must be assigned a unique serial number to allow it to be distinguished from other standard remote identification unmanned aircraft or remote identification broadcast modules.

Comments: Streamline Designs LLC, senseFly, DJI Technology, Inc. and many individuals indicated that the requirement to list the serial number of every UAS produced under a declaration of compliance is overly restrictive. DJI Technology, Inc. believed the requirement for the producer to list the serial numbers of all UAS manufactured under a declaration of compliance is unnecessary because under the proposed revisions to the registration requirements, the owner of a UAS would have to include the serial number when registering the unmanned aircraft. Some commenters mentioned that for foreign manufactured UAS, the serial numbers should be provided at the time the UAS are declared in a customs form by an import agent rather than at the time of production.

FAA Response: The FAA does not agree with the commenters. The Agency has determined the serial number is necessary to establish the unique identity of the unmanned aircraft. Because the declaration of compliance establishes that the standard remote identification unmanned aircraft or the remote identification broadcast module meets the minimum performance requirements, the consolidated list of all standard remote identification unmanned aircraft or remote identification broadcast modules produced under a declaration of compliance is necessary to facilitate recognition of unmanned aircraft and broadcast modules that meet the requirements. Lastly, the serial numbers must be listed because under the operating requirements in subpart B, an

operator may only operate a standard remote identification unmanned aircraft or remote identification broadcast module outside an FAA-recognized identification area if its serial number is listed under an FAA-accepted declaration of compliance.

Comments: Unifly and other commenters believe a manufacturer should be able to update the list of serial numbers listed under an FAA-accepted declaration of compliance without it being considered a change to the declaration of compliance. Some commenters suggested that UAS serial numbers be ''submitted to the FAA by the customs agent upon entry into the United States'' and noted that listing all relevant serial numbers in the declaration of compliance will increase the cost of production management because the serial number is generated and introduced to the UAS flight controller during the factory production process, and therefore UAS meant to be sold in the United States would have to be identified and distinguished from UAS meant to be sold in other jurisdictions. Commenters suggested that an alternate method to address this issue would be to submit the declaration of compliance after production is complete and the UAS that are going to be sent to the United States for sale have been identified. Commenters mentioned that this alternative could create a delay in delivering UAS because the UAS could not be sent to the United States until after the declaration of compliance has been accepted by the FAA.

FAA Response: The FAA does not agree with these comments. The producer is the party responsible for designing and producing standard remote identification unmanned aircraft and remote identification broadcast modules for operation in the United States and ensuring they meet the remote identification requirements of part 89. Therefore, the FAA has determined that the producer is responsible for all requirements under subpart F, including the filing and amendment of serial numbers.

The FAA does not agree with the request to allow designers and producers of remote identification unmanned aircraft to be able to update the list of serial numbers listed under an FAA-accepted declaration of compliance without following the amendment process for a declaration of compliance. An amendment is submitted to modify any aspect of an FAA-accepted declaration of compliance. Reasons for submitting an amendment include, but are not limited to: Resolving a safety or non-compliance issue (*e.g.,* replacing a means of compliance); updating or correcting information (*e.g.,* the name of the responsible person or contact information); or including new serial numbers.

Comments: One commenter asked how the FAA intends to enforce the requirements, particularly with regards to international manufacturers of pre-fabricated racing UAS, which do not have GPS, barometers, or broadcast telemetry. Commenters mentioned the requirements would potentially impact the sport of UAS racing. Other commenters suggested people may resort to importing UAS from outside the UAS or overriding their UAS systems to circumvent these regulations.

FAA Response: No person may produce a standard remote identification unmanned aircraft or remote identification broadcast module unless the person complies with all of the design and production requirements of subpart F, and obtains an FAA-accepted declaration of compliance authorizing the production of standard remote identification unmanned aircraft or remote identification broadcast modules for use in the airspace of the United States. Failure to comply with any of the requirements constitutes grounds for the FAA to rescind its acceptance of a declaration of compliance. Any standard remote identification unmanned aircraft or remote identification broadcast module listed under the rescinded declaration of compliance would not be able to operate outside of an FAA-recognized identification area.

This rule establishes production and operating requirements for remote identification. The rule does not preclude the sale of unmanned aircraft without remote identification nor does it prohibit someone from buying and importing foreign-made unmanned aircraft. However, the operating rules of part 89 continue to apply to all persons operating unmanned aircraft in the airspace of the United States, including persons operating foreign-made unmanned aircraft or unmanned aircraft without remote identification.

Comments: Many commenters asked the FAA to revise the regulation so that the producers of UAS do not have to file declarations of compliance.

FAA Response: As previously mentioned, the producer is the party responsible for designing and producing unmanned aircraft and broadcast modules for operation in the airspace of the United States and ensuring the unmanned aircraft and broadcast modules meet the remote identification requirements of subpart F. The FAA has determined the declaration of compliance must be submitted by the producers because it is a condition precedent to being able to produce unmanned aircraft and broadcast modules used in the airspace of the United States.

H. Acceptance of a Declaration of Compliance

1. Discussion of the Final Rule

Section 89.535 prescribes the requirements for the acceptance of declarations of compliance. The Administrator will evaluate a declaration of compliance that is submitted to the FAA and may request additional information or documentation, as needed, to supplement the declaration of compliance. If the Administrator determines that the submitter has demonstrated compliance with the requirements of this subpart, the FAA will notify the submitter that the Administrator has accepted the declaration of compliance.

The FAA adopts the requirements for the acceptance of a declaration of compliance as proposed.

2. Public Comments and FAA Response

Comments: Streamline Designs LLC, AiRXOS, and numerous others asked the FAA to provide more information about the design and production requirements, and how the Agency would assess compliance to issue an acceptance of a declaration of compliance. For example, they asked the Agency to define routine maintenance and to list all requirements that must be met to obtain the FAA's approval of a declaration of compliance. They also asked if FAA will require validation for each producer. Various commenters asked the FAA to provide a list of all FAA-accepted declarations of compliance on the FAA website to notify the public of which declarations of compliance are valid.

FAA Response: The design and production requirements for remote identification of unmanned aircraft are covered in subpart F. Any person, whether in the United States or a foreign country, producing such unmanned aircraft or broadcast module must file a declaration of compliance, provide certain information, and agree to abide by the production requirements and certain terms and conditions (*e.g.,* inspection, audit, product support and notification, instructions). The FAA will evaluate a declaration of compliance that is submitted to the FAA to determine that the submitter has demonstrated compliance with the requirements of this subpart, the FAA

will notify the submitter that the Administrator has accepted the declaration of compliance. With the exception of including the FCC identifier of the 47 CFR part 15-compliant radio frequency equipment used and integrated into the standard remote identification unmanned aircraft or the remote identification broadcast module, the FAA adopts § 89.530, the required information for submitting a declaration of compliance for FAA acceptance, as proposed. The FAA will publish the list of FAA-accepted declarations of compliance at *https://www.faa.gov.*

The FAA is establishing an advisory circular on the declaration of compliance process for remote identification of unmanned aircraft. This advisory circular provides guidance on the declaration of compliance process described in part 89, and outlines the required information for submitting a declaration of compliance. This guidance material is also available in the docket for this rulemaking.

Comments: Aerospace Industries Association (AIA) and many other commenters questioned whether the Agency had the necessary resources to process all declarations of compliance submitted for acceptance in a timely manner. The commenters also questioned whether the FAA had the proper oversight and enforcement mechanisms. This commenter added that as the UAS industry continues to grow, there will be an increase in declaration of compliance submissions, which would require a huge investment from the FAA, and other governmental stakeholders, to keep up with the demand. Various commenters asked the Agency to commit to a timeline for review of a declaration of compliance. For example, DJI proposed a 30-day review period; Skydio proposed a 90-day period to provide a decision to the producers.

FAA Response: The FAA is committed to the implementation of this rule and is developing internal processes and identifying and allocating the appropriate resources to facilitate all processes required under subpart F of part 89. The FAA is committed to working with internal and external stakeholders to ensure that the process of submitting and obtaining FAA-acceptance of a declaration of compliance is implemented in an effective and timely manner. That being said, the FAA cannot commit to a specific timeline to review and approve the declarations of compliance because the response time will vary based on the complexity of the application, the technology, and a wide variety of use cases. The Administrator might have a need to request additional information (*e.g.,* test results, etc.) or documentation, as needed, to supplement the declaration of compliance and to ensure completeness and compliance with the requirements of § 89.530 of this rule.

Comments: Streamline Designs LLC, senseFly, DJI Technology, Inc., and many individuals believe that the process would increase the administrative and compliance burden for manufacturers, operators, and the FAA. They also said the process would delay the introduction of new UAS into the market because producers would have to wait for the FAA to accept their declarations of compliance. They believe the acceptance process will likely create a backlog.

FAA Response: The declaration of compliance process does not impose a burden on operators of unmanned aircraft because the requirements of subpart F only apply to producers of unmanned aircraft. As previously explained, the declaration of compliance process is an essential part of the remote identification framework and is a condition precedent for someone to be able to produce standard remote identification unmanned aircraft or remote identification broadcast modules. The FAA has determined the process is in the interest of safety and security of the airspace of the United States because it ensures that producers produce unmanned aircraft and broadcast modules that meet the minimum performance requirements for remote identification in the United States. The costs related to the process are justified by the benefits that will result from the rule, and both costs and benefits are discussed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking.

Comments: Theia and other commenters asked the FAA to provide a streamlined declaration of compliance process with lower costs and less stringent requirements for persons or entities that build, operate, and insure their own UAS. The Association for Unmanned Vehicle Systems International (AUVSI), Skydio, DJI Technology Inc., and other commenters asked the FAA to allow a producer to file a single declaration of compliance that covers multiple makes and models of UAS, rather than have to file an individual declaration of compliance for each make and model.

FAA Response: The FAA determined that the declaration of compliance process is simple, straightforward, and applies to all designers or producers of non-certificated unmanned aircraft. The FAA also determined that the declaration of compliance process provides the basic information necessary to assess compliance with the remote identification requirements. The information and assessment is necessary for all aircraft, and the FAA has determined it should not vary based on the number of aircraft manufactured by a person or the fact that person manufactures the unmanned aircraft for his or her own use.

A declaration of compliance needs to contain a single producer, make, and model and serial number(s) to uniquely identify the standard remote identification unmanned aircraft or remote identification broadcast module.

I. Rescission of FAA Acceptance of a Declaration of Compliance

1. Discussion of the Final Rule

Section 89.540 establishes the grounds and procedures related to the rescission of the FAA's acceptance of a declaration of compliance and a petition for reconsideration of such decision. The Administrator may rescind an accepted declaration of compliance if a standard remote identification unmanned aircraft or remote identification broadcast module listed under the declaration of compliance does not meet the minimum performance requirements of the rule; if the declaration of compliance does not meet a requirement of subpart F; or if the FAA rescinds acceptance of the means of compliance listed in the declaration of compliance.

The Administrator may provide a reasonable period of time for the person who submitted the declaration of compliance to remediate the noncompliance.

Notice of a rescission will be published in the **Federal Register**.

2. Public Comments and FAA Response

i. Rescission of a Declaration of Compliance

Comments: Commenters asked the FAA to publish a list of declarations of compliance that have been rescinded to notify the public of which declarations of compliance are no longer valid.

FAA Response: As explained in the NPRM and adopted in this rule, the FAA will notify the submitter of its rescission and will publish a list of declarations of compliance that are no longer accepted at *https://www.faa.gov.*

ii. Petition To Reconsider the Rescission of FAA Acceptance of a Declaration of Compliance

Comments: PRENAV and multiple individuals asked the FAA to remove the 60-day limit to petition the Agency to reconsider its decision to rescind a previously accepted declaration of compliance because, they argued, issues typically take time to identify and resolve. Therefore, they believed there should be no time limit on a manufacturer's ability to petition for reconsideration of the rescission of the FAA's acceptance of a declaration of compliance.

FAA Response: If the FAA determines it is in the public interest, prior to rescission, it will provide a reasonable period of time for the person holding the declaration of compliance to remediate the issue of non-compliance. If the person does not take appropriate action to resolve the issue promptly, the Agency would proceed with the rescission. The FAA has determined the term is appropriate because it grants sufficient time after the rescission for the producer to request for reconsideration of the decision. Prior to the rescission, the FAA would grant producers reasonable time to take action to resolve the defects or conditions. The FAA would proceed with the rescission after it has determined that no action can be taken, that the producer did not act within a reasonable time, or that the producer is unwilling or unable to resolve the defect or condition.

J. Record Retention

1. Discussion of the Final Rule

The FAA adopts § 89.545 as proposed, except that it is deleting references to the limited remote identification UAS concept and replacing them with the remote identification broadcast module concept. According to the requirements, a person must retain the following information for as long as the standard remote identification unmanned aircraft or remote identification broadcast module listed on that declaration of compliance is produced plus an additional 24 calendar months, and must make it available for inspection by the Administrator: (a) The means of compliance, all documentation, and substantiating data related to the means of compliance used; (b) records of all test results; and (c) any other information necessary to demonstrate compliance with the means of compliance so that the standard remote identification unmanned aircraft or remote identification broadcast module meets the remote identification requirements and the design and production requirements of part 89.

2. Public Comments and FAA Response

Comments: Some commenters mentioned that UAS manufacturers could have difficulties complying with the record retention requirements because certain components of the UAS (*e.g.,* beacons or transmitters), could be procured from other persons (*e.g.,* component manufacturers) and used in the UAS produced by the manufacturer.

FAA Response: The FAA does not agree with these commenters. The unmanned aircraft producer can obtain the data and documentation necessary for compliance as a part of its procurement process.

Comments: The Small UAV Coalition and others expressed concerns about the proposed requirement to retain ''all test results'' and requested clarification of what tests were covered by the requirement.

FAA Response: The record retention requirements in § 89.545 of this rule apply to the production of standard remote identification unmanned aircraft and remote identification broadcast modules. Designers and producers of remote identification unmanned aircraft must retain records of all test results showing that the standard remote identification unmanned aircraft or the remote identification broadcast module meet the minimum performance requirements in subpart D of part 89 and all production and design requirements in subpart F of part 89.

Comments: Multiple commenters expressed concerns that a person who does not comply with the requirements of subpart F could face legal liability.

FAA Response: No person may produce a standard remote identification unmanned aircraft or remote identification broadcast module unless the person complies with all design and production requirements in subpart F and obtains the FAA's acceptance of a declaration of compliance. Failure to comply with any of the requirements—including the record keeping requirements—constitutes a ground for the FAA to rescind its acceptance of a declaration of compliance. The rescission would mean that the person would not be authorized, under that declaration of compliance, to produce standard remote identification unmanned aircraft or remote identification broadcast modules for use in the airspace of the United States. Any standard remote identification unmanned aircraft or unmanned aircraft with a remote identification broadcast module listed in a rescinded declaration of compliance would be restricted to operating in an FAA-recognized identification area.

Comments: Various individuals expressed concerns that the record retention requirements could prove costly for manufacturers. Western Michigan University, Drone Delivery Systems, and others indicated that the administrative costs and record keeping requirements might prevent the home building of recreational UAS.

FAA Response: In accordance with § 89.501(c), the requirements of subpart F of this rule do not apply to home-built unmanned aircraft. This means that persons producing home-built unmanned aircraft are not subject to the record retention requirements unless they voluntarily opt into subpart F by producing home-built standard remote identification unmanned aircraft.

The FAA acknowledges that the record retention requirements in § 89.545 of this rule will impose certain costs to producers of standard remote identification unmanned aircraft and remote identification broadcast modules. The costs are justified by the benefits that will result from the rule, and both costs and benefits are discussed in the Regulatory Evaluation section of this rule and in the Regulatory Impact Analysis available in the docket for this rulemaking. The Agency has determined that the requirement is necessary to verify demonstration of compliance with the minimum performance requirements in subpart D of part 89, and all production and design requirements in subpart F of part 89. In the event of an FAA investigation or analysis, the Administrator needs to obtain data necessary to reassess the acceptability of the declaration of compliance. The additional 24 calendar months would ensure that the data is still readily available while any FAA actions are being taken. If the FAA requests the data, and the submitter did not retain the data in accordance with this requirement, then the Administrator may choose to rescind acceptance of the declaration of compliance.

XV. Registration

The FAA proposed that persons operating unmanned aircraft registered or required to be registered under part 47 or 48 would have to comply with the remote identification requirements of proposed part 89. The FAA proposed to tie the remote identification requirements to the registration of unmanned aircraft because the FAA and law enforcement agencies need the ability to correlate remote identification information with registration data to

obtain more complete information regarding the ownership of unmanned aircraft operating in the airspace of the United States.

Aircraft registration requirements serve the dual purposes of both identifying aircraft and promoting accountability and the safe and efficient use of the airspace of the United States by both manned and unmanned aircraft. With limited exceptions, most unmanned aircraft are required to be registered under part 47 or 48; therefore, nearly all unmanned aircraft operating in the airspace of the United States will have to comply with the remote identification requirements. Foreign civil unmanned aircraft operating in the airspace of the United States will also be required to comply with the remote identification requirements. This will enhance the overall safety and efficiency of the airspace of the United States.

Under the current registration requirements, no person may operate an unmanned aircraft in the airspace of the United States unless the unmanned aircraft has been registered by its owner under part 47 or 48, or unless the aircraft is excepted from registration. There are two exceptions to the registration requirements for unmanned aircraft: (1) Unmanned aircraft of the Armed Forces of the United States; and (2) most unmanned aircraft weighing 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft. Small unmanned aircraft operating under 14 CFR part 91, 107, or 135, or any other operating part are required to register under part 47 or 48 regardless of weight.[28]

U.S. owners of small unmanned aircraft used in civil operations (including commercial operations), limited recreational operations, or public aircraft operations, among others, are eligible to register the unmanned aircraft under part 48 in one of two ways: (1) Under an individual registration number issued to each unmanned aircraft; or (2) under a single registration number issued to an owner of multiple unmanned aircraft used exclusively for limited recreational operations. The FAA's existing registration requirements were implemented through the *Registration and Marking Requirements for Small Unmanned Aircraft* interim final rule (Registration Rule), published on December 15, 2016.

In the NPRM, the FAA proposed changes to those registration requirements to meet the objectives and intent of remote identification of UAS. Specifically, the FAA proposed to require all unmanned aircraft, including those used for limited recreational operations, to obtain a unique registration number. The FAA also proposed requiring owners to submit the unmanned aircraft's serial number and other information as a part of the application process.

The FAA adopts the requirement tying remote identification requirements to registration requirements and the requirements to submit the unmanned aircraft's serial number and other information. After reviewing comments and further consideration, the FAA decided not to adopt the requirement that all unmanned aircraft, including those used for limited recreational operations, obtain a unique registration number. Those changes are described in the sections that follow.

A. Aircraft Registration Requirements

1. Discussion of the Final Rule

The Registration Rule implemented separate registration requirements for ''small unmanned aircraft used exclusively as model aircraft'' and ''small unmanned aircraft used as other than model aircraft.'' The Registration Rule required small unmanned aircraft used as other than model aircraft to be registered with a separate Certificate of Aircraft Registration issued for each individual aircraft. The Registration Rule required small unmanned aircraft used exclusively as model aircraft to be registered with a single Certificate of Aircraft Registration issued to the aircraft owner for all aircraft owned by that person.

In the Remote Identification of Unmanned Aircraft Systems NPRM, the FAA explained that the lack of aircraft-specific data for unmanned aircraft registered under part 48 could inhibit the FAA and law enforcement agencies from correlating the remote identification data with data stored in the Aircraft Registry. Thus, the FAA proposed to revise part 48 to require the individual registration of all small unmanned aircraft and the provision of additional aircraft-specific data. The FAA proposed that owners of small unmanned aircraft would have to complete the registration application by providing aircraft-specific information in addition to basic contact information.

After reviewing comments submitted in response to both the Registration Rule and the Remote Identification NPRM, and after further consideration, the FAA decided not to adopt this proposed change to part 48. The FAA will maintain the current registration options and will no longer revise part 48 to require the individual registration of all small unmanned aircraft. Owners intending to operate all their small unmanned aircraft exclusively in compliance with 49 U.S.C. 44809 may register once for all unmanned aircraft meeting that description.[29]

The FAA proposed to revise the registration framework to require each unmanned aircraft to be registered under part 48. However, after considering comments and incorporating the remote identification broadcast module concept, the FAA determined that the current framework for small unmanned aircraft registration in part 48 is sufficient for remote identification and for statutory compliance with the FAA's authority for aircraft registration. By maintaining the current framework, the intent of the statutory requirement for aircraft registration is achieved without being overly burdensome, particularly considering the mitigation of cost for those individuals specifically flying multiple aircraft exclusively in compliance with section 44809. The FAA therefore will retain the current part 48 registration framework.

Corresponding updates are applied to part 48 to reflect the inclusion of the current statutory requirement for limited recreational operations and to incorporate information relevant to remote identification. Owners registering as exclusively compliant with section 44809 will be required to submit the aircraft manufacturer and model name of small unmanned aircraft associated with the registration number provided by the Registry. Owners of aircraft operated exclusively in compliance with section 44809 would be required to obtain unique certificates of aircraft registration for any aircraft that are ever operated outside of the statutory framework set forth in section 44809, such as under part 107.

The FAA is clarifying that owners registering as exclusively compliant with section 44809 may include more than one serial number—of either a standard remote identification unmanned aircraft or a remote identification broadcast module—on a single Certificate of Aircraft Registration. Serial numbers of both standard remote identification unmanned aircraft and remote

[28] Foreign civil aircraft remain subject to the requirements of 14 CFR part 375 and, to the extent applicable, 14 CFR 48.125.

[29] The registration is based on the intended use of the unmanned aircraft. An operator would violate FAA regulations if he or she uses any of such aircraft for any purpose other than for limited recreational operations under 49 U.S.C. 44809.

identification broadcast modules may be included on a single Certificate of Aircraft Registration for owners registering as exclusively compliant under section 44809.

The FAA reorders §§ 48.100 through 48.115 to maximize regulatory clarity and also revises §§ 48.100 through 48.110 to amend statutory references for 49 U.S.C. 44809 and to reflect the inclusion of remote identification broadcast module serial number information in the registration application.

2. Public Comments and FAA Response

Registration Rule Comments: The FAA received a comment from the University of Illinois at Urbana-Champaign, which urged the FAA to utilize the same system for recreational and commercial UAS, contending that there are no mechanical differences between the two groups and that having separate systems would likely lead to confusion. ALPA supported the efforts to minimize the burden of registering multiple small unmanned aircraft that are operated for hobby or recreational purposes. Some commenters supported registration of remote pilots instead of individual aircraft. Several commenters suggested that though the FAA has the authority to register aircraft, it does not have the authority to register pilots. A few individual commenters raised concerns about a single Certificate of Registration for multiple small unmanned aircraft owned by one operator.

Remote Identification NPRM Comments: A number of organizations supported the FAA's proposal that all aircraft, regardless of use, must be individually registered. The National Association of Tower Erectors stated its belief that public safety demands that recreational users be subject to the same remote identification requirements as commercial users. A number of commenters supported unique registration of each unmanned aircraft in the interest of safety and accountability and because it is more consistent with other aviation registration requirements. The American Association of Airport Executives (AAAE) supported the proposal to require unique registration for each unmanned aircraft because it would enable the FAA to trace each unmanned aircraft back to its owner while also helping the FAA and industry to assess the total number of unmanned aircraft in the airspace of the United States.

In contrast, a significant number of organizations and numerous individual commenters noted that many owners of aircraft used for limited recreational operations have large numbers of fixed wing model aircraft. The Chairperson of the Academy of Model Aeronautics (AMA) Advanced Flight System Committee proposed instead that remote identification modules be movable from aircraft to aircraft and that the modules themselves be registered instead of the aircraft. Many commenters mentioned that requiring pilots to register may be a better option than requiring every aircraft to register, particularly with regard to the hobby class of UAS because students and young persons could freely fly various models. Other commenters stated the FAA presented no evidence that requiring registration of each unmanned aircraft would result in lower risk than applying one registration number to multiple aircraft. The New Hampshire Department of Transportation (NHDOT) suggested instead that UAS owners be allowed to submit to the FAA a list of the unmanned aircraft that they own. NHDOT added that the proposed changes to registration requirements do not address current non-compliance with registration requirements, and that the FAA should focus instead on increasing compliance. Numerous commenters stated they own dozens of aircraft and requiring them to register each one separately would be economically burdensome. Some of the commenters who own aircraft used for limited recreational operations noted they build the aircraft but rarely—if ever—fly them. Other commenters discussed that owners of these aircraft frequently disassemble these aircraft and switch out aircraft parts, creating several new combinations of aircraft, and asked which specific component of the aircraft needs to be registered. Another commenter expressed concern about the costs to FAA of keeping track of ''hundreds of millions'' of registrations and serial numbers.

Several commenters suggested that the requirement to register each unmanned aircraft is discriminatory against modelers because some manned aircraft such as ultralights are not required to be registered. Many commenters objected to the proposal on the grounds that it is impracticable and costly for hobbyists, especially for handmade and kit-built aircraft, and that adopting the proposed rule will ''destroy the RC aircraft hobby.''

Other commenters believed that registering every unmanned aircraft is redundant and unnecessary, asserting that only one aircraft can be in the air at one time. Commenters also mentioned that if an unmanned aircraft is flown exclusively at an FAA-recognized identification area, the aircraft should not be required to be registered because information gathered from the registration process would serve no purpose for remote identification. Several commenters suggested the FAA should make a distinction between those operating commercially and those operating recreationally.

The AMA stated that registration is unnecessary for operators flying within visual line of sight because the operators are not far from the aircraft and can easily be located. The AMA objected to what they estimated would be a total collective burden of $8.1 million in registration costs borne by their members. The AMA added that its calculation of $8.1 million should be included in FAA's economic burden estimates and that the Regulatory Impact Assessment should be updated accordingly. Multiple individual commenters cited this same figure ($8.1 million), and asserted that it is excessively burdensome on AMA members and other hobbyists. The Aircraft Owners and Pilots Association (AOPA) echoed the AMA's $8.1 million estimate, and opposed the proposal to require registration of each small unmanned aircraft. In addition, AOPA expressed its opposition to registration requirements for aircraft that will operate exclusively in FAA-recognized identification areas.

One commenter asked whether the FAA was prepared to certify hundreds of thousands of UAS annually as may be required given the current market for home-built and out-of-the-box UAS. One commenter supported registering both commercial unmanned aircraft operating within the UTM and unmanned aircraft flown BVLOS with the serial number of each UAS, because the owner and UAS may be widely separated from one another at the time of an incident.

Many commenters believed that only certain types of aircraft should be required to be registered. Some of these commenters believed that only rotorcraft, including ''quadcopters'' and other ''drones'' should be required to register. Other commenters emphasized their use of sailplanes and stated their belief that those aircraft should not be required to register. Still other commenters believed that only those aircraft used for commercial purposes should be required to register.

The FAA received several comments regarding the weight requirement for small unmanned aircraft as it relates to registration. Commenters expressed support for removing a weight requirement entirely, rewriting the registration weight thresholds, and

maintaining the current exclusion for aircraft weighing 0.55 pounds or less used for limited recreational operations under section 44809. The Small UAV Coalition supported exempting unmanned aircraft weighing 0.55 pounds or less from registration requirements, unless those UAS are used for commercial purposes or BVLOS.

Digital Aerolus, Inc. suggested that the FAA clarify that registration and identification requirements are not applicable below ground or indoors.

ALPA, along with numerous individuals, suggested that the FAA should require registration at the point-of-sale. In the case of home-made models, ALPA recommended that the FAA require that such aircraft be registered prior to its first use outdoors.

Numerous commenters suggested that the FAA facilitate the deregistration of UAS, in the case of destruction or theft, and clarify the registration requirements when a UAS is sold or transferred. The Utah Public Lands Policy Coordinating Office suggested that the FAA make the UAS aircraft registration database searchable, like the current aircraft registry. ALPA commented that the rule should clarify that registration information will be available only to law enforcement or the FAA.

FAA Response: For the reasons described above, the FAA agrees with the commenters who suggested that it was not necessary to register each individual unmanned aircraft operated for limited recreational purposes and does not adopt the proposed change in this rule.

In addition, as the FAA discussed in the Registration Rule, the FAA has consistently recognized that the term ''small unmanned aircraft'' includes both fixed wing and rotary aircraft, and has the same definition as the colloquial term ''drone.'' The same is true for all unmanned aircraft. All unmanned aircraft that fall within the applicability of this regulation, not just those popularly referred to as ''drones,'' are required to register.

With respect to comments regarding the minimum weight for small unmanned aircraft registration, this rulemaking clarifies the regulatory requirement with respect to operations under part 107. That threshold was not at issue in this rulemaking, and accordingly, comments requesting a change to the weight threshold are out of scope of this rule.

The FAA clarifies, as it did in the Registration Rule, that operations in the airspace of the United States only include operations out-of-doors and above the surface of the Earth. With respect to comments regarding point-of-sale registration, the FAA has statutory authority that is limited to requiring registration prior to operation. The FAA considered point-of-sale registration as an option, but it presented difficulties for the Agency to overcome, including that the individual purchasing the unmanned aircraft may not be the owner of the unmanned aircraft. At this time, the FAA has declined to make the part 48 registry publicly available, though it reserves the ability to do so in the System of Records Notice (SORN) 801 for this database. The Agency is balancing the sensitive nature of the personal information provided to the Agency by owners of small unmanned aircraft with the public availability of the information.

B. Registration Fees for the Registration of Individual Aircraft

1. Discussion of the Final Rule

Noting the FAA is required by statute to charge a fee for registration services, the Registration Rule imposed a $5 fee for registration and a $5 fee for registration renewal. The registration system permits the use of any credit, debit, gift, or prepaid card. If none of these methods of payment is available to the registrant, the Registration Rule noted that the registrant may register using the existing paper-based system under part 47, which allows payment by check or money order. The FAA also assesses a fee of $5 for a Certificate of Registration for each manned aircraft.[30]

To ease the financial burden on operators who previously registered multiple model aircraft under a single registration number, in the Remote Identification NPRM the FAA indicated it would explore ways to minimize the registration fee when multiple aircraft are registered at the same time and solicited comment.

After review of public comments and further consideration, the FAA retains the requirement for small unmanned aircraft owners to pay a $5 registration fee and a $5 renewal fee, though this rule differs from the proposal. As a result of the FAA's decision to maintain the current registration framework, owners of aircraft operated exclusively in compliance with 49 U.S.C. 44809 must only register once for all aircraft meeting that description. Therefore, those owners would pay the $5 fee one time every 3 years. As noted in the Registration Rule, though the Task Force and some commenters recommended no fee for small unmanned aircraft registration for varying reasons, the FAA is required by statute to charge a fee for registration services.[31] Accordingly, the revenue stream generated by the fees collected under this rule supports the development, maintenance, and operation of the Registry. The payment system used by the Registry complies with all Federal laws for online transactions, as discussed in the Registration Rule.

The applicability of the part 48 registration fee to public aircraft operations is consistent with the requirement set forth in part 47. Under 49 U.S.C. 44101, only certain foreign aircraft and aircraft of the national defense forces of the United States are eligible to operate unregistered aircraft in the United States. Small unmanned aircraft used in non-military public aircraft operations are subject to the registration requirements of 49 U.S.C. 44101 and, as such, must complete the registration process provided in part 47 or 48, which includes payment of the fee. The fee for small unmanned aircraft registration under part 48 must be submitted through the web-based registration application process.

2. Public Comments and FAA Response

Registration Rule Comments: The Small UAV Coalition and a number of individual commenters objected to the imposition of a registration fee. The Small UAV Coalition said the FAA should not impose a registration fee of any amount for small unmanned aircraft ''to promote broad participation in the program.'' Some commenters referred to the $5 fee as a ''tax.''

A number of commenters objected to the requirement to pay the registration fee via the web-based system using credit or debit cards due to perceived privacy and security implications. Another questioned why the registration system requires a renewal fee every 3 years, when small manned-aircraft pilots are only charged a one-time fee.

Remote Identification NPRM Comments: A number of commenters objected to the size of the fee, as well as the requirement to pay to register each aircraft individually. DJI and many other commenters suggested that the $5 fee per aircraft is too high, and that the FAA should maintain the current $5-per-three-year fee per registrant, not per aircraft.

The District of Columbia office of the Deputy Mayor for Public Safety and Justice recommended imposing a

[30] 14 CFR 47.17(a).

[31] Section 45305 of title 49 U.S.C. directs the FAA to establish and collect fees for aircraft registration and airman certification activities to recover the cost of providing those services and to adjust these fees when the Administrator determines that the cost of the service has changed.

discounted registration fee for those who comply prior to the proposed regulatory deadline. Motorola Solutions, Inc., and one individual argued that public aircraft operations such as those involving law enforcement and search-and-rescue operations be exempt from the proposed registration fee.

One commenter noted that a registration fee could cause a lower level of overall compliance, added expense, and negative privacy implications, while adding that charging more than $5 per person contradicts the FAA's 2015 Registration Task Force recommendations.

FAA Response: As a result of the FAA's decision to maintain the current registration framework, owners of aircraft operated exclusively in compliance with 49 U.S.C. 44809 must only create one registration for all aircraft meeting that description. Comments received on the use of credit card payment are not within the scope of this rule. See the Regulatory Impact Analysis available in the docket for more information on the costs associated with the registration framework for this rule.

C. Information Included in the Application for Registration

1. Discussion of the Final Rule

In the Registration Rule, the FAA amended 14 CFR part 47 and created part 48 to require individuals intending to use a small unmanned aircraft exclusively as model aircraft to provide only basic contact information (name, address, and email address) for the small unmanned aircraft owner. For individuals intending to use a small unmanned aircraft as other than a model aircraft, in addition to the same basic contact information required for model aircraft, the Registration Rule also required the individual to provide aircraft-specific information (manufacturer and model name, and a serial number for each aircraft being registered).[32]

The FAA adopts these requirements with one change. Applicants registering aircraft as limited recreational operations under 44809 must provide manufacturer and model information but not a unique serial number for each aircraft being registered.

In addition, the FAA proposed to update registration information requirements to require one or more telephone number(s) for the applicant. As the FAA explained in the NPRM, requiring owners of unmanned aircraft to provide their telephone number(s) as part of the registration process would assist FAA and law enforcement to disseminate safety and security-related information to the registrant in near real-time. This additional information will be retained by the FAA and only disclosed as needed to authorized law enforcement or Federal agencies. The FAA adopts this requirement as proposed.

2. Public Comments and FAA Response

Registration Rule Comments: The Small UAV Coalition recommended that the information the FAA requires of registrants ''be no more than is necessary to provide the FAA and law enforcement and national security agencies with the ability to ensure proper and prompt accountability in the event of an accident or incident.'' The Small UAV Coalition also said that the regulatory responsibility to register an unmanned aircraft should rest with the owner of the aircraft, as it is with the current FAA Aircraft Registry, and as set forth in Chapter 441 of 49 U.S.C. and part 47 of 14 CFR. The Small UAV Coalition noted that in most instances the owner and operator will be the same person, but if the unmanned aircraft is leased to another person, then the owner-lessor should remain the registrant.

A few individual commenters said that for registration to be useful, the FAA should require additional information about the individual aircraft; specifically, to include the serial number of ready-to-fly aircraft and the serial number of electronic components used to construct home-built aircraft.

Remote Identification NPRM Comments: The Southern Company, along with Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association, commenting jointly, supported the proposal to require telephone numbers to be included as part of the registration process. However, both commenters suggested that only a company telephone should be required for commercial operations, rather than individual telephone numbers for company operations. Both commenters sought clarification of this point in the final rule.

McInflight Aerospace, LLC, supported the proposed requirement, as it would permit an operator to be contacted immediately if an unmanned aircraft entered restricted airspace.

One commenter worried that registrants' phone numbers might be made available to bad actors if there is a failure in data security.

FAA Response: As discussed in the Registration Rule, the registration database complies with all Federal requirements for data security. The FAA does not specify what sort of telephone number must be included, beyond that it must be a way that the applicant can be reached. The FAA considered all comments received and believes the information required is the minimum information required to ensure accountability from the aircraft owner.

D. Proposed Changes to the Registration Requirements To Require a Serial Number as Part of the Registration Process

1. Discussion of the Final Rule

The FAA proposed to require a unique identifier as part of the message elements used to identify remotely UAS. The proposed revision of part 48 would require the provision of an unmanned aircraft's serial number at the time of registration.

As the FAA explained in the NPRM, the serial number requirement enables the FAA to correlate the data broadcast or transmitted by the UAS with the registration data in the Aircraft Registry to associate an unmanned aircraft with its registered owner. The requirement also allows the FAA to associate an aircraft with its owner while operating in the airspace of the United States and facilitates the identification of non-registered unmanned aircraft operating in the airspace of the United States, which may warrant additional oversight or action by the FAA, national security agencies, or law enforcement agencies.

The FAA proposed to add a new § 47.14 to require the owners of standard remote identification unmanned aircraft and unmanned aircraft using a broadcast module registered under part 47 to list in the Certificate of Aircraft Registration the serial number issued by the manufacturer of the unmanned aircraft or the manufacturer of the broadcast module in accordance with the ANSI/CTA–2063–A serial number standard.

The FAA also proposed to revise § 48.100(a) to require a serial number for every small unmanned aircraft. Consistent with the proposed changes in part 47, § 48.100(a)(5) would have required the owner of any standard remote identification unmanned aircraft or limited remote identification

[32] The FAA notes that, currently, serial numbers may be repeated because there is no mechanism in place for manufacturers to ensure that a given serial number is unique to a specific aircraft. However, the FAA supports any efforts by small UAS manufacturers collectively to standardize aircraft serial numbers, such that each small unmanned aircraft will receive a unique serial number in production.

unmanned aircraft to list in the Certificate of Aircraft Registration the serial number issued by the producer of the unmanned aircraft in accordance with the production requirements of part 89. Per the production requirements in proposed § 89.505, such serial number would have to comply with the ANSI/CTA–2063–A serial number standard.

In the NPRM, the FAA acknowledged that some unmanned aircraft may not have serial numbers that comply with the ANSI/CTA–2063–A serial number standard. Some examples include unmanned aircraft manufactured prior to the compliance date of a final rule (assuming the producer of the unmanned aircraft is unable to modify the aircraft or upgrade the software to assign an ANSI/CTA–2063–A compliant serial number), some amateur-built unmanned aircraft, and foreign-built unmanned aircraft with no serial numbers or with serial numbers that do not comply with ANSI/CTA–2063–A. Since these unmanned aircraft would not comply with the remote identification requirements for standard remote identification UAS or limited remote identification UAS, the FAA proposed to restrict their operation to FAA-recognized identification areas. Accordingly, the FAA did not impose a requirement for the owners of such unmanned aircraft to obtain an ANSI/CTA–2063–A compliant serial number and to list it in the application for a Certificate of Aircraft Registration or the notice of identification. The FAA sought detailed comments on whether and why it should require the owners of UAS without remote identification to obtain an ANSI/CTA–2063–A compliant serial number and to list it in the application for a Certificate of Aircraft Registration or the notice of identification and whether there would be any costs associated with obtaining a compliant serial number. The FAA also sought comments on whether the Agency should issue ANSI/CTA–2063–A compliant serial numbers to such aircraft when registered or re-registered by their owners.

The FAA adopts the requirement that owners of standard remote identification unmanned aircraft and remote identification broadcast modules must provide an ANSI/CTA–2063A compliant serial number on their application for registration. After review of comments and further consideration, the FAA determined not to require owners of unmanned aircraft without remote identification to provide a serial number during registration.

For unmanned aircraft registered individually and operated under part 91, 107, or 135, or any other operating part, the FAA clarifies that the serial number used to register a standard remote identification unmanned aircraft or remote identification broadcast module may only be associated with one registration application. The FAA will not accept duplicate submissions of serial numbers under part 47 or 48. This means that a person may not move the remote identification broadcast module amongst aircraft required to be registered individually without removing the serial number from one Certificate of Aircraft Registration before adding it to another. Alternatively, the owner of such aircraft may obtain a unique remote identification broadcast module (with a unique serial number that complies with the ANSI/CTA–2063–A serial number standard) and include it with the registration of each unmanned aircraft registered individually and operated under part 91, 107, or 135, or any other operating part.

For owners operating exclusively in compliance with 49 U.S.C. 44809, the remote identification broadcast module may be used for all unmanned aircraft for which the owner is registered, but only one of those aircraft may be operated at a time. An owner may submit multiple remote identification broadcast module serial numbers for operation of multiple aircraft simultaneously at a one-to-one aircraft-to-operator ratio, as long as those operations would be compliant with section 44809. If an owner includes a serial number associated with a standard remote identification unmanned aircraft in the registration application for operations exclusively in compliance with section 44809, he or she may also include a serial number for a remote identification broadcast module linked to other unmanned aircraft registered under his or her registration for operations exclusively in compliance with section 44809.

2. Public Comments and FAA Response

Comments: A number of commenters believed that requiring an individual to obtain and assign an ANSI/CTA–2063–A serial number imposed an unreasonable burden. Many stated that it would be impossible for those with amateur-built aircraft to comply with this requirement, as those aircraft do not come with serial numbers.

FAA Response: In response to comments regarding whether compliance with the serial number requirements is too burdensome for owners of model aircraft, the FAA notes that the revised requirements for remote identification offer increased flexibility for individuals who are equipping their unmanned aircraft with remote identification broadcast modules or operating exclusively in FAA-recognized identification areas.

The FAA determined that the serial number requirement is an important element of the remote identification framework. Serial numbers are used to provide a unique identity to unmanned aircraft operating in the airspace of the United States. The requirement is particularly necessary to identify unmanned aircraft operated for recreational purposes when multiple unmanned aircraft are registered under a single registration. The unique serial number of each standard remote identification unmanned aircraft or remote identification broadcast module allows the Agency and law enforcement to distinguish among unmanned aircraft with the same registration number that are flying outside of FAA-recognized identification areas.

Also, the FAA reaffirms that subpart F of this rule does not apply to the production of home-built unmanned aircraft. As explained in section XIV.A of this preamble, the FAA excepts producers of home-built unmanned aircraft from the design and production requirements, therefore home-built unmanned aircraft need not comply with the serial number requirements as prescribed in § 89.505. If a person intends to produce a standard remote identification unmanned aircraft, or a remote identification broadcast module to equip their unmanned aircraft to comply with the remote identification requirements, then that person would have to comply with the design and production requirements under subpart F of part 89, which includes the requirement to issue a serial number that conforms to the ANSI/CTA–2063–A standard.

Comments: Several commenters stated this requirement would make it impossible to salvage parts from damaged aircraft for reuse, thus rendering every accident or crash a total loss. Others, in a similar vein, stated that this requirement would end the tradition of swapping or exchanging modular parts from model to model.

A commenter suggested that because model aircraft are often unique, the validity of their serial numbers would be unknowable to the FAA and a modeler could swap serial number plates undetected. Another commenter asked if the intent of the Agency is that the serial number is associated with the air frame alone, and that the electronics can be swapped between air frames. Another suggested that the FAA require

reporting of each aircraft's radio control receiver, not the aircraft itself.

FAA Response: The FAA does not agree with commenters who believe that the requirement to obtain a serial number to then use for aircraft registration would render parts swapping obsolete. The FAA explains in section XVIII.A of this preamble that discarded unmanned aircraft can be disassembled into the following parts: Carbon (frame, frame parts), plastic, metal parts (screws, standoffs), wire, electronics (flight controller, ESC, motors, camera, VTX, RX), and batteries. Those parts can be reused, especially if they remain in good condition. In addition, home-built unmanned aircraft are excepted from the production requirements of this rule including the requirement for a serial number.

Comments: The U.S. Chamber of Commerce Technology Engagement Center supported the proposed requirement, as it would lead to greater standardization. ALPA, in comments echoed by AAAE, supported the proposed requirement as ''a fundamental necessity and fail-safe method of connecting each owner with the specific UAS being operated, thus allowing the fulfillment of the central purpose of [proposed 14 CFR part 89].''

One commenter suggested the serial-number requirement apply just to a remote identification module, rather than the entire aircraft. Another commenter predicted that ''hobby companies'' would be unable to afford to submit declarations of compliance that contain compliant serial numbers. A commenter suggested the FAA implement a waiver process for the operation of model aircraft outside of FAA-recognized identification areas.

The Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association, commenting jointly, supported the serial-number requirement, adding that aircraft registration requirements are the foundation for both identifying aircraft and promoting accountability. One commenter stated the serial number requirement, along with other changes proposed in the NPRM, is reasonable and would not pose an undue burden. Another agreed and added the inclusion of a serial number could aid first responders in the event of an accident. The District of Columbia office of the Deputy Mayor for Public Safety and Justice also supported the requirement, as it would aid in law enforcement and in determining whether or not a UAS is operating in restricted airspace. However, the District of Columbia office of the Deputy Mayor for Public Safety and Justice added that the serial number should be issued by the FAA, to reduce costs to users.

FAA Response: With respect to comments agreeing with the FAA's proposed approach, the FAA believes that the revised final rule requirement still provides sufficient information to ensure accountability of unmanned aircraft owners operating in the airspace of the United States. As of the publication of this rule, the ANSI/CTA–2063–A standard is available for viewing and download free of charge. While ANSI/CTA–2063–A was specifically developed to provide a serial number format for small UAS serial numbers, the FAA has determined that ANSI/CTA–2063–A is appropriate to issue serial numbers under this rule regardless of the size of the unmanned aircraft or broadcast module because it enables the issuance of unique serial numbers, and promotes worldwide standardization of unmanned aircraft remote identification requirements. The use of ANSI/CTA–2063–A would provide a single accepted format for serial numbers, helping to ensure consistency in the transmission of this message element.

Subpart F of part 89 does not apply to unmanned aircraft without remote identification manufactured prior to the compliance date of the production requirement of this rule. The serial number requirement in § 89.505 applies to standard remote identification unmanned aircraft and remote identification broadcast modules produced after the effective date of this rule. This rule does not require producers to assign a serial number to any unmanned aircraft without remote identification produced prior to the compliance date of the design and production requirements.[33] The requirements also do not make the existing unmanned aircraft fleet obsolete because operators can continue to operate existing unmanned aircraft subject to the operating rules in subpart B of this rule. This means that operators may fly existing unmanned aircraft without remote identification equipment at FAA-recognized identification areas or may equip existing unmanned aircraft with remote identification broadcast modules to meet the operating requirements of this rule.

[33] Producers may choose to assign an ANSI/CTA–2063–A compliant serial number to an unmanned aircraft produced prior to the compliance date of the design and production requirements of this rule.

E. Serial Number Marking

1. Discussion of the Final Rule

Small unmanned aircraft registered under part 48 may not operate unless they display a unique identifier in a way that is readily accessible and visible upon inspection of the aircraft. The unique identifier must be either: (1) The registration number issued to an individual or the registration number issued to the aircraft by the Registry upon completion of the registration process; or (2) the small unmanned aircraft serial number, if authorized by the Administrator and provided with the application for Certificate of Aircraft Registration.

In the NPRM, the FAA emphasized that small unmanned aircraft owners are not required to affix the serial number to the exterior of the aircraft, though nothing would preclude them from doing so. The FAA sought specific comments on whether UAS producers should be required to affix the serial number to the exterior of all standard remote identification unmanned aircraft and limited remote identification unmanned aircraft.

After review of comments and further consideration, the FAA decided not to impose such a requirement. The current registration marking requirements already require the registration number be marked on an external surface of the unmanned aircraft; this information allows the FAA to tie the aircraft to the FAA registration information including the serial number of the unmanned aircraft or broadcast module.

See section XIV.C of this preamble for a discussion of the serial number requirements of this rule.

2. Public Comments and FAA Response

Comments: Many commenters did not think it is necessary to display the serial number on the exterior of the unmanned aircraft, and many noted that the current requirement to display the registration number is sufficient. Some commenters, including Wingcopter, mentioned their support for external marking of unmanned aircraft with a serial number.

FAA Response: The FAA considered the above comments and is not prepared to permit serial number marking in lieu of registration identifier marking at this time. The NPRM proposal remains unchanged. The Administrator reserves the ability to permit serial number marking in the future. Comments regarding the external marking requirement are out of scope of this rulemaking.

F. Compliance Dates

As discussed in section XV.A of this preamble, the FAA proposed that all unmanned aircraft be required to register individually. In light of that change, the FAA proposed that § 48.5 be amended to establish new compliance dates for updating registrations to meet that requirement. Because this rule will not adopt those changes, there is no longer a need to establish new compliance dates.

This rule therefore removes and reserves § 48.5. Existing § 48.5 established the initial compliance time periods for registration which expired in 2016. Because this provision is no longer necessary and the existing § 48.5 includes terminology that is outdated following the 2018 FAA Reauthorization, the FAA is removing and reserving § 48.5 in this rule.

XVI. Foreign Registered Civil Unmanned Aircraft Operated in the United States

A. Discussion of the Final Rule

In the NPRM, the FAA explained the need to correlate the remote identification message elements transmitted or broadcast by foreign civil unmanned aircraft operated in the United States against information that helps FAA and law enforcement identify a person responsible for the operation of the foreign civil unmanned aircraft. Where unmanned aircraft are registered in a foreign jurisdiction, the FAA may not have access to information regarding the unmanned aircraft or its registered owner. The FAA proposed to allow a person to operate foreign-registered civil unmanned aircraft in the United States only if the person submits a notice of identification to the Administrator that includes certain information that allows the FAA to associate the foreign civil unmanned aircraft to a responsible person. The FAA explained that after a person submits a notice of identification, the Agency would issue a confirmation of identification. The Agency also clarified that the notice of identification and the confirmation of identification did not constitute, nor had the effect of, a United States aircraft registration.

After review of comments and further consideration, the FAA revised § 89.130(a) to clarify that the requirement to file a notice of identification applies to persons operating foreign-registered civil unmanned aircraft with remote identification in the airspace of the United States. These are persons operating foreign-registered unmanned aircraft that meet the remote identification requirements of part 89 (*i.e.,* a foreign-registered standard remote identification unmanned aircraft or a foreign-registered unmanned aircraft with a remote identification broadcast module). Foreign-registered unmanned aircraft that do not meet the remote identification requirements of part 89 may only operate in the United States in an FAA-recognized identification area.[34]

In response to comments noting that some countries register operators instead of aircraft, the FAA is revising § 89.130(a)(8) by deleting the phrase ''of the aircraft'' so that the requirement for the filing of the notice of identification allows the operator to provide the registration number of the unmanned aircraft issued by the country of registry or the registration number issued to the operator of the unmanned aircraft by the country of registry, as applicable.

In light of the revisions addressed above, as of the effective date of this rule, no person will be permitted to operate a foreign registered civil unmanned aircraft with remote identification in the airspace of the United States unless, prior to the operation, the person submits a notice of identification that includes:

(1) The name of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative.

(2) The physical address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the physical address for the person's authorized representative. If the operator or authorized representative does not receive mail at the physical address, a mailing address must also be provided.

(3) The telephone number(s) where the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative can be reached while in the United States.

(4) The email address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the email address of the person's authorized representative.

(5) The unmanned aircraft manufacturer and model name.

(6) The serial number of the unmanned aircraft or remote identification broadcast module.

(7) The country of registration of the unmanned aircraft.

(8) The registration number.

Once the notice is submitted, the FAA will issue a confirmation of identification. In accordance with § 89.130(c), a person operating a foreign-registered unmanned aircraft in the airspace of the United States has to maintain the confirmation of identification at the unmanned aircraft control station, and has to produce it when requested by the FAA or a law enforcement officer. The holder of a confirmation of identification must ensure that the information provided remains accurate and must update the information prior to operating a foreign-registered civil unmanned aircraft in the airspace of the United States.

As specified in § 89.130(b)(2), the filing of the notice of identification and the issuance of a confirmation of identification under this rule do not have the effect of United States aircraft registration.

B. Public Comments and FAA Response

Comments: The Small UAV Coalition supported the proposed notice of identification and confirmation of identification requirement for foreign-registered civil UAS with remote identification operating in the airspace of the United States.

The European Union Aviation Safety Agency (EASA) noted that in the European Union, it is the operator who is required to be registered and not the unmanned aircraft (unless the unmanned aircraft is certified). EASA mentioned the requirement to include the registration number of the aircraft in the notice of identification would be burdensome because it would entail an obligation for operators registered in the European Union to register their unmanned aircraft in the United States as well.

FAA Response: The FAA acknowledges EASA's comments with respect to differences in the unmanned aircraft registration regimes. For example, some jurisdictions require the registration of all unmanned aircraft, some jurisdictions require the registration of certificated unmanned aircraft, some jurisdictions require the registration of the operator of uncertificated unmanned aircraft, and some jurisdictions have not implemented a registration system for unmanned aircraft. Section 89.130(a) is meant to assist the Administrator in obtaining certain information that allows the FAA to associate the foreign-

[34] Foreign civil unmanned aircraft that are not registered in their home country are not eligible to file a notice of identification. Because such aircraft may not be able to register under part 47 or 48 and cannot file a notice of identification, they may be unable to meet the operating requirements of §§ 89.110 and 89.115(a). Therefore, unregistered foreign civil unmanned aircraft would be required to fly at an FAA-recognized identification area. These requirements are in addition to any other applicable requirements under 14 CFR part 375.

registered civil unmanned aircraft to the operator, as the responsible person for the operation of the unmanned aircraft. Recognizing the differences in registration regimes, the FAA is revising § 89.130(a)(8) by deleting the phrase ''of the aircraft'' so that the requirement for the filing of the notice of identification allows the operator to provide the registration number of the unmanned aircraft issued by the country of registry or the registration number issued to the operator of the unmanned aircraft by the country of registry, as applicable.

Comments: Wing Aviation recommended removing the requirement to provide a physical address for the foreign operator in the United States as part of the process for the confirmation of identification and indicated that a physical address, a mailing address, and an authorized representative should be sufficient to support oversight and enforcement action. The commenter suggested the rule should not assume operators will be, or need to be, collocated with the aircraft or flight area to ensure safe and compliant operations. According to Wing, this rule will set a global precedent for the implementation of remote identification and such a requirement, if followed by other jurisdictions, would significantly limit the ability of United States companies to scale competitively across international markets.

FAA Response: While operators have to submit their physical address under § 89.130(a)(2), such address is not necessarily required to be in the United States. The FAA and law enforcement have a need to locate the operator, as the responsible party, when physically located in the United States for oversight and enforcement purposes. The FAA also believes that providing the operator's physical address in the United States fosters accountability. Therefore, the FAA will finalize the requirement as proposed.

Comments: A few commenters expressed their concerns about this rule imposing operational limitations on persons operating foreign UAS in the airspace of the United States. Another commenter asked whether foreign-registered UAS had to re-register in the United States to be eligible to operate in the United States. The commenter asked whether the United States would recognize foreign certification and registration of UAS. Various commenters noted that foreign UAS may not have an ANSI/CTA–2063–A compliant serial number and might not comply with the remote identification requirements of this rule. The commenters sought clarification of whether such aircraft could operate in the United States and whether the FAA is prohibiting their sale in the United States.

FAA Response: While this rule does require all persons operating foreign unmanned aircraft in the airspace of the United States to comply with the remote identification operating requirements of part 89, it does not alter the operating rules for UAS operating in the airspace of the United States. This means that the operation of foreign unmanned aircraft in the airspace of the United States—just as with the operation of U.S.-registered unmanned aircraft—will continue to be subject to the UAS operating rules in effect in the United States (*e.g.,* part 91, part 107, 49 U.S.C. 44809, part 375). Foreign-registered unmanned aircraft do not have to re-register in the United States. However, the operators of foreign-registered UAS must ensure they comply with all applicable regulations and obtain the appropriate safety authority issued by the FAA and economic authority issued by the Department of Transportation, as applicable, prior to operating in the airspace of the United States.

FAA regulations do not prohibit the sale of unmanned aircraft without remote identification in the United States. The regulations do regulate the manufacturing of unmanned aircraft produced for operation in the airspace of the United States and the operation of all unmanned aircraft in the airspace of the United States, as further described in this rule.

XVII. ADS–B Out and Transponders for Remote Identification

A. Discussion of the Final Rule

The FAA proposed to prohibit the use of ADS–B Out equipment as a form of remote identification of UAS under part 89. The FAA also proposed changes to parts 91 and 107 to generally prohibit the use of ADS–B Out and transponders on UAS, unless otherwise authorized.

The FAA adopts § 89.125, ADS–B Out prohibition as proposed, with minor edits for clarity. This prohibits the use of ADS–B Out equipment as a form of remote identification under part 89.

The FAA adopts the proposed modifications to § 91.215, which state that ATC transponder and altitude-reporting equipment and use requirements do not apply to persons operating unmanned aircraft, unless the operation is conducted under a flight plan and the person operating the unmanned aircraft maintains two-way communication with ATC, or the use of a transponder is otherwise authorized by the Administrator. In addition, § 91.215(e)(2) prohibits the use of ATC transponders by persons operating unmanned aircraft unless the operation is conducted under a flight plan and the person operating the unmanned aircraft maintains two-way communication with ATC, or the use of a transponder is otherwise authorized by the Administrator.

The FAA adopts the modifications to § 91.225(a)–(f) and (i) with some additional revisions for clarification. Per this section, no person may operate an unmanned aircraft under a flight plan and in two-way communication with ATC unless that aircraft has equipment installed that meets the performance requirements in TSO–C166b or TSO–C154c, and the equipment meets the requirements of § 91.227

In addition, § 91.225(i)(2) prohibits the use of ADS–B Out equipment by persons operating unmanned aircraft unless the operation is conducted under a flight plan and the person operating that unmanned aircraft maintains two-way communication with ATC, or the use of ADS–B Out is otherwise authorized by the Administrator.

Lastly, the FAA adopts §§ 107.52 and 107.53 as proposed, which prohibit the use of ADS–B Out and ATC transponders on small UAS. Under § 107.52, no person may operate a small UAS under part 107 with a transponder on, unless otherwise authorized by the Administrator. Under § 107.53, no person may operate a small UAS under part 107 with ADS–B Out equipment in transmit mode unless otherwise authorized by the Administrator.

B. Public Comments and FAA Response

Comments: Many commenters supported prohibiting ADS–B Out on UAS to prevent high volumes of UAS traffic using ADS–B Out from interfering with ADS–B used by manned aircraft and Air Traffic Control (ATC). Multiple commenters wanted to ensure that the use of ADS–B Out on UAS must first be proven not to interfere with manned aircraft before being widely allowed. They asked the FAA to continue to monitor radio frequency spectrum concerns if some UAS are authorized to use ADS–B Out by exception. They also noted that ADS–B Out does not accommodate sharing all of the proposed message elements. Airlines for America recommended that the FAA clearly state that UAS remote identification is prohibited from interfering with existing electronic surveillance technologies used for manned aircraft, and that the FAA consider permitting the use of ADS–B Out for more sophisticated UAS

operations near commercial airports and manned aircraft.

FAA Response: The FAA agrees with commenters that supported prohibiting ADS–B Out on most UAS due to the likelihood that the high density of UAS operations compared to manned aircraft may generate signal saturation and create a safety hazard for manned aircraft. The FAA notes that unmanned aircraft remote identification equipment broadcasting in the frequency bands allowed under 47 CFR part 15 is prohibited by FCC regulations from interfering with existing, licensed frequencies used by existing surveillance technologies.

Comments: Many commenters also supported limited exceptions permitting ADS–B Out on larger UAS operating at higher altitudes and participating in ATC services. Some commenters challenged the FAA to justify remote identification requirements for unmanned aircraft that fly at higher altitudes. Boeing and other commenters recommended permitting ADS–B Out in lieu of remote identification for UAS operating primarily above 400 feet and not operating under 14 CFR part 107 (*e.g.,* part 91, part 135). AERO Corporation recommended permitting the use of ADS–B Out on UAS operating above 400 feet under 14 CFR part 91, 107, or 135. The General Aviation Manufacturers Association recommended allowing ADS–B Out or transponder use for UAS of sufficient gross weight, based on the operations being performed.

The National Business Aviation Association agreed with prohibiting ADS–B Out and transponders on low altitude UAS such as those operating under 14 CFR part 107, but recommended clarifying the regulations to ensure UAS are not operating at higher altitudes typically used by manned aircraft while transmitting remote identification that is not directly available to manned aircraft. They recommended the FAA consider specifying UAS operations that are permitted or required to use ADS–B Out or a transponder instead of authorizing by exception, such as for UAS operating at higher altitudes, under a flight plan, or in communication with Air Traffic Control. Johns Hopkins University Applied Physics Lab asked the FAA to clarify that use of ''ADS–B Out'' in this proposal specifically refers to current use of 978 and 1090 MHz and does not preclude potential future systems on alternate frequencies that may meet remote identification requirements.

FAA Response: The FAA agrees with commenters that recommended permitting use of ADS–B Out instead of remote identification equipment by unmanned aircraft that are participating in ATC services and are likely to be integrated with manned aircraft, or by limited exception. For this reason, persons operating unmanned aircraft equipped with ADS–B Out, when operating under a flight plan and where the operator is in communication with ATC, do not have to meet the remote identification requirements in part 89. This is consistent with a recommendation by the UAS–ID ARC. Unmanned aircraft not operated in this specific manner must be equipped with remote identification unless authorized by the Administrator as permitted by § 89.105, which is being finalized to permit such exceptions on a case-by-case basis.

In response to the comment regarding future systems or alternate frequencies for ADS–B, the FAA notes that any changes to the current ADS–B Out equipment performance requirements, which include the 978 and 1090 MHz broadcast frequencies, would require a separate rulemaking activity and are outside the scope of this final rule.

Comments: Many commenters said that the rule does not clearly state that UAS authorized by the FAA to use ADS–B Out or transponders are excepted from meeting part 89 remote identification requirements. They suggested that remote identification would be unsuitable for use at traditional manned aircraft altitudes as well as unnecessary and redundant on UAS specifically approved to use ADS–B Out. Garmin similarly stated that requiring remote identification for UAS equipped with ADS–B would be unnecessarily duplicative.

FAA Response: The FAA agrees with commenters, and finalizes a change to § 89.101 which clarifies that the unmanned aircraft remote identification requirements do not apply to persons operating unmanned aircraft when the unmanned aircraft is equipped with ADS–B Out and operated in accordance with § 91.225.

However, as explained in section XIV.E.1 of this preamble, nothing in the rule precludes producers from producing unmanned aircraft that have both the remote identification and ADS–B capabilities identified in the regulation. Therefore, depending on the operation, with a few exceptions, unmanned aircraft must comply with remote identification requirements when the operation does not qualify for use of ADS–B Out under § 91.225. Operations that do qualify for use of ADS–B Out must comply with § 91.225.

Comments: Many commenters wanted the FAA to mandate the use of ADS–B Out on UAS instead of remote identification. Commenters objected to the FAA's rationale that ADS–B Out is not appropriate due to infrastructure issues (ground radars and ADS–B receivers) and noted that remote identification will also require substantial new infrastructure, such as Remote ID USS, UAS equipment, and potentially greater internet coverage. Other commenters suggested that ADS–B Out should be a permitted option to meet the remote identification requirement.

FAA Response: In the NPRM, the FAA explained the range of considerations that influenced its decision not to propose ADS–B Out as a solution for unmanned aircraft remote identification, including coverage at low altitudes and the absence of any information about the control station location. The FAA declines to require the use of ADS–B Out as the means of providing unmanned aircraft remote identification. The FAA reiterates that the ADS–B system serves a unique purpose of enabling surveillance for air traffic control purposes while remote identification enables the FAA, law enforcement, and the public to identify unmanned aircraft and locate their operators. Due to the prospects of signal saturation and the differences in the types of information being shared, ADS–B Out is not a suitable alternative for remote identification equipment.

Comments suggesting that a greater number of receiver sites and software patches to limit ATC display clutter could address the issue with ADS–B Out were found to be impractical, in terms of both the time and the cost necessary to develop them. Further, they would not address the fundamental issues of signal saturation and insufficient message elements that made ADS–B unsuitable for remote identification. In addition, the FAA notes that the remote identification requirements, as being finalized, no longer require the referenced USS network infrastructure for the time being.

Comments: Several commenters were concerned about punishing UAS operators who were early adopters of ADS–B Out, and suggested permitting ADS–B Out or similar broadcast remote identification devices that are interchangeable between multiple UAS. AT&T Services asked the FAA to permit ADS–B Out on UAS responding to emergencies, noting that their UAS providing emergency cellular service in disaster areas currently use ADS–B Out to share UAS location information with manned emergency aircraft. The Academy of Model Aeronautics

proposed permitting a single ADS–B Out unit to identify an FAA-recognized identification area so manned aircraft and other UAS are aware of active model aircraft operations. They also proposed pairing this with ADS–B In and a warning system at some locations so members would be alerted when cooperative manned aircraft are in the area.

FAA Response: The FAA has determined that ADS–B Out as presently implemented for surveillance purposes is inadequate to meet unmanned aircraft remote identification requirements. This rule includes provisions in §§ 89.105 and 91.225 to permit use of ADS–B Out on unmanned aircraft on a case-by-case basis as authorized by the Administrator. The FAA declines to require the use of ADS–B Out to identify an FAA-recognized identification area because it was not intended to be used to identify physical locations where UAS may be operating without remote identification.

Comments: One commenter expressed concern about the volume of UAS users that will be transmitting on Wi-Fi frequencies as well as range and altitude coverage on these frequencies.

A commenter was concerned about future expansion of manned aircraft operations if ADS–B Out radio frequency spectrum could be saturated by UAS, and suggested the ADS–B Out system be upgraded to support UAS operations as well. Another commenter suggested requiring ADS–B Out in remote, uncontrolled airspace where is it unlikely to cause frequency saturation, and requiring network remote identification in controlled and urban airspace where data and cellular coverage is readily available.

FAA Response: Regarding broadcast on Wi-Fi frequencies, the FAA notes that, by FCC rule, 47 CFR part 15 devices, including those used for the remote identification broadcast, may not cause harmful interference and must accept any interference received. In addition, remote identification equipment may not cause harmful interference to the unmanned aircraft command and control datalink or otherwise be in violation of FCC regulations. Unmanned aircraft remote identification equipment broadcasting in the 47 CFR part 15 radio frequency spectrum is also prohibited from interfering with existing, licensed frequencies used by existing surveillance technologies. With regard to the use of ADS–B Out in less dense environments where signal saturation would not be as likely a hazard, the FAA emphasizes that the ADS–B message set does not provide an indication of the control station location which is one of the reasons that ADS–B is not a suitable alternative.

Comments: Some commenters, including the Aviators Code Initiative, suggested that UAS operating under part 91 and future Urban Air Mobility (UAM) operations be required to use ADS–B Out unless future frequency saturation issues develop or remote identification is proven to be an adequate substitute for these operations.

FAA Response: The FAA partially agrees with comments that suggest ADS–B use is appropriate for unmanned aircraft operating under part 91 and UAM operations, and adopts the requirements necessary for unmanned aircraft to operate with ADS–B Out instead of remote identification. The FAA believes that the performance-based requirements in this rule provide multiple technical solutions for unmanned aircraft remote identification and support the evolution of remote identification solutions as UAS technology evolves.

Comments: A number of commenters challenged the FAA to justify its position that ADS–B functionality as a whole would be adversely impacted by a sharp increase in ADS–B users. uAvionix noted that radio frequency spectrum studies to date have focused on UAS operating in high traffic density below 400 feet AGL, but there are no studies at higher altitudes. uAvionix and Sagetech Avionics stated the part 91 prohibition introduces the possibility of non-cooperative part 91 UAS unless otherwise required to equip with remote identification (or ''otherwise authorized by the Administrator'' to use ADS–B Out or transponders). uAvionix, McInflight Aerospace, Sagetech Avionics, and NBAA recommended considering alternatives such as ADS–B Out. They also noted these licensed frequencies would be more reliable than 47 CFR part 15, Remote Identification Frequencies.

FAA Response: In the NPRM, the FAA referenced a study titled ''ADS–B Surveillance System Performance with Small UAS at Low Altitudes'' as the basis for proposing that an ADS–B Out solution for unmanned aircraft remote identification would cause adverse impacts to the existing ADS–B surveillance system. The FAA agrees with the analysis and information contained in this study. Related comments suggesting that lower-power ADS–B Out transmitters could be developed to meet remote identification requirements, accompanied by additional receiver sites and software patches to limit ATC display clutter, were found to be impractical, both in terms of the time and the cost necessary to develop them. The FAA agrees with commenters concerned about the possibility of non-cooperative unmanned aircraft in areas where remote identification is required, and notes that in accordance with § 89.101, part 89 applies to all unmanned aircraft operations except for those unmanned aircraft operations under part 91 of this chapter that are transmitting ADS–B Out pursuant to § 91.225.

Comments: Many commenters noted that both UAS and manned aircraft would benefit from shared situational awareness if UAS were equipped with ADS–B Out, which would provide UAS position information to manned aircraft pilots (and vice versa) via ADS–B In. Another commenter recommended that all manned aircraft and commercial UAS be required to equip with ADS–B Out (and ADS–B In for UAS), while permitting recreational UAS without remote identification to operate in Class G airspace.

Several commenters suggested that UAS remote identification and location information should be available to operators via the ADS–B In system, similar to current traffic and weather information, and noted a potential risk of reduced collision prevention capability because remote identification and ADS–B systems do not share information. Several manned pilots objected to needing to purchase new equipment to gain access to UAS remote identification information after already being required to purchase ADS–B equipment.

A number of commenters discussed potential safety advantages associated with UAS equipping with ADS–B In as a means of remaining well clear of all ADS–B Out equipped aircraft. Several commenters suggested that ADS–B In should be required or optional for UAS, either in general or specifically for larger UAS or for UAS capable of BVLOS such as delivery operations, and the National Agricultural Aviation Association noted that ADS–B In for UAS remains essential.

FAA Response: As the FAA stated in the NPRM, the primary purpose of UAS remote identification is to identify UAS operating in the airspace and provide an indication of the location of the operator. The FAA discussed other potential uses of remote identification information, such as situational awareness or future aircraft separation applications.

The FAA recognizes the benefit of shared situational awareness and encourages unmanned aircraft operators to equip with ADS–B In for increased traffic awareness, if practicable. The

FAA notes that ADS–B In is not required equipment for aircraft operations under part 91, and any changes to require ADS–B In for manned or unmanned aircraft are outside the scope of this rule.

XVIII. Environmental Analysis

A. Public Comments and FAA Response

Comments: The FAA received several comments addressing the potential environmental impacts associated with the proposed rule. Commenters expressed concerns with the potential environmental impacts associated with the disposal for UAS that would potentially become obsolete under the rule requirements.

Some commenters suggested that additional analysis should be done under the National Environmental Policy Act, particularly in the areas of historic or socioeconomic impacts of the proposed rule. Other commenters indicated that the rule would increase the number of UAS operations with resulting impacts on noise and quality of life, wildlife, birds, light and visual impacts, and other similar environmental impacts.

FAA Response: The FAA believes the changes in this final rule compared to the NPRM provide the flexibility necessary for recreational unmanned aircraft designers, producers, and operators to continue to operate safely in the airspace of the United States. Specifically, this rule allows for the retrofit of existing unmanned aircraft and home-built unmanned aircraft and increases the availability of FAA-recognized identification areas where operations may occur without remote identification. For these reasons, FAA does not anticipate that this rule would result in an increase in unmanned aircraft disposal. The FAA notes that a discarded unmanned aircraft can be disassembled into the following parts: Carbon (frame, frame parts), plastic, metal parts (screws, standoffs), wire, electronics (flight controller, ESC, motors, camera, VTX, RX), and batteries. Recycling centers and online vendors can assist with the proper management of used unmanned aircraft parts. In addition, parts in good working condition could potentially be reused.

The FAA considers that though this rulemaking action establishes requirements for the remote identification of unmanned aircraft, it does not, by itself, enable routine expanded operations, affect the frequency of UAS operations in the airspace of the United States, or authorize additional UAS operations. Nor does the rule open up new areas of airspace to UAS. With regard to the specific comments on impacts to birds, the FAA's experience has been that current levels of UAS operations do not produce negative impacts to Endangered Species Act-covered species or other migratory birds. The FAA also emphasizes that this rule does not relieve operators from other legal obligations that may be applicable to them, such as ones imposed by the Endangered Species Act or the Migratory Bird Treaty Act. For these reasons, the FAA has determined that it is appropriate to apply a categorical exclusion to this rule and that it does not require preparation of an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act.

XIX. Effective and Compliance Dates

A. Effective Date of This Rule

1. Discussion of the Final Rule

As with most new regulations, the FAA recognized that some elements of the NPRM would take time to implement fully. The FAA also recognized it would need to implement requirements that address ongoing safety and security needs quickly. Therefore, the FAA proposed that the effective date of remote identification requirements would be the first day of the calendar month following 60 days from the date of publication of a final rule. The FAA also proposed the production compliance date would be 2 years after the proposed effective date, and the operational compliance date would be 3 years after the proposed effective date.

However, given the changes in policy concepts since the publication of the NPRM, the FAA has instead decided to change the effective date of this rule to 60 days from the date of publication—with the exception of subpart C concerning FAA-recognized identification areas, which becomes effective 18 months following the 60 day effective date. The FAA also adopts the production compliance date as 18 months after the rule's effective date, and the operational compliance date as 30 months after the rule's effective date.

The FAA decided not to adopt the proposed requirement for owners of small unmanned aircraft used exclusively for limited recreational operations to register each aircraft individually. The FAA decided to maintain the current registration options, and will no longer revise part 48 to require individual aircraft registration as proposed. Therefore, it is no longer necessary for the final rule to be effective on the first day of a calendar month following 60 days after the publication date.

2. Public Comments and FAA Response

Comments: Several commenters objected to mandating the use of technologies for remote identification of UAS and Remote ID USS, which do not exist and may not be developed by the proposed effective date, and noted that it is very difficult to estimate costs for operators accurately without existing technology. An individual commenter found it hard to envision third party companies completing implementation of an airspace-wide UAS equivalent to the current ATC system by the proposed effective date. Another commenter who also had issues with the proposed date recommended phasing in requirements initially in small geographic areas with limited technical requirements and then gradually expand to national use, adding additional technical requirements upon successful completion of each phase.

FAA Response: The FAA notes that technologies for unmanned aircraft remote identification are not required to be developed or available on the rule effective date, but rather this date establishes a starting point for the 18-month production compliance date. Producers will have to comply with the rule's requirements by the production compliance date, which is 18 months after the effective date. Operators will have to comply with the rule's requirements by the operational compliance date, which is 30 months after the effective date.

Comments expressing concern about the readiness of Remote ID USS and the USS network by the rule effective date are no longer applicable because the FAA is no longer adopting those proposed requirements.

The FAA received many comments regarding the proposed timeline for accepting FAA-recognized identification areas applications, and how that policy would impact the rule. Those public comments and FAA responses are discussed in section XII of this preamble. Section XII.C of this preamble also discusses the FAA rationale for eliminating the 12-month deadline, and the impact of that elimination on the effectivity of subpart C of part 89.

B. Production Requirements Compliance Date

1. Discussion of the Final Rule

The FAA proposed a 24-month compliance date for the production of remote identification unmanned aircraft. The FAA discussed how persons responsible for the production

of unmanned aircraft would not be able to submit declarations of compliance until the FAA accepts at least one means of compliance. Once a means of compliance is accepted by the FAA, persons responsible for the production of unmanned aircraft would need time to design, develop, and test unmanned aircraft using that means of compliance. For that reason, the FAA proposed a 24-month period before compliance with the production requirements would be required. As proposed, the 24-month period would have provided time for the development and deployment of Remote ID USS to support the requirements of the proposed rule. Prior to the 24-month compliance date, the FAA proposed that the rule would allow for the production and operation of both unmanned aircraft with and without remote identification.

As being finalized, this rule requires persons producing standard remote identification unmanned aircraft for operation in the airspace of the United States to comply with the requirements of subpart F by September 16, 2022. The compliance date has been reduced by 6 months and now begins 18 months after the effective date of this rule. The change from the proposed 24-month production compliance date for standard remote identification unmanned aircraft is supported by the removal of the requirement for the unmanned aircraft to connect to the internet and transmit information to a Remote ID USS. The change is also supported by the elimination of any schedule or technical risks associated with the development and deployment of a Remote ID USS network. The FAA also considered the maturity of existing standards for unmanned aircraft remote identification, such as ASTM F3411–19, and notes that the UAS–ID ARC suggested that industry consensus standards could be updated in as little as 6 months. For these reasons, this rule establishes an 18-month compliance date for the production of standard remote identification unmanned aircraft.

As promulgated, this rule also requires persons producing remote identification broadcast modules to comply with the requirements of subpart F by March 16, 2021. This requirement is because of the introduction of the remote identification broadcast module concept that replaces the proposed limited remote identification UAS concept, as further discussed throughout this rule. The requirement will support early adoption of remote identification.

2. Public Comments and FAA Response

Comments: A few commenters supported the 24-month production compliance date, as proposed, including Zipline International and Airlines for America. An individual commenter supported the 2-year production timeline if the remote identification requirements were changed to ''broadcast or network'' but not both. This commenter believed this change would simplify the complexity of UAS and support faster development. Another individual stated that while the 2-year production compliance date is appropriate for ''mass produced commercial UAS,'' it should not apply to any recreational UAS. Similarly, another individual commenter noted it will be hard to incorporate remote identification on fixed wing model aircraft and suggested that additional time should be allowed for model aircraft.

Many commenters stated the 24-month compliance date for production of UAS with remote identification is not long enough for the introduction of a new technology like UAS remote identification. Some of these commenters provided specific recommendations for a different compliance date, while others stated their disagreement without providing a recommendation. An individual commenter suggested that because remote identification is a new technology, introduction should happen slowly, and UAS with remote identification should be available before the rule is adopted. Another commenter noted that ADS–B technology was being developed and tested before the ADS–B rule was adopted, and that 10 years was provided for manned aircraft to equip with ADS–B technology. This commenter raised the concern that UAS remote identification technology has not been developed and tested, yet the FAA still intends to finalize the rule. Some commenters wanted the FAA to provide further guidance to allow adequate time for UAS service operators to replace, update, or upgrade hardware to meet any new requirement.

Droneport Texas LLC recommended a 3-year production compliance date because ''the time required for rule assessment, engineering, testing, manufacturing and marketing to provide remote ID unit consumption at levels that allow for economies of scale to become practical is estimated to begin at a minimum of 36 months.'' A separate individual commenter recommended a production compliance period of 48 months because the commenter believed it is unlikely that the infrastructure necessary to enable remote identification will be ready in 2 years.

In contrast to commenters who recommended a longer production compliance period, commenters that supported a production period shorter than the 2 years proposed include the Small UAV Coalition, American Association of Airport Executives, and Verizon/Skyward. The Small UAV Coalition stated the production compliance date should be shortened by 1 year on the basis that the ASTM F38 UAS Remote Identification standard has been published and the 1-year allocated to development and acceptance of a means of compliance can be eliminated. The American Association of Airport Executives also supported a 1-year production compliance period, stating that ''this is a more reasonable balance between the needs of airports and many other stakeholders, and the time needed to implement the proposed framework.'' Verizon and Skyward noted that ''USS Remote ID compliance is technically feasible today for a very high percentage of existing UAS through software upgrades and for manufacturers with minimal changes'' and suggested a production compliance date of 10 months after the rule's effective date.

An individual commenter suggested that the FAA should allow for a 1-year vendor proposal period where UAS producers would compete to manufacture a system that meets FAA requirements, at which point the FAA should approve the qualified bidder with the lowest cost. The Consumer Technology Association and other commenters said that the FAA should permit producers to continue selling non-compliant UAS if retrofit modules were available to bring the aircraft into compliance with the remote identification requirements.

FAA Response: As stated above, the FAA is no longer requiring standard remote identification unmanned aircraft to connect to the internet and transmit information to a Remote ID USS. As a result, any schedule or technical risks associated with the development and deployment of a Remote ID USS network are no longer applicable. Since FAA is adopting a broadcast-only remote identification requirement, the decision to eliminate the network requirement for remote identification at this time supports a reduction of the production compliance date from 24 months to 18 months.

The FAA acknowledges that though persons responsible for the production of unmanned aircraft will not be able to submit declarations of compliance until the FAA accepts at least one means of compliance, the FAA anticipates an

expedited revision to the ASTM F3411–19 Standard Specification for Remote ID and Tracking to occur after publication of this final rule. Once the standard is revised to meet the minimum performance requirements, it could be submitted for consideration as an FAA-accepted means of compliance. The FAA also notes that any person, including unmanned aircraft manufacturers, may submit a means of compliance for consideration by the FAA. This provides additional opportunities for the UAS industry to develop means of compliance, potentially on an accelerated schedule. Finally, the FAA believes the 18-month production compliance date provides sufficient time for unmanned aircraft manufacturers to design, develop, and test standard remote identification unmanned aircraft using an FAA-accepted means of compliance.

C. Operational Requirements Compliance Date

1. Discussion of the Final Rule

The FAA proposed that the requirements for the operation of unmanned aircraft with remote identification would begin 36 months after the effective date of a final rule. This 36-month period would run concurrently with the proposed 24-month period provided for the development of means of compliance, and for the design and production of unmanned aircraft with remote identification. The FAA explained in the NPRM that once unmanned aircraft with remote identification become widely available, this rule would allow an additional 1-year time period for unmanned aircraft owners and operators to purchase and transition to operations of unmanned aircraft with remote identification.

As promulgated, this rule requires persons operating unmanned aircraft in the airspace of the United States to comply with the operational rules in subpart B by September 16, 2023. The compliance date has been reduced by 6 months and now begins 30 months after the effective date of this rule as compared to the proposed 36-month compliance date in the NPRM. The FAA notes that the 30-month operational compliance date is still 1 year later than the 18-month production compliance date, so the difference between the two dates has been maintained in this final rule compared to the NPRM. The FAA believes that an operational compliance date that is 1 year after the production compliance date provides adequate time for unmanned aircraft operators to acquire standard remote identification unmanned aircraft.

In addition, because there is no production compliance date for remote identification broadcast modules, the FAA anticipates that a means of compliance may be developed and submitted to the FAA for consideration soon after the rule is effective, potentially resulting in broadcast modules being available well in advance of the 30-month operational compliance date. The FAA believes that a 30-month operational compliance date is appropriate for operators of standard remote identification unmanned aircraft, as well as unmanned aircraft equipped with remote identification broadcast modules.

2. Public Comments and FAA Response

Comments: The FAA received some comments that supported the operational compliance date as proposed, including comments from the Golden Gate Bridge, Highway and Transportation District, and various individuals that noted a 3-year phase-in period is reasonable for developing initial solutions. However, many commenters did not agree with the FAA's proposed 3-year operational compliance date, of which some suggested alternative time periods that are longer or shorter than the proposed operational compliance date.

Many commenters raised the concern that there is only 1 year between the production and operational compliance dates, resulting in some UAS being ineligible to operate after only 1 year of ownership. Instead, an individual commenter suggested that a 3-year operational compliance date, after the manufacturing compliance date, would be preferable and would preclude having to throw away or discontinue using UAS purchased only a year prior to the operational compliance date. Many individual commenters, however, stated the FAA's belief that a typical UAS would reach the end of its useful life in 3 years is incorrect, and therefore opposed the proposed operational compliance date of 3 years after the effective date of the rule. An individual stated that while a ''commercial quadcopter (drone)'' may have a lifespan of 3 years, certain R/C model aircraft can have a lifespan of 30–40 years or more. Another commenter stated that with proper care and maintenance, the lifespan of a UAS can be extended past 3 years. An individual suggested the government pay for the loss of use of UAS equipment that lasts for greater than 3 years. Another individual recommended that additional time be provided to allow the price of UAS with remote identification to come down. This commenter also noted that its existing fleet of UAS without remote identification will have no resale value

In contrast to the commenters that requested additional time to comply with the operational compliance period, others suggested an operational compliance date shorter than the proposed 3 years. Organizations including: Amazon, AUVSI, the National Sheriff's Association, Zipline International, sports organizations (NFL, MLB, NASCAR, and NCAA), U.S. Rail Operating Subsidiaries of the Canadian National Railway Company, FlyGuys, Inc., Tampa International Airport/Hillsborough County Aviation Authority, and UPS, all supported the expeditious implementation of the rule. These commenters generally opposed an operational compliance date longer than 3 years. Verizon and Skyward stated the operational compliance date could be as soon as 12 months after the rule's effective date. The U.S. Chamber of Commerce supported 18 months for the operational compliance date, and suggested that the FAA follow the recommendations of the Drone Advisory Committee (DAC) related to early compliance with remote identification requirements. The Small UAV Coalition supported an operational compliance period of 18 to 24 months.

DRONERESPONDERS Public Safety Alliance, Airlines for America, International Association of Fire Fighters, Medina County EMA, American Association of Airport Executives, and Motorola Solutions, Inc. supported a 2-year operational compliance date while generally agreeing that shortening the operational compliance date serves to expedite the safety and security benefits of the rule. An individual believed that UAS manufacturers would have sufficient time to incorporate remote identification into their UAS, and that the operational compliance date should be reduced to a time period of 1 year to 18 months. Another individual commenter recommended shortening the operational compliance date because of existing UAS operations that are in violation of the regulations.

Kittyhawk stated the 3-year compliance date is too long because the FAA has made it clear that ''routine (*i.e.,* waiverless) advanced operations like those beyond visual line of sight, operations over people, or operations at night, require Remote ID.'' Kittyhawk supports a tiered approach for establishing compliance dates, which would allow some operations to be conducted with remote identification

immediately upon the rule effective date. The National Association of Tower Erectors (NATE) suggested reducing the 3-year operational compliance period both to enhance safety and enable earlier expanded operations such as BVLOS. The National Agricultural Aviation Association stated they do not believe it should take 3 years to implement the rule, but did not provide a specific alternative timeline. AirMap, Aerospace Industries Association, and the Commercial Drone Alliance supported an immediate implementation of the rule compared to the proposed 3-year compliance date. WhiteFox Defense Technologies supported a shorter operational compliance period if the rule was modified to allow retrofit modules for existing UAS.

Several individual commenters recommended a 5-year timeline for the operational compliance date because they believed it would better align with the typical lifespan of UAS, and allow time for the technology to be widely available. The Academy of Model Aeronautics supported a ''more reasonable timeline,'' including incentives similar to those that were provided for the general aviation community to equip with ADS–B. Several individual commenters referenced the 10-year operational compliance period in the ADS–B rule as justification for extending the proposed 3-year operational compliance date; most of these commenters suggested an operational compliance date between 5 and 10 years from the rule's publication date. Other commenters recommended additional time, ranging from 10–15 years, for the operational compliance date because remote identification technology does not exist. Several individual commenters recommended a 5–7 year operational compliance date, and for the FAA to not rush the implementation of remote identification.

To simplify compliance, multiple individuals supported the idea of an FAA ''grandfathering'' provision that would not require existing UAS to comply with the rules for remote identification for 10 years. A commenter suggested grandfathering all existing recreational UAS, with remote identification required for recreational UAS only if they are new. This commenter recommended a 5-year operational compliance date for part 107 operators. Another commenter noted that many recreational UAS operators are still not registered, and asked why the FAA thinks these unregistered operators will comply with a 3-year operational compliance period. San Diego County Water requested that additional 3-year waivers be available for operators that are not able to comply with the 3-year remote identification operational compliance date.

Rather than requiring a fixed time period, an individual suggested that the operational compliance date be based on the availability of remote identification technology. Another individual suggested a phased approach for operational compliance dates, with UAS conducting higher risk operations having an earlier date than those conducing low risk operations. Utah Public Lands policy recommended that ''the FAA should initiate a pilot program, working with UAS developers, USS suppliers, and UAS operators, to better understand how these various components can be successfully brought together and proven and, only then, determine an implementation or compliance period accompanied with known costs and technology solutions.'' Another individual asked how the 3-year operational compliance date would apply to existing UAS.

FAA Response: The FAA does not agree with grandfathering or broadly excepting existing unmanned aircraft from meeting remote identification requirements. However, after considering the comments received, the FAA has updated this rule to permit less complex, cost-effective solutions to prevent obsolescence of existing unmanned aircraft, and support continued unmanned aircraft operations in compliance with remote identification requirements. Removing the requirements to transmit remote identification information to a Remote ID USS will make it more straightforward for manufacturers to upgrade or retrofit existing unmanned aircraft to meet the broadcast remote identification requirements, or to upgrade unmanned aircraft which are produced before the production compliance date. Most unmanned aircraft produced without remote identification will be able to equip with a remote identification broadcast module, or will be able to operate in an FAA-recognized identification area. The FAA anticipates this rule, which permits additional organizations to apply for an FAA-recognized identification area, with no deadline for submitting an application, will result in an increased number of FAA-recognized identification areas for operators without remote identification.

Though the finalized remote identification requirements support reducing the production compliance date by 6 months, the FAA does not agree with commenters that suggested further shortening the operational compliance date. A 1-year time period, as originally proposed in the NPRM, is necessary for unmanned aircraft owners and operators to purchase new unmanned aircraft, upgrade or retrofit existing unmanned aircraft, and transition to operations of those unmanned aircraft which meet remote identification requirements. Therefore, the FAA is adopting a 30-month operational compliance period which runs concurrently with the amended 18-month production compliance date. Requirements that prohibit operation of UAS without remote identification would begin 30 months after the effective date of the rule. This 30-month period provides sufficient time for the development of means of compliance for the design and production of unmanned aircraft with remote identification, and time for operators to procure standard remote identification unmanned aircraft or remote identification broadcast modules to comply with the operating requirements of this rule.

Comments: Commenters, including Unifly and the District of Columbia government, believed that UAS operating under a waiver should still be required to have remote identification. These operations include nighttime operations, operations over people, or BVLOS operations. In contrast, an individual member of the FPVFC suggested that if the UAS has remote identification, operations over people and at night should be allowed without a waiver. This individual added that if the UAS has LAANC authorization, then no remote identification equipment should be required for operating over people or at night. Other commenters also referenced similar recommendations made by the DAC, and stated that UAS that meet the remote identification requirements should not be required to seek a waiver for small UAS operations at night or over people.

FAA Response: The unmanned aircraft remote identification requirements in this rule are separate from, and in addition to, the UAS operating rules as well as any waivers or exemptions issued from those operating rules. The FAA agrees that all UAS operations, including those subject to waiver or exemption, must meet the unmanned aircraft remote identification requirements in part 89. The FAA does not agree with commenters who suggest equipping an unmanned aircraft with remote identification is a basis for operating without a waiver when a waiver would otherwise be required. Having remote identification equipment

does not address the operational safety issues associated with operating an unmanned aircraft at night or over people, and does not support relief from any existing operating requirements, including requirements for airspace authorizations.

D. Incentives for Early Compliance

1. Discussion of the Final Rule

The FAA explained that early compliance may benefit both industry and UAS operators, and encourages regulated parties to implement remote identification of unmanned aircraft sooner than the established compliance dates. The FAA requested comments on the NPRM providing specific proposals and ideas on how to build an early compliance framework into the regulation. The Agency stated it is interested in comments related to how an early compliance framework would work and how it would fit into the overarching remote identification framework proposed by the FAA.

The FAA received many comments addressing incentives for early compliance. The FAA has reviewed the comments supporting an incentive for early compliance with remote identification, and views these incentives as part of the implementation methodology and not part of this rule.

2. Public Comments and FAA Response

Comments: A commenter suggested allowing operations in certain restricted airspace as an incentive for early compliance with the remote identification requirements. AUVSI, Small UAV Coalition, Consumer Technology Association, Aerospace Industries Association, and WhiteFox Defense Technologies expressed their support for incentivizing early compliance, including support of the DAC recommendations. AUVSI identified many possible incentives for early compliance with the remote identification requirements, such as permitting expanded operations through waivers and exemptions for operators who equip early, providing ''preferential treatment'' for UAS equipped with remote identification, increased access to airspace such as temporary flight restrictions, restricted areas, and controlled airspace, and various financial incentives. AiRXOS stated that ''early compliance with remote identification should be incentivized through applied use in advanced operational approvals.'' Fortem Technologies supported expedited waiver approvals for operators that use UAS equipped with remote identification.

FAA Response: The FAA commits to conducting an analysis of any waivers or exemptions that use remote identification industry consensus standards and communicating any additional information needed for the FAA to give credit for, as appropriate, using remote identification as part of a waiver application. This is how operators may take advantage of the availability of industry consensus standards prior to a final rule concerning remote identification. While voluntary adoption of remote identification will not equate to automatic waiver approval, the FAA's evaluation of part 107 waiver applications may consider early adoption of remote identification prior to any required compliance date set forth by this rule.

To be considered as a benefit for a particular operation, applicants will need to demonstrate in their waiver application that the unmanned aircraft are equipped with remote identification capability and will remain compliant with this rule during operations. The FAA will evaluate applicants' ability to demonstrate early compliance with remote identification in their DroneZone applications. The FAA anticipates such updates will result in handling applications for waiver in an efficient manner.

The FAA supports the proposition that remote identification will provide security benefits, which underlies the DAC's recommendations regarding increasing access by unmanned aircraft with remote identification to airspace restricted for security reasons. The Agency is committed to working with interagency security partners to realize those benefits where appropriate, including using remote identification equipage as a positive consideration in authorizing access to airspace to which security instructions have been applied. Remote identification equipage will be, however, only one of many complex factors driving decisions made by the FAA to enable access by UAS to this sort of secured airspace. The FAA will continue to coordinate with security agencies, as well as industry, to determine how to best leverage the security benefits offered by remote identification. The FAA commits to considering the added safety and security benefits provided by remote identification equipage in development of future rules related to UAS and airspace access.

Comments: Many commenters provided input and ideas that would allow for an early compliance framework into the regulation. Both AUVSI and SenseFly suggested the FAA follow the recommendations provided by the DAC [35] as an early compliance framework for UAS remote identification requirements, while Wing Aviation LLC suggested the FAA accepts the ASTM F3411–19 Standard Specification for Remote ID and Tracking as an idea for early compliance. An individual member of the FPVFC suggested that the FAA should adopt the incentives proposed in the DAC's October 2019 submission to the FAA. Verizon and Skyward and also expressed support for incentivizing early compliance.

Unifly recommended allowing operators to use an add-on retrofit for remote identification as a solution for achieving early compliance. An individual commenter stated the FAA should utilize open source technology to build an early compliance framework, and provided web-links to those sources. This commenter stated that working with these resources may require new partnerships or contracts, but they can be tremendously beneficial to the FAA. Another individual commenter suggested the FAA provide monetary subsidies for operators to adopt remote identification technology similar to the rebates that were offered for ADS–B. The Albuquerque Radio Control Club recommended subsidizing purchases of equipment over $50 to help ensure widespread compliance, and the Aviators Code Initiative suggested offering subsidies for installation of remote identification equipment on UAS manufactured without broadcast capability. Some commenters suggested the government subsidize UAS operators to speed the replacement of current UAS with remote identification UAS, similar to the incentives for manned aircraft to equip with ADS–B Out.

Droneport Texas LLC raised the concern that ''since a regulation cannot be followed until it is implemented, attempts at creating an early compliance framework will only confuse those attempting to enforce the law and create an easily-challenged situation for those required to adjudicate on this slippery slope.''

FAA Response: The Agency will review all comments and incentive methods for potential inclusion in implementation after this rule is published.

Incentives for government procurement and contracting would require compliance with certain specific

[35] October 17, 2019 Drone Advisory Committee (DAC) Meeting Materials, *https://www.faa.gov/uas/programs_partnerships/drone_advisory_committee/media/eBook_10172019_DAC_Meeting.pdf.*

regulations and standards. To be fair and equitable, the FAA's procurement processes do not enable preferential treatment for voluntary early adoption of equipment or compliance to regulations.

Regarding early equipage, as stated in the FAA's remote identification NPRM, the FAA will maintain an online database of designers and producers of remote identification unmanned aircraft that have declared compliance with an industry consensus standard recognized by the FAA as a means of compliance with the remote identification rule. The FAA will begin this database with the first declaration of compliance. This online list will be linked to all applicable FAA apps, including B4UFLY, and on all relevant web pages. The FAA will endeavor to ensure information is disseminated as far as possible.

As stated in the FAA's remote identification NPRM, the FAA is willing to consider methods to offset the registration costs associated with final remote identification rule compliance. 84 FR 72438, 72463 (Dec. 31, 2019) at Sec. IX.C. The FAA will consider opportunities for cost reduction and off-setting, while remaining mindful of statutory requirements that apply to the collection of registration fees.

Finally, the FAA strongly encourages the industry to continue collaborating in the area of early adoption incentives. It is important to recognize that the broad safety and security benefits of remote identification equipage for UAS are realized only with widespread compliance with the rule and equipage standards. The result is a cooperative user community that becomes its own mitigation against risk presented by other unmanned air traffic, especially in circumstances with the unmanned aircraft flying beyond visual line-of-sight. The FAA recognizes that while this may not be a direct incentive for individual operators and recreational flyers, it should broadly incentivize the unmanned aircraft producer or designer community to produce aircraft in compliance with published industry consensus standards (*e.g.,* the serial number standard) as early and quickly as possible.

XX. Comments on the Regulatory Impact Analysis—Benefits and Costs

A. General Comments About Cost Impacts of the Rule

Comments: Many commenters stated the remote identification requirements as proposed would be too costly for many recreational operators and businesses, many of which are small, to comply. Commenters suggested that retail hobby businesses already operate on low margins. Any impact on these businesses would also have negative downstream effects on the community. The affected groups include retail hobby shops, designers and producers of UAS and suppliers of model aircraft, parts and equipment, and aerial photographers. The commenters suggested that many recreational operators and owners, especially those involved in flying and building remote controlled aircraft, would cease pursuing the hobby or business, because of the cost to either upgrade or replace existing aircraft to meet the proposed standard and the cost to subscribe to internet service. Many commenters expressed concern for the potential impact of the rule on businesses and consumers who cannot afford to retrofit or replace UAS at a low cost. Commenters suggested that there does not exist an off-the-shelf solution, such as software upgrades, to retrofit most recreational aircraft. One commenter provided an estimate of $12 billion in sales for the model aircraft industry for 2021. Another commenter reported $1 billion to $20 billion per year based on IBIS World's 2020 Hobby and Toy Store industry. Commenters state that by requiring standard remote identification UAS to both broadcast and provide information over the internet, the FAA is violating the requirement of E.O. 13563 to maximize net benefits and design regulations to impose the least burden. Allowing the option of remote broadcast alone would allow UAS owners to save the Remote ID USS subscription fee. The broadcast-only option would also not reduce demand from operators who do not want to send flight data to a Remote ID USS. Removal of the requirement for both kinds of transmission would also eliminate the need for ''Limited'' remote identification UAS and streamline the regulation. DJI Technology estimated a one-time cost of $2 or less per unit for a large quantity when manufacturing new UAS or a cost for existing UAS of $15 or less per unit for a large quantity without requiring screens, sim cards, internet connections, data plans, or centralized data aggregation like a network solution would require. A commenter states that the FAA neglects the increased cost of customer support because UASs will not be able to fly unless Remote ID USS is functional. The reason a UAS is not working will not always be clear, and designers and producers of remote identification UAS or sellers may need to provide support to determine the reason the UAS is not functioning. Using data on customer complaint rates for the telecommunications sector tracked by the Australian Communications and Media Authority (ACMA) on complaint rates and an estimate of the cost of a customer service call by the Harvard Business Review of $10 per call, the commenter estimates a 10-year cost of $80 million.

FAA Response: The FAA acknowledges that recreational and business operators of unmanned aircraft will incur out-of-pocket costs as a result of this rule. However, the FAA has attempted to alleviate complexity and costs of compliance for all operators of unmanned aircraft by removing the network requirement from this rule and allowing remote identification using a stand-alone broadcast module for the time being. The concept allows unmanned aircraft built without remote identification (*e.g.,* existing unmanned aircraft fleet, home-built unmanned aircraft) to be operated outside of FAA-recognized identification areas because the broadcast modules enable the unmanned aircraft to broadcast the remote identification message elements required by this rule.

The FAA decided to incorporate this concept into this rule after reviewing public comments and considering the significant concerns raised with respect to the remote identification UAS framework. The FAA determined a remote identification broadcast module facilitates compliance with this rule and meets the safety and security needs of the FAA, national security agencies, and law enforcement. The concept is broadcast-based and does not require a person to connect to the internet to identify remotely, as the limited remote identification UAS proposal did. This shift allows unmanned aircraft with remote identification broadcast modules to operate in areas where the internet is unavailable. In addition, by making this a broadcast solution, the FAA has determined that the 400-foot range limitation included in the proposed requirements for limited remote identification UAS is no longer warranted and has removed the design constraint.

Comments: Multiple commenters expressed concern with displacing hobbyists, recreational operators and amateur builders in favor of creating opportunities for new commercial operations. In particular, one commenter believed that the FAA's proposed approach highly favors current monolithic vendors and delivery fleet operators of UAS (DJI, Amazon, Google, UPS, etc.), and would harm or eliminate small UAS integrator-owners

by forcing UAS owners to purchase them only from a limited number of commercial corporations. Thus, the rule would severely limit or eliminate independent UAS electronic vendors.

FAA Response: The FAA recognizes that this rule places a burden on all operators of unmanned aircraft, and has eliminated the internet connectivity requirement to reduce the negative impact to independent UAS electronic vendors and the hobby industry. The FAA does not agree that it favors creating opportunities for new commercial operations at the expense of hobbyists, recreational operators and home-builders. While recreational users of unmanned aircraft have been operating in the airspace of the United States for decades, commercial operations of unmanned aircraft are in their infancy. Commercial operations of unmanned aircraft are creating economic opportunities and facilitating safer operating environments by substituting unmanned aircraft for manned operations. The evolution of this nascent industry has spawned educational programs from elementary school through college, which in turn could produce a new generation of model aircraft enthusiasts and recreational operators.

Comments: Many commenters suggested that designers and producers of remote identification UAS are likely to pass on the costs of additional parts, equipment, and software necessary to meet the proposed standard to consumers in the form of higher prices for aircraft. One commenter stated the cost of implementing the proposed nationwide infrastructure, broadcasting and monitoring system of UAS will be paid by consumers including UAS manufacturers' new costs that would be passed on to UAS buyers. Commenters suggested that the additional cost of UAS production and operation would also result in fewer designers and producers of remote identification UAS and near elimination of the hobby market. One commenter expressed concern that the remote identification requirements would limit competition and innovation in UAS technologies leading to adverse impacts on employment and the United States economy.

FAA Response: The FAA agrees that designers and producers of remote identification unmanned aircraft will likely pass the costs of producing standard remote identification unmanned aircraft to consumers, though the elimination of the network requirement at this time should reduce consumer costs. As well, the infrastructure required to receive broadcast messages would be borne by the entity requiring access to the information, and not the consumer. In addition, in its preliminary regulatory impact analysis, FAA acknowledged uncertainties regarding direct or indirect effects of the rule on the small toy unmanned aircraft market. Producers of toy unmanned aircraft where the unmanned aircraft currently weigh more than 0.55 pounds would need to make a business decision weighing the costs and practicality of producing small toy unmanned aircraft with remote identification using an FAA-accepted means of compliance. As a result, the market for small toy unmanned aircraft where the unmanned aircraft weighs more than 0.55 pounds may be negatively affected by the rule, while the market for unmanned aircraft weighing 0.55 pounds or less may be positively affected. Nonetheless, the UAS industry is evolving rapidly as demonstrated by the success of beyond visual line of sight operations and small-cargo delivery operations occurring on a limited basis in the airspace of the United States, and therefore, the FAA does not believe this rule would limit innovation in the technologies supporting integration of UAS into the airspace of the United States.

Comments: Many commenters expressed concern with the option of flying within designated fields (FAA-recognized identification areas) because of their inconvenient locations, scarcity, and the membership costs required for usage. Commenters indicated the impracticality of using designated flying fields compared with using one's own residential property. Other comments stated that limiting first-person-view (FPV) UAS to a few FAA-recognized identification areas will harm the FPV UAS market because hobbyists will not have access to a wide variety of interesting places. Similarly, amateur photographers with substantial investments in equipment (*e.g.,* $5,000) will only be able to fly at an FAA-recognized identification area near home. Commenters expressed concern that the rule will devalue current equipment and end the recreational UAS photography hobby.

FAA Response: The FAA concedes that the proposed rule imposed opportunity costs and out-of-pocket costs for individuals that would only be able to comply with the proposed rule by travelling to an FAA-recognized identification area. This rule allows operators to equip their unmanned aircraft with remote identification broadcast modules, which would enable affected individuals to operate at locations other than FAA-recognized identification areas so long as a remote identification broadcast module is securely installed into their aircraft. The FAA acknowledges that these individuals will incur a cost for purchase of the broadcast module, and anticipates that owners of UAS without remote identification would prefer to incur this cost in exchange for the freedom to fly at locations other than FAA-recognized identification areas.

Comments: Commenters stated the FAA underestimated the time and resource cost burden for the CBOs to complete FAA-recognized identification area requests. A commenter asserted that the burden threatens the viability of CBOs.

FAA Response: The FAA agrees that it could have underestimated the time and resource cost burden for CBOs to complete FAA-recognized identification area requests. However, to revise the estimates, the FAA requires a cost for the time and resource burden, with documentation supporting the estimate. The FAA expects that submitting an FAA-recognized identification area requests could become automated at some point, alleviating some of the burden on CBOs to complete the FAA-recognized identification area request.

Comments: Commenters suggested that the proposed rule would implicitly force operators to purchase additional equipment, such as transmitters or transponders, which could cost about $100 to $500.

FAA Response: The FAA agrees that operators with a desire to operate beyond the boundaries of an FAA-recognized identification area will be required to purchase broadcast equipment of some kind (*i.e.,* standard remote identification unmanned aircraft or a remote identification broadcast module). The FAA expects that the incremental cost to a consumer will range between $20 and $50 per unit. The FAA determined remote identification facilitates compliance with this rule and meets the safety and security needs of the FAA, national security agencies, and law enforcement.

Commenters: Multiple commenters suggested that many recreational operators may ultimately decide not to comply with the rule because of the perception that the cost of compliance is overly burdensome. Commenters suggested that a high level of non-compliance would have an overall negative effect on safety.

FAA Response: The FAA has greatly reduced the burden for recreational operators to comply with this rule. The two most impactful changes for recreational operators are: (1) The

network connectivity requirement has been removed at this time, and (2) the proposed requirement to register each aircraft individually is not adopted. The FAA does not agree that there will be a high-level of non-compliance by recreational operators. The FAA is continually engaging the recreational community regarding safely operating in the airspace of the United States, and asserts that this community is, by and large, aware that FAA regulations lead to a safer, more secure operating environment for all (users and non-users alike).[36]

Comments: Many commenters expressed concern with the potential obsolescence of existing aircraft equipment and their financial impact. DJI noted that no manufacturer would be willing to certify that retrofits comply with remote identification requirements because previously sold models are no longer in their control. The manufacturer certification requirement therefore reduces the retrofit rate to zero. Commenters provided examples of equipment that may become obsolete, including UAS camera platforms with retail value of $3,000 and UASs with values of $10,000 or more. Another commenter noted that many hobbyists own dozens of UAS, some of which are nearly 50 years old, some of which are unique and difficult or impossible to replace, and some of which cost over $15,000. Commenters asserted a wide variation in retail values of existing UAS and accessories, including transmitters and ground control stations. Investments in equipment and licenses range from hundreds to hundreds of thousands or even millions of dollars. One commenter provided an estimate of $880 as the average UAS priced based on a survey of members of the First Person View Freedom Coalition. In addition to obsolescence of equipment, another commenter stated there would be obsolescence in terms of training based on existing equipment for some UAS operators.

FAA Response: First, the FAA appreciates the estimate of $880 as the average UAS price based on a survey of First Person View Freedom Coalition members. Second, this rule will allow pilots to attach a remote identification broadcast module to unmanned aircraft that will make the aircraft remote identification compliant. The FAA acknowledges that the relief provided in this rule will still be considered a burden by some operators. Nonetheless, the rule will create a safe and secure airspace and is a stepping stone toward integration of increasingly complex UAS operations.

Comments: Commenters expressed concerns with the costs associated with a Remote ID USS, suggesting that the FAA underestimated subscription costs in the regulatory evaluation. The commenters also suggest that businesses would not be able to incur the cost of a data plan, which would adversely affect their ability to continue operations. Some estimates ranged from $25 to $100 per month for subscription fees. Multiple commenters expressed concern with the purchase of cellular service or a data plan for the purposes of transmitting remote identification information from their UAS. Commenters were also concerned about the cost to switch to data plans with better coverage for those with cellular service plans.

FAA Response: The FAA acknowledges the complexity of creating Remote ID USS and requiring network connectivity by operators to a Remote ID USS. The requirement that the remote identification UAS connect to the internet and transmit remote identification message elements through the internet to a Remote ID USS is not adopted at this time.

Comments: A commenter stated the FAA incorrectly assumes that there may be no price charged for USS subscriptions and therefore no societal cost. The commenter stated that no matter what pricing strategy a USS provider selects, it must recover the real resource cost of designing, building and maintaining the system.

FAA Response: The FAA recognizes that if Remote ID USS were to exist, they would do so with intent to recover the cost of designing, building, and maintaining the system. However, the FAA acknowledges the complexity of designing a Remote ID USS and did not adopt the proposed network connectivity requirement at this time.

Comments: Many commenters stated the costs of the proposed rule include additional unmanned aircraft registration fees as well as subscription fees for remote identification service providers. These fees would increase barriers to entry and reduce the accessibility of UAS to lower income individuals while shifting the market to larger corporations that can sell the remote identification hardware and software. Droneport Texas noted that the costs of Remote ID USS subscriptions were not included in the FAA-recognized identification area analysis but is required for remote identification UAS operating in an FAA-recognized identification area as proposed. The International Association of Fire Fighters and the Coconino County Sheriff's Office noted the increased cost for emergency response organizations to comply with the proposed rule. One commenter suggested Remote ID USS subscriptions should be provided free if it is required for emergency service operators.

FAA Response: The FAA agrees that registration and subscription fees could reduce the accessibility of unmanned aircraft to lower income individuals and notes that the proposed requirement that recreational operators register each aircraft individually is not adopted. In addition, the proposed network connectivity requirement is not adopted at this time, and thus subscription fees are eliminated. Instead, this rule requires that small unmanned aircraft operating beyond the boundaries of an FAA-recognized identification area do so with either standard remote identification or with a remote identification broadcast module.

Comments: One commenter stated the FAA should not have included the cost of obsolescence for UAS purchased in the first year of the rule implementation. The commenter also asserted that the FAA incorrectly applied an 80 percent retrofit rate in the calculation of obsolescence cost, inconsistent with the stated assumption of a 20 percent retrofit rate.

FAA Response: The FAA appreciates the commenter's observations regarding the cost of obsolescence. FAA has carefully reviewed the obsolescence section of the regulatory impact analysis and provides clarity to the commenter. On page 75 of the analysis, it is stated that 20 percent of the recreational fleet purchased during year 1 could be retrofit. Based on the assumption that 20 percent of the recreational fleet purchased during year 1 could be retrofit, the FAA determined that the remaining 80 percent of the fleet could become obsolete prior to the end of its lifespan.

To estimate the size of the fleet that would become obsolete, the FAA spread the estimated sales of recreational aircraft that could not be retrofit equally over a 12-month period during year 1. Based on the assumption that a small unmanned aircraft has a 3-year lifespan (36 months), those unmanned aircraft purchased during the earlier part of year 1 would have less loss of use compared to those aircraft purchased near the end of year 1. For calculating obsolescence, sales of unmanned aircraft were presumed to occur on the first day of the month. Therefore, units sold in January of year 1 of the analysis period are fully depreciated by December of year 3, and thus there is no loss of useful life; units

[36] *https://www.faa.gov/uas/resources/community_engagement/.*

sold in February of year 1 lose one month of useful life (which is January of year 4); units sold in March of year 1 lose two months of useful life (which are January–February of year 4); units sold in April of year 1 lose three months of useful life (which are January–March of year 4); etc. This calculation is shown on Appendix G of the regulatory impact analysis.

Comments: Commenters stated that many areas in which UAS operations take place, such as for aerial photography, inspections, or survey mapping, tend to be rural locations or coastlines where internet connection and cellular service does not exist. The requirement to transmit via internet would therefore create geographic limitations for many businesses. It would prevent operators from providing services in those areas without cellular service.

FAA Response: The FAA recognizes the complexities and nuances of a remote identification rule that requires network connectivity, including the geographic limitations it creates for many businesses. The proposed requirement to transmit via internet is not part of this rule at this time. Instead, this rule requires that small unmanned aircraft operating beyond the boundaries of an FAA-recognized identification area do so with either standard remote identification or with a remote identification broadcast module.

Comments: Commenters provided alternative estimates of the number of Academy of Model Aeronautics members ranging from 180,000 to 195,000 with 9 to 10 as the average number of aircraft owned by AMA members. Based on these estimates of membership and aircraft ownership, commenters develop an estimated cost of $8.1 million to $9.75 million associated with registration. Multiple commenters expressed concern with the burden associated with the registration process and fee for each owned aircraft. Many commenters opposed having to register each aircraft.

FAA Response: The FAA appreciates information provided by AMA regarding the number of its members and the average number of aircraft owned by each member. The proposal to require recreational operators register each aircraft individually is not adopted. By maintaining the current framework, the intent of the statutory requirement for aircraft registration is achieved without being overly burdensome, particularly considering the mitigation of cost for those individuals specifically flying multiple aircraft exclusively in compliance with section 44809. The FAA therefore will retain the current part 48 registration framework. Corresponding updates are applied to part 48 to reflect the inclusion of the current statutory requirement for limited recreational operations and to incorporate information relevant to remote identification. Owners registering as exclusively compliant with section 44809 will be required to submit the aircraft manufacturer and model name.

Comments: A commenter stated requiring one control station for each aircraft would increase costs substantially. Another commenter stated the cost of replacing a commercial fleet due to the lack of serial numbers would be cost-prohibitive for many small businesses.

FAA Response: The FAA notes that the serial number requirement in § 89.505 applies to standard remote identification unmanned aircraft and remote identification broadcast modules produced after the effective date of this rule. This rule does not require designers and producers of remote identification unmanned aircraft to assign a serial number to any unmanned aircraft produced prior to the compliance date of the design and production requirements. The requirements also do not make the existing unmanned aircraft fleet obsolete because operators can continue to operate existing unmanned aircraft subject to the operating rules in subpart B of this rule.[37] This rule does not require any person to assign an ANSI/CTA–2063–A compliant serial number to any existing unmanned aircraft produced prior to the compliance date of the design and production requirements. In addition, the rule neither requires serial numbers to be assigned to control stations nor prevents operators from swapping out control stations. The serial number requirements are specific to the unmanned aircraft, not to the entire UAS.

Comments: Many commenters suggested that UAS on the market last more than the three years that FAA assumed in its regulatory impact analysis. Some commenters estimated the lifespan to be 10 years with an average cost per UAS for recreational operators to be $600–$700.

FAA Response: The FAA appreciates commenters' estimates for the average lifespan of an unmanned aircraft and the average cost for unmanned aircraft used for recreational operators. At this time, the FAA continues to assume an average lifespan of unmanned aircraft to be three years, which is the assumption used by the FAA in its published 2020 UAS fleet forecasts.[38] The FAA welcomes estimates of UAS lifespan and UAS costs when informed by supporting documentation, and would consider use of such estimates in its regulatory impact analyses.

Comments: One commenter questioned whether the proposed rule would meet the threshold under the Unfunded Mandates Reform Act.

FAA Response: The FAA recognizes that the Unfunded Mandates Reform Act (UMRA) was enacted to avoid imposing unfunded Federal mandates on State, local, and tribal governments (SLTG), or the private sector. Most of UMRAs provisions apply to proposed and final rules for which a general notice of proposed rulemaking was published and that include a Federal mandate that may result in the expenditure of funds by SLTG, in the aggregate, or by the private sector of $100 million or more in any year. The FAA notes that the threshold of $100 million (in 1995 dollars) or more in any 1 year was not exceeded in either the proposed rule or the final rule.

Comments: A commenter stated the proposed rule did not address the costs of equipping 18,000 police departments with technology required to access remote identification data and the required training of 750,000 officers to use the technology. The commenter asserted that these costs should be included in the cost analysis for the final rule and suggested that the FAA should conduct a survey of law enforcement departments to determine if they are equipped with remote identification technology, and what the cost and funding needs would be if they need to obtain the technology. Further, the commenter suggested that the FAA delay the implementation of the final rule until funding and implementation

[37] Producers may choose to assign an ANSI/CTA–2063–A compliant serial number to an unmanned aircraft produced prior to the compliance date of the design and production requirements of this rule (*e.g.,* through a software upgrade). The assignment of the serial number—by itself—does not make the unmanned aircraft a standard remote identification unmanned aircraft or a compliant unmanned aircraft that is properly equipped with a remote identification broadcast module. Persons who wish to ''upgrade'' an unmanned aircraft produced prior to the compliance date of this rule to make it a standard remote identification unmanned aircraft or an unmanned aircraft equipped with a remote identification broadcast module may do so by meeting all design and production requirements in subpart F. Subpart F contains the design and production requirements for a standard remote identification unmanned aircraft and a remote identification broadcast module.

[38] *https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2020-40_FAA_Aerospace_Forecast.pdf.* Pages 41–63.

plans for law enforcement groups are available.

FAA Response: The FAA recognizes that equipping 18,000 police departments with technology to access remote identification data, and then training 750,000 officers to use the technology has costs. The regulatory impact analysis for this rule identifies the qualitative safety and security benefits of remote identification information used to distinguish compliant operations from non-compliant operations. The FAA does not place any requirements on local law enforcement; to the contrary, the purpose is to make a resource available so that they can use it in the discharge of their responsibilities. The FAA assumes that security and law enforcement entities would incur costs relative to the scope of their needs (*e.g.,* scaled to national, regional and locality needs, based on the level of UAS operations).

Comments: Some commenters expressed concerns that the rule would adversely impact UAS manufactured in the United States, causing manufacturing to move offshore as the Western products and products in the United States become less competitive. One commenter gave examples of certain companies that supply radio systems that have abandoned their markets and cut back on their research and development because foreign companies have copied their technologies and undercut their manufacturing costs.

FAA Response: The FAA acknowledges that at the time of this rulemaking, foreign companies produce a majority of the unmanned aircraft already being operated in the United States. Accordingly, the FAA does not expect this rule to negatively impact United States designers and producers of remote identification unmanned aircraft at a greater rate than their foreign counterparts.

Comments: A commenter asserted the FAA incorrectly neglects the value of lost UAS sales due to the cost of the rule. The commenter stated the FAA implicitly and incorrectly assumes that the UAS elasticity of demand is zero and that designers and producers of remote identification UAS will pass all costs to consumers, but that the quantity demanded will be unaffected. The commenter argued that the other possible assumption is that the manufacturer will absorb all costs, but the market is competitive so this will not happen. The commenter provided an estimate based on a survey that the demand for new UAS would decline by 10.6 percent due to the increase in cost. The commenter further asserted that demand may decrease because of the loss of privacy from the requirement to disclose location and flight data to the government and the public.

FAA Response: The FAA appreciates these comments, and recognizes that the final rule could change consumer behavior and result in reduced demand for unmanned aircraft. However, for purposes of the regulatory impact analysis, three scenarios were considered—a base scenario (which is the preliminary estimate), a low case scenario, and a high case scenario. The low case scenario is reflective of a reduced demand for unmanned aircraft.

B. Comments on Benefits and Cost Savings

Comments: Commenters did not agree that the cost of conducting investigations would decrease under the remote identification requirement. Some commenters suggested remote identification will increase the total cost of investigating UAS incidents. Commenters argued that by increasing the amount of available data from remote identification, there would be an increase in the number of incidents requiring investigations. Commenters also argued that there would be an increase in the cost of investigations due to potential non-compliance among amateur flyers or hobbyists.

FAA Response: The FAA recognizes the commenters concerns and notes that since Fiscal Year 2017, the number of UAS investigations conducted by the FAA has declined.[39] The FAA continually conducts community outreach with the recreational and part 107 communities regarding safe operation of UAS in the airspace of the United States. Similarly, part 107 remote pilots must pass recurrent knowledge testing every 24 calendar months on topics related to operating safely and complying with regulations.[40] The FAA believes that a vast majority of pilots in each of the communities are compliant with regulations and operate safely.

For purposes of the regulatory impact analysis the FAA presents a range for estimating the FAA costs of UAS investigations using three scenarios based on UAS fleet size. The regulatory impact analysis also acknowledges security partners and law enforcement communities incur costs investigating UAS incidents, and discusses them qualitatively in the regulatory impact analysis for the final rule.

Comments: Commenters asserted that because of the safety record of limited recreational aircraft and first-person view quadcopter operators, there are no incremental safety or security benefits from applying the remote identification requirements to recreational flyers. The rule would not necessarily prevent malicious actors from building their own unmanned aircraft without complying.

FAA Response: FAA agrees with commenters that the final rule for the remote identification of unmanned aircraft would not prevent malicious actors from building their own unmanned aircraft that do not comply with the requirements of this rule. However, as discussed earlier in this preamble, an unmanned aircraft flying in violation of this rule would be a data point that law enforcement could use in deciding what action to take in response to that aircraft. In addition, broadcast remote identification does not rely on internet availability, and is a secure method which is less susceptible to widespread failure caused by malicious actors or systems outages. The FAA has determined that a requirement for unmanned aircraft to broadcast remote identification information will provide the FAA, law enforcement, the general public, and other parts of the aviation community with real-time information about unmanned aircraft operations in any area in which broadcast signals can be received. The broadcast will permit detection of unmanned aircraft and will permit law enforcement and the general public who receive those broadcasted message elements to have information about the aircraft location as well as information about the control station or takeoff location.

Comments: Commenters asserted that the FAA should make the data on UAS incidents available to the public to assess the level of safety benefits.

FAA Response: The FAA values the commenters concern. At this time, the FAA does not report on UAS investigations. The FAA does publish a quarterly UAS sightings report, however the FAA acknowledges that reported UAS sightings do not necessarily involve the violation of regulations or unsafe conditions.[41]

Comments: A commenter stated the FAA incorrectly includes benefits of

[39] The FAA recorded 2,141 investigations in FY 2017; 2,002 investigations in FY 2018, 1,955 investigations in FY 2019; and it is estimated that there will be approximately 1,460 investigations in FY 2020.

[40] The FAA notes the requirements for recurrent knowledge testing were proposed to be removed and replaced with recurrent knowledge training in the Operations of Small Unmanned Aircraft Systems over People notice of proposed rulemaking. 84 FR 3856, February 13, 2019.

[41] *https://www.faa.gov/uas/resources/public_records/uas_sightings_report/.*

extended operations though the proposed rule does not enable flight at night, operations over people, or flights beyond visual line of sight. The commenter asserted that it is incorrect to include the benefits from future rules in the analysis. In addition, there is no evidence that remote identification is necessary to expand UAS operations.

FAA Response: The FAA acknowledges that the reader of the regulatory impact analysis may have the impression that the benefits of extended operations were included in its estimates of the proposed rule, however, they were not and it was not the FAA's intent to mislead the reader. The FAA provided estimated cost savings due to a reduction in waiver processing for operations over people and night operations in Appendix C of its preliminary regulatory impact analysis (page 162), however these cost savings were not used for the proposed rule's estimated net costs.

C. Comments on Data and Assumptions

Comments: Many commenters argued the FAA substantially underestimated the current UAS fleet size and UAS sales. Commenters did not agree with the assumptions regarding the average number of aircraft owned, suggesting that the FAA underestimated the number of affected aircraft. The AMA stated their members own on average of at least nine model aircraft and many AMA members own 100 to 200 aircraft. Recreational flyers of model aircraft frequently buy, sell, and trade aircraft. The requirement to register an aircraft every time ownership changes is impractical and costly. Some recreational flyers replace aircraft more frequently than the three-year lifespan assumed by the FAA. Some hobbyists frequently exchange and recombine aircraft components making it difficult to identify distinct aircraft. One commenter provided an average estimate of 15 UAS owned, based on a survey of members from the First-Person View Freedom Coalition. One commenter suggested it will take 15 minutes to complete an aircraft registration because of the additional complexity of the proposed requirement.

FAA Response: The FAA values the response on the average number of aircraft owned by recreational flyers. The FAA recognizes its fleet forecast for recreational unmanned aircraft is most likely underestimated, and is pursuing resources to assist with developing a forecast that accurately reflects the number of aircraft in the fleet. In the NPRM, the FAA explained that the lack of aircraft-specific data for unmanned aircraft registered under part 48 could inhibit the FAA and law enforcement agencies from correlating the remote identification data with data stored in the FAA's Aircraft Registry. Thus, the Agency proposed to revise part 48 to require the individual registration of all small unmanned aircraft and the provision of additional aircraft-specific data. The FAA proposed that owners of small unmanned aircraft would have to complete the registration application by providing aircraft specific information in addition to basic contact information. After evaluating the comments and incorporating the new remote identification broadcast module option for part 89 compliance, the FAA determined it will maintain the current registration framework and will no longer revise part 48 to require the individual registration of all small unmanned aircraft. Owners intending to operate all their small unmanned aircraft exclusively in compliance with 49 U.S.C. 44809 may maintain one registration for all unmanned aircraft meeting that description.[42]

Comments: A commenter suggested the regulatory impact analysis should include the cost of cell phones and data plans because not all recreational flyers own cell phones. Commenters also expressed concern that some flyers may incur costs of switching to data plans with better coverage. A commenter stated the FAA overestimated the percentage of UAS that are already connected to the internet, but did not provide an alternative estimate. Many commenters did not agree with the FAA assumption that most unmanned aircraft would only need a software upgrade to comply. Compliance would require the addition of hardware that would add weight and cost. In some cases, retrofitting aircraft to connect to the internet is not technically feasible, especially for small aircraft. The weight of additional equipment would adversely impact the performance of UAS, especially in speed, safety, endurance and races. A commenter stated that the regulatory evaluation omitted or underestimated the cost of service to retrofit the aircraft for connection to the internet. Commenters stated that the FAA's assumption of monthly Remote ID USS subscription fee per aircraft based on LAANC fees underestimates the actual cost. The commenter suggested that the median monthly fee would be approximately $10 per month based on internet pet and car location and tracking services. A commenter did not agree with the FAA's assumption that all LAANC providers will become Remote ID USS and stated the FAA did not provide data to support its estimate of the number of USS providers. Another commenter asserted that the FAA does not have sufficient resources to monitor the USS network and enforce the proposed requirements.

FAA Response: The FAA appreciates that comments received on the regulatory impact analysis for the rule. The NPRM proposed requiring both standard remote identification and limited remote identification UAS to transmit the remote identification message elements through an internet connection to a Remote ID USS. After careful consideration of public comments on the implementation challenges associated with this requirement, the FAA decided to eliminate this requirement. Without the requirement to transmit remote identification through the internet, limited remote identification UAS is no longer a viable concept. In its place, the FAA incorporates a modified regulatory framework under which persons can retrofit an unmanned aircraft with a remote identification broadcast module to satisfy the remote identification requirements of this rule. While the FAA recognizes that there are potential benefits associated with establishing a network of Remote ID USS, the FAA believes that, for the time being and given the types of unmanned aircraft operations that are currently allowed, the broadcast remote identification solution fulfills agency and law enforcement needs to maintain the safety and security of the airspace of the United States.

In addition, FAA acknowledges that the weight of additional equipment to an unmanned aircraft adversely impacts its performance and discusses this cost of the rule qualitatively in the regulatory impact analysis for the final rule.

Comments: Some recreational flyers did not agree with the assumption that all modelers belong to the AMA. Commenters also stated the FAA incorrectly assumed that most AMA members operate exclusively at flight sites and that only 10 percent of members will be displaced due to denials of FAA-recognized identification area requests.

FAA Response: The FAA appreciates the comments on the composition of the recreational flyer population. The FAA is aware that not all recreational flyers belong to the AMA, and provides clarity on this point in the regulatory impact

[42] The registration is based on the intended use of the unmanned aircraft. An operator would violate FAA regulations if he or she uses any of such aircraft for any purpose other than for limited recreational operations under 49 U.S.C. 44809.

analysis of the final rule. The regulatory impact analysis for the final rule acknowledges that AMA members do not operate exclusively at flight sights. The regulatory impact analysis will reflect that all recreational flyers belonging to a community-based organization will choose to purchase a remote identification broadcast module to equip their unmanned aircraft to be in compliance with the final rule when operating outside of the boundaries of an FAA-recognized identification area. Lastly, the FAA acknowledges comments which state that over 10 percent of AMA members would be displaced from flight sites due to denials of FAA-recognized identification area requests. The FAA acknowledges that the public may have access to information or data that would enable the FAA to estimate costs with greater accuracy, and encourages the public to provide such information with supporting documentation.

Comments: Commenters stated that the FAA underestimated the average lifespan of UAS, asserting that some aircraft have decades of useful life rather than an average of three years. Commenters requested that the data used to estimate the lifespan of UAS be available to the public for review. A commenter provided an estimated average lifespan of 6 years based on a survey of members in the First Person View Freedom Coalition. Other commenters contended that the average lifespan of recreational UAS is much lower than 3 years due to accidents.

FAA Response: The FAA values the information provided by commenters touching on the lifespan assumption used for the regulatory impact analysis. The 3-year lifespan is not an assumption created specifically to analyze the costs and benefits of the remote identification rulemaking. Rather, the lifespan is one element used to forecast the unmanned aircraft fleet, which is available to the public in a document titled *FAA Aerospace Forecast 2020–2040.*[43] The FAA continues to seek resources and information that inform unmanned aircraft lifespan assumptions.

D. Comments on Regulatory Alternatives

Comments: Multiple commenters suggested alternatives to reduce the burden on operators. One alternative would be to grandfather older UAS or to allow for a grace period for compliance. Over time as the existing unmanned aircraft fleet becomes obsolete, fewer unmanned aircraft not equipped with remote identification capabilities would make up the market. Some commenters also proposed additional time to come into compliance. Others suggested a notification system that would allow pilots to call-in to identify themselves before flying their unmanned aircraft. Some commenters suggested requiring internet transmission of remote identification for BVLOS operations only. Several commenters supported the concept of remote identification, but suggested establishing simpler alternatives to the rule, such as a simple remote beacon that would have less performance impact on smaller aircraft. Others preferred to use a simple application on the phone or an FAA-approved application to register pre-flight model and location to ''check-out'' airspace. Some commenters proposed a government buy-back program to compensate for the loss of use for aircraft that cannot comply through software upgrades or government subsidization. Many commenters suggested the FAA should compensate or reimburse UAS owners for aircraft rendered obsolete by the rule. One commenter suggested the use of network publishing utilizing a network connection to transmit remote identification as an alternative to broadcasting which would require equipment upgrades. The commenter noted that the proposed solution was recommended by the UAS Identification and Tracking Aviation Rulemaking Committee in its final report. Commenters express concern that the compliance deadline of 1 year is too soon. The proposed compliance period would benefit designers and producers of remote identification UAS by increasing sales at the expense of UAS owners who have to purchase new equipment to comply.

FAA Response: The FAA values the abundance of commenter suggestions for reducing the burden of the rulemaking on operators of unmanned aircraft, and will not adopt the network requirement as proposed for the time being. Instead, operators of unmanned aircraft can comply with the final rule in one of three ways, which include: (1) Operating standard remote identification unmanned aircraft, or (2) attaching a remote identification broadcast module to an unmanned aircraft that is not able to otherwise broadcast, or (3) operating unmanned aircraft within the boundaries of an FAA-recognized identification area.

The FAA decided to incorporate this concept after reviewing public comments and considering the significant concerns raised with respect to the remote identification UAS framework. The FAA determined a remote identification broadcast module facilitates compliance with this rule and meets the safety and security needs of the FAA, national security agencies, and law enforcement. The concept is broadcast based and does not require a person to connect to the internet to identify remotely, as the limited remote identification UAS proposal did. This shift allows unmanned aircraft with remote identification broadcast modules to operate in areas where the internet is unavailable. In addition, by making this a broadcast solution, the FAA has determined that the 400-foot range limitation included in the proposed requirements for limited remote identification UAS is no longer warranted and has removed the design constraint.

E. Miscellaneous Comments

Comments: Some commenters expressed concern that the existing 4G and LTE cellular networks will be adversely affected by the potential increase in usage due to UAS surveillance and monitoring.

FAA Response: The FAA acknowledges the concern that existing 4G and LTE cellular networks would be adversely affected by the potential increase in usage due to UAS surveillance and monitoring, and did not adopt the proposed requirement for network connectivity at this time.

Comments: The Fourth Branch Project of the Mercatus Center at George Mason University suggested that the FAA had not established how much risk a UAS without remote identification poses to manned aircraft when operating in Class G airspace and away from airports and heliports, and noted that increased costs of network remote identification as well as dependence on Remote ID USS and internet connectivity is likely excessive considering that risk is likely very low. Many other comments also noted that given the safety record of UAS operators, the safety benefits would be minimal. Some also noted that the FAA did not produce data to support the claim of safety benefits. DJI also noted that some of the improvements in safety may have occurred even without the remote identification rule.

FAA Response: The FAA acknowledges the comments related to risk, and notes that this rule will play a critical role in threat discrimination by law enforcement and national security entities, similar to radar data for manned aircraft and license plates on road vehicles. Law enforcement officials have made clear that it can be very difficult to make a decision about the risk posed by a person manipulating the

[43] *https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2020-40_FAA_Aerospace_Forecast.pdf.* Pages 41–63.

flight controls of the UAS with the limited information available from visually observing an unmanned aircraft. Remote identification information will enable better threat discrimination, an immediate and appropriate law enforcement response, and an effective follow-on investigation. This is because remote identification information can be correlated with unmanned aircraft registry information to inform law enforcement officers about the registered owner. This information, along with the real-time location of the UAS operator, provide critical input to a law enforcement officer's decision on whether intervention is appropriate. In addition, a careless or clueless operator may be introducing unnecessary risk into the airspace of the United States without realizing it. Remote identification allows appropriate authorities to identify the operator for follow up or education on how to operate safely and in compliance with the FAA's rules.

XXI. Guidance Documents

The FAA is promulgating several guidance documents to supplement the requirements in this rule. Copies of the guidance documents are available in the docket for this rulemaking.

The FAA is establishing an advisory circular on the means of compliance process for remote identification of unmanned aircraft systems. This advisory circular provides guidance on the means of compliance process described in part 89. This AC outlines the required information for submitting a means of compliance.

The FAA is establishing an advisory circular on the declaration of compliance process for remote identification of unmanned aircraft systems. This advisory circular provides guidance on the declaration of compliance process described in part 89. This AC outlines the required information for submitting a declaration of compliance.

The FAA is revising AC 107–2, Small Unmanned Aircraft Systems, to describe the requirements of remote identification. The advisory circular also describes where the various small UAS are permitted to operate.

The FAA is establishing a new advisory circular for FAA-recognized identification areas. This advisory circular provides guidance to persons requesting the establishment of an FAA-recognized identification area under § 89.210. This AC also provides guidance for persons responsible for FAA-recognized identification areas, as well as persons operating UAS at FAA-recognized identification areas under § 89.115(b).

XXII. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. In addition, DOT rulemaking procedures in subpart B of 49 CFR part 5 instruct DOT agencies that if the regulatory action is expected to impose costs, then the rulemaking shall include either a reasoned determination that the benefits outweigh the costs or, if the particular rulemaking is mandated by statute or compelling safety need notwithstanding a negative cost-benefit assessment, a detailed discussion of the rationale supporting the specific regulatory action proposed, and an explanation of why a less costly alternative is not an option. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act of 1979 (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing United States standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of United States standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). The FAA has provided a detailed Regulatory Impact Analysis in the docket of this rulemaking. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this rule.

In conducting these analyses, the FAA has determined that this rule: (1) Has benefits that justify its costs; (2) is a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; (3) is ''significant'' as defined in DOT's general rulemaking procedures at 49 CFR 5.13(a)(1); (4) will have a significant economic impact on a substantial number of small entities; (4) will not create unnecessary obstacles to the foreign commerce of the United States; and (5) will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector by exceeding the threshold identified above.

A. Regulatory Evaluation

1. Key Assumptions and Data Sources

The analysis of the rule is based on findings from the Unmanned Aircraft Systems Identification and Tracking Aviation Rulemaking Committee (UAS–ID ARC), as well as data and information from the FAA and industry stakeholders. The analysis for the regulatory evaluation is based on the following assumptions and data sources.

- The analysis uses 2020 constant dollars. Year 1 of the period of analysis, which would correlate with the effective date of the final rule, is used as the base year.
- The FAA uses a 10-year time period of analysis to capture the effects of the compliance period and recurring effects of the rule.[44]
- The analysis includes the 18-month phase-in period from the effective date of the rule for compliance by persons responsible for the production of unmanned aircraft. At the end of 30 months from the effective date, operators must fly either a standard remote identification unmanned aircraft or an unmanned aircraft equipped with a remote identification broadcast module, or operate within the boundaries of an FAA-recognized identification area.
- The FAA uses a three percent and seven percent discount rate to quantify present value costs and cost savings as prescribed by OMB in Circular A–4.[45]
- The analysis of costs and cost savings of this rule are based on the fleet forecast for small unmanned aircraft as published in the FAA Aerospace Forecast 2020–2040.[46] The forecast includes base, low, and high scenarios. The analysis provides a range of net impacts from low to high based on these forecast scenarios. The FAA considers

[44] The FAA typically uses a 5-year time period for Regulatory Impact Analysis of UAS rulemakings to align with historical and current FAA UAS Forecasts (see *https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/Unmanned_Aircraft_Systems.pdf*). In addition, the FAA acknowledges uncertainty in estimating incremental impacts of this proposed rule beyond 5 years due to rapid changes in UAS technology and innovation.

[45] OMB Circular A–4, *Regulatory Analysis* (2003), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[46] FAA Aerospace Forecast Fiscal Years 2020–2040 at 41–63, *available at http://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2020-40_FAA_Aerospace_Forecast.pdf*

the primary estimate of net impacts of the rule to be the base scenario.

• Based on the FAA part 48 unmanned aircraft registry, the FAA estimates that 87.6 percent of small unmanned aircraft sold in the United States are produced by foreign entities.

• Each unmanned aircraft producer will incur an estimated one-time cost of $85 for the purchase of a remote identification standard from a consensus standards body.[47] The serial number standard is available at no cost.

• The FAA estimates that potentially as many as 191 United States and 351 foreign producers would submit a declaration of compliance for 391 United States and 891 foreign models of unmanned aircraft for FAA during year 2 of the analysis period.[48] During each of the remaining years of the analysis period, the FAA assumes an additional nine new producers would submit a declaration of compliance annually for one model of unmanned aircraft each, and nine new models will be produced by preexisting producers, for a total of eighteen new models of unmanned aircraft annually.[49]

• The FAA assumes that five percent of the declarations of compliance submitted by persons responsible for the production of standard remote identification unmanned aircraft and remote identification broadcast modules to the FAA would not be accepted. The declaration of compliance would then be rewritten and resubmitted to the FAA for acceptance, and the FAA would accept the resubmission.

• Producers will maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes the unmanned aircraft or broadcast module to not to meet the requirements of proposed part 89.

• The FAA assigns the United States Department of Transportation guidance on the hourly value of travel time savings for personal purposes (for limited recreational flyers only). This value is equal to $14.37 per hour and is applicable for the 10-year analysis period.[50]

• The FAA assumes that all Academy of Model Aeronautics (AMA) flying sites, about 2,200 as of this writing,[51] will submit requests to establish FAA-recognized identification areas, and that 90 percent of the requests will be approved. The remaining 10 percent are assumed to be in sensitive areas and therefore will not be approved to become an FAA-recognized identification area. The FAA also assumes that 1,700 United States Army Junior ROTC clubs and 66 institutions identified as awarding undergraduate degrees in aerospace engineering will submit requests to establish FAA-recognized identification areas, and that 90 percent of the requests will be approved as well.[52]

• The FAA estimates it will conduct approximately 1,500 to 1,600 investigations of UAS incidents annually for each year of the analysis period and that each investigation will range between 0 and 40 hours.[53] This is used to estimate cost savings from reduced hours for FAA UAS investigations.

• The FAA determines the cost of a broadcast module to be $50.[54]

• The FAA notes the analysis of this rule reflects industry conditions that predate the public health emergency concerning the coronavirus disease 2019 (COVID–19). While there is currently a lack of data to forecast the timing of recovery from COVID–19 impacts relative to implementation of the rule, the analysis provides information on the types of impacts that may be experienced in the future as the economy returns to baseline levels.

2. Benefits Summary

The FAA expects this rule will result in several important benefits and enhancements to support safety and security in the airspace of the United States. Remote identification provides information that helps address existing challenges of the FAA, law enforcement entities, and national security agencies responsible for the safety and security of the airspace of the United States. As UAS operations increase, so does the risk of unmanned aircraft being operated in close proximity to manned aircraft or in airspace that is not open to the operations. Remote identification provides a means to identify these aircraft and locate the person that controls them (*e.g.,* operators, pilots in command). It allows law enforcement and national security agencies to distinguish compliant airspace users from those potentially posing a safety or security risk. It permits the FAA and law enforcement to conduct oversight of persons operating UAS and to determine whether compliance actions, enforcement, educational, training, or other types of actions are needed to mitigate safety or security risks and foster increased compliance with regulations. Remote identification data also informs users of the airspace of the United States of the operations that are being conducted at any given moment in a particular airspace.

The FAA expects this rule will result in important benefits and enhancements to support the safe integration of expanded UAS operations in the United States airspace. Remote identification provides greater situational awareness of UAS operations to airport operators and other aircraft in the vicinity of those operations. Manned aircraft, especially those operating at low altitudes where UAS operations are anticipated to be the most prevalent (such as helicopters and agricultural aircraft), could carry the necessary equipment to display the location of UAS operating nearby. In addition, towered airports could use remote identification information for situational awareness, especially for landing and takeoff operations.

3. Cost and Savings Summary

The costs of this rule include UAS owners including additional information when completing the unmanned aircraft certificate of registration; UAS operators flying compliant remote identification unmanned aircraft or travelling to FAA-recognized identification areas to operate without remote identification; the producers of standard remote identification unmanned aircraft and the producers of broadcast modules submitting a declaration of compliance to the FAA for acceptance; entities submitting means of compliance to the FAA for acceptance; entities submitting

[47] *https://www.astm.org/Standards/F3411.htm.* Accessed August 4, 2020. The price for the Standard Specification for Remote ID and Tracking is listed as $85.

[48] Based on analysis of the Association for Unmanned Vehicle Systems International (AUVSI) Unmanned Systems & Robotics Database.

[49] Based on analysis of the Association for Unmanned Vehicle Systems International (AUVSI) Unmanned Systems & Robotics Database.

[50] Time savings is estimated to be median hourly wage plus benefits as described in the U.S. Department of Transportation Revised Departmental Guidance on Valuation of Travel Time in Economic Analysis (Sept. 27, 2016).

[51] *https://www.modelaircraft.org/club-finder.* Accessed August 26, 2020. The FAA notes that a subset of AMA clubs has flying sites.

[52] *http://www.usarmyjrotc.com/general/program_overview.php.* Accessed August 26, 2020. *https://ira.asee.org/wp-content/uploads/2019/07/2018-Engineering-by-Numbers-Engineering-Statistics-UPDATED-15-July-2019.pdf.* P. 18. Accessed August 26, 2020.

[53] The FAA conducted 2,002 investigations in FY 2018; 1,995 investigations in FY 2019; and as of May 18, 2020, the FAA has conducted 920 investigations.

[54] The FAA received company proprietary information from potential U.S. manufacturers of a broadcast module that may meet remote identification requirements. One U.S. manufacturer estimated a cost of $50 for a self-contained module with its own power and GPS, with a decrease in cost as production volume increases. Another U.S. manufacturer stated an estimate would not be available until the rule's final requirements were published. Commercially available modules that comply with French remote identification laws range from 40 euros (equivalent to $47.48 US dollars on 9/14/2020), and up.

requests to establish FAA-recognized identification areas; FAA approving means of compliance, declarations of compliance, and requests for designated flying fields, and developing information technology in support of the rule. The cost savings of this rule include relief provided to the FAA from avoided aviation safety inspector costs resulting from a reduction in hours expended on UAS investigations.

The FAA bases the analysis of this rule on a fleet forecast for small unmanned aircraft that includes base, low, and high scenarios. Accordingly, this analysis provides a range of net impacts from low to high based on these forecast scenarios. The FAA considers the base scenario as the primary estimate of net impacts of this rule. For the primary estimate, over a 10 year period of analysis this rule will result in present value net costs of $227.1 million at a three percent discount rate, with annualized net costs of $26.6 million. At a seven percent discount rate, this rule will result in present value net costs of $186.5 million, with annualized net costs of $26.6 million. The following table summarizes the quantified costs and cost savings of this rule for the three forecast scenarios.

TABLE 2—NET COSTS OF FINAL RULE ($MILLIONS) *

[Base scenario—Primary estimate]

Affected entity/category	10 Year present value (at 3%)	Annualized (at 3%)	10 Year present value (at 7%)	Annualized (at 7%)
UAS Owners/Operators	181.3	21.2	144.9	20.6
UAS Producers (US and Foreign)	33.8	4.0	30.9	4.4
Developers of Remote Identification Means of Compliance	2.9	0.3	2.4	0.3
FAA-Recognized Identification Area Requests	0.6	0.1	0.6	0.1
FAA Costs	12.1	1.4	10.6	1.5
Total Costs	230.7	27.0	189.4	27.0
Cost Savings	(3.6)	(0.4)	(2.9)	(0.4)
Net Costs	227.1	26.6	186.5	26.6

***Table notes:** (i) Column totals may not sum due to rounding and parenthesis, "()", around numbers to indicate savings. (ii) The low and high forecast scenarios are not symmetric around the base—please see the forecast report for more information. The FAA Aerospace Forecast Fiscal Years 2020–2040, available at *https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2020-40_FAA_Aerospace_Forecast.pdf.* The forecast provides a base with high and low scenarios.

TABLE 3—NET COSTS OF FINAL RULE ($MILLIONS) *

[Low scenario]

Affected entity/category	10 Year present value (at 3%)	Annualized (at 3%)	10 Year present value (at 7%)	Annualized (at 7%)
UAS Owners/Operators	167.7	19.7	134.1	19.1
UAS Producers (US and Foreign)	33.8	4.0	30.9	4.4
Developers of Remote Identification Means of Compliance	2.9	0.3	2.4	0.3
FAA-Recognized Identification Area Requests	0.6	0.1	0.6	0.1
FAA Costs	12.1	1.4	10.6	1.5
Total Costs	217.1	25.4	178.6	25.4
Cost Savings	(3.5)	(0.4)	(2.8)	(0.4)
Net Costs	213.6	25.0	175.8	25.0

Table notes: Column totals may not sum due to rounding and parenthesis, "()", around numbers to indicate savings.

TABLE 4—NET COSTS OF FINAL RULE ($MILLIONS) *

[High scenario]

Affected entity/category	10 Year present value (at 3%)	Annualized (at 3%)	10 Year present value (at 7%)	Annualized (at 7%)
UAS Owners/Operators	200.8	23.5	160.4	22.8
UAS Producers (US and Foreign)	33.8	4.0	30.9	4.4
Developers of Remote Identification Means of Compliance	2.9	0.3	2.4	0.3
FAA-Recognized Identification Area Requests	0.6	0.1	0.6	0.1
FAA Costs	12.1	1.4	10.6	1.5
Total Costs	250.2	29.3	204.9	29.2
Cost Savings	(3.7)	(0.4)	(3.0)	(0.4)
Net Costs	246.4	28.9	201.9	28.7

***Table notes:** Column totals may not sum due to rounding and parenthesis, "()", around numbers indicate savings.

The following table presents an itemized list of the base scenario or primary estimate of costs and cost savings from this rule.

TABLE 5—REMOTE IDENTIFICATION COSTS AND COST SAVINGS ($MILLIONS)

[Base scenario—Primary estimate]

Affected entity	10 Year present value (at 3%)	10 Year present value (at 7%)
UAS Owners/Operators Recreational:		
Registration Updates	0.82	0.67
Travel Expense (Travel to FAA-recognized Identification Areas)	85.18	66.17
Broadcast Module	27.15	23.57
Standard Unmanned Aircraft	51.17	40.68
Part 107:		
Registration	2.35	1.92
Broadcast Module	3.62	3.23
Standard Unmanned Aircraft	10.97	8.65
FAA-recognized Identification Area Requests:		
Letters of Agreement Submission	0.64	0.56
UAS Manufacturers:		
Declaration of Compliance	31.53	28.83
Industry Consensus Standard—Remote Identification	0.05	0.05
Industry Consensus Standard—Serial Number*	0.00	0.00
Labeling Requirement	2.22	2.03
Developers of Remote Identification Means of Compliance:		
Industry Consensus Standard	1.25	1.10
Developers of Means of Compliance (Others)	1.65	1.30
FAA Costs:		
Accept/Not Accept Means of Compliance	0.15	0.12
Accept/Not Accept Mfr Declaration of Compliance**	0.00	0.00
Web Portal Update—Registration/Notification	0.73	0.70
Approve/Disapprove Designated FAA-recognized Identification Areas	6.46	5.65
Website for Receiving Declarations of Compliance	4.72	4.14
Total Costs	230.69	189.38
Cost Savings: Reduced Hours for FAA UAS Investigations	(3.58)	(2.85)
Net Costs	227.11	186.53
Annualized Net Costs	26.62	26.56

*Serial number standard is available at zero cost to manufacturers.
**Automated approval through FAA DroneZone portal at no additional costs.
Note: Column totals may not sum due to rounding.

The key cost drivers of the rule are the total costs for remote identification equipage followed by travel expenses for a select group of recreational flyers. Total costs for remote identification equipage are about $93 million at a three percent discount rate and about $76 million at a seven percent discount rate. The annualized equipage cost is about $11 million at both a three percent discount rate and a seven percent discount rate. This impact represents 40.3 percent of the rule's total costs. The cost for a select group of operators to travel to an FAA-recognized identification area is 36.9 percent of the rule's total costs.

The FAA expects this rule will also provide important unquantified savings and efficiencies from reduced operational costs. The ability to identify and locate UAS provides additional situational awareness to manned and unmanned aircraft and critical information to law enforcement and other government officials. This will become increasingly important as the number of UAS operations in all classes of airspace grow. The following table summarizes unquantified savings from the final rule.

TABLE 6—UNQUANTIFIED SAVINGS

Savings	Summary
Reduced obsolescence of unmanned aircraft.	Operators will be able to attach a remote identification broadcast module to their unmanned aircraft that enables them to identify remotely. Without this option, operators would be allowed to only operate within the boundaries of an FAA-recognized identification area.
Refined threat assessment	Remote identification provides near real-time information to security agencies and law enforcement organizations that will enhance threat assessments.
Promotes safety	Availability of near real-time information facilitated by remote identification discourages unsafe flying by operators of unmanned aircraft, thereby promoting safety for other users of the airspace of the United States and for those on the ground.
Supports industry innovation	Supports future industry and technology innovation by providing a performance-based framework for the development of current and future industry standards and means of compliance.

4. Alternatives Considered

The FAA considered both higher and lower cost alternatives for the final rule. The alternatives and the FAA's reasons for rejecting those alternatives are discussed below.

i. Alternative Compliance Periods—Producers

The chosen compliance period to estimate producer costs is 18 months beyond the effective date of the final rule. The FAA proposed a 2-year compliance date in the NPRM, and considered it for the final rule as well. The reduction in the producer compliance period by 6 months reflects that the final rule removes the network requirement which alleviates technical complexities for producers of unmanned aircraft. Though no FAA-accepted means of compliance is currently available for producers to build to, there is an ASTM Standard Specification for Remote ID and Tracking available. Accordingly, the FAA believes it is practical for this industry consensus standard to be modified and submitted for acceptance as a means of compliance 6 months after the effective date of the final rule, allowing an additional year for producers to design, build, and test unmanned aircraft that meet the standard.

The final rule does not preclude earlier producer compliance, and there potentially could be economic incentive to comply earlier.

ii. Alternative Operational Compliance Period

The FAA considered allowing 3 years beyond the effective date of the final rule for owners and operators to comply with the remote identification requirements of this rule. However, the FAA determined that period of time was less preferable because it prolonged safety and security risks to air traffic and airports by delaying the ability of law enforcement personnel to identify unauthorized UAS operations. To reduce the delay in implementing remote identification, the owner/operator compliance period was reduced from 3 years after the effective date of the final rule to 30 months after the effective date of the final rule. For UAS purchased prior to the final rule or after the final rule is published, a broadcast module could be purchased to continue operating the unmanned aircraft for the entirety of its lifespan. In addition, the adopted alternative is more likely to reduce uncertainty of adverse impacts to producers with inventories of UAS produced before the compliance date that would likely not meet the remote identification provisions of the proposal.

iii. Requiring ADS–B Out

The FAA could have required transponders or ADS–B Out for unmanned aircraft as a means to identify those aircraft remotely. The FAA is prohibiting the use of transponders or ADS–B Out for remote identification of unmanned aircraft operations, with limited exceptions, for two primary reasons. First, the FAA expects that, due to the volume of unmanned aircraft operations projected, the additional radio frequency signals would saturate the available spectrum and degrade the overall cooperative surveillance system. Second, transponders and ADS–B Out do not provide any information about the location of control stations or takeoff locations, as these systems were designed for manned aircraft. For these reasons, the FAA has determined that existing cooperative surveillance systems are incapable of supporting unmanned aircraft remote identification. In addition, there would be a higher cost to equip under this alternative compared to the rule. The cost to equip unmanned aircraft with transponders and ADS–B Out would be $3,999 per aircraft.

iv. UAS Service Suppliers

The final rule considered a network solution that would require Remote ID USS to come forward to offer remote identification services to individuals operating UAS in the airspace of the United States. Throughout its integration of UAS into the airspace of the United States, the FAA has taken a phased, incremental approach that fosters industry innovation while meeting the safety and security concerns presented by the operations. The FAA believes this should be the case with remote identification of unmanned aircraft as well and has carefully considered the intent of the remote identification of unmanned aircraft.

Though the FAA continues to work toward full integration of UAS into the airspace of the United States, the FAA believes that the most appropriate step, at this time, is to establish a broadcast based remote identification system that provides for immediate awareness of unmanned aircraft in the widest variety of settings. The FAA is not adopting the requirement to transmit message elements through the internet to a Remote ID USS in this rule. The FAA believes broadcast alone is sufficient for the time being, given the types of unmanned aircraft operations that are currently allowed, to maintain the safety and security of the airspace of the United States.

v. Require Network Connectivity and Broadcast Capability

The FAA considered requiring network connectivity through a USS and a broadcast requirement for the final rule, but as adopted the rule contains only a broadcast requirement at this time. The FAA recognized concerns about an internet connectivity requirement including internet availability or connectivity issues, and increased costs for UAS upgrades, internet data plans, and Remote ID USS subscriptions. The FAA acknowledges that the ability to connect to the internet is dependent on a variety of factors including geographic coverage of cellular internet networks, wide-scale network disruptions, or natural disasters.

The FAA notes that many current UAS are capable of broadcast but may have difficulty with the potential complexity and cost of integrating network capabilities to meet the standard remote identification requirements proposed in the NPRM. By shifting to the broadcast-only requirement, the dependency on an internet connection as the sole means of providing remote identification information is removed and allows the unmanned aircraft to operate in areas where the internet is unavailable. In addition, by incorporating a broadcast requirement, the FAA has determined that the 400-foot range limitation is no longer warranted and has removed this design constraint.

vi. Requiring Separate Certificate of Aircraft Registration for Each Section 44809 Unmanned Aircraft

This rule retains the requirement for small unmanned aircraft owners to pay a $5 registration fee and a $5 renewal fee, but this final rule differs from the proposal which required a separate registration for each individual aircraft. As a result of the FAA's decision to maintain the current registration framework, owners of aircraft operated exclusively in compliance with 49 U.S.C. 44809 must only register once every 3 years for all aircraft meeting that description. Therefore, those owners would pay the $5 fee one time every 3 years, and not a $5 fee for each aircraft registered.

vii. Open FAA-Recognized Identification Areas to Entities Other Than CBOs

The FAA considered allowing educational institutions and State and

local governments to request FAA-recognized identification areas. The intent for allowing FAA-recognized identification areas is to minimize the regulatory burden for operators of existing unmanned aircraft used exclusively for educational purposes or by State and local government that do not have remote identification equipment, while still meeting the intent of the rule.

By identifying a defined location where operations of unmanned aircraft without remote identification would be occurring, the FAA-recognized identification area itself becomes the form of identification. Though the FAA considers that FAA-recognized identification areas may not be necessary for the majority of unmanned aircraft operators under this rule with the addition of the remote identification broadcast module option, the FAA recognizes an ongoing need for some operators such as educational science, technology, engineering, and math programs to have an option for flying their unmanned aircraft without remote identification. To support science, technology, engineering, and math programs and encourage participation in aviation for educational purposes, this rule will expand eligibility to educational institutions including institutions of primary and secondary education, trade schools, colleges, and universities. As adopted, community-based organizations will continue to be eligible to apply.

The FAA is including educational institutions at all levels in recognition of the critical role they play in providing pathways to aviation careers, whether through science, technology, engineering, and math curricula; the building and flight of unmanned aircraft; or other educational activities. The FAA determines it is appropriate to allow these educational institutions to request the establishment of FAA-recognized identification areas for their educational purposes. The FAA believes that extending the ability to request establishment of FAA-recognized identification areas to educational institutions will provide a greater number of convenient locations for those operations and reduce costs associated with travel time to FAA-recognized identification areas.

The FAA also considered expanding eligibility for FAA-recognized identification areas to State and local governments. The FAA considers that expanding eligibility to CBOs and educational institutions at all levels is sufficient, and declines to expand eligibility to State and local governments. With the addition of the remote identification broadcast module option, the FAA considers there is now an available option for unmanned aircraft operators to retrofit their unmanned aircraft produced prior to the production compliance date. Expanding eligibility to State and local governments could expand the scope of FAA-recognized identification areas to an extent that would undermine the effectiveness of remote identification.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the Agency determines that it will, section 604 of the Act requires agencies to prepare a Final Regulatory Flexibility Analysis describing the impact of final rules on small entities.

The FAA has determined this rule will have a significant economic impact on a substantial number of small entities. Therefore, under the requirements in section 604 of the RFA, the Final Regulatory Flexibility Analysis must address:

- A statement of the need for, and objectives of, the rule;
- A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the Agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- The response of the Agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- A description of the steps the Agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the Agency which affect the impact on small entities was rejected.

1. A Statement of the Need for, and Objectives of, the Rule

The remote identification of unmanned aircraft is necessary to ensure public safety and the safety and efficiency of the airspace of the United States. The remote identification framework provides unmanned aircraft-specific data, which could be used in tandem with new technologies and infrastructure to facilitate advanced operational capabilities (such as detect-and-avoid and aircraft-to-aircraft communications that support beyond visual line of sight operations). Remote identification of unmanned aircraft will allow the FAA, national security agencies, and law enforcement entities, to discern compliant airspace users from those potentially posing a safety or security risk.

Current rules for registration and marking of unmanned aircraft facilitate the identification of the owners of unmanned aircraft, but normally only upon physical examination of the aircraft. Existing electronic surveillance technologies, like transponders and ADS–B, were considered as potential solutions for the remote identification of unmanned aircraft but were determined to be unsuitable due to the lack of infrastructure for these technologies at lower altitudes and potential saturation of available radio frequency spectrum. Currently, the lack of real-time data regarding unmanned aircraft operations affects the ability of the FAA to oversee the safety and security of the airspace of the United States, creates challenges for national security agencies and law enforcement entities in identifying threats, and impedes the further integration of UAS into the airspace of the United States. The FAA addresses

the identification issues associated with UAS by requiring the use of systems and technology to enable the remote identification of unmanned aircraft.

The final rule is consistent with the FAA's missions of promoting safe flight of civil aircraft through regulations necessary for safety in air commerce and national security and promoting the safe and efficient use of the navigable airspace. The rule also strengthens the FAA's oversight of UAS operations and supports efforts of law enforcement to address and mitigate disruptive behavior and hazards, which may threaten the safety and security of the airspace of the United States, other UAS, manned aviation, and persons and property on the ground. The near real-time access to remote identification information will also assist Federal security partners in threat discrimination—allowing them to identify an operator and make an informed decision regarding the need to take actions to mitigate a perceived security or safety risk. The final rule enhances the FAA's ability to monitor compliance with applicable regulations; contributes to the FAA's ability to undertake compliance, enforcement, and educational actions required to mitigate safety risks; and incrementally advances the safe and secure integration of UAS into the airspace of the United States.

Statement of the legal basis. The FAA promulgates this rulemaking pursuant to various authorities. First, under 49 U.S.C. 40103(b)(1) and (2), the FAA is directed to issue regulations: (1) To ensure the safety of aircraft and the efficient use of airspace; and (2) to govern the flight of aircraft for purposes of navigating, protecting and identifying aircraft, and protecting individuals and property on the ground.

Second, under 49 U.S.C. 44701(a)(5), the FAA must promote safe flight of civil aircraft by prescribing regulations the FAA finds necessary for safety in air commerce and national security.

Third, under section 2202 of Public Law 114–190, the Administrator must convene industry stakeholders to facilitate the development of consensus standards for remotely identifying operators and owners of UAS and associated unmanned aircraft and to issue regulations or guidance based on any standards developed.

Fourth, under 49 U.S.C. 44805, the Administrator must establish a process for, among other things, accepting risk-based consensus safety standards related to the design and production of small UAS.

Fifth, under 49 U.S.C. 44805(b)(7), the Administrator must take into account any consensus identification standard regarding remote identification of unmanned aircraft developed pursuant to section 2202 of Public Law 114–190.

Sixth, under 49 U.S.C. 44809(f), the Administrator is not prohibited from promulgating rules generally applicable to unmanned aircraft, including those unmanned aircraft eligible for the exception for limited recreational operations of UAS. Among other things, this authority extends to rules relating to the registration and marking of unmanned aircraft and the standards for remotely identifying owners and operators of UAS and associated unmanned aircraft.

Seventh, the FAA has authority to regulate registration of aircraft under 49 U.S.C. 44101–44106 and 44110–44113, which require aircraft to be registered as a condition of operation and establish registration requirements and registration processes.

Lastly, this rulemaking is promulgated under the authority described in 49 U.S.C. 106(f), which establishes the authority of the Administrator to promulgate regulations and rules, and 49 U.S.C. 40101(d), which authorizes the FAA to consider in the public interest, among other things, the enhancement of safety and security as the highest priorities in air commerce, the regulation of civil and military operations in the interest of safety and efficiency, and assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

Objectives for the final rule. The FAA is integrating UAS operations into the airspace of the United States through a phased, incremental, and risk-based approach.[55] On June 28, 2016, the FAA achieved a major step towards UAS integration when it issued the final rule for Operation and Certification of Small Unmanned Aircraft Systems.[56] This was one of multiple UAS-related regulatory actions taken by the FAA to enable the safe integration of UAS into the airspace of the United States. As technology progresses and the utility of UAS increases, the FAA anticipates a need for further rulemaking to continue to foster the safe, secure, and efficient use of the airspace of the United States. The FAA believes that the next step in the regulatory process involves the enactment of regulatory requirements to enable the remote identification of UAS operating in the airspace of the United States.

This action would implement requirements for the remote identification of UAS. The remote identification of UAS in the airspace of the United States would address safety, security, and law enforcement concerns regarding the further integration of these aircraft into the airspace.

2. A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

FAA is not aware of any comments specific to the regulatory flexibility analysis; however, many commenters stated that small businesses would be adversely affected. Commenters that stated that compliance with the remote identification requirements as proposed would be too costly for many recreational operators and businesses, many of which are small. The commenters suggested that many recreational operators and owners, especially those involved in flying and building remote controlled aircraft, would cease pursuing the hobby or business, because of the cost to either upgrade or replace existing aircraft to meet the proposed standard and the cost to subscribe to internet service. Commenters suggested that there does not exist an off-the-shelf solution, such as software upgrades, to retrofit most recreational aircraft.

The FAA has attempted to alleviate complexity and costs of compliance for all operators of unmanned aircraft by removing the network requirement from the final rule and allowing remote identification using a stand-alone broadcast module at this time. The concept allows unmanned aircraft built without remote identification (*e.g.,* existing unmanned aircraft fleet, home-built unmanned aircraft) to be operated outside of FAA-recognized identification areas because the broadcast modules enable the unmanned aircraft to broadcast the remote identification message elements required by this rule.

The FAA decided to incorporate this new concept into this rule after reviewing public comments and considering the significant concerns raised with respect to the remote identification UAS framework. The FAA determined a remote identification broadcast module facilitates compliance with this rule and meets the safety and security needs under this rule of the

[55] Consult *http://www.faa.gov/uas* for additional information regarding UAS operations.

[56] 81 FR 42064.

FAA, national security agencies, and law enforcement. The concept is broadcast-based and does not require a person to connect to the internet to identify remotely, as the limited remote identification UAS proposal did. This shift allows unmanned aircraft equipped with remote identification broadcast modules to operate in areas where the internet is unavailable. In addition, by making this a broadcast solution, the FAA has determined that the 400-foot range limitation included in the proposed requirements for limited remote identification UAS is no longer warranted and has removed the design constraint.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

The Chief Counsel for Advocacy of the Small Business did not submit comments to the proposed rule.

4. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate is Available

The rule could apply to three communities of small entities: Producers of unmanned aircraft, entities that either own or operate UAS, and community-based organizations.

For purposes of this rulemaking, the FAA estimates that there are approximately 188 United States entities that produce small unmanned aircraft.[57] Out of these 188 United States entities, data on entity size, as defined by number of employees, was available for 157 of the entities. Out of these 157, 132 are categorized as small, 11 are categorized as medium, and 12 are categorized as large.[58] Data for the remaining entities was not available and thus the categorization by entity size could not be determined, however a majority of these entities are believed to be small. NAICS code 336411 is titled ''Miscellaneous Aircraft Manufacturing,'' and includes the manufacture of unmanned and robotic aircraft. The SBA defines industries within this code to be small if they employ 1,500 employees or less.

The next group of entities affected by the final rule are owners and operators of UAS that conduct operations for purposes other than recreational. While the FAA does not collect entity size information when owners register unmanned aircraft, the Association for Unmanned Vehicle Systems International (AUVSI) has performed an analysis of part 107 waivers issued and determined that 92 percent of the waivers were issued to entities with fewer than 100 employees.[59] Based on the AUVSI analysis, the FAA determines that a majority of entities operating unmanned aircraft for other than recreational purposes are small.

Model aircraft clubs[60] currently operating flying sites are affected by this rulemaking. To have an established flying site approved as an FAA-recognized identification area, these organizations would be required to submit a request to the FAA. Based on an AMA (Academy of Model Aeronautics) membership of 180,000,[61] it is estimated that each flying club has, on average, 82 members.[62] For NAICS code 713990 ''All Other Amusement and Recreation Activities'' the SBA standard for small entity size is less than $7.5 million in annual receipts. Financial records for these individual community-based organizations are not public information, but it is believed that none have receipts totaling $7.5 million, and thus each is considered a small entity.

The FAA determines that a majority of entities impacted by this proposed rule are small. Therefore, the FAA determines this proposed rule would have a significant economic impact on a substantial number of small entities.

5. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

This rule imposes recordkeeping requirements. The FAA proposed changes to the registration requirements for all unmanned aircraft, including small unmanned aircraft, in the NPRM. While the FAA is not finalizing all of the registration changes proposed, this final rule finalizes certain requirements for all persons registering unmanned aircraft. As of the effective date of this final rule, an applicant requesting registration of an unmanned aircraft is required to submit the following information: The applicant's name, physical address, email address, and telephone number(s); the aircraft manufacturer and model name; the serial number of the standard remote identification unmanned aircraft or the serial number of the remote identification broadcast module; and other information as required by the Administrator.

Next, the FAA requires persons who develop standards that the FAA may accept as a means of compliance to submit those standards for review and acceptance by the FAA. A person who submits a means of compliance is required to retain the data for as long as the means of compliance is accepted, plus an additional 24 calendar months.

The FAA is requiring persons who produce unmanned aircraft with remote identification to meet the minimum performance requirements of the rule using an FAA-accepted means of compliance. To demonstrate the unmanned aircraft has been produced to meet the minimum performance requirements using an FAA-accepted means of compliance, persons responsible for the production of unmanned aircraft would be required to submit to the FAA a declaration of compliance. A person who submits a declaration of compliance is required to retain the data submitted for 24 calendar months after the cessation of production of the unmanned aircraft with remote identification.

The rule requires a producer to label the unmanned aircraft to show that it was produced with remote identification technology capable of meeting the rule. The labeling requirement would inform the operator that the unmanned aircraft is eligible to conduct operations within the airspace of the United States.

[57] AUVSI Air Platform Database. Accessed July 2020.

[58] This is based on AUVSI criteria for number of employees. The AUVSI criteria for a manufacturer of unmanned aircraft to be identified as a small entity is 49 employees or fewer. The criteria to be identified as a medium entity is 50–499 employees. Large entities are determined to have 500 or more employees.

[59] (AUVSI) Association of Unmanned Vehicle Systems International. As of April 2020, 4,144 waivers had been issued. For those waivers that could be identified by entity size, 85.5 percent were granted to entities with less than 10 employees), and 6.7 percent were granted to entities with 10 to 100 employees.

[60] Academy of Model Aeronautics (AMA), *http://www.modelaircraft.org/aboutama/whatisama.aspx;* more than 2,500 AMA clubs.

[61] *http://amablog.modelaircraft.org/amagov/files/2020/02/AMA-Letter-to-Sec-Chao-on-Remote-ID-Hobbyist-Impact-2-12-20-.pdf.*

[62] Ibid. Based on 2020 AMA membership of 180,000 and approximately 2,200 AMA fields, the average membership per field is estimated to be 82 individuals.

Standard remote identification unmanned aircraft and unmanned aircraft equipped with a remote identification broadcast module must be designed and produced to broadcast certain message elements using unlicensed radio frequency spectrum. The disclosure of this information in the form of message elements is necessary to comply with the statutory requirement to develop standards for remotely identifying operators and owners of UAS and associated unmanned aircraft. Remote identification of unmanned aircraft would provide airspace awareness to the FAA, national security agencies, law enforcement entities, and other government officials which could be used to distinguish compliant airspace users from those potentially posing a safety or security risk.

Authorized representatives of CBOs and educational institutions may request the establishment of an FAA-recognized identification area by submitting an application in a form and manner acceptable to the Administrator. The application will collect certain information regarding the location and requirements of the flying site, and require the CBO representative to confirm certain information regarding the site.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The FAA considered both higher and lower cost alternatives as part of the proposed rule because the RFA requires the Agency to consider significant regulatory alternatives that meet the Agency's statutory objectives and minimize the costs to small entities. The FAA rejected the costlier alternatives due to policy considerations and the undue burden imposed on small unmanned aircraft operators. The less costly alternatives and the FAA's reasons for either rejecting those alternatives, or adopting them for the final rule, are discussed below.

i. Alternative Compliance Periods—Producers

The chosen compliance period to estimate producer costs is 18 months beyond the effective date of the final rule. The FAA proposed a 2-year compliance date in the NPRM, and considered it for the final rule as well. The reduction in the producer compliance period by 6 months reflects that the final rule removes the network requirement for the time being, which alleviates technical complexities for producers of unmanned aircraft. Though no FAA-accepted means of compliance is currently available for producers to build to, there is an ASTM Standard Specification for remote identification and tracking available. Accordingly, the FAA believes it is practical for this industry consensus standard to be modified and submitted for acceptance as a means of compliance 6 months after the effective date of the final rule, allowing an additional year for producers to design, build, and test unmanned aircraft that meet the standard.

The FAA has not identified or analyzed an alternative based on the final rule's requirements. The rule does not preclude earlier producer compliance, and there potentially could be economic incentive to comply earlier.

ii. Alternative Operational Compliance Periods

The FAA considered allowing 3 years beyond the effective date of the final rule for owners and operators to comply with the remote identification requirements of this rule. However, the FAA determined that period of time was less preferable because it prolonged safety and security risks to air traffic and airports by delaying the ability of law enforcement personnel to identify unauthorized UAS operations. To reduce the delay in implementing remote identification, the owner/operator compliance period was reduced from 3 years after the effective date of the final rule to 30 months after the effective date of the final rule. For UAS purchased prior to the final rule or after the final rule is published, a stand-alone broadcast module could be purchased to continue operating the unmanned aircraft for its natural lifespan. Permitting stand-alone broadcast modules is a simple and minimally burdensome solution that lowers the cost for existing manufactured and amateur-built unmanned aircraft to meet the remote identification requirements via broadcast. In addition, this alternative is likely to reduce uncertainty of adverse impacts to producers with inventories of unmanned aircraft produced before the compliance date that would likely not meet the remote identification provisions of the proposal.

iii. Require Network Connectivity and Broadcast Capability

The FAA considered requiring network connectivity through a USS in addition to the broadcast requirement that the final rule adopts. However, the FAA recognized concerns about an internet connectivity requirement including internet availability or connectivity issues; increased costs for unmanned aircraft upgrades, internet data plans, and Remote ID USS subscriptions; and reduced air and ground risk when operating in remote areas with less air traffic and lower population density. The FAA acknowledges that the ability to connect to the internet is dependent on a variety of factors including geographic coverage of cellular internet networks, wide-scale network disruptions, or natural disasters.

There are some remote areas where an operator cannot connect to the internet, such as locations where cellular or other internet signals are not available or sufficient to establish and maintain a connection to a Remote ID USS. While loss of the broadcast capability is an indication of a remote identification equipment failure, loss of connectivity to the internet or a Remote ID USS could be attributed to a lack of internet availability that is outside the control of the UAS operator. A functioning broadcast capability is necessary for remote identification information to be available in areas that do not have internet availability. Therefore, the proposed regulations have been updated to reflect that the required remote identification message elements must be broadcast from the unmanned aircraft, with no internet connectivity or Remote ID USS transmission requirements.

The FAA notes that many current unmanned aircraft are capable of broadcasting information but may have difficulty with the potential complexity and cost of integrating network capabilities to meet proposed standard remote identification requirements. By incorporating the broadcast-only requirement, the dependency on an internet connection as the sole means of providing remote identification information is removed, and allows the unmanned aircraft to operate in areas where the internet is unavailable. In addition, by incorporating a broadcast requirement, the FAA has determined that the 400-foot range limitation is no longer warranted and has removed this design constraint. The previously proposed limited remote identification UAS concept is being replaced with the remote identification broadcast module to provide a simpler, cost-effective

method for existing and amateur-built unmanned aircraft to meet the remote identification requirements.

iv. Requiring Separate Certificate of Aircraft Registration for Each Section 44809 Unmanned Aircraft

This rule retains the requirement for small unmanned aircraft owners to pay a $5 registration fee and a $5 renewal fee, though this rule differs from the proposal in the NPRM to require a separate registration for each individual aircraft. As a result of the FAA's decision to maintain the current registration framework, owners of aircraft operated exclusively in compliance with 49 U.S.C. 44809 must only register once for all aircraft meeting that description. Therefore, those owners would pay the $5 fee one time every 3 years, and not a $5 fee for each aircraft registered.

v. Open FAA-Recognized Identification Areas to Entities Other Than CBOs

The FAA considered allowing educational institutions and State and local governments to request FAA-recognized identification areas if it would reduce regulatory burden while meeting the intent of the rule.

By identifying a defined location where operations of UAS without remote identification would be occurring, the FAA-recognized identification area itself becomes the form of identification. Though the FAA considers that FAA-recognized identification areas may not be necessary for the majority of unmanned aircraft operators under this rule with the addition of the remote identification broadcast module option, the FAA recognizes an ongoing need for some operators such as educational science, technology, engineering, and math programs to have an option for operating without remote identification. To support science, technology, engineering, and math programs and encourage participation in aviation for educational purposes, this rule will expand eligibility to educational institutions including institutions of primary and secondary education, trade schools, colleges, and universities. As adopted, community-based organizations will continue to be eligible to apply.

The FAA is including educational institutions at all levels in recognition of the critical role they play in providing pathways to aviation careers, whether through science, technology, engineering, and math curricula; the building and flight of unmanned aircraft; or other educational activities. The FAA determines it is appropriate to allow these educational institutions to request the establishment of FAA-recognized identification areas. The FAA believes that extending the ability to request establishment of FAA-recognized identification areas to educational institutions will provide more convenient locations for those operations and reduce costs associated with travel time to FAA-recognized identification areas.

The FAA also considered expanding eligibility for FAA-recognized identification areas to State and local governments. The FAA considers that expanding eligibility to CBOs and educational institutions at all levels is sufficient, and declines to expand eligibility to State and local governments. With the addition of the remote identification broadcast module option, the FAA considers there is now an available option for operators to retrofit their unmanned aircraft produced prior to the production compliance date. Expanding eligibility to State and local governments could expand the scope of FAA-recognized identification areas to an extent that would undermine the effectiveness of remote identification.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for United States standards.

The FAA has assessed the potential effect of this rule and determined that it ensures the safety of the American public and does not exclude imports that meet this objective. As a result, the FAA does not consider this final rule as creating an unnecessary obstacle to foreign commerce.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of about $155 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA sought public comments on all of the information collections being established or revised in this rule. The FAA did not receive any comments specific to the information collection-related aspects of the proposed rule. The FAA is implementing these collections based on the requirements of this rule as published in the NPRM.

Five new information collections are established as part of this rule.

1. New Information Collection: 2120–0785: Additional Elements for Small Unmanned Aircraft Registration System

This rule finalizes several changes to the registration requirements for small unmanned aircraft registering under part 48. Specifically, the FAA is establishing a new information collection to add the following information to the list of information collected upon registration or registration renewal of small unmanned aircraft under information collection 2120–0765, Small Unmanned Aircraft Registration System:

(1) Applicant's telephone number(s) and, for an applicant other than an individual, the telephone number(s) of the authorized representative.

(2) For any standard remote identification unmanned aircraft, the serial number issued by the manufacturer of the unmanned aircraft in accordance with the design and production requirements of part 89. The serial number provided in this application must not be listed on more than one Certificate of Aircraft Registration at the same time.

(3) For any unmanned aircraft equipped with a remote identification broadcast module, the serial number issued by the manufacturer of the remote identification broadcast module in accordance with the design and production requirements of part 89. An applicant may submit the serial number

of more than one remote identification broadcast module as part of the application for aircraft registration under § 48.105. The serial number of a remote identification broadcast module provided in this application must not be listed on more than one Certificate of Aircraft Registration at the same time.

The FAA recognizes that persons who currently register their small unmanned aircraft other than exclusively for limited recreational operations are already required to provide the manufacturer, model, and serial number, if available. Therefore, these persons will only need to update their registration with one or more telephone numbers.

Persons who have registered their unmanned aircraft exclusively for limited recreational operations will need to provide one or more telephone numbers, and will need to list one or more unmanned aircraft serial numbers or remote identification broadcast module serial numbers if they wish to operate their unmanned aircraft outside FAA-recognized identification areas.

Use: The FAA would use the telephone number, manufacturer, model, and serial number of the unmanned aircraft or remote identification broadcast module to assist with the remote identification of unmanned aircraft systems. The serial number, which may be broadcast as the unique identifier of an unmanned aircraft, would help to identify the aircraft and associate the aircraft with its owner. The FAA would use the telephone number of the owner to disseminate safety and security-related information to the registrant as well as issues related to compliance.

TABLE 7—SMALL UNMANNED AIRCRAFT REGISTRATION—INCREMENTAL HOURLY BURDEN AND COST

[$Mil.]

Year	Registrations	Hourly burden	Total cost ($Mil.)
1	552,046	9,201	$0.29
2	819,428	13,657	0.37
3	748,983	12,483	0.36
Total	2,120,457	35,341	1.02

Row and column totals may not sum due to rounding.

2. New Information Collection: 2120–0782, Identification of Foreign-Registered Civil Unmanned Aircraft Operating in the Airspace of the United States

The FAA is extending the operational requirements of part 89 to persons operating foreign civil unmanned aircraft in the United States. These persons must comply with the remote identification requirements, which means that these persons are required to operate foreign civil unmanned aircraft that qualify as standard remote identification unmanned aircraft, unmanned aircraft equipped with a remote identification broadcast module, or that have no remote identification equipment, but are operated within an FAA-recognized identification area.

The FAA will allow a person to operate foreign-registered civil unmanned aircraft in the United States only if the person submits a notice of identification to the Administrator. The notice is required to have the following information to allow FAA to associate an unmanned aircraft to a responsible person:

(1) The name of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative.

(2) The physical address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the physical address for the person's authorized representative. If the operator or authorized representative does not receive mail at the physical address, a mailing address must also be provided.

(3) The telephone number(s) where the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative can be reached while in the United States.

(4) The email address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the email address of the person's authorized representative.

(5) The unmanned aircraft manufacturer and model name.

(6) The serial number of the unmanned aircraft or remote identification broadcast module.

(7) The country of registration of the unmanned aircraft.

(8) The registration number.

Once a person submits a notice of identification, the FAA will issue a confirmation of identification. A person operating a foreign-registered civil unmanned aircraft in the United States will have to maintain the confirmation of identification at the unmanned aircraft' control station, and will have to produce it when requested by the FAA or a law enforcement officer. The holder of a confirmation of identification will have to ensure that the information provided remains accurate and is current prior to operating a foreign-registered civil unmanned aircraft in the United States.

Use: The FAA uses information provided by operators of foreign-registered civil unmanned aircraft operating in the airspace of the United States to identify those aircraft.

TABLE 8—NOTICE OF IDENTIFICATION

[Unit cost]

Year	Minutes to establish account [63]	Additional minutes per aircraft	Total minutes	Part 107 opportunity cost of time ($0.794/minute) [64]	Recreational flyer opportunity cost of time ($0.242/minute) [65]
1	5	1	6	$4.76/notification	$1.45/notification.
2	5	1	6	4.76/notification	1.45/notification.

TABLE 8—NOTICE OF IDENTIFICATION—Continued

[Unit cost]

Year	Minutes to establish account [63]	Additional minutes per aircraft	Total minutes	Part 107 opportunity cost of time ($0.794/minute) [64]	Recreational flyer opportunity cost of time ($0.242/minute) [65]
3	5	1	6	4.76/notification	1.45/notification.

3. New Information Collection: 2120–0781, Remote Identification Means of Compliance, Declaration of Compliance, and Labeling Requirements

i. Means of Compliance

The FAA is requiring persons who develop standards that the FAA may accept as means of compliance for the production of standard remote identification unmanned aircraft and remote identification broadcast modules to submit those standards for review and acceptance by the FAA. The means of compliance will include requirements for producer demonstration of how the standard remote identification unmanned aircraft or remote identification broadcast module performs its intended functions and meets the performance requirements by analysis, ground test, or flight test, as appropriate. A person who submits a means of compliance that is accepted by the FAA is required to retain the following data for as long as the means of compliance is accepted and an additional 24 calendar months: All documentation and substantiating data submitted for the acceptance of the means of compliance; records of all test procedures, methodology, and other procedures, if applicable; and any other information necessary to justify and substantiate how the means of compliance enables compliance with the remote identification requirements of part 89.

Use: The FAA uses the means of compliance as a way for persons responsible for the production of standard remote identification unmanned aircraft or remote identification broadcast modules to demonstrate compliance with the requirements for remote identification of unmanned aircraft.

TABLE 9—MEANS OF COMPLIANCE HOURLY BURDEN AND COST

Year	Means of compliance submitted	Total pages	Hours per page	Total hours	Cost per hour	Total cost
1	1	12	1	12	$94.52	$1,134.24
2	1	12	1	12	94.52	1,134.24
3	1	12	1	12	94.52	1,134.24
Total	3	36	3	36		3,402.72

Row and column totals may not sum due to rounding.

ii. Declaration of Compliance

The FAA is requiring persons responsible for the production of standard remote identification unmanned aircraft and remote identification broadcast modules to produce those unmanned aircraft and broadcast modules to meet the minimum performance requirements of the rule using an FAA-accepted means of compliance.

To demonstrate that a standard remote identification unmanned aircraft has been produced using an FAA-accepted means of compliance, producers are required to submit to the FAA a declaration of compliance containing:

- The name, physical address, telephone number, and email address of the person responsible for production of the standard remote identification unmanned aircraft.
- The unmanned aircraft make and model.
- The unmanned aircraft's serial number, or the range of serial numbers for which the person responsible for production is declaring compliance.
- The FCC Identifier of the 47 CFR part 15-compliant radio frequency equipment used and integrated into the unmanned aircraft.
- The means of compliance used in the design and production of the unmanned aircraft.
- Whether the declaration of compliance is an initial declaration or an amended declaration, and if the declaration of compliance is an amended declaration, the reason for the amendment.
- A declaration that the person responsible for the production of the unmanned aircraft:
  - Can demonstrate that the unmanned aircraft was designed and produced to meet the minimum performance requirements of standard remote identification unmanned aircraft by using an FAA-accepted means of compliance.
  - Will, upon request, allow the Administrator to inspect its facilities, technical data, and any unmanned aircraft produced with remote identification, and to witness any tests necessary to determine compliance with part 89, subpart D.
  - Will perform independent audits on a recurring basis, and whenever the

[63] *https://www.faa.gov/news/updates/media/2015-12-13_2120-AK82_RIA.pdf.* See Page 13 of the Regulatory Impact Analysis of the Interim Final Rule Regulatory Evaluation for the Registration and Marking Requirements for Small Unmanned Aircraft. RIN 2120–AK82.

[64] The hourly wage earned by part 107 operators is estimated to be $33.33 per hour. The fully-burdened hourly wage (compensation + benefits) uses a load factor 1.43 for a total of $47.66 per hour. ($0.794 per minute).

[65] Department of Transportation Departmental Guidance on Valuation of Travel Time in Economic Analysis, September 27, 2016. Table 4 Recommended Hourly Values of Travel Time Savings, Page 17. In constant dollars, the hourly value of time for personal travel is $14.52 per hour ($.242 per minute). This value is used as a proxy for the value of time of someone operating UAS for recreational operations.

FAA provides notice of noncompliance or of potential noncompliance, to demonstrate compliance with the requirements of subpart F of part 89, and will provide the results of those audits to the FAA upon request.

○ Will maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes the unmanned aircraft to no longer meet the requirements of subpart F of part 89, within 15 calendar days of the date the person becomes aware of the defect or condition.

• A statement that 47 CFR part 15-compliant radio frequency equipment is used and is integrated into the unmanned aircraft without modification to its authorized radio frequency parameters.[66]

To demonstrate that a remote identification broadcast module has been produced using an FAA-accepted means of compliance, producers are required to submit to the FAA a declaration of compliance containing:

• The name, physical address, telephone number, and email address of the person responsible for production of the remote identification broadcast module.

• The remote identification broadcast module make and model.

• The remote identification broadcast module serial number, or the range of serial numbers for which the person responsible for production is declaring compliance.

• The FCC Identifier of the 47 CFR part 15-compliant radio frequency equipment used and integrated into the remote identification broadcast module.

• The means of compliance used in the design and production of the remote identification broadcast module.

• Whether the declaration of compliance is an initial declaration or an amended declaration, and if the declaration of compliance is an amended declaration, the reason for the amendment.

• A declaration that the person responsible for the production of the remote identification broadcast module:

○ Can demonstrate that the broadcast module was designed and produced to meet the minimum performance requirements of remote identification broadcast modules by using an FAA-accepted means of compliance.

○ Will, upon request, allow the Administrator to inspect its facilities, technical data, and any remote identification broadcast modules produced, and to witness any tests necessary to determine compliance with part 89, subpart D.

○ Will perform independent audits on a recurring basis, and whenever the FAA provides notice of noncompliance or of potential noncompliance, to demonstrate compliance with the requirements of subpart F of part 89, and will provide the results of those audits to the FAA upon request.

○ Will maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes the remote identification broadcast module to no longer meet the requirements of subpart F of part 89, within 15 calendar days of the date the person becomes aware of the defect or condition.

○ Will make available instructions for installing and operating the remote identification broadcast module to any person operating an unmanned aircraft with the remote identification broadcast module.

• A statement that 47 CFR part 15-compliant radio frequency equipment is used and is integrated into the remote identification broadcast module without modification to its authorized radio frequency parameters, and a statement that instructions have been provided for installation of 47 CFR part 15-compliant remote identification broadcast module without modification to the broadcast module's authorized radio frequency parameters.

A person who submits a declaration of compliance that is accepted by the FAA is required to retain the following data for 24 calendar months after the cessation of production of the standard remote identification unmanned aircraft or remote identification broadcast module: The means of compliance, all documentation, and substantiating data related to the means of compliance used; records of all test results; and any other information necessary to demonstrate compliance with the means of compliance so that the unmanned aircraft or broadcast module meets the remote identification requirements of part 89.

Use: The FAA uses the declaration of compliance to determine that the person responsible for the production of standard remote identification unmanned aircraft or remote identification broadcast modules has demonstrated compliance with the requirements for remote identification of unmanned aircraft.

TABLE 10—DECLARATION OF COMPLIANCE HOURLY BURDEN AND COST

[$Mil]

Year	Declaration of compliance submitted	Pages per declaration of compliance	Hours per page	Hourly burden	Cost per hour	Total cost
1	.....	.....	.....	.....	.....	.....
2	1,346.1	50	1	67,305	$83.79	$5.64
3	18.9	50	1	945	83.79	0.08
Total	1,365	.....	.....	68,250	83.79	5.72

Row and column totals may not sum due to rounding.

iii. Labeling

For standard remote identification unmanned aircraft and remote identification broadcast modules, the rule requires the person responsible for production of the unmanned aircraft or broadcast module to label the unmanned aircraft or broadcast module to show that it was produced with remote identification technology that meets the requirements of the rule. The label would be in English and be legible, prominent, and permanently affixed to the unmanned aircraft or broadcast module. The proposed labeling

[66] As part of the acceptance process, the FAA will rely on an applicant's statement that the equipment complies with FCC regulations. The FAA's acceptance of a declaration of compliance is not a determination that the equipment is in compliance with FCC regulations. The FAA notes that an applicant who falsely asserts that the equipment is in compliance with FCC regulations may be subject to civil and criminal penalties, as well as administrative action pursuant to 18 U.S.C. 1001 and 14 CFR 89.5.

requirement assists the operator to know that his or her unmanned aircraft or broadcast module is eligible to conduct operations within the airspace of the United States.

Use: The labeling requirement assists the FAA and owners and operators of unmanned aircraft and broadcast modules to determine if the unmanned aircraft or broadcast module meets the remote identification requirements of the rule.

TABLE 11—LABELING REQUIREMENT HOURLY BURDEN AND COST

[$Mil.]

Year	Number of platforms	Hours per design	Hourly burden	Cost per hour	Total cost
1					
2	1,282	2	2,564	$83.79	$0.215
3	18	2	36	83.79	0.003
Total	1,300		2,600	83.79	0.218

Row and column totals may not sum due to rounding.

4. New Information Collection: 2120–0783, Remote Identification Message Elements

Standard remote identification unmanned aircraft and unmanned aircraft equipped with a remote identification broadcast module must be designed and produced to broadcast certain message elements using unlicensed radio frequency spectrum. The remote identification requirements to broadcast the message elements are consistent with the statutory authority allowing FAA to promulgate rules generally applicable to unmanned aircraft relating to the standards for remotely identifying owners and operators of UAS and associated unmanned aircraft.[67]

Remote identification of unmanned aircraft would provide airspace awareness to the FAA, national security agencies, law enforcement entities, and other government officials. The information can be used to distinguish compliant airspace users from those potentially posing a safety or security risk.

No person would be able to operate an unmanned aircraft required to have remote identification within the airspace of the United States unless the unmanned aircraft is capable of broadcasting certain message elements. Persons operating unmanned aircraft would comply with remote identification in one of three ways. First, standard remote identification unmanned aircraft would broadcast those message elements directly from the unmanned aircraft. These message elements would include the unique identifier (either the unmanned aircraft's serial number or session ID), latitude, longitude, and geometric altitude of both the control station and the unmanned aircraft, the velocity of the unmanned aircraft, a time mark, and an emergency status code that would be broadcast-only when applicable. A standard remote identification unmanned aircraft that could no longer broadcast the message elements would have to land as soon as practicable.

Second, unmanned aircraft without remote identification could equip with a remote identification broadcast module by either a software upgrade or by securing the module to the unmanned aircraft prior to takeoff. The broadcast module would broadcast the message elements directly from the unmanned aircraft. These message elements would include the unique identifier (the unmanned aircraft's serial number); latitude, longitude, and geometric altitude of both the takeoff location and the unmanned aircraft; the velocity of the unmanned aircraft; and a time mark. Unmanned aircraft with remote identification broadcast modules would have to be operated such that the person manipulating the flight controls of the UAS is able to see the unmanned aircraft at all times throughout the operation.

The third way to comply with the unmanned aircraft remote identification requirements would be to operate an unmanned aircraft without remote identification at an FAA-recognized identification area. Because these types of operations do not involve the broadcast of message elements, they were not considered as part of this information collection.

Use: The remote identification message elements are broadcast from the standard remote identification unmanned aircraft or remote identification broadcast module using unlicensed radio frequency spectrum.

The following table shows the number of estimated respondents that would broadcast messages.

TABLE 12—BROADCAST MESSAGE ELEMENTS

Year	Remote ID respondents
1	
2	269,600
3	1,160,669
Total	1,430,269

5. New Information Collection: 2120–0784, Application for FAA-Recognized Identification Areas

The FAA will allow CBO representatives and representatives of educational institutions to submit applications for flying sites to become FAA-recognized identification areas in a form and manner acceptable to the FAA. The application collects certain information regarding the location of the flying site, and requires the representative to confirm certain information regarding the site.

An applicant for an FAA-recognized identification area would be required to submit: (1) The name of the eligible person under § 89.205; (2) the name of the individual making the request on behalf of the eligible person; (3) a declaration that the individual making the request has the authority to act on behalf of the entity; (4) the name and contact information, including telephone number, of the primary point of contact for communications with the FAA; (5) the physical address of the proposed FAA-recognized identification area; (6) the location of the proposed FAA-recognized identification area; (7) if applicable, a copy of any existing letter of agreement regarding the flying site; (8) a description of the intended purpose of the FAA-recognized identification area and why the proposed FAA-recognized identification area is necessary for that purpose, and

[67] See 49 U.S.C. 44809.

(9) any other information required by the Administrator.

Use: Applications permit community-based organizations and educational institutions to apply for FAA-recognized identification areas.

TABLE 13—REQUEST FOR FAA-RECOGNIZED IDENTIFICATION AREA HOURLY BURDEN AND COST

[$Mil]

Year	Requests submitted	Pages per request	Total pages	Hours per page	Total hours	Hourly burden	Total cost
2	3,966	4	15,864	0.5	7,932	$58.47	$0.46
3	50	4	200	0.5	100	58.47	0.01
Total	4,016		16,064		8,032		0.47

Row and column totals may not sum due to rounding.

F. International Compatibility and Cooperation

In keeping with United States obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the existing ICAO Standards and Recommended Practices and has determined that no Standards and Recommended Practices correspond to these regulations. The FAA regularly reaches out to its international partners on a bilateral and multilateral basis to harmonize regulations to the maximum extent possible. The FAA's international outreach efforts include the following:

- Discussions with the Switzerland Federal Office of Civil Aviation (FOCA) regarding plans for use of remote identification to facilitate U-Space operations and plans to allow multiple UAS Service Suppliers to provide a range of services, similar in concept to current and future FAA USS plans.
- Collaboration with the European Union Aviation Safety Agency (EASA) on the EASA U-Space Regulatory Framework.
- Cooperation in the Joint Authorities for Rulemaking on Unmanned Systems (JARUS) on UTM/U-Space and other regulatory recommendations under development.
- Collaboration with the Transport Canada Civil Aviation (TCCA) Remotely Piloted Aircraft Systems (RPAS) Task Force on policy, rulemaking, regulatory, and research and development topics related to UAS and beyond visual line of sight operations.
- The FAA hosted a workshop on Sharing Best Practices for Managing UAS with the Association of Southeast Asian Nations (ASEAN) Member States in Singapore.
- Meetings with the Australia Civil Aviation Safety Authority (CASA) to share best practices and lessons learned on UAS integration.
- Shared the remote identification NPRM announcement with FAA international Regional Directors, and also shared the NPRM directly with 35 civil aviation authorities, air navigation service providers, trade associations and embassies.
- The FAA met with Transport Canada Civil Aviation (TCCA), briefed them on the remote identification NPRM, and learned of TCCA plans to issue proposed BVLOS rulemaking with potential remote identification content by the end of 2020.
- The FAA Associate Administrator for Aviation Safety gave a speech on the remote identification NPRM at the Singapore Airshow.
- The FAA met with United Kingdom National Air Traffic Services organization to discuss UTM, including the status of the remote identification rulemaking and comments received to date.
- The FAA Administrator met with the French Minister of Transportation in discussions that included the remote identification NPRM.
- The FAA met with EASA to discuss comments received and the status of the respective U-Space rulemaking by EASA and remote identification rulemaking of the FAA, and learned that EASA had received approximately 2,600 comments on their U-Space Opinion compared to the 53,000 comments received on the remote identification NPRM.
- The FAA held webinars with 52 countries, and representatives from the International Civil Aviation Organization (ICAO) and the Latin American Civil Aviation Commission (LACAC), ICAO Regional Offices, and the Africa Civil Aviation Commission (AFCAC) to discuss the FAA UTM Concept of Operations, including its relationship to remote identification transmissions, answering questions on the status of remote identification rulemaking.

In addition, the FAA has assessed the European Commission regulations for UAS remote identification and compared them to the requirements in this final rule. Similar to the proposed European Commission regulations, the FAA adopts a broadcast-only requirement for remote identification information. Other similarities include that the European regulation and the FAA's rule both include the position of the unmanned aircraft and the control station as remote identification message elements. One difference is the proposed European regulation requires the broadcast of both the unmanned aircraft registration number and the serial number, whereas the FAA's rule uses the unmanned aircraft or remote identification broadcast module serial number or a session ID as the unique identifier in the remote identification message set. Other differences include that the European regulation requires message elements for the route course and speed of the unmanned aircraft, while the FAA's rule only includes velocity of the unmanned aircraft, and the FAA rule includes remote identification message elements for emergency status and a time mark, but the European regulation does not.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances. The FAA determined that the categorical exclusion in FAA Order 1050.1F, paragraph 5–6.6.f. applies to this action. The FAA has determined that none of the extraordinary circumstances in FAA Order 1050.1F, paragraph 5–2 exist.

This rulemaking action provides a framework and establishes requirements for the remote identification of all UAS operating in the airspace of the United States. It will not alone enable routine expanded operations, affect the frequency of UAS operations in the

airspace of the United States, or authorize additional UAS operations. Nor does the rule by itself open up new areas of airspace to UAS.

Subpart C provides the requirements for an applicant to request the establishment of an FAA-recognized identification area. At the time that FAA establishes any such area, the FAA will conduct any necessary environmental reviews.

For these reasons, the FAA has reviewed the implementation of the rulemaking action and determined it is categorically excluded from further environmental review. Possible extraordinary circumstances that would preclude the use of a categorical exclusion have been examined and the FAA has determined that no such circumstances exist. After careful and thorough consideration of the rulemaking action, the FAA finds that it does not require preparation of an Environmental Assessment or an Environmental Impact Statement in accordance with the requirements of NEPA, Council on Environmental Quality regulations, and FAA Order 1050.1F.

XXIII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. The Agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have federalism implications.

B. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,[68] and FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures,[69] the FAA ensures that Federally Recognized Tribes (Tribes) are given the opportunity to provide meaningful and timely input regarding proposed Federal actions that have the potential to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes; or to affect uniquely or significantly their respective Tribes.

One tribe, the Choctaw Nation, provided comments on the proposed rule. See Comment ID FAA–2019–1100–34477. In these comments, the Choctaw Nation expressed that remote identification would help expand unmanned aircraft operations and build confidence in local communities. It also requested that FAA be mindful of issues facing rural communities in development of the final rule, including the potential for unique broadband and communication issues.

At this point, the FAA has not identified any substantial direct effects or any unique or significant effects on tribes resulting from this rule.

The FAA continues to develop its involvement with tribes within the broader UAS integration effort.[70] In particular, the FAA has partnered with the Choctaw Nation in a pilot program under which State, local, and tribal governments test and evaluate the integration of civil and public UAS operations into the low-altitude airspace of the United States to promote the safe operation of UAS and enable the development of UAS technologies and their use in agriculture, commerce, emergency management, human transportation, and other sectors.[71]

The FAA has also conducted outreach to tribes to ensure they are familiar with UAS-related rules and that they are aware of FAA's plans for additional rulemakings to integrate UAS into the airspace of the United States. As part of that recent outreach, the FAA has:

- Presented information on UAS for public safety at the Osage Nation 2019 Public Safety Drone Conference (Tulsa, Oklahoma, November 5, 2019); and
- Provided information to the National Congress of American Indians on the proposed rule for remote identification of UAS. (February 6, 2020).

The FAA will continue to respond to tribes that express interest in or concerns about UAS operations, and will engage in government-to-government consultation with tribes as appropriate, in accordance with Executive Orders and FAA guidance.

C. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The Agency has determined that it would not be a ''significant energy action'' under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

D. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

For significant regulations that the Agency identifies as having significant international impacts, the FAA has to consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan. A significant regulatory action under Executive Order 13609 has the same meaning as in section 3(f) of Executive Order 12866. An international impact, as defined in Executive Order 13609, means ''a direct effect that a proposed or final regulation is expected to have on international trade and investment, or that otherwise may be of significant interest to the trading partners of the United States.''

As discussed in the International Compatibility and Cooperation section of this rule, in keeping with United States obligations under the Convention on International Civil Aviation, the FAA seeks to conform to International Civil Aviation Organization Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations. In addition, the FAA regularly reaches out to its international partners on a bi-lateral and multi-lateral basis to harmonize regulations to the maximum extent possible. Thus, the FAA believes that the rule should have no effect on international regulatory cooperation.

The FAA identified a direct effect that may be of significant interest to the trading partners of the United States. Even though a majority of the costs and the benefits of the rule are accrued by United States entities and United States

[68] 65 FR 67249 (Nov. 6, 2000).

[69] FAA Order No. 1210.20 (Jan. 28, 2004), available at *http://www.faa.gov/documentLibrary/media/1210.pdf.*

[70] 81 FR 42064, 42189.

[71] Federal Aviation Administration, UAS Integration Pilot Program (May 7, 2018), available at *https://www.faa.gov/uas/programs_partnerships/uas_integration_pilot_program/.*

commerce,[72] the rule is estimated to cost foreign producers approximately $121.8 million at 3 percent present value and $86 million at 7 percent present value. These costs exceed those borne by United States producers because presently a vast majority of UAS operated in the United States are manufactured overseas (> 80 percent). On a per unit basis, the costs to foreign and United States producers of UAS are expected to be the same.

E. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This final rule is an Executive Order 13771 regulatory action. Details on the estimated impacts of this final rule are in the rule's economic analysis.

XXIV. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the internet by:

- Searching the Federal eRulemaking Portal (*https://www.regulations.gov);*
- Visiting the FAA's Regulations and Policies at *https://www.faa.gov/regulations_policies;* or
- Accessing the Government Publishing Office at *https://www.govinfo.gov.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the internet through the Federal eRulemaking Portal referenced above.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *https://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

[72] Thus, the FAA estimates that the primary impact of the rule will be on U.S. entities.

List of Subjects

14 CFR Part 1

Air transportation.

14 CFR Part 11

Administrative practice and procedure, Reporting and recordkeeping requirements.

14 CFR Part 47

Aircraft, Reporting and recordkeeping requirements.

14 CFR Part 48

Aircraft, Reporting and recordkeeping requirements.

14 CFR Part 89

Aircraft, Airmen, Air traffic control, Aviation safety, Incorporation by reference, Reporting and recordkeeping requirements, Security measures.

14 CFR Part 91

Air traffic control, Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements, Security measures.

14 CFR Part 107

Aircraft, Airmen, Aviation safety, Security measures.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

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

■ 2. In § 1.1, add the definition for ''Unmanned aircraft system'' in alphabetical order to read as follows:

§ 1.1 General definitions.

* * * * *

Unmanned aircraft system means an unmanned aircraft and its associated elements (including communication links and the components that control the unmanned aircraft) that are required for the safe and efficient operation of the unmanned aircraft in the airspace of the United States.

* * * * *

PART 11—GENERAL RULEMAKING PROCEDURES

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

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40109, 40113, 44110, 44502, 44701–44702, 44711, 46102, and 51 U.S.C. 50901–50923.

■ 4. Amend § 11.201(b) by adding the entry ''Part 89'' in numerical order to read as follows:

§ 11.201 Office of Management and Budget (OMB) control numbers assigned under the Paperwork Reduction Act.

* * * * *

(b) * * *

14 CFR part or section identified and described	Current OMB control No.
* * * * *	
Part 89	2120–0781, 2120–0782, 2120–0783, 2120–0785.
* * * * *	

PART 47—AIRCRAFT REGISTRATION

■ 5. The authority citation for part 47 is revised to read as follows:

Authority: 4 U.S.T. 1830; Pub. L. 108–297, 118 Stat. 1095 (49 U.S.C. 40101 note, 49 U.S.C. 44101 note); 49 U.S.C. 106(f), 106(g), 40113–40114, 44101–44108, 44110–44113, 44703–44704, 44713, 44809(f), 45302, 45305, 46104, 46301.

■ 6. Add § 47.14 to read as follows:

§ 47.14 Serial numbers for unmanned aircraft.

(a) The unmanned aircraft serial number provided as part of any application for aircraft registration of any standard remote identification unmanned aircraft must be the serial number issued by the manufacturer of the unmanned aircraft in accordance with the design and production requirements of part 89 of this chapter. The serial number provided in this application must not be listed on more than one Certificate of Aircraft Registration at the same time.

(b) The unmanned aircraft serial number provided as part of any application for registration of any unmanned aircraft with a remote identification broadcast module must be the serial number issued by the manufacturer of the remote identification broadcast module in accordance with the design and production requirements of part 89 of this chapter. The serial number provided in this application must not be listed on more than one Certificate of Aircraft Registration at the same time.

PART 48—REGISTRATION AND MARKING REQUIREMENTS FOR SMALL UNMANNED AIRCRAFT

■ 7. The authority citation for part 48 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40113–40114, 41703, 44101–44103, 44105–44106, 44110–44113, 44809(f), 45302, 45305, 46104, 46301, 46306.

§ 48.5 [Removed and Reserved]

■ 8. Remove and reserve § 48.5.

■ 9. Amend § 48.15 by revising paragraph (b) to read as follows:

§ 48.15 Requirement to register.

* * * * *

(b) The aircraft is operated exclusively in compliance with 49 U.S.C. 44809 and weighs 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft; or

* * * * *

■ 10. Amend § 48.25 by revising paragraph (a) to read as follows:

§ 48.25 Applicants.

(a) To register a small unmanned aircraft in the United States under this part, a person must provide the information required by § 48.110 to the Registry in a form and manner prescribed by the Administrator. Upon submission of this information, the FAA issues a Certificate of Aircraft Registration to that person.

* * * * *

■ 11. Amend § 48.30 by revising paragraphs (a) and (b) to read as follows:

§ 48.30 Fees.

(a) The fee for issuing or renewing a Certificate of Aircraft Registration as described in § 48.100 is $5.00 per aircraft.

(b) The fee for issuing or renewing a Certificate of Aircraft Registration as described in § 48.105 is $5.00 per certificate.

* * * * *

§§ 48.100, 48.105, 48.110, and 48.115 [Redesignated as §§ 48.110, 48.115, 48.100, and 48.105]

■ 12. Redesignate §§ 48.100 through 48.115 as follows:

Old section	New section
48.100	48.110
48.105	48.115
48.110	48.100
48.115	48.105

■ 13. Amend newly redesignated § 48.100 by revising the section heading and paragraphs (a) and (c)(1) to read as follows:

§ 48.100 Registration: Small unmanned aircraft operated for any purpose other than exclusively limited recreational operations.

(a) *Certificate of Aircraft Registration.* A Certificate of Aircraft Registration issued in accordance with § 48.110 to a small unmanned aircraft used for any purpose other than operating exclusively in compliance with 49 U.S.C. 44809 constitutes registration for the small unmanned aircraft identified on the application.

* * * * *

(c) * * *

(1) The holder of a Certificate of Aircraft Registration must renew the Certificate by verifying, in a form and manner prescribed by the Administrator, that the information provided in accordance with § 48.110 is accurate and if it is not, provide updated information. The verification may take place at any time within the six months preceding the month in which the Certificate of Aircraft registration expires.

* * * * *

■ 14. Amend newly redesignated § 48.105 by revising the section heading and paragraphs (a) and (c)(1) to read as follows:

§ 48.105 Registration: Small unmanned aircraft intended exclusively for limited recreational operations.

(a) *Certificate of Aircraft Registration.* A Certificate of Aircraft Registration issued in accordance with § 48.110 for small unmanned aircraft to be operated exclusively in compliance with 49 U.S.C. 44809 constitutes registration for all the small unmanned aircraft used exclusively for operations in compliance with 49 U.S.C. 44809 owned by the individual identified on the application.

* * * * *

(c) * * *

(1) The holder of a Certificate of Aircraft Registration must renew the Certificate by verifying, in a form and manner prescribed by the Administrator, that the information provided in accordance with § 48.110 is accurate and if it is not, provide updated information. The verification may take place at any time within the six months preceding the month in which the Certificate of Aircraft registration expires.

* * * * *

■ 15. Revise newly redesignated § 48.110 to read as follows:

§ 48.110 Application.

(a) *Required information.* Each applicant for a Certificate of Aircraft Registration issued under this part must submit all of the following information to the Registry:

(1) Applicant's name and, for an applicant other than an individual, the name of the authorized representative applying for a Certificate of Aircraft Registration.

(2) Applicant's physical address and, for an applicant other than an individual, the physical address of the authorized representative. If the applicant or authorized representative cannot receive mail at a physical address, then provide a mailing address.

(3) Applicant's email address or, for applicants other than individuals, the email address of the authorized representative.

(4) Applicant's telephone number(s) and, for an applicant other than an individual, the telephone number(s) of the authorized representative.

(5) The aircraft manufacturer and model name.

(6) For any standard remote identification unmanned aircraft, the serial number issued by the manufacturer of the unmanned aircraft in accordance with the design and production requirements of part 89 of this chapter. The serial number provided in this application must not be listed on more than one Certificate of Aircraft Registration at the same time.

(7) For any unmanned aircraft equipped with a remote identification broadcast module, the serial number issued by the manufacturer of the remote identification broadcast module in accordance with the design and production requirements of part 89 of this chapter. An applicant may submit the serial number of more than one remote identification broadcast module as part of the application for aircraft registration under § 48.105. The serial number of a remote identification broadcast module provided in this application must not be listed on more than one Certificate of Aircraft Registration at the same time.

(8) Other information as required by the Administrator.

(b) *Provision of information.* The information identified in paragraph (a) of this section must be submitted to the Registry through the web-based small unmanned aircraft registration system in a form and manner prescribed by the Administrator.

(c) *Issuance of Certificate of Aircraft Registration.* The FAA will issue a Certificate of Aircraft Registration upon completion of the application requirements provided in paragraph (a) of this section.

■ 16. Amend newly redesignated § 48.115 by revising paragraphs (a) and (b)(1) to read as follows:

§ 48.115 Requirement to maintain current information.

(a) The holder of a Certificate of Aircraft Registration must ensure that the information provided under § 48.110 remains accurate.

(b) * * *

(1) A change in the information provided under § 48.110.

* * * * *

■ 17. Amend § 48.200 by revising paragraph (b)(2) to read as follows:

§ 48.200 General.

* * * * *

(b) * * *

(2) If authorized by the Administrator, the small unmanned aircraft serial number provided with the application for Certificate of Aircraft Registration under § 48.110(a).

■ 18. Add part 89 to subchapter F to read as follows:

PART 89—REMOTE IDENTIFICATION OF UNMANNED AIRCRAFT

Sec.

Subpart A—General

89.1 Definitions.
89.5 Falsification, reproduction, alteration, or omission.

Subpart B—Operating Requirements

89.101 Applicability.
89.105 Remote identification requirement.
89.110 Operation of standard remote identification unmanned aircraft.
89.115 Alternative remote identification.
89.120 Operations for aeronautical research or to show compliance with regulations.
89.125 Automatic Dependent Surveillance-Broadcast (ADS–B) Out prohibition.
89.130 Confirmation of identification.

Subpart C—[Reserved]

Subpart D—Requirements for Standard Remote Identification Unmanned Aircraft and Remote Identification Broadcast Modules

89.301 Applicability.
89.305 Minimum message elements broadcast by standard remote identification unmanned aircraft.
89.310 Minimum performance requirements for standard remote identification unmanned aircraft.
89.315 Minimum message elements broadcast by remote identification broadcast modules.
89.320 Minimum performance requirements for remote identification broadcast modules.

Subpart E—Means of Compliance

89.401 Applicability.
89.405 Submission of a means of compliance for FAA acceptance.
89.410 Acceptance of a means of compliance.
89.415 Rescission.
89.420 Record retention.

Subpart F— Remote Identification Design and Production

89.501 Applicability.
89.505 Serial numbers.
89.510 Production requirements for unmanned aircraft produced under a design approval or production approval issued under part 21 of this chapter.
89.515 Production requirements for unmanned aircraft without design approval or production approval issued under part 21 of this chapter.
89.520 Production requirements for remote identification broadcast modules.
89.525 Labeling.
89.530 Submission of a declaration of compliance for FAA acceptance.
89.535 Acceptance of a declaration of compliance.
89.540 Rescission and reconsideration.
89.545 Record retention.

Authority: 49 U.S.C. 106(f), 106(g), 40101(d), 40103(b), 44701, 44805, 44809(f); Section 2202 of Pub. L. 114–190, 130 Stat. 629.

Subpart A—General

§ 89.1 Definitions.

The following definitions apply to this part.

Declaration of compliance means a record submitted to the FAA by the producer of a standard remote identification unmanned aircraft or remote identification broadcast module to attest that all the requirements of subpart F of this part have been met.

Home-built unmanned aircraft means an unmanned aircraft that an individual built solely for education or recreation.

§ 89.5 Falsification, reproduction, alteration, or omission.

(a) No person may make or cause to be made any of the following:

(1) Any fraudulent or intentionally false statement in any document related to any acceptance, application, approval, authorization, certificate, declaration, designation, qualification, record, report, request for reconsideration, or similar, submitted under this part.

(2) Any fraudulent or intentionally false statement in any document required to be developed, provided, kept, or used to show compliance with any requirement under this part.

(3) Any reproduction or alteration, for fraudulent purpose, of any document related to any acceptance, application, approval, authorization, certificate, declaration, designation, qualification, record, report, request for reconsideration, or similar, submitted or granted under this part.

(b) No person may, by omission, knowingly conceal or cause to be concealed, a material fact in—

(1) Any document related to any acceptance, application, approval, authorization, certificate, declaration, designation, qualification, record, report, request for reconsideration, or similar, submitted under this part; or

(2) Any document required to be developed, provided, kept, or used to show compliance with any requirement under this part.

(c) The commission by any person of an act prohibited under paragraph (a) or (b) of this section is a basis for—

(1) Denial, suspension, rescission, or revocation of any acceptance, application, approval, authorization, certificate, declaration, declaration of compliance, designation, document, filing, qualification, means of compliance, record, report, request for reconsideration, or similar instrument issued or granted by the Administrator and held by that person; or

(2) A civil penalty.

Subpart B—Operating Requirement

§ 89.101 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart applies to the following:

(1) Persons operating unmanned aircraft registered or required to be registered under part 47 or 48 of this chapter.

(2) Persons operating foreign civil unmanned aircraft in the United States.

(b) This subpart does not apply to unmanned aircraft operations under part 91 of this chapter that are transmitting ADS–B Out pursuant to § 91.225.

§ 89.105 Remote identification requirement.

Except as otherwise authorized by the Administrator or as provided in § 89.120, after September 16, 2023, no person may operate an unmanned aircraft within the airspace of the United States unless the operation meets the requirements of § 89.110 or § 89.115.

§ 89.110 Operation of standard remote identification unmanned aircraft.

Unless otherwise authorized by the Administrator, a person may comply with the remote identification requirement of § 89.105 by operating a standard remote identification unmanned aircraft under the following conditions:

(a) *Operational requirements.* A person may operate a standard remote identification unmanned aircraft only if the person operating the standard remote identification unmanned aircraft ensures that all of the following conditions are met:

(1) From takeoff to shutdown, the standard remote identification

unmanned aircraft must broadcast the message elements of § 89.305.

(2) The person manipulating the flight controls of the unmanned aircraft system must land the unmanned aircraft as soon as practicable if the standard remote identification unmanned aircraft is no longer broadcasting the message elements of § 89.305.

(b) *Standard remote identification unmanned aircraft requirements.* A person may operate a standard remote identification unmanned aircraft only if the unmanned aircraft meets all of the following requirements:

(1) Its serial number is listed on an FAA-accepted declaration of compliance, or the standard remote identification unmanned aircraft is covered by a design approval or production approval issued under part 21 of this chapter and meets the requirements of subpart F of this part.

(2) Its remote identification equipment is functional and complies with the requirements of this part from takeoff to shutdown.

(3) Its remote identification equipment and functionality have not been disabled.

(4) The Certificate of Aircraft Registration of the unmanned aircraft used in the operation must include the serial number of the unmanned aircraft, as per applicable requirements of parts 47 and 48 of this chapter, or the serial number of the unmanned aircraft must be provided to the FAA in a notice of identification pursuant to § 89.130 prior to the operation.

§ 89.115 Alternative remote identification.

A person operating an unmanned aircraft that is not a standard remote identification unmanned aircraft may comply with the remote identification requirement of § 89.105 by meeting all of the requirements of either paragraph (a) or (b) of this section.

(a) *Remote identification broadcast modules.* Unless otherwise authorized by the Administrator, a person may operate an unmanned aircraft that is not a standard remote identification unmanned aircraft if all of the following conditions are met:

(1) *Equipage.* (i) The unmanned aircraft used in the operation must be equipped with a remote identification broadcast module that meets the requirements of § 89.320 and the serial number of the remote identification broadcast module must be listed on an FAA-accepted declaration of compliance.

(ii) The Certificate of Aircraft Registration of the unmanned aircraft used in the operation must include the serial number of the remote identification broadcast module, as per applicable requirements of parts 47 and 48 of this chapter, or the serial number of the unmanned aircraft must be provided to the FAA in a notice of identification pursuant to § 89.130 prior to the operation.

(2) *Remote identification operating requirements.* Unless otherwise authorized by the Administrator, a person may operate an unmanned aircraft under this paragraph (a) only if all of the following conditions are met:

(i) From takeoff to shutdown, the person operating the unmanned aircraft must ensure that the remote identification broadcast module broadcasts the remote identification message elements of § 89.315 directly from the unmanned aircraft.

(ii) The person manipulating the flight controls of the unmanned aircraft system must be able to see the unmanned aircraft at all times throughout the operation.

(3) *Pre-flight requirement.* Prior to takeoff, the person manipulating the flight controls of the unmanned aircraft system must ensure the remote identification broadcast module is functioning in accordance with this subpart.

(4) *In-flight loss of remote identification broadcast.* The person manipulating the flight controls of the unmanned aircraft system must land the unmanned aircraft as soon as practicable if the unmanned aircraft is no longer broadcasting the message elements of § 89.315.

(b) *Operations at FAA-recognized identification areas.* Unless otherwise authorized by the Administrator, a person may operate an unmanned aircraft without remote identification equipment only if all of the following conditions are met:

(1) The unmanned aircraft and the person manipulating the flight controls of the unmanned aircraft system remain within the boundaries of an FAA-recognized identification area throughout the operation; and

(2) The person manipulating the flight controls of the unmanned aircraft system must be able to see the unmanned aircraft at all times throughout the operation.

§ 89.120 Operations for aeronautical research or to show compliance with regulations.

The Administrator may authorize operations without remote identification where the operation is solely for the purpose of aeronautical research or to show compliance with regulations.

§ 89.125 Automatic Dependent Surveillance-Broadcast (ADS–B) Out prohibition.

Automatic Dependent Surveillance-Broadcast (ADS–B) Out equipment cannot be used to comply with the remote identification requirements of this part.

§ 89.130 Confirmation of identification.

(a) *Notification requirement.* No person may operate a foreign registered civil unmanned aircraft with remote identification in the airspace of the United States unless, prior to the operation, the person submits a notice of identification in a form and manner acceptable to the Administrator. The notice of identification must include all of the following:

(1) The name of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative.

(2) The physical address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the physical address for the person's authorized representative. If the operator or authorized representative does not receive mail at the physical address, a mailing address must also be provided.

(3) The telephone number(s) where the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative can be reached while in the United States.

(4) The email address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the email address of the person's authorized representative.

(5) The unmanned aircraft manufacturer and model name.

(6) The serial number of the unmanned aircraft or remote identification broadcast module.

(7) The country of registration of the unmanned aircraft.

(8) The registration number.

(b) *Issuance of a Confirmation of Identification.* (1) The FAA will issue a Confirmation of Identification upon completion of the notification requirements provided in paragraph (a) of this section.

(2) The filing of a notification under paragraph (a) of this section and the Confirmation of Identification issued under paragraph (b)(1) of this section do not have the effect of United States aircraft registration.

(c) *Proof of notification.* No person may operate a foreign registered civil unmanned aircraft with remote identification in the United States

unless the person obtains a Confirmation of Identification under paragraph (b)(1) of this section, maintains such Confirmation of Identification at the unmanned aircraft's control station, and produces the Confirmation of Identification when requested by the FAA or a law enforcement officer.

(d) *Requirement to maintain current information.* The holder of a Confirmation of Identification must ensure that the information provided under paragraph (a) of this section remains accurate and must update the information prior to operating a foreign registered civil unmanned aircraft in the United States.

Subpart C [Reserved]

Subpart D—Requirements for Standard Remote Identification Unmanned Aircraft and Remote Identification Broadcast Modules

§ 89.301 Applicability.

This subpart prescribes the minimum message element set and minimum performance requirements for standard remote identification unmanned aircraft and remote identification broadcast modules.

§ 89.305 Minimum message elements broadcast by standard remote identification unmanned aircraft.

A standard remote identification unmanned aircraft must be capable of broadcasting the following remote identification message elements:

(a) The identity of the unmanned aircraft, consisting of:

(1) A serial number assigned to the unmanned aircraft by the person responsible for the production of the standard remote identification unmanned aircraft; or

(2) A session ID.

(b) An indication of the latitude and longitude of the control station.

(c) An indication of the geometric altitude of the control station.

(d) An indication of the latitude and longitude of the unmanned aircraft.

(e) An indication of the geometric altitude of the unmanned aircraft.

(f) An indication of the velocity of the unmanned aircraft.

(g) A time mark identifying the Coordinated Universal Time (UTC) time of applicability of a position source output.

(h) An indication of the emergency status of the unmanned aircraft.

§ 89.310 Minimum performance requirements for standard remote identification unmanned aircraft.

A standard remote identification unmanned aircraft must meet the following minimum performance requirements:

(a) *Control station location.* The location of the control station of the unmanned aircraft must be generated and encoded into the message elements and must correspond to the location of the person manipulating the flight controls of the unmanned aircraft system.

(b) *Time mark.* The time mark message element must be synchronized with all other remote identification message elements.

(c) *Self-testing and monitoring.* (1) Prior to takeoff, the unmanned aircraft must automatically test the remote identification functionality and notify the person manipulating the flight controls of the unmanned aircraft system of the result of the test.

(2) The unmanned aircraft must not be able to take off if the remote identification equipment is not functional.

(3) The unmanned aircraft must continuously monitor the remote identification functionality from takeoff to shutdown and must provide notification of malfunction or failure to the person manipulating the flight controls of the unmanned aircraft system.

(d) *Tamper resistance.* The unmanned aircraft must be designed and produced in a way that reduces the ability of a person to tamper with the remote identification functionality.

(e) *Error correction.* The remote identification equipment must incorporate error correction in the broadcast of the message elements in § 89.305.

(f) *Interference considerations.* The remote identification equipment must not interfere with other systems or equipment installed on the unmanned aircraft, and other systems or equipment installed on the unmanned aircraft must not interfere with the remote identification equipment.

(g) *Message broadcast.* (1) The unmanned aircraft must be capable of broadcasting the message elements in § 89.305 using a non-proprietary broadcast specification and using radio frequency spectrum compatible with personal wireless devices in accordance with 47 CFR part 15, where operations may occur without an FCC individual license.

(2) Any broadcasting device used to meet the requirements of this section must be integrated into the unmanned aircraft without modification to its authorized radio frequency parameters and designed to maximize the range at which the broadcast can be received, while complying with 47 CFR part 15 and any other applicable laws in effect as of the date the declaration of compliance is submitted to the FAA for acceptance.

(h) *Message elements performance requirements.* (1) The reported geometric position of the unmanned aircraft and the control station must be accurate to within 100 feet of the true position, with 95 percent probability.

(2) The reported geometric altitude of the control station must be accurate to within 15 feet of the true geometric altitude, with 95 percent probability.

(3) The reported geometric altitude of the unmanned aircraft must be accurate to within 150 feet of the true geometric altitude, with 95 percent probability.

(4) The unmanned aircraft must broadcast the latitude, longitude, and geometric altitude of the unmanned aircraft and its control station no later than 1.0 seconds from the time of measurement to the time of broadcast.

(5) The unmanned aircraft must broadcast the message elements at a rate of at least 1 message per second.

(i) *Take-off limitation.* The unmanned aircraft must not be able to take off unless it is broadcasting the message elements in § 89.305.

§ 89.315 Minimum message elements broadcast by remote identification broadcast modules.

Remote identification broadcast modules must be capable of broadcasting the following remote identification message elements:

(a) The identity of the unmanned aircraft, consisting of the serial number assigned to the remote identification broadcast module by the person responsible for the production of the remote identification broadcast module.

(b) An indication of the latitude and longitude of the unmanned aircraft.

(c) An indication of the geometric altitude of the unmanned aircraft.

(d) An indication of the velocity of the unmanned aircraft.

(e) An indication of the latitude and longitude of the take-off location of the unmanned aircraft.

(f) An indication of the geometric altitude of the take-off location of the unmanned aircraft.

(g) A time mark identifying the Coordinated Universal Time (UTC) time of applicability of a position source output.

§ 89.320 Minimum performance requirements for remote identification broadcast modules.

Remote identification broadcast modules must meet the following minimum performance requirements:

(a) *Take-off location.* The remote identification broadcast module must be

capable of determining the take-off location of the unmanned aircraft.

(b) *Time mark.* The time mark message element must be synchronized with all other remote identification message elements.

(c) *Self-testing and monitoring.* (1) Prior to take-off, the remote identification broadcast module must automatically test the remote identification functionality and notify the person manipulating the flight controls of the unmanned aircraft system of the result of the test.

(2) The remote identification broadcast module must continuously monitor the remote identification functionality from takeoff to shutdown and must provide notification of malfunction or failure to the person manipulating the flight controls of the unmanned aircraft system.

(d) *Tamper resistance.* The remote identification broadcast module must be designed and produced in a way that reduces the ability of a person to tamper with the remote identification functionality.

(e) *Error correction.* The remote identification broadcast module must incorporate error correction in the broadcast of the message elements in § 89.315.

(f) *Interference considerations.* The remote identification broadcast module must not interfere with other systems or equipment installed on compatible unmanned aircraft, and other systems or equipment installed on compatible unmanned aircraft must not interfere with the remote identification equipment.

(g) *Message broadcast.* (1) The remote identification broadcast module must be capable of broadcasting the message elements in § 89.315 using a non-proprietary broadcast specification and using radio frequency spectrum compatible with personal wireless devices in accordance with 47 CFR part 15, where operations may occur without an FCC individual license.

(2) The remote identification broadcast module must be designed to maximize the range at which the broadcast can be received, while complying with 47 CFR part 15 and any other applicable laws in effect as of the date the declaration of compliance is submitted to the FAA for acceptance.

(h) *Message elements performance requirements.* (1) The reported geometric position of the unmanned aircraft must be accurate to within 100 feet of the true position, with 95 percent probability.

(2) The reported geometric altitude of the unmanned aircraft must be accurate to within 150 feet of the true geometric altitude, with 95 percent probability.

(3) The reported geometric position of the take-off location must be accurate to within 100 feet of the true geometric position, with 95 percent probability.

(4) The reported geometric altitude of the take-off location must be accurate to within 150 feet of the true geometric altitude, with 95 percent probability.

(5) The remote identification broadcast module must broadcast the latitude, longitude, and geometric altitude of the unmanned aircraft no later than 1.0 seconds from the time of measurement to the time of broadcast.

(6) The remote identification broadcast module must broadcast the message elements at a rate of at least 1 message per second.

Subpart E—Means of Compliance

§ 89.401 Applicability.

This subpart prescribes—

(a) Requirements for means of compliance with subpart D of this part.

(b) Procedural requirements for the submission and acceptance of means of compliance used in the design and production of standard remote identification unmanned aircraft or remote identification broadcast modules to ensure they meet the minimum performance requirements of this part.

(c) Rules governing persons submitting means of compliance for FAA acceptance.

§ 89.405 Submission of a means of compliance for FAA acceptance.

(a) *Eligibility.* Any person may submit a means of compliance for acceptance by the FAA.

(b) *Required information.* A person requesting acceptance of a means of compliance must submit the following information to the FAA in a form and manner acceptable to the Administrator:

(1) The name of the person or entity submitting the means of compliance, the name of the main point of contact for communications with the FAA, the physical address, email address, and other contact information.

(2) A detailed description of the means of compliance.

(3) An explanation of how the means of compliance addresses all of the minimum performance requirements established in subpart D of this part so that any standard remote identification unmanned aircraft or remote identification broadcast module designed and produced in accordance with such means of compliance meets the remote identification requirements of this part.

(4) Any substantiating material the person wishes the FAA to consider as part of the request.

(c) *Testing and validation.* A means of compliance submitted for acceptance by the FAA must include testing and validation procedures for persons responsible for the production of standard remote identification unmanned aircraft or remote identification broadcast modules to demonstrate through analysis, ground test, or flight test, as appropriate, how the standard remote identification unmanned aircraft or the remote identification broadcast module performs its intended functions and meets the requirements in subpart D of this part, including any applicable FAA performance requirements for radio station operation.

§ 89.410 Acceptance of a means of compliance.

(a) A person requesting acceptance of a means of compliance must demonstrate to the Administrator that the means of compliance addresses all of the requirements of subparts D and E of this part, and that any standard remote identification unmanned aircraft or remote identification broadcast module designed and produced in accordance with such means of compliance would meet the performance requirements of subpart D of this part.

(b) The Administrator will evaluate a means of compliance that is submitted to the FAA and may request additional information or documentation, as needed, to supplement the submission.

(c) If the Administrator determines the person has demonstrated that the means of compliance meets the requirements of subparts D and E of this part, the FAA will notify the person that the Administrator has accepted the means of compliance.

§ 89.415 Rescission.

(a) *Rescission of an FAA-accepted means of compliance.* (1) A means of compliance is subject to ongoing review by the Administrator. The Administrator may rescind acceptance of a means of compliance if the Administrator determines that a means of compliance does not meet any or all of the requirements of subpart D or E of this part.

(2) The Administrator will publish a notice of rescission in the **Federal Register**.

(b) *Inapplicability of part 13, subpart D, of this chapter.* Part 13, subpart D, of this chapter does not apply to the procedures of paragraph (a) of this section.

§ 89.420 Record retention.

A person who submits a means of compliance that is accepted by the Administrator under this subpart must retain the following information for as long as the means of compliance is accepted plus an additional 24 calendar months, and must make available for inspection by the Administrator the following:

(a) All documentation and substantiating data submitted to the FAA for acceptance of the means of compliance.

(b) Records of all test procedures, methodology, and other procedures, as applicable.

(c) Any other information necessary to justify and substantiate how the means of compliance enables compliance with the remote identification requirements of this part.

Subpart F— Remote Identification Design and Production

§ 89.501 Applicability.

(a) This subpart prescribes—

(1) Requirements for the design and production of unmanned aircraft with remote identification produced for operation in the airspace of the United States.

(2) Requirements for the design and production of remote identification broadcast modules.

(3) Procedural requirements for the submission, acceptance, and rescission of declarations of compliance.

(4) Rules governing persons submitting declarations of compliance for FAA acceptance under this part.

(b) Except as provided in paragraph (c) of this section, this subpart applies to the design and production of all unmanned aircraft operated in the airspace of the United States.

(c) Except for unmanned aircraft designed and produced to be standard remote identification unmanned aircraft, this subpart does not apply to the design or production of:

(1) Home-built unmanned aircraft.

(2) Unmanned aircraft of the United States Government.

(3) Unmanned aircraft that weigh 0.55 pounds or less on takeoff, including everything that is on board or otherwise attached to the aircraft.

(4) Unmanned aircraft designed or produced exclusively for the purpose of aeronautical research or to show compliance with regulations.

§ 89.505 Serial numbers.

No person may produce a standard remote identification unmanned aircraft under § 89.510 or § 89.515 or a remote identification broadcast module under § 89.520, unless the producer assigns to the unmanned aircraft or remote identification broadcast module a serial number that complies with ANSI/CTA–2063–A. ANSI/CTA–2063–A, *Small Unmanned Aerial Systems Serial Numbers* (September 2019) is incorporated by reference into this section with the approval of the Director of the Office of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the FAA's Office of Rulemaking (ARM–1), 800 Independence Avenue SW, Washington, DC 20590 (telephone 202–267–9677) and is available from Consumer Technology Association (CTA), 1919 South Eads Street, Arlington, VA 22202, *CTA@CTA.tech*, 703–907–7600 or at *https://www.cta.tech*. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to *www.archives.gov/federal-register/cfr/ibr-locations.html.*

§ 89.510 Production requirements for unmanned aircraft produced under a design approval or production approval issued under part 21 of this chapter.

After September 16, 2022, no person may produce an unmanned aircraft for operation in the airspace of the United States under a design approval or production approval issued under part 21 of this chapter unless:

(a) All applicable requirements of part 21 of this chapter are met; and

(b) The unmanned aircraft is—

(1) Designed and produced to meet the minimum performance requirements for standard remote identification unmanned aircraft established in § 89.310 in accordance with an FAA-accepted means of compliance; or

(2) Equipped with Automatic Dependent Surveillance-Broadcast (ADS–B) Out equipment that meets the requirements of § 91.225 of this chapter.

§ 89.515 Production requirements for unmanned aircraft without design approval or production approval issued under part 21 of this chapter.

Except as provided in § 89.510, after September 16, 2022, no person may produce an unmanned aircraft for operation in the airspace of the United States unless—

(a) The unmanned aircraft is designed and produced to meet the minimum performance requirements for standard remote identification unmanned aircraft established in § 89.310 in accordance with an FAA-accepted means of compliance; and

(b) All of the following conditions are met:

(1) *Inspection requirements for production of standard unmanned aircraft.* A person responsible for the production of standard remote identification unmanned aircraft must, upon request, allow the Administrator to inspect the person's facilities, technical data, and any standard remote identification unmanned aircraft the person produces, and to witness any tests necessary to determine compliance with this subpart.

(2) *Audit requirements.* A person responsible for the production of standard remote identification unmanned aircraft must cause independent audits to be performed on a recurring basis, and additionally whenever the FAA provides notice of noncompliance or potential noncompliance, to demonstrate the unmanned aircraft listed under a declaration of compliance meet the requirements of this subpart. The person responsible for the production of standard remote identification unmanned aircraft must provide the results of all such audits to the FAA upon request.

(3) *Product support and notification.* A person responsible for the production of standard remote identification unmanned aircraft must maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes an unmanned aircraft to no longer meet the requirements of this subpart, within 15 calendar days of the date the person becomes aware of the defect or condition.

§ 89.520 Production requirements for remote identification broadcast modules.

After March 16, 2021, no person may produce remote identification broadcast modules unless:

(a) The remote identification broadcast module is designed and produced to meet the minimum performance requirements for remote identification broadcast modules established in § 89.320 in accordance with an FAA-accepted means of compliance; and

(b) All of the following conditions are met:

(1) *Inspection requirements for production of remote identification broadcast modules.* A person responsible for the production of remote identification broadcast modules must, upon request, allow the Administrator to inspect the person's facilities, technical data, and any remote identification broadcast modules the person produces, and to witness any

tests necessary to determine compliance with this subpart.

(2) *Audit requirements.* A person responsible for the production of remote identification broadcast modules must cause independent audits to be performed on a recurring basis, and additionally whenever the FAA provides notice of noncompliance or potential noncompliance, to demonstrate the remote identification broadcast modules listed under a declaration of compliance meet the requirements of this subpart. The person responsible for the production of remote identification broadcast modules must provide the results of all such audits to the FAA upon request.

(3) *Product support and notification.* A person responsible for the production of remote identification broadcast modules must maintain product support and notification procedures to notify the public and the FAA of any defect or condition that causes the remote identification broadcast module to no longer meet the requirements of this subpart, within 15 calendar days of the date the person becomes aware of the defect or condition.

(4) *Instructions.* A person responsible for the production of a remote identification broadcast module must make available instructions for installing and operating the remote identification broadcast module to any person operating an unmanned aircraft with the remote identification broadcast module.

§ 89.525 Labeling.

(a) No person may produce a standard remote identification unmanned aircraft under § 89.515 unless it displays a label indicating that the unmanned aircraft meets the requirements of this part. The label must be in English and be legible, prominent, and permanently affixed to the unmanned aircraft.

(b) No person may produce a remote identification broadcast module under § 89.520 unless it displays a label indicating that the equipment meets the requirements of this part. The label must be in English and be legible, prominent, and permanently affixed to the broadcast module.

§ 89.530 Submission of a declaration of compliance for FAA acceptance.

(a) *Eligibility.* A person responsible for the production of a standard remote identification unmanned aircraft under § 89.515 or a remote identification broadcast module under § 89.520 must submit a declaration of compliance for acceptance by the FAA.

(b) *Required information for standard remote identification unmanned aircraft.* The person responsible for the production of a standard remote identification unmanned aircraft requesting acceptance of a declaration of compliance must declare that the unmanned aircraft complies with the requirements of this subpart by submitting a declaration of compliance to the FAA in a form and manner acceptable to the Administrator. The declaration must include at a minimum the following information:

(1) The name, physical address, telephone number, and email address of the person responsible for production of the unmanned aircraft.

(2) The unmanned aircraft's make and model.

(3) The unmanned aircraft's serial number, or the range of serial numbers for which the person responsible for production is declaring compliance.

(4) The FCC Identifier of the 47 CFR part 15-compliant radio frequency equipment used and integrated into the unmanned aircraft.

(5) The means of compliance used in the design and production of the unmanned aircraft.

(6) Whether the declaration of compliance is an initial declaration or an amended declaration, and if the declaration of compliance is an amended declaration, the reason for the amendment.

(7) A declaration that the person responsible for the production of the unmanned aircraft:

(i) Can demonstrate that the unmanned aircraft was designed and produced to meet the minimum performance requirements of § 89.310 by using an FAA-accepted means of compliance.

(ii) Complies with the requirements of § 89.515(b).

(8) A statement that 47 CFR part 15-compliant radio frequency equipment is used and is integrated into the unmanned aircraft without modification to its authorized radio frequency parameters.

(c) *Required information for remote identification broadcast modules.* The person responsible for the production of a remote identification broadcast module under § 89.520 that is requesting acceptance of a declaration of compliance must declare that the remote identification broadcast module complies with the requirements of this subpart by submitting a declaration of compliance to the FAA in a form and manner acceptable to the Administrator. The declaration must include at a minimum the following information:

(1) The name, physical address, telephone number, and email address of the person responsible for production of the remote identification broadcast module.

(2) The remote identification broadcast module's make and model.

(3) The remote identification broadcast module's serial number, or the range of serial numbers for which the person responsible for production is declaring compliance.

(4) The FCC Identifier of the 47 CFR part 15-compliant radio frequency equipment used and integrated into the remote identification broadcast module.

(5) The means of compliance used in the design and production of the remote identification broadcast module.

(6) Whether the declaration of compliance is an initial declaration or an amended declaration, and if the declaration of compliance is an amended declaration, the reason for the amendment.

(7) A declaration that the person responsible for the production of the remote identification broadcast module:

(i) Can demonstrate that the remote identification broadcast module was designed and produced to meet the minimum performance requirements of § 89.320 by using an FAA-accepted means of compliance.

(ii) Complies with the requirements of § 89.520(b).

(8) A statement that 47 CFR part 15-compliant radio frequency equipment is used and is integrated into the remote identification broadcast module without modification to its authorized radio frequency parameters, and a statement that instructions have been provided for installation of 47 CFR part 15-compliant remote identification broadcast module without modification to the broadcast module's authorized radio frequency parameters.

§ 89.535 Acceptance of a declaration of compliance.

(a) The Administrator will evaluate a declaration of compliance that is submitted to the FAA and may request additional information or documentation, as needed, to supplement the declaration of compliance.

(b) If the Administrator determines that the submitter has demonstrated compliance with the requirements of this subpart, the FAA will notify the submitter that the Administrator has accepted the declaration of compliance.

§ 89.540 Rescission and reconsideration.

(a) *Rescission of the FAA's acceptance of a declaration of compliance.* (1) A declaration of compliance is subject to ongoing review by the Administrator. The Administrator may rescind acceptance of a declaration of

compliance under circumstances including but not limited to the following:

(i) A standard remote identification unmanned aircraft or remote identification broadcast module listed under an accepted declaration of compliance does not meet the minimum performance requirements of § 89.310 or § 89.320.

(ii) A previously FAA-accepted declaration of compliance does not meet a requirement of this subpart; or

(iii) The FAA rescinds acceptance of the means of compliance listed in an FAA-accepted declaration of compliance.

(2) The Administrator will notify the person who submitted the FAA-accepted declaration of compliance of any issue of noncompliance.

(3) If the Administrator determines that it is in the public interest, prior to rescinding acceptance of a declaration of compliance, the Administrator may provide a reasonable period of time for the person who submitted the declaration of compliance to remediate the noncompliance. A failure to remediate the noncompliance constitutes cause for rescission of the FAA's acceptance of the declaration of compliance.

(4) The Administrator will notify the person who submitted the declaration of compliance of the decision to rescind acceptance of the declaration of compliance by publishing a notice of rescission in the **Federal Register**.

(b) *Petition to reconsider the FAA's decision to rescind acceptance of a declaration of compliance.* (1) The person who submitted the FAA-accepted declaration of compliance or any person adversely affected by the rescission of the Administrator's acceptance of a declaration of compliance may petition for a reconsideration of the decision by submitting a request to the FAA in a form and manner acceptable to the Administrator within 60 calendar days of the date of publication in the **Federal Register** of notification of rescission.

(2) A petition to reconsider the rescission of the Administrator's acceptance of a declaration of compliance must show that the petitioner is an interested party and has been adversely affected by the decision of the FAA. The petition must also demonstrate at least one of the following:

(i) The petitioner adduces a significant additional fact not previously presented to the FAA.

(ii) The Administrator made a material error of fact in the decision to rescind acceptance of the declaration of compliance.

(iii) The Administrator did not correctly interpret a law, regulation, or precedent.

(3) Upon consideration of the information submitted by the petitioner, the Administrator will notify the petitioner and the person who submitted the declaration of compliance (if different) of the decision on whether to reinstate the Administrator's acceptance of the declaration of compliance.

(c) *Inapplicability of part 13, subpart D, of this chapter.* Part 13, subpart D, of this chapter does not apply to the procedures of paragraphs (a) and (b) of this section.

§ 89.545 Record retention.

A person who submits a declaration of compliance under this subpart that is accepted by the Administrator must retain the following information for as long as the standard remote identification unmanned aircraft or remote identification broadcast module listed on that declaration of compliance is produced plus an additional 24 calendar months, and must make available for inspection by the Administrator the following:

(a) The means of compliance, all documentation, and substantiating data related to the means of compliance used.

(b) Records of all test results.

(c) Any other information necessary to demonstrate compliance with the means of compliance so that the standard remote identification unmanned aircraft or remote identification broadcast module meets the remote identification requirements and the design and production requirements of this part.

■ 19. Effective September 16, 2022, add subpart C to part 89 to read as follows:

Subpart C—FAA-Recognized Identification Areas

89.201 Applicability.
89.205 Eligibility.
89.210 Requests for establishment of an FAA-recognized identification area.
89.215 Approval of FAA-recognized identification areas.
89.220 Amendment.
89.225 Duration of an FAA-recognized identification area.
89.230 Expiration and termination.

Subpart C—FAA-Recognized Identification Areas

§ 89.201 Applicability.

This subpart prescribes procedural requirements to establish an FAA-recognized identification area.

§ 89.205 Eligibility.

Only the following persons are eligible to apply for the establishment of an FAA-recognized identification area under this subpart:

(a) A community-based organization recognized by the Administrator.

(b) An educational institution, including primary and secondary educational institutions, trade schools, colleges, and universities.

§ 89.210 Requests for establishment of an FAA-recognized identification area.

(a) *Application.* An eligible person requesting the establishment of an FAA-recognized identification area under this subpart may submit an application in a form and manner acceptable to the Administrator.

(b) *Required documentation.* A request under this subpart must contain all of the following information:

(1) The name of the eligible person under § 89.205.

(2) The name of the individual making the request on behalf of the eligible person.

(3) A declaration that the individual making the request has the authority to act on behalf of the community-based organization or educational institution.

(4) The name and contact information of the primary point of contact for communications with the FAA.

(5) The physical address of the proposed FAA-recognized identification area.

(6) The location of the proposed FAA-recognized identification area in a form and manner prescribed by the Administrator.

(7) If applicable, a copy of any existing letter of agreement regarding the flying site.

(8) Description of the intended purpose of the FAA-recognized identification area and why the proposed FAA-recognized identification area is necessary for that purpose.

(9) Any other information required by the Administrator.

§ 89.215 Approval of FAA-recognized identification areas.

The Administrator will assess applications for FAA-recognized identification areas and may require additional information or documentation, as needed, to supplement an application. The Administrator will approve or deny an application, and may take into consideration matters such as, but not limited to:

(a) The existence of any FAA established flight or airspace restriction limiting the operation of unmanned aircraft systems, such as special use

airspace designations under part 73 of this chapter, temporary flight restrictions issued under part 91 of this chapter, or any other special flight rule, restriction or regulation in this chapter limiting the operation of unmanned aircraft systems in the interest of safety, efficiency, national security and/or homeland security, which overlaps with the proposed FAA-recognized identification area.

(b) The safe and efficient use of airspace by other aircraft.

(c) The safety and security of persons or property on the ground.

(d) The need for an FAA-recognized identification area in the proposed location and proximity of other FAA-recognized identification areas.

§ 89.220 Amendment.

(a) From the time of application until expiration or termination of an FAA-recognized identification area, any change to the information submitted in the application including but not limited to a change to the point of contact for the FAA-recognized identification area or a change to the FAA-recognized identification area's organizational affiliation must be submitted to the FAA within 10 calendar days of the change.

(b) If the person who has been granted an FAA-recognized identification area wishes to change the geographic boundaries of the FAA-recognized identification area, the person must submit a request describing the change to the FAA for review. The geographic boundaries of the FAA-recognized identification area will not change unless the requested change is approved in accordance with § 89.215.

(c) The establishment of an FAA-recognized identification area is subject to ongoing review in accordance with § 89.215 by the Administrator that may result in the termination of the FAA-recognized identification area pursuant to § 89.230 or modification of the FAA-recognized identification area.

§ 89.225 Duration of an FAA-recognized identification area.

(a) *Duration.* Except as otherwise provided in this subpart, an FAA-recognized identification area will be in effect for 48 calendar months after the date the FAA approves the request for establishment of an FAA-recognized identification area.

(b) *Renewal.* A person wishing to renew an FAA-recognized identification area must submit a request for renewal no later than 120 days prior to the expiration of the FAA-recognized identification area in a form and manner acceptable to the Administrator. The Administrator may deny requests submitted after that deadline or requests submitted after the expiration.

§ 89.230 Expiration and termination.

(a) *Expiration.* Unless renewed, an FAA-recognized identification area issued under this subpart will expire automatically and will have no further force or effect as of the day that immediately follows the date of expiration.

(b) *Termination prior to expiration*—(1) *Termination by request.* An individual identified as the point of contact for an approved FAA-recognized identification area may submit a request to the Administrator to terminate that FAA-recognized identification area.

(2) *Termination by FAA.* (i) The FAA may terminate an FAA-recognized identification area upon a finding that—

(A) The FAA-recognized identification area may pose a risk to aviation safety, public safety, homeland security, or national security;

(B) The FAA-recognized identification area is no longer associated with a person eligible for an FAA-recognized identification area; or

(C) The person who submitted a request for establishment of an FAA-recognized identification area provided false or misleading information during the submission, amendment, or renewal process.

(ii) The Administrator will notify the primary point of contact of the decision to terminate the FAA-recognized identification area and the reasons for the termination. Except as provided in paragraph (c) of this section, if the FAA terminates an FAA-recognized identification area based upon a finding that the FAA-recognized identification area may pose a risk to aviation safety, public safety, homeland security, or national security, that area will no longer be eligible to be an FAA-recognized identification area for as long as those conditions remain in effect.

(c) *Petition to reconsider the FAA's decision to terminate an FAA-recognized identification area.* No later than 30 calendar days after the termination of an FAA-recognized identification area, a person may petition the Administrator for reconsideration of the decision. The petition must state the reasons justifying the request for reconsideration and include any supporting documentation. Upon consideration of the information submitted by the petitioner, the Administrator will notify the petitioner of the decision on the request for reconsideration.

(d) *Inapplicability of part 13, subpart D, of this chapter.* Part 13, subpart D, of this chapter does not apply to the procedures of paragraphs (b) and (c) of this section.

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 20. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

■ 21. Amend § 91.215 by revising paragraphs (b) introductory text and (c) and adding paragraph (e) to read as follows:

§ 91.215 ATC transponder and altitude reporting equipment and use.

* * * * *

(b) *All airspace.* Unless otherwise authorized or directed by ATC, and except as provided in paragraph (e)(1) of this section, no person may operate an aircraft in the airspace described in paragraphs (b)(1) through (5) of this section, unless that aircraft is equipped with an operable coded radar beacon transponder having either Mode 3/A 4096 code capability, replying to Mode 3/A interrogations with the code specified by ATC, or a Mode S capability, replying to Mode 3/A interrogations with the code specified by ATC and intermode and Mode S interrogations in accordance with the applicable provisions specified in TSO C–112, and that aircraft is equipped with automatic pressure altitude reporting equipment having a Mode C capability that automatically replies to Mode C interrogations by transmitting pressure altitude information in 100-foot increments. The requirements of this paragraph (b) apply to—

* * * * *

(c) *Transponder-on operation.* Except as provided in paragraph (e)(2) of this section, while in the airspace as specified in paragraph (b) of this section or in all controlled airspace, each person operating an aircraft equipped with an operable ATC transponder maintained in accordance with § 91.413 shall operate the transponder, including Mode C equipment if installed, and shall reply on the appropriate code or as assigned by ATC, unless otherwise directed by ATC when transmitting

would jeopardize the safe execution of air traffic control functions.

* * * * *

(e) *Unmanned aircraft.* (1) The requirements of paragraph (b) of this section do not apply to a person operating an unmanned aircraft under this part unless the operation is conducted under a flight plan and the person operating the unmanned aircraft maintains two-way communication with ATC.

(2) No person may operate an unmanned aircraft under this part with a transponder on unless:

(i) The operation is conducted under a flight plan and the person operating the unmanned aircraft maintains two-way communication with ATC; or

(ii) The use of a transponder is otherwise authorized by the Administrator.

* * * * *

■ 22. Amend § 91.225 by revising paragraphs (a) introductory text, (b) introductory text, (d) introductory text, and (f) introductory text and adding paragraph (i) to read as follows:

§ 91.225 Automatic Dependent Surveillance-Broadcast (ADS–B) Out equipment and use.

(a) After January 1, 2020, unless otherwise authorized by ATC, no person may operate an aircraft in Class A airspace unless the aircraft has equipment installed that—

* * * * *

(b) After January 1, 2020, except as prohibited in paragraph (i)(2) of this section or unless otherwise authorized by ATC, no person may operate an aircraft below 18,000 feet MSL and in airspace described in paragraph (d) of this section unless the aircraft has equipment installed that—

* * * * *

(d) After January 1, 2020, except as prohibited in paragraph (i)(2) of this section or unless otherwise authorized by ATC, no person may operate an aircraft in the following airspace unless the aircraft has equipment installed that meets the requirements in paragraph (b) of this section:

* * * * *

(f) Except as prohibited in paragraph (i)(2) of this section, each person operating an aircraft equipped with ADS–B Out must operate this equipment in the transmit mode at all times unless—

* * * * *

(i) For unmanned aircraft:

(1) No person may operate an unmanned aircraft under a flight plan and in two way communication with ATC unless:

(i) That aircraft has equipment installed that meets the performance requirements in TSO–C166b or TSO–C154c; and

(ii) The equipment meets the requirements of § 91.227.

(2) No person may operate an unmanned aircraft under this part with Automatic Dependent Surveillance-Broadcast Out equipment in transmit mode unless:

(i) The operation is conducted under a flight plan and the person operating that unmanned aircraft maintains two-way communication with ATC; or

(ii) The use of ADS–B Out is otherwise authorized by the Administrator.

PART 107—SMALL UNMANNED AIRCRAFT SYSTEMS

■ 23. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 106(f), 40101 note, 40103(b), 44701(a)(5), 44807.

§ 107.53 [Redesignated as § 107.56]

■ 24. Redesignate § 107.53 as § 107.56.

■ 25. Add § 107.52 and new § 107.53 to read as follows:

§ 107.52 ATC transponder equipment prohibition.

Unless otherwise authorized by the Administrator, no person may operate a small unmanned aircraft system under this part with a transponder on.

§ 107.53 Automatic Dependent Surveillance-Broadcast (ADS–B) Out prohibition.

Unless otherwise authorized by the Administrator, no person may operate a small unmanned aircraft system under this part with ADS–B Out equipment in transmit mode.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f), 40101, 40103, 44701(a)(5), 44805, 44809, and section 2202 of Public Law 114–190.

Steve Dickson,

Administrator.

[FR Doc. 2020–28948 Filed 1–8–21; 4:15 pm]

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Part V

Department of the Treasury

Internal Revenue Services
26 CFR Part 1
Guidance on Passive Foreign Investment Companies; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9936]

RIN 1545–BO59

Guidance on Passive Foreign Investment Companies

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding the determination of whether a foreign corporation is treated as a passive foreign investment company (''PFIC'') for purposes of the Internal Revenue Code (''Code''), and the application and scope of certain rules that determine whether a United States person that indirectly holds stock in a PFIC is treated as a shareholder of the PFIC. The regulations affect United States persons with direct or indirect ownership interests in certain foreign corporations.

DATES:

Effective date: These regulations are effective on January 14, 2021.

Applicability dates: For dates of applicability see §§ 1.1291–1(j), 1.1297–1(g), 1.1297–2(h), 1.1297–4(g), 1.1297–6(f), 1.1298–2(g), and 1.1298–4(f).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations §§ 1.1291–0 and 1.1291–1, 1.1297–0 through 1.1297–2, 1.1298–0, 1.1298–2, and 1.1298–4, Christina G. Daniels at (202) 317–6934; concerning the regulations §§ 1.1297–4 and 1.1297–6, Josephine Firehock at (202) 317–4932 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On July 11, 2019, the Department of the Treasury (''Treasury Department'') and the IRS published proposed regulations (REG–105474–18) under sections 1291, 1297, and 1298 in the **Federal Register** (84 FR 33120) (the ''proposed regulations'' or ''2019 proposed regulations''). All written comments received in response to the proposed regulations are available at *www.regulations.gov* or upon request. A public hearing on the proposed regulations was scheduled for December 9, 2019, but it was not held because there were no requests to speak. Terms used but not defined in this preamble have the meaning provided in these final regulations.

In addition, on October 2, 2019, the Treasury Department and the IRS published proposed regulations (REG–104223–18) relating to the repeal of section 958(b)(4) by the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054 (2017) (the ''Act'') in the **Federal Register** (84 FR 52398) (the ''section 958 proposed regulations''). As in effect before its repeal, section 958(b)(4) provided that section 318(a)(3)(A), (B), and (C) (providing for downward attribution) was not to be applied so as to consider a United States person (as defined in section 7701(a)(30)) as owning stock owned by a person who is not a United States person (a ''foreign person''). After the Act repealed section 958(b)(4), stock of a foreign corporation owned by a foreign person could be attributed to a United States person under section 318(a)(3) for various purposes, including for purposes of determining whether the foreign corporation is a controlled foreign corporation within the meaning of section 957 (''CFC''). The section 958 proposed regulations generally made modifications to ensure that the operation of certain rules outside of subpart F of part III of subchapter N of chapter 1 of subtitle A of the Code (''subpart F'') are consistent with their application before the Act's repeal of section 958(b)(4). A public hearing on these regulations was not held because there were no requests to speak. This rulemaking finalizes the portion of the section 958 proposed regulations under section 1297 regarding the treatment of foreign corporations for purposes of section 1297(e).[1] See Part III.D.1 of the Summary of Comments and Explanation of Revisions section.

A notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register** (REG–111950–20) (the ''2020 NPRM'') provides additional guidance on the treatment of income and assets of a foreign corporation for purposes of the PFIC rules and on the exception from passive income under section 1297(b)(2)(B) (''PFIC insurance exception'').

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the proposed regulations, with certain revisions. This Summary of Comments and Explanation of Revisions section discusses those revisions as well as comments received in response to the solicitation of comments in the notice of proposed rulemaking. Comments outside the scope of this rulemaking are generally not addressed but may be considered in connection with the potential issuance of future guidance.

II. Comments and Revisions to Proposed § 1.1291–1—Taxation of U.S. Persons That Are Shareholders of Section 1291 Funds

Section 1298(a) provides attribution rules that apply to the extent the effect is to treat stock of a PFIC as owned by a United States person. These rules apply when a United States person directly or indirectly owns an interest in a PFIC, a partnership, an estate or a trust, or when a United States person directly or indirectly owns 50 percent or more in value of the stock of a corporation that is not a PFIC. In such cases, the attribution rules of section 1298(a) may apply to treat the United States person as owning shares of a PFIC owned directly or indirectly by such an entity. Stock considered to be owned by a person by reason of any of the foregoing rules is treated as actually owned by that person for purposes of the further application of those rules (the ''successive application rule''). Except as provided in regulations, the attribution rules do not apply to treat stock owned or treated as owned by a United States person as owned by any other person. The current rules in § 1.1291–1(b)(8) are consistent with these statutory provisions.

A. Attribution of Ownership Through a Partnership, S Corporation, Estate or Trust

Proposed § 1.1291–1(b)(8)(iii) provided that an owner of an interest in a partnership, S corporation, estate or trust (a ''pass-through entity'') would be treated as owning stock owned by the pass-through entity only if the pass-through owner owns 50 percent or more of the pass-through entity. Examples in the proposed regulations illustrated the operation of this rule in cases where a United States person owns 50 percent, in one case, or 40 percent, in another case, of a foreign partnership. The preamble to the proposed regulations indicated that the proposed rule was intended to ensure that the attribution rules apply consistently whether a United States person owns stock of a non-PFIC foreign corporation indirectly through a partnership or directly.

The only comment received on this proposed rule agreed with the results of the first example but recommended that a different approach be taken with respect to attribution through partnerships. The comment responded to the statement in the preamble that the proposed regulations would have results consistent with an aggregate approach to

[1] The other portions of the section 958 proposed regulations were finalized at 85 FR 59428.

partnerships by noting that in certain circumstances the proposed rule would deviate from a true aggregation approach. It posited an example in which application of the rule in the proposed regulations would prevent a United States person from being treated as owning stock of a PFIC owned by a non-PFIC corporation, even though the United States person directly and indirectly owned, in the aggregate, more than 50 percent of the stock of the non-PFIC corporation and argued that this result was inappropriate. Accordingly, the comment suggested that the final regulations, instead of adopting the rule included in the proposed regulations, adopt a rule that uses an aggregation approach to attribution through partnerships.

The Treasury Department and the IRS agree with the comment that the rule in the proposed regulations could have inappropriate results, and that a partner in a partnership should be treated as indirectly owning the same number of shares of a non-PFIC corporation owned by the partnership as if the partner held those shares directly. Accordingly, the final regulations do not adopt the rules in the proposed regulations to amend the rules of § 1.1291–1(b)(8)(iii), relating to pass-through entities (partnerships, S corporations, estates and nongrantor trusts).

B. Application of ''top-down'' Approach

The preamble to the proposed regulations indicated that proposed § 1.1291–1(b)(8)(iii) was intended to apply the attribution rules to a tiered ownership structure involving a pass-through entity on a ''top-down'' basis, by starting with a United States person and determining what stock is considered owned at each successive lower tier on a proportionate basis. The preamble requested comments as to whether the ''top-down'' approach should be extended to attribution through corporations.

The only comment received on the issue indicated that the ''top-down'' approach should not be so extended, on the grounds that the successive application rule of section 1298(a)(5) requires a ''bottom-up'' approach (that is, applying the attribution rules to a tiered ownership structure by starting with the lowest-tier entity and determining which persons are treated as owning stock of that entity at each successive higher tier on a proportionate basis) for corporate structures. The comment acknowledged that this would result in inconsistency in attribution of ownership between stock of a PFIC held through a partnership (which, in many cases, may be a foreign corporate entity treated as a partnership for U.S. federal income tax purposes as the result of a check-the-box election) and stock of a PFIC held through a corporation.

The Treasury Department and the IRS have determined that the same approach should apply to attribution through a pass-through entity, a PFIC or a 50 percent-owned non-PFIC corporation. In each case, the statutory language provides that an owner of an interest in such an entity is treated as owning its proportionate share of stock owned by the entity. The same approach to attribution therefore should apply regardless of which entity a United States person holds an interest in.

The successive application rule of section 1298(a)(5) can be applied either under a ''top-down'' or ''bottom-up'' approach. While both approaches to attribution may treat a United States person as owning an amount of stock of a PFIC that is less than that person's economic interest in the PFIC, a ''top-down'' approach takes into account both the direct and indirect ownership of stock of a corporation by the same person while the bottom-up approach may not do so. For example, assume that U.S. individual A owns 49 percent of the partnership interests in a partnership that owns 95 percent of the stock of a tested foreign corporation. The tested foreign corporation is not a PFIC but owns all of the single class of stock of a PFIC. Individual A also owns the remaining 5 percent of the tested foreign corporation's stock directly. Under a ''top-down'' approach, individual A is deemed to hold 46.55 percent of the tested foreign corporation's stock through the partnership and owns 5 percent of the tested foreign corporation's stock directly. Therefore, individual A is treated as owning 51.55 percent of the tested foreign corporation's stock and 51.55 percent of the PFIC stock. Under a ''bottom-up'' approach, the tested foreign corporation owns all of the PFIC stock; the partnership owns 95 percent of the tested foreign corporation's stock and therefore is treated as owning 95 percent of the PFIC stock; and individual A is treated as owning 49 percent of what the partnership owns, or 46.55 percent of the PFIC stock. In this example, the ''top-down'' approach treats individual A as owning its economic share of the PFIC's stock, while the ''bottom-up'' approach may not take into account the PFIC stock that is owned through the 5 percent of the tested foreign corporation's stock that individual A owns directly. Accordingly, the final regulations apply a ''top-down'' approach to the attribution of ownership through all tiered ownership structures.

The final regulations also include a new rule addressing the application of the successive application rule to tiered ownership structures. The new rule specifically provides for a top-down approach to attribution of ownership. *See* § 1.1291–1(b)(8)(iv). The examples in the existing and proposed regulations have been revised to clarify how the top-down approach applies to those examples. *See* § 1.1291–1(b)(8)(v). A new example is added to illustrate the operation of the successive application rule in a fact pattern in which a United States person owns stock of a foreign corporation both directly and indirectly through a partnership. *See* § 1.1291–1(b)(8)(v)(D).

C. Ownership Attribution Through Nongrantor Trusts

A comment requested that the final regulations provide additional guidance on attributing PFIC stock held by a nongrantor trust to the beneficiaries of the trust, suggesting that determining ownership by U.S. beneficiaries of PFIC stock held directly or indirectly by a nongrantor trust warrants more specificity than determining ownership in PFIC stock held directly or indirectly by other pass-through entities.

Section 1298(a)(3) and § 1.1291–1(b)(8)(iii)(C) provide that each beneficiary is considered to own a proportionate amount of stock held by a foreign or domestic estate or nongrantor trust. Section 1.1291–1(b)(8)(i) provides that the determination of a person's indirect ownership is made on the basis of all the facts and circumstances of each case and that the substance rather than the form of the ownership is controlling, taking into account the purposes of sections 1291 through 1298.

On December 31, 2013, the Treasury Department and the IRS published final and temporary regulations under several Code sections including section 1291 (78 FR 79602, as corrected at 79 FR 26836) (''2013 temporary and final regulations''). The preamble to those regulations provided that pending further guidance, beneficiaries of estates and nongrantor trusts that hold PFIC stock subject to the section 1291 regime should use a reasonable method to determine their ownership interests in the PFIC. The preamble to those regulations also provided that section 1291 and the principles of subchapter J must be applied in a reasonable manner with respect to estates and trusts, and beneficiaries thereof, to preserve or trigger the tax and interest charge rules under section 1291. Accordingly, the

preamble provided that the estate or trust, or the beneficiary thereof, must take excess distributions into account under section 1291 in a reasonable manner, consistent with the general operating rules of subchapter J and that it would be unreasonable for the shareholders of the section 1291 fund to take the position that neither the beneficiaries nor the estate or trust are subject to the tax and interest charge rules under section 1291.

The Treasury Department and the IRS remain aware of the need for guidance regarding both the ownership attribution rules and the interaction of the rules in subchapter J with the PFIC rules. The Treasury Department and the IRS are also aware that in some cases, the application of the PFIC attribution rules may impose tax on U.S. beneficiaries of foreign trusts that never receive the related distributions. The Treasury Department and the IRS believe that further guidance with respect to the identification of indirect shareholders in such circumstances requires coordination of the PFIC rules with the rules of subchapter J, which is beyond the scope of this regulation project. Pending the issuance of further guidance, taxpayers should continue to apply these rules in a reasonable manner as expressed in the preamble to the 2013 temporary and final regulations.

III. Comments and Revisions to Proposed § 1.1297–1—Definition of Passive Foreign Investment Company

Proposed § 1.1297–1 provided general rules and definitions under section 1297 including general rules concerning the application of the income test of section 1297(a)(1) (''Income Test'') and the asset test of section 1297(a)(2) (''Asset Test''), clarification on the scope of the section 1297(b)(1) cross-reference to section 954(c) for purposes of defining passive income, and general rules that address certain computational and characterization issues that arise in applying the Asset Test.

A. Definition of Passive Income

1. In General

Section 1297(b)(1) defines passive income, for purposes of the PFIC rules, as income of a kind that would be foreign personal holding company income (''FPHCI'') under section 954(c), and proposed § 1.1297–1(c)(1)(i) provided accordingly that passive income means income of a kind that would be FPHCI under section 954(c)(1). A comment suggested that the cross-reference to section 954(c)(1) should incorporate only those provisions of section 954(c) (and the regulations thereunder) that were in effect in 1986 when section 1297 was enacted and not, for example, section 954(c)(1)(H), relating to income from personal services contracts, or recent revisions to the regulatory rules for active rents and royalties under section 954(c)(2)(C). The Treasury Department and the IRS disagree, and believe that, in view of the original purpose of referencing section 954(c), section 1297 incorporates the law in respect of the referenced provisions—both statutory and regulatory—when it is applied. *Compare* section 951A(d)(3).[2] Therefore, the final regulations do not adopt this comment.

2. PFIC/CFC Overlap Rule and RPII Income

Section 1297(d) provides that, for PFIC purposes, a corporation shall not be treated as a PFIC with respect to a shareholder during the qualified portion of such shareholder's holding period with respect to stock in such corporation during which time the corporation is a CFC (''PFIC/CFC overlap rule''). The qualified portion of a shareholder's holding period generally is the period during which the shareholder is a United States shareholder (''U.S. shareholder''), as defined in section 951(b). Section 951(b) defines a U.S. shareholder, for purposes of the Code, as a U.S. person that owns 10 percent or more of the voting power or value of a foreign corporation. Section 957(a) provides that, for purposes of the Code, a CFC means any foreign corporation more than 50 percent owned (by vote or value, taking into account section 958(b) constructive ownership rules) by U.S. shareholders on any day during the taxable year of the foreign corporation.

In certain circumstances, the subpart F insurance rules lower the CFC ownership threshold requirements used to determine CFC status and eliminate the 10 percent vote or value test for determining U.S. shareholder status that are otherwise applicable for purposes of the Code. Under section 957(b), a special definition of a CFC applies and lowers the more than 50 percent ownership rule to a more than 25 percent ownership rule for taking into account section 953(a) insurance income, but only if the foreign corporation's gross amount of premiums or other consideration in respect of reinsurance or the issuing of insurance or annuity contracts not described in section 953(e)(2) exceeds 75 percent of the gross amount of all premiums or other consideration in respect of all risks. Also, under section 953(c)(1)(B), for purposes of taking into account related party insurance income (''RPII'') as defined in section 953(c)(2), the CFC ownership requirement is reduced to a ''25 percent or more'' requirement. In addition, for purposes of determining RPII, the 10 percent of vote or value test for determining U.S. shareholder status is eliminated. *See* section 953(c)(1)(A). Instead, for RPII purposes, a U.S. shareholder means any U.S. person that directly or indirectly owns any of the stock of the foreign corporation at any time during the foreign corporation's taxable year. *See* section 953(c)(1)(A). Constructive ownership under section 958(b) is not taken into account for this purpose.

A comment requested that the proposed regulations be modified to provide an exception to the PFIC rules for all U.S. shareholders (meaning without regard to the 10 percent vote or value test in section 951(b)) of all CFCs (including those that satisfy the 25 percent threshold applicable solely for the subpart F purposes described above). The final regulations do not adopt this comment. Consideration of the scope of the PFIC/CFC overlap rule, including the interaction with the RPII rules, is beyond the scope of this rulemaking. The Treasury Department and the IRS continue to study the interaction of these provisions and if necessary, will provide guidance in the future.

B. Exceptions From Passive Income

1. Application of Active Banking and Active Insurance Exceptions

Proposed § 1.1297–1(c)(1)(i)(A) provided that section 954(h), which excludes from FPHCI income derived by a CFC in the active conduct of a banking or financing business from customers outside of the United States, applied for purposes of determining PFIC status. The proposed regulations also provided that section 954(i), which excludes from FPHCI certain income derived in the active conduct of an insurance business, did not apply for purposes of determining PFIC status. *See* proposed § 1.1297–1(c)(1)(i)(B). Several comments approved of the application of section 954(h) to the determination of whether income is treated as passive for purposes of section 1297. One comment noted that, in the case of tested foreign corporations with look-through subsidiaries that are domestic corporations, section 954(h)(3)(A)(ii)(I)

[2] As enacted, section 951A(d) contains two paragraphs designated as paragraph (3). The section 951A(d)(3) referenced in this preamble relates to the paragraph on determination of the adjusted basis in property for purposes of calculating QBAI.

would result in the section 954(h) exception being inapplicable to active financing income earned by these subsidiaries from transactions with local customers, even though it would otherwise be of a type that would not be passive. The comment suggested that section 954(h) should be applied in the PFIC context by treating income as qualified banking or financing income even if the income is derived from transactions with customers in the United States. Several comments recommended that the section 954(h) exception continue to apply in the PFIC context in the event that final regulations implementing the active banking exception in section 1297(b)(2)(A) are adopted. Comments also requested that the final regulations apply the section 954(i) insurance exception for purposes of determining PFIC status of an insurance company in a parallel manner as section 954(h).

In response to these comments, the Treasury Department and the IRS have further studied sections 954 and 1297 and their legislative history. As described in more detail in the remainder of this Part III.B.1 of this Summary of Comments and Explanation of Revisions section, the Treasury Department and the IRS have determined that sections 954(h) and (i) do not apply for purposes of section 1297(b) absent regulations and that the appropriate statutory authority for any such regulations is section 1297(b)(2) rather than section 1297(b)(1). The Treasury Department and the IRS have further concluded that section 954(i) does not apply for purposes of section 1297(b)(2)(B), and that certain principles of section 954(h) should be applied for purposes of section 1297(b)(2)(A) but that a different approach is warranted with respect to section 954(h) than the approach taken in the proposed regulations. Accordingly, the 2020 NPRM proposes rules that would treat qualifying income of certain taxpayers that satisfy the requirements of section 954(h) as income derived in the active conduct of a banking business within the meaning of section 1297(b)(2). *See* proposed § 1.1297–1(c)(2).

As previously discussed, section 1297(b)(1) provides that, except as otherwise provided in section 1297(b)(2), passive income means any income of a kind that would be FPHCI as defined in section 954(c). The definitions of the categories of FPHCI listed in section 954(c) describe types of gross income, for example interest, dividends, gains from the sale of property and foreign currency gains, as well as exceptions to those definitions. While these definitions and exceptions in some places refer to CFCs, the definitions and exceptions themselves do not require that a foreign corporation be a CFC. By contrast, although sections 954(h) and (i) apply ''for purposes of section 954(c)(1),'' those provisions explicitly require that a foreign corporation be a CFC to qualify for an exception to FPHCI. Section 954(h) applies only to eligible CFCs, as defined in section 954(h)(2), and section 954(i) applies only to qualifying insurance company CFCs, as defined in section 953(e)(3). Accordingly, sections 954(h) and (i) do not apply for purposes of section 1297(b)(1) unless a tested foreign corporation is treated pursuant to regulations as a CFC for that purpose or otherwise qualifies as a CFC. *See* proposed § 1.1297–1(c)(1)(i)(D) of the 2019 proposed regulations (treating a tested foreign corporation as a CFC for purposes of applying section 954(h)).

The Treasury Department and the IRS have further determined that any regulations treating sections 954(h) and (i) as applicable for purposes of section 1297(b) should be issued under section 1297(b)(2) and not under section 1297(b)(1). As originally enacted, section 1297(b)(1) provided a rule of general application, and section 1297(b)(2) provided a limited set of exceptions to section 1297(b)(1). While the list of exceptions in section 1297(b)(2) has changed from time to time, that statutory scheme remains intact today. Section 1297(b)(2) provides exceptions for income derived in the active conduct of a banking or insurance business, subject to various conditions. If section 954(h) or (i) were treated as applicable for purposes of section 1297(b)(1), section 1297(b)(2)(A) and (B) would provide duplicative exceptions for banking or insurance income, respectively. Moreover, interpreting section 1297(b)(1) in this manner would have the effect of narrowing the scope of the exceptions provided by section 1297(b)(2), because the income of some foreign banks or insurance companies would already be treated as non-passive under section 1297(b)(1). No explicit action by Congress authorizes the narrowing of section 1297(b)(2) in this manner. The legislative history of the enactment of section 954(h) (as a temporary rule relating to both banking and insurance income) in 1997 and the enactment of sections 954(h) and (i) in 1998 are void of any indication that Congress intended such an interpretation of section 1297(b)(1).[3] The legislative history provides further evidence that section 954(h) was not intended to apply for purposes of section 1297(b)(1); the conference report states that ''the conferees intend that a corporation will be considered to be engaged in the active conduct of a banking . . . business if the corporation would be treated as so engaged under the regulations proposed under'' section 1297(b)(2).[4] Incorporating this standard into section 1297(b)(1) would limit the scope of section 1297(b)(2). Accordingly, given the specialized nature of these exceptions within the subpart F regime, the Treasury Department and the IRS have determined that it is inappropriate to apply them in defining the types of income that are ''of a kind'' described in section 954(c) (that is, FPHCI) for purposes of section 1297(b)(1).

In addition, as explained in the preamble to the 2019 proposed regulations, the Treasury Department and the IRS have determined that because the recent changes to section 1297(b)(2)(B) require that income eligible for the exception be earned by a qualifying insurance corporation, section 954(i) should not apply in addition to the newly modified exception in section 1297(b)(2)(B). *See* 84 FR 33120, at 33123. Therefore, the final regulations do not adopt the comments requesting that the section 954(i) exception apply for purposes of determining PFIC status. As a result, section 954(i) remains listed in § 1.1297–1(c)(1)(i)(B) as one of the exceptions in section 954 that is not applied in the PFIC context.

Section 954(h) has been removed from the list of exceptions that are applied to PFICs with respect to section 1297(b)(1). *See* § 1.1297–1(c)(1)(i)(A). Despite the conclusion that it is inappropriate to incorporate section 954(h) as an exception to the definition of passive income under section 1297(b)(1), the Treasury Department and the IRS have considered whether principles of section 954(h) could apply in the context of the rules of section 1297(b)(2)(A). Section 1297(b)(2)(A) provides that passive income does not include any income derived in the

[3] *See* H.R. Rep. No. 220, 105th Cong. 1st Sess. 623–28 (July 30, 1997) (discussing adoption of section 1297(d) CFC overlap rule and section 1296 mark-to-market rule; no discussion of contemporaneous adoption of section 954(h)); *id.* at 639–45 (discussing adoption of active financing income (section 954(h)) rule; no suggestion that rules apply for PFIC purposes).

[4] *Id.* at 642; *see also* H.R. Rep. No. 105–825, at 1555 (Oct. 19, 1998) (Conf. Rep.) (''[I]n this regard, a corporation is considered to be engaged in the active conduct of a banking or securities business if the corporation would be treated as so engaged under the regulations proposed under prior law section 1296(b) (as in effect prior to the enactment of the Taxpayer Relief Act of 1997)'').

active conduct of a banking business by an institution licensed to do business as a bank in the United States (or, to the extent provided in regulations, by any other corporation). Pursuant to this grant of regulatory authority, the 2020 NPRM proposes an active banking exception that incorporates certain principles of section 954(h) in defining other corporations that are eligible to apply this exception in addition to U.S. licensed banks. *See* proposed § 1.1297–1(c)(2). The preamble to the 2020 NPRM discusses comments that address issues relating to the potential application of section 954(h) in the PFIC context.

2. Treatment of Gains From Certain Transactions

Proposed § 1.1297–1(c)(1)(ii) provided that for purposes of the Income Test, categories of income under section 954(c) that are determined by netting gains against losses are taken into account by a corporation on that net basis. However, under the proposed regulations, the net amount of income in each category of FPHCI was calculated separately for each relevant corporation, such that net gains or losses of a look-through subsidiary may not be netted against net losses or gains of another look-through subsidiary or of a tested foreign corporation. *See* proposed § 1.1297–1(c)(1)(ii).

One comment recommended that the final regulations not adopt the separate entity approach in proposed § 1.1297–1(c)(1)(ii) and, instead, permit a tested foreign corporation to net its gains and losses with those of its directly or indirectly owned look-through subsidiaries and its directly or indirectly owned partnerships. The comment noted that the separate entity approach could result in an overstatement of FPHCI of an integrated business that is conducted through multiple subsidiaries.

The Treasury Department and the IRS have determined that the integrated treatment proposed by the comment with respect to look-through subsidiaries and look-through partnerships is consistent with the statutory language treating the owner of a look-through subsidiary as receiving directly its proportionate share of the income of the subsidiary, and with the policies underlying section 1297(c). Accordingly, § 1.1297–1(c)(1)(ii) provides that the net gains or income for a category of FPHCI that is determined by netting gains against losses are determined at the level of a tested foreign corporation taking into account individual items of the tested foreign corporation and its look-through subsidiaries and look-through partnerships. Because these regulations do not adopt an overall look-through approach with respect to all partnerships, netting is not provided with respect to gains and losses derived from partnerships that are not look-through partnerships. For example, netting does not apply to gains and losses that are part of a tested foreign corporation's distributive share from a partnership that is a related person within the meaning of section 954(d)(3) but not a look-through partnership.

3. Treatment of Effectively Connected Income and Income Attributable to U.S. Permanent Establishments

Section 952(b) excludes from subpart F income the U.S. source income of a CFC that is effectively connected with the conduct by such CFC of a trade or business in the United States (''effectively connected income''). Comments noted that the proposed regulations did not address the treatment of effectively connected income, or the assets held to produce such income, of a foreign corporation or the treatment of income that is attributable to a U.S. permanent establishment, or the assets held to produce such income. The comments noted that section 952(b) can exclude from subpart F income amounts that are FPHCI in order to prevent such amounts from being double-taxed, once directly to the foreign corporation, and a second time to United States shareholders of the foreign corporation, and stated that the PFIC rules should not discriminate against income earned through a U.S. branch rather than through a domestic subsidiary that may qualify for the special rules of section 1298(b)(7). These comments suggested that the final regulations either characterize such income, and the assets held to produce such income, as non-passive or not include such income for purposes of the Income and Asset Tests.

As noted in Part III.B.1 of this Summary of Comments and Explanation of Revisions, the determination of whether amounts should be taken into account for purposes of the Income Test or the Asset Test is based on whether income would be FPHCI under section 954(c), not whether the income is treated as subpart F income. The PFIC rules address whether income is passive, which is a different question from whether it should be treated as subpart F income. Section 1298(b)(7) does not provide non-passive treatment for all income of domestic subsidiaries, but rather only for income of domestic subsidiaries that meet specified requirements, indicating that Congress did not consider it appropriate to exclude all income of domestic subsidiaries that are subject to U.S. net income taxation from passive income treatment. As a corollary, the limited scope of section 1298(b)(7) implies that a broad exception for effectively connected income is not warranted. Furthermore, section 1293(g)(1)(B)(ii) provides authority to exclude effectively connected income of a PFIC that is subject to U.S. net income taxation from inclusion in the hands of a shareholder of the PFIC that has made a qualified electing fund election, indicating that effectively connected income is otherwise treated as income of a tested foreign corporation for PFIC purposes.

The Treasury Department and the IRS have determined that an exclusion of effectively connected income (and income attributable to a U.S. permanent establishment) from passive income would be inconsistent with the statutory definition of passive income in section 1297(b)(1), with the limited application of section 1298(b)(7) and with the exclusion provided by section 1293(g)(1)(B)(ii), and that the treatment of effectively connected income (and income attributable to a U.S. permanent establishment) is contemplated and appropriately addressed by the existing PFIC rules. Consequently, the final regulations do not adopt the suggestions in these comments.

C. Income Subject to the Related Person Look-Through Rule

Section 1297(b)(2)(C) characterizes dividends, interest, rents, and royalties received or accrued from a related person as non-passive income to the extent those amounts are properly allocable to income of such related person that is not passive. Proposed § 1.1297–1(c)(3) provided additional guidance on the application of the section 1297(b)(2)(C) related person exception for dividends, interest, rents, and royalties. In response to comments, changes have been made to these regulations and additional guidance has been provided.

Under the final regulations, for purposes of the Asset Test and Income Test, corporations and partnerships owned in whole or part by a tested foreign corporation are generally classified into one or more of three categories. Lower-tier entities generally are treated as one or more of (i) a look-through subsidiary or look-through partnership (a ''look-through entity''), (ii) a related person or (iii) an entity that is neither a look-through entity nor a related person. The rules for look-through entities are discussed in Part IV of this Summary of Comments and Explanation of Revisions. Dividends

and the distributive share of income from a lower-tier entity that is neither a look-through entity nor a related person generally are treated as passive income, regardless of whether the income of the lower-tier entity is active or passive in its hands. *See* § 1.1297–1(c)(3). Similarly, ownership interests in such entities are treated as passive assets. *See* § 1.1297–1(d)(4).

For purposes of section 1297(b)(2)(C), the term *related person* has the meaning provided by section 954(d)(3). *See* section 1297(b)(2) and § 1.1297–1(f)(8). Because the ownership threshold required for an entity to be treated as a related person is higher than the ownership threshold required for an entity to be treated as a look-through entity, there may be many entities that qualify as both or solely as look-through entities. However, because section 954(d)(3) has broader attribution rules than the rules that apply for purposes of determining look-through entity classification, there may be entities that are treated as related persons with respect to a tested foreign corporation but not as look-through entities with respect to that tested foreign corporation.

For purposes of section 1297(b)(2)(C), interest, dividends, rents or royalties actually received or accrued by a tested foreign corporation are considered received or accrued from a related person only if the payor of the interest, dividend, rent or royalty is a related person with respect to the tested foreign corporation. In the case of income received or accrued from a look-through entity, the rules that eliminate intercompany income described in Part IV.D of this Summary of Comments and Explanation of Revisions apply before the rules applicable to income received or accrued from a related person. *See* § 1.1297–1(c)(4)(ii). Consequently, the rules of § 1.1297–1(c)(4) apply to dividends, interest, rents, and royalties received or accrued from a look-through entity only if those amounts are treated as regarded after application of the intercompany income rules. These rules also apply to income from a related person that is received or accrued by a look-through entity. The determination of whether income received or accrued by a look-through entity is treated as received from a related person is made at the level of the look-through entity, both for purposes of determining whether the look-through entity is a PFIC, if relevant, and for purposes of determining whether an upper-tier tested foreign corporation is a PFIC. *See* § 1.1297–2(d).

If a partnership is a related person (that is not a look-through entity) with respect to a tested foreign corporation or look-through entity, and therefore subject to these rules, the tested foreign corporation's or look-through entity's distributive share of income from the partnership is treated as passive or non-passive in whole or part based on the activities of the partnership, and the partnership interest is correspondingly treated as passive or non-passive in whole or part. *See* § 1.1297–1(c)(4)(vii), (d)(3)(i), and (d)(4). An asset that gives rise to income that is treated as in part passive and in part non-passive pursuant to these rules is subject to the rules that apply to dual-character assets. *See* § 1.1297–1(d)(3)(i).

1. Treatment of Interest

The proposed regulations provided that, for purposes of the section 1297(b)(2)(C) exception, interest is properly allocable to income of the related person that is not passive income based on the relative portion of the related person's income for its taxable year that ends in or with the taxable year of the recipient that is not passive income. *See* proposed § 1.1297–1(c)(3)(i). Comments generally supported the pro rata approach taken in the proposed regulations. One comment noted that the final regulations should clarify that the allocation is based on the ratio of gross non-passive income to gross total income. Another comment that supported the pro rata approach in the proposed regulations recommended that the final regulations address situations in which the related person does not have income during the taxable year of the payment. In such a case, this comment suggested that the final regulations apply the principles of § 1.861–9T, which provides rules for allocating and apportioning interest expense, to determine whether the interest payments are allocated to passive or non-passive income of the related person. The comment also requested that the approach using the principles of § 1.861–9T to allocate interest when the related person does not have gross income be made available as an alternative method at the election of the tested foreign corporation.

As suggested by the first comment, the final regulations clarify that the ratio for allocating interest to income is based on gross income. *See* § 1.1297–1(c)(4)(iii). Similar clarifications are made for the rule for rents and royalties. *See* § 1.1297–1(c)(4)(v). The Treasury Department and the IRS have determined that the pro rata approach provided in the proposed regulations is the most straightforward and consistent with the purposes of the section 1297(b)(2)(C) exception if the related person has gross income in the taxable year, and accordingly, the final regulations do not provide a generally applicable election to apply the principles of § 1.861–9T in lieu of the general rule. *See* § 1.1297–1(c)(4)(iii).

It is anticipated that it will rarely be the case that a related person will not have gross income, because gross income for most taxpayers is determined without taking expenses into account. However, in the case of taxpayers that determine gross income after taking operating expenses into account, it is possible that a taxpayer will not have gross income for a taxable year. In such a case, the Treasury Department and the IRS agree that the principles of § 1.861–9T may properly apply for a year in which the related person does not have gross income, because § 1.861–9T is a general rule—the default rule in the absence of a more specific rule—relating to the allocation of interest expense. Alternatively, because section 1297(b)(2)(C) characterizes interest received or accrued from a related person as non-passive income to the extent it is properly allocable to non-passive income of the related person, it may also be appropriate for interest received or accrued by the tested foreign corporation to be allocated entirely to passive income in such a case, and that treatment may be simpler for a tested foreign corporation to determine. Accordingly, the final regulations provide that for a year in which the related person does not have gross income, a tested foreign corporation may use the principles of § 1.861–9 through –13T, applied in a reasonable and consistent manner taking into account the general operation of the PFIC rules and the purpose of section 1297(b)(2)(C) in order to allocate interest received or accrued from the related person between passive and non-passive income. Alternatively, at a tested foreign corporation's election, it may treat the interest income entirely as passive income.

2. Treatment of Dividends

The proposed regulations provided that, for purposes of the section 1297(b)(2)(C) exception, dividends are treated as properly allocable to income of the related person that is not passive income based on the portion of the related payor's current earnings and profits (''E&P'') for the taxable year that ends in or with the taxable year of the recipient that is attributable to non-passive income. *See* proposed § 1.1297–1(c)(3)(ii).

A comment observed that foreign corporations often do not maintain E&P based on U.S. tax principles. The comment recommended that dividends be treated as allocated between passive and non-passive amounts based on the ratio of passive to non-passive gross income.

Two comments requested that proposed § 1.1297–1(c)(3)(ii) be modified to allocate dividend income based on both current and accumulated E&P of the related payor to which the dividend income is attributable, in accordance with the principles of section 316. A third comment observed that there are administrative benefits to characterizing dividends by reference to current E&P, because it may be easier to obtain relevant information for current E&P and because the nature of a company's activities may change. This comment further requested that dividends be determined by reference to gross income over a reasonable look-back period such as three to five years, rather than by reference to E&P under section 316 principles, in order to reflect the economic reality of the corporation's activities and to avoid undue emphasis on the timing of the dividends. The comment suggested as an alternative that this method might apply only if the related payor does not maintain E&P using U.S. tax principles, while if the related party does maintain E&P based on U.S. tax principles, then, to the extent of current E&P, dividends would be characterized based on the portion of the related payor's current-year E&P that is attributable to non-passive income, and the remaining amount would be characterized based on the relative portion of accumulated E&P that is attributable to non-passive income. The comment suggested that the ratio for accumulated E&P could be based on accumulated E&P for the period in which the related payor was a related person under section 954(d)(3).

Another comment suggested that the difficulty in obtaining information necessary to determine the character of accumulated E&P with respect to foreign corporations could be addressed by allowing taxpayers to use reasonable methods to determine the character of accumulated E&P and proposed that characterizing the accumulated E&P based on the current year's E&P be considered a reasonable method.

The Treasury Department and the IRS agree that dividends from related parties should be allocated between passive and non-passive E&P based on the principles of section 316, which apply generally for purposes of the U.S. international tax rules. Accordingly, the final regulations adopt the recommendation to characterize dividends in accordance with first current and then accumulated E&P of the related payor to which the dividend income is attributable. *See* § 1.1297–1(c)(4)(iv)(A). In order to address concerns that foreign corporations that are not CFCs may not maintain E&P based on U.S. tax principles, taxpayers are permitted to allocate E&P in proportion to the ratio of passive gross income to non-passive gross income for the relevant period. *See* § 1.1297–1(c)(4)(iv)(B).

The Treasury Department and the IRS also agree with the premise of all of the comments that if dividends are paid out of E&P other than current E&P, either because there is no current E&P or because the amount of the dividends exceeds the current E&P, it would be appropriate to take into account the character of the income supporting the dividend. The final regulations provide that dividends paid out of accumulated E&P are allocated between passive and non-passive E&P under the same rules that apply with respect to dividends paid out of current E&P. *See* § 1.1297–1(c)(4)(iv)(C).

The Treasury Department and the IRS understand that it may be difficult for shareholders to determine the character of accumulated E&P with respect to foreign corporations, particularly for E&P from pre-acquisition periods. The suggestion of referring to a look-back period of several years is consistent with the rule for characterizing stock, discussed in Part III.D.4 of this Summary of Comments and Explanation of Revisions, which is intended to effectively treat stock as, in whole or part, held for the production of non-passive income if dividends received with respect to it within a three-year period constitute non-passive income due to the application of section 1297(b)(2)(C). Accordingly, the final regulations permit taxpayers to use the default approach, consistent with general U.S. federal income tax principles, of allocating dividends paid out of accumulated E&P based on the ratio of passive to non-passive E&P for each prior year (beginning with the most recently accumulated), or to use one of two administratively simpler alternatives. *See* id. The first alternative is to allocate dividends paid out of accumulated E&P based on the ratio of passive to non-passive E&P that is attributable to E&P accumulated in the years in which the payor was related to the recipient. If the payor has been related to the recipient for more than three years, a second alternative is available, which is to allocate dividends paid out of accumulated E&P based on the ratio of passive to non-passive E&P that is attributable to E&P accumulated during a look-back period of the three years before the current taxable year. *See* id.

D. Asset Test

1. Section 958 Proposed Regulations

Shareholders of a foreign corporation that became a CFC as a result of the repeal of section 958(b)(4) would have to apply the Asset Test based on the adjusted basis of the foreign corporation's assets under section 1297(e). The section 958 proposed regulations modified the definition of a CFC for purposes of section 1297(e) to disregard downward attribution from foreign persons. *See* proposed § 1.1297–1(d)(1)(iii)(A). No comments were received with respect to this rule in the section 958 proposed regulations. Accordingly, the rule is finalized without modification. *See* § 1.1297–1(d)(1)(v)(B)(*2*).

2. Determination of Average Amount of Assets Based on Value or Adjusted Basis

Section 1297(e) provides that the assets of a tested foreign corporation are to be measured based on (i) value, pursuant to section 1297(e)(1), if it is a publicly traded corporation for the taxable year, or if section 1297(e)(2) does not apply to it for the taxable year; or (ii) adjusted basis, pursuant to section 1297(e)(2), if it is a CFC or elects the application of section 1297(e)(2). These statutory provisions create a hierarchy for determining the method for measuring the assets of a tested foreign corporation, as follows: (a) First by value, if the tested foreign corporation is a publicly traded corporation for the taxable year; (b) second by adjusted basis, if the tested foreign corporation is not a publicly traded corporation and is a CFC; and (c) third by value, or at the election of the tested foreign corporation, by adjusted basis, in other cases. The Treasury Department and the IRS understand that taxpayers typically prefer to use value to measure assets of a tested foreign corporation.

The proposed regulations provided that, for purposes of the Asset Test, companies that were publicly traded for only part of the year were required to measure assets on the basis of value for the entire year if the corporation was publicly traded on the majority of days during the year or if section 1297(e)(2) did not apply to the corporation on the majority of days of the year. If the tested foreign corporation was not publicly traded on the majority of days during the year, the tested foreign corporation was required to use adjusted basis to

measure assets if it was a CFC or if an election to use adjusted basis was made under section 1297(e)(2)(B). *See* proposed § 1.1297–1(d)(1)(v). The majority of days rule in the proposed regulations would have required a tested foreign corporation that was a CFC and whose shares were publicly traded for less than the majority of days during the year to use adjusted basis to measure its assets for that taxable year because the corporation would not have been treated as a publicly traded corporation. The requirement to use adjusted basis might apply, for example, to a foreign corporation treated as a CFC that issues publicly traded shares in an initial public offering in the second half of the year.

A comment requested that the proposed regulations be modified to provide that the Asset Test be applied based on value if shares of the tested foreign corporation were publicly traded at any time during the taxable year. The comment asserted that the use of value more appropriately reflects the purposes of the PFIC rules in general, and that the statute requires only non-publicly traded CFCs to use basis for purposes of the Asset Test and otherwise allows a tested foreign corporation to apply the Asset Test based on value. The comment also noted that, due to the repeal of section 958(b)(4), there may be more tested foreign corporations that are CFCs. In such cases, less-than-10-percent shareholders of those tested foreign corporations would be required to use basis rather than value in determining PFIC status. The comment requested relief from this result. The comment further noted that publicly traded corporations required to use basis would not be able to take into account goodwill and other self-created business intangibles for purposes of the Asset Test because such items often do not have tax basis.

The Treasury Department and the IRS agree with the concerns expressed by the comment regarding the effects of the repeal of section 958(b)(4). As discussed in Part III.D.1 of this Summary of Comments and Explanation of Revisions, this rulemaking finalizes the portion of the section 958 proposed regulations concerning the definition of the term CFC for purposes of the Asset Test, which accordingly allows use of the value method of measuring assets to the extent permissible under the statute. *See* § 1.1297–1(d)(1)(v)(B)(*2*) (treating foreign corporations that are CFCs solely due to the repeal of section 958(b)(4) as not CFCs for purposes of section 1297(e)). The Treasury Department and the IRS believe that this change may alleviate much of the concern expressed about the proposed rule because the change makes it less likely that a tested foreign corporation will be treated as a CFC that is required to use adjusted basis to measure its assets.

The Treasury Department and the IRS also agree that section 1297(e) favors the use of value as a method to measure assets and that the use of value aligns with the objective of the PFIC rules. As a result, the final regulations expand the definition of publicly traded corporation for purposes of section 1297(e) to include more circumstances in which a tested foreign corporation is treated as a publicly traded foreign corporation. *See* § 1.1297–1(f)(7). However, the Treasury Department and the IRS believe that it would be inappropriate to require a corporation to use value for purposes of the Asset Test if it was publicly traded for a de minimis period during its taxable year. Accordingly, the final regulations provide that a publicly traded corporation, which is defined as a corporation that has been publicly traded in more than de minimis amounts for at least twenty trading days (approximately one month) during a taxable year, is required to apply the Asset Test based on value. *See* § 1.1297–1(d)(1)(v)(A) and (f)(7). Pursuant to section 1297(e), a tested foreign corporation that does not qualify as a publicly traded foreign corporation may use value to measure assets as long as it is not a non-publicly traded CFC, but it is not required to do so.

The comment also requested clarification on the application of section 1297(e) in the case of tiers of tested foreign corporations. The comment recommended the final regulations provide that, for purposes of applying the Asset Test, a publicly traded tested foreign corporation should measure all of its assets—including the assets of its non-publicly traded look-through subsidiaries—based on value. The Treasury Department and the IRS generally agree with the premise of this comment, except in cases where section 1297(e) requires a different treatment for the assets of subsidiaries (as discussed in the next paragraph). For the avoidance of doubt, the final regulations include cross-references to § 1.1297–2(b)(2)(i) (which provides the rule that a tested foreign corporation is deemed to directly own the assets of the look-through subsidiary) in the final section 1297(e) rules. *See* § 1.1297–1(d)(1)(i) and (d)(1)(v)(A).

The comment also observed that, unlike the typical situation where a publicly traded tested foreign corporation would measure all of its assets (including the assets of its non-publicly traded look-through subsidiaries) based on value in accordance with section 1297(e)(1)(A), it is questionable whether a CFC that is a non-publicly traded subsidiary of a publicly traded parent corporation could also use value, rather than basis, for purposes of testing its own PFIC status. The comment noted that such a subsidiary might be a CFC as a result of the repeal of section 958(b)(4). As discussed in Part III.D.1 of this Summary of Comments and Explanation of Revisions, § 1.1297–1(d)(1)(v)(B)(*2*), which provides that foreign corporations that are CFCs solely due to the repeal of section 958(b)(4) are not treated as such for purposes of section 1297(e), mitigates this concern. Further, if a lower-tier tested foreign corporation is a CFC that is not publicly traded, section 1297(e)(2)(A) requires that adjusted basis be used as the method for measuring its assets. Therefore, the final regulations clarify that a lower-tier tested foreign corporation that is a non-publicly traded CFC must use adjusted basis and not value to measure its assets, regardless of whether it is owned by a publicly traded foreign corporation.

In order to clarify the application of the statutory hierarchy for measuring a tested foreign corporation's assets more generally, including with respect to lower-tier tested foreign corporations, § 1.1297–1(d)(1)(v) has been revised. The regulation provides a hierarchy that generally applies to every tested foreign corporation, regardless of whether it is an upper-tier or lower-tier tested foreign corporation. Pursuant to section 1297(e) and this hierarchy, (i) a publicly traded foreign corporation (as defined in § 1.1297–1(f)(7)) must use value to measure its assets, (ii) a non-publicly traded CFC must use basis to measure its assets, unless the CFC becomes a publicly traded foreign corporation (as defined in § 1.1297–1(f)(7)) during a taxable year, and (iii) any other tested foreign corporation would use value to measure its assets unless an election is made to use adjusted basis, except if it is a lower-tier subsidiary in which case additional rules apply. *See* § 1.1297–1(d)(1)(v)(A), (B), and (C)(*1*). Section 1.1297–1(d)(1)(iii) clarifies that the election to use adjusted basis may be made by the tested foreign corporation or its shareholders.

Revised § 1.1297–1(d)(1)(v) provides specific rules for measuring the assets of lower-tier subsidiaries, which in the usual case are expected to be look-through subsidiaries. These rules follow the same hierarchy described in the prior paragraph, except that the method used to measure the assets of a lower-tier subsidiary may be determined either by the status of the lower-tier subsidiary

if it is a publicly traded foreign corporation or a non-publicly traded CFC, or by the status of a tested foreign corporation that directly or indirectly owns all or part of the shares of the lower-tier subsidiary (a parent foreign corporation), if the parent foreign corporation has one of those statuses. *See* § 1.1297–1(d)(1)(v)(C)(*2*).

As a general matter, the method used by a parent foreign corporation to measure its assets also must be used to measure the assets of a lower-tier foreign corporation owned in whole or part by that parent foreign corporation. This rule applies both for purposes of determining whether the parent foreign corporation is a PFIC and for purposes of determining whether the lower-tier foreign corporation is a PFIC. If a tested foreign corporation indirectly owns a lower-tier subsidiary through one or more other foreign corporations, the status of the parent foreign corporation in that chain of corporations that has the highest status in the hierarchy described above governs. *See* § 1.1297–1(d)(1)(v)(C)(*2*)(*iii*).

This general consistency rule does not apply, however, if the lower-tier foreign corporation has a status for which section 1297(e) mandates a method for measuring assets (that is, it is a publicly traded foreign corporation or non-publicly traded CFC). In such a case, the statutorily mandated method applies to measure the lower-tier foreign corporation's assets, both for purposes of determining whether the parent foreign corporation is a PFIC and for purposes of determining whether the lower-tier foreign corporation is a PFIC. For example, if a tested foreign corporation is a publicly traded foreign corporation, then both its assets and the assets of its lower-tier subsidiaries must be measured on the basis of value, unless a lower-tier subsidiary is a non-publicly traded CFC, in which case the assets of that subsidiary must be measured using adjusted basis. Similarly, if a tested foreign corporation is a non-publicly traded CFC, then both its assets and the assets of its lower-tier subsidiaries must be measured using adjusted basis, unless a lower-tier subsidiary is a publicly traded foreign corporation, in which case the assets of that subsidiary must be measured using value. *See* § 1.1297–1(d)(1)(v)(C)(*2*)(*i*) and (*ii*). If a lower-tier tested foreign corporation does not have a status for which section 1297(e) mandates a method for measuring assets, and it is a subsidiary of more than one parent foreign corporation, then U.S. shareholders of the two different parent corporations may be required to use different methods to measure the assets of the lower-tier foreign corporation based on the method used for each respective parent foreign corporation. *See* the last sentence of § 1.1297–1(d)(1)(v)(C)(*2*)(*iii*) and § 1.1297–1(d)(1)(v)(E)(*3*) (Example 3).

The Treasury Department and the IRS recognize that section 1297(e)(1) requires in many cases that a valuation must be performed for assets of an operating company for which no publicly available valuation is available, apart from information provided in financial statements prepared under widely-used financial reporting standards, and that ascertaining such a valuation creates a compliance burden. The Treasury Department and the IRS are studying whether to provide rules permitting taxpayers to rely on financial statement information in appropriate cases, and the final regulations reserve on this issue. *See* § 1.1297–1(d)(1)(v)(D). The 2020 NPRM proposes a rule to address this issue and solicits comments on the proposed rule. *See* proposed § 1.1297–1(d)(1)(v)(D).

3. Treatment of Working Capital for Purposes of Asset Test

The proposed regulations did not address the treatment of working capital for purposes of the Asset Test. Notice 88–22, 1988–1 C.B. 489 (''Notice 88–22'') provides that cash and other current assets readily convertible into cash, including assets that may be characterized as the working capital of an active business, are treated as passive assets for purposes of the Asset Test. Notice 88–22 indicated that passive treatment is warranted because working capital produces passive income (interest income).

A comment on the proposed regulations asserted that the approach taken in Notice 88–22 with respect to working capital undermines the purpose of the PFIC regime to distinguish between investments in passive assets and investments in active businesses. The comment requested that the final regulations adopt an approach, similar to the treatment of dual-character assets, pursuant to which working capital would be bifurcated between passive and non-passive assets in proportion to the relative amount of gross income that is passive or non-passive.

The Treasury Department and the IRS continue to study the appropriate treatment of working capital, and the final regulations reserve on this issue. *See* § 1.1297–1(d)(2). The 2020 NPRM proposes a limited exception to the treatment of working capital to take into account the short-term cash needs of operating companies. *See* proposed § 1.1297–1(d)(2).

4. Assets That Produce Income Subject to the Related Person Look-Through Rule

The proposed regulations defined the term passive asset, consistent with section 1297(a), as an asset that produces passive income, or which is held for the production of passive income, taking into account the rules in proposed § 1.1297–1(c), which defined passive income, and proposed § 1.1297–1(d), which provided rules for the application of the Asset Test. *See* proposed § 1.1297–1(f)(6). The proposed regulations also provided that an asset that produces both passive income and non-passive income during a taxable year is treated as two assets, one of which is passive and one of which is non-passive, with the value (or adjusted basis) of the asset being allocated between the passive asset and non-passive asset in proportion to the relative amounts of passive and non-passive income produced by the asset during the taxable year. *See* proposed § 1.1297–1(d)(2)(i).

A number of comments expressed concern that the proposed regulations did not provide a general rule to characterize assets—in particular shares of stock—that give rise to income subject to the related person look-through rule of section 1297(b)(2)(C), discussed in Part III.C of this Summary of Comments and Explanation of Revisions. The comments suggested that the final regulations include a rule that treats assets that give rise to income subject to section 1297(b)(2)(C) as a passive or non-passive asset to the extent the income that is received with respect to such asset is treated as passive or non-passive by the tested foreign corporation. The Treasury Department and the IRS agree that it is consistent with the statutory language and intent of section 1297(a)(2) to treat assets that give rise to both passive and non-passive income as partly passive and partly non-passive. The Treasury Department and the IRS believe that it was clear under proposed § 1.1297–1(d)(2)(i) and (f)(6) that assets that produced income subject to the related person look-through rule of section 1297(b)(2)(C) were treated as non-passive in proportion to the non-passive income produced by the asset, subject to the special rules in § 1.1297–1(d). However, for the avoidance of doubt, the final regulations provide an explicit cross-reference to section 1297(b)(2)(C) to clarify that assets that produce income subject to the related person look-through rule are subject to the general and special rules with respect to treatment of assets under § 1.1297–1(d),

for example related party stock, loans, leases or licenses that produce dividends, interest, rent or royalties that are treated as passive and non-passive under section 1297(b)(2)(C). *See* § 1.1297–1(d)(3)(i). Accordingly, assets that give rise to income subject to section 1297(b)(2)(C) generally are treated as a passive or non-passive asset to the extent the income that is received with respect to such asset is treated as passive or non-passive by the tested foreign corporation.

The proposed regulations also provided that stock of a related person with respect to which no dividends are received or accrued during a taxable year but that previously generated dividends that were characterized as non-passive income, in whole or in part, under section 1297(b)(2)(C) is characterized based on the dividends received or accrued with respect thereto for the prior two years. *See* proposed § 1.1297–1(d)(2)(iii).

Comments noted that there may be instances in which the related person has not paid dividends in more than two years. One comment suggested that, in this instance, stock be apportioned in proportion to the average percentage of the dividends that were characterized as passive and non-passive in the last two years in which the related person paid dividends. If the related person never paid a dividend that was excluded under section 1297(b)(2)(C), the comment recommended that the stock be characterized based on the earnings during the last two years in which the related person generated earnings or, if the related person has never generated earnings, based on the earnings that are reasonably expected to be generated in the future. Another comment requested that proposed § 1.1297–1(d)(2)(iii) be replaced with a general rule with respect to stock of a related party that would characterize the stock based on whether the stock is expected to generate passive income. The comment asserted that this rule would allow for taxpayers to use reasonable methods to determine if the stock is expected to generate passive income.

One comment argued that, for purposes of characterizing stock that does not generate dividends in the current year, a look-back period of two years would be appropriate if the final regulations adopt an approach that characterizes the stock based on the character of hypothetical dividends and uses the proportionate amount of non-passive gross income over the look-back period to determine the character of the dividends. If such an approach is not adopted, the comment recommended that, instead of a look-back period of two years, the stock could be characterized based on dividends paid during the preceding five years or, if shorter, the period during which the subsidiary was a related person under section 954(d)(3).

Proposed § 1.1297–1(d)(2)(iii) was premised on the understanding that stock that has recently generated dividends that are, in whole or in part, non-passive under the related person look-through rule can be understood to be held for the production of non-passive income. If, however, the stock has not recently generated dividends, it is more appropriate to treat the stock as held for the production of gains upon disposition, which would generally be passive income. Accordingly, the Treasury Department and the IRS have determined that it would not be appropriate to allow stock to be treated as a non-passive asset on the basis of speculation that dividends might be received with respect to the stock and that such dividends could be non-passive under section 1297(b)(2)(C) as most of the comments' recommendations would provide. Moreover, the changes to the rules for determining the passive or non-passive character of dividends, discussed in Part III.C.2 of this Summary of Comments and Explanation of Revisions, also take into account the actual history of the stock and allow taxpayers to treat the most recent prior years as most relevant in determining the character of the stock. Thus, the final regulations do not adopt these comments and, instead, the final regulations provide that stock that did not produce dividends within the current taxable year or within either of the preceding two taxable years is characterized as a passive asset. *See* § 1.1297–1(d)(3)(iii); *but see* section 1297(c) and § 1.1297–2(c)(1)(i) (eliminating stock of look-through subsidiaries for purposes of the Asset Test).

E. Stapled Entities

Proposed § 1.1297–1(e) provided that, for purposes of determining whether any stapled entity (as defined in section 269B(c)(2)) is a PFIC, all entities that are stapled entities with respect to each other are treated as one entity. A comment suggested that the definition of stapled entities provided in section 269B(c)(2) and § 1.269B–1 could be overbroad and thus lead to planning opportunities for purposes of PFIC testing. Therefore, the comment recommended that the final regulations provide a more restrictive definition for stapled entities so that, for purposes of PFIC testing, single-entity treatment would be limited to situations in which nearly 100 percent of the outstanding equity interests in both entities are stapled to each other. Alternatively, the comment suggested, the Treasury Department and the IRS could issue rules applicable to the holders of stapled interests clarifying the application of the anti-abuse rule in section 1298(b)(4) (which would treat separate classes of stock (or other interests) in a corporation as interests in separate corporations, pursuant to regulations, where necessary to carry out the purposes of the PFIC regime) to such stapled interests by providing that the rule would apply only if unusual features exist and the arrangement would allow avoidance of the PFIC rules. The comment also highlighted the inappropriateness of potentially applying the rule in proposed § 1.1297–1(e) to treat a shareholder of an entity that would not be a PFIC, but for the rule, as the shareholder of a PFIC.

Another comment requested clarification on the extent to which stapled entities that were treated as a single entity for purposes of PFIC testing would be treated as a single entity with respect to other provisions in the PFIC regime. In particular, the comment requested that the final regulations indicate whether the stapled entities are treated as one PFIC for purposes of including income under the PFIC regime and for purposes of making an election with respect to income inclusions under the PFIC regime. Like the first comment, it also requested guidance when not all interests are stapled.

The Treasury Department and the IRS have determined that it is appropriate to apply the single entity treatment of proposed § 1.1297–1(e) even when not all interests in the stapled entities are stapled because section 269B(c)(2) applies only when controlling interests in the stapled entities are stapled, but that the application of the rule should be limited to apply only to U.S. persons that hold stapled interests and should not affect U.S. persons that directly or indirectly own only one of the stapled entities. Accordingly, the rule in proposed § 1.1297–1(e) is modified to apply only if a U.S. person that would be a shareholder of the stapled entities owns stock in all entities that are stapled entities with respect to each other. In this case, the stapled entities are treated as an interest in a single entity for all purposes of the PFIC rules, which may have the effect of causing a stapled entity that would not be a PFIC on a stand-alone basis to be treated as a PFIC when stapled, or the reverse. *See* § 1.1297–1(e). Given these modifications to the rule and the fact that the

definition of stapled entities in section 269B(c)(2) already limits stapling to situations in which more than 50 percent in the value of the beneficial ownership in each of the entities consists of stapled interests, the Treasury Department and the IRS have determined that it is not necessary at this time to provide guidance on the application of section 1298(b)(4) or to further limit the interests that can be stapled.

IV. Comments and Revisions to Proposed § 1.1297–2—Special Rules Regarding Look-Through Subsidiaries and Look-Through Partnerships

Proposed § 1.1297–2 provided guidance on the application of the look-through rule of section 1297(c) for purposes of the Income Test and the Asset Test.

A. Overview

1. Treatment of Income and Assets

Under the final regulations, a tested foreign corporation is treated as directly owning the assets of, and directly deriving the gross income of, a look-through subsidiary or look-through partnership. *See* § 1.1297–2(b)(2) and (b)(3). The tested foreign corporation disregards the equity interest in the look-through entity for purposes of the Asset Test. *See* § 1.1297–2(c)(1)(i) and (c)(3). As discussed in more detail in Part IV.D of this Summary of Comments and Explanation of Revisions, dividends from a lower-tier subsidiary and distributions and the distributive share of income from a lower-tier partnership generally are treated as if they did not exist (''eliminated'') for purposes of the Income Test. *See* § 1.1297–2(c)(2)(i) and (c)(3).

For Income Test purposes, the proposed regulations provided that the disposition of the stock of a look-through subsidiary is treated as the disposition of stock and provided rules for the calculation of gain. *See* proposed § 1.1297–2(f)(1). The final regulations also include rules addressing the disposition of partnership interests in a look-through partnership, which are similar in concept to the rules that apply to the disposition of stock of a look-through subsidiary, and rules addressing the disposition of partnership interests in a partnership described in section 954(c)(4)(B). *See* § 1.1297–2(f)(4). Where both rules could potentially apply, the disposition is subject to the rules of section 954(c)(4). *See* § 1.1297–2(f)(4)(i) and (ii). Consequently, it is anticipated that the sale of interests in a partnership that a tested foreign corporation owns at least 25 percent of by value generally will be subject to section 954(c)(4), and therefore will be treated as a disposition of assets rather than a disposition of the partnership interest, while the sale of interests in a partnership that a tested foreign corporation owns less than 25 percent of by value may or may not be subject to section 954(c)(4) in light of the different 25-percent ownership test in that statutory provision. The effect on the determination of gain under section 954(c)(4) of partnership earnings that have been included in income by the tested foreign corporation but not distributed is beyond the scope of these regulations.

Payments of interest, rent and royalties, and the related debt obligation, lease or license, between the tested foreign corporation and the look-through entity or between look-through entities generally also are eliminated for purposes of both the Income and the Asset Tests, as discussed in Part IV.D of this Summary of Comments and Explanation of Revisions. *See* § 1.1297–2(c)(1)(ii), (c)(2)(ii), and (c)(3). If the obligation is between look-through entities that are not wholly owned by the tested foreign corporation, a proportionate part of the obligation and income from it is eliminated. *See* id.

2. Definition of Look-Through Subsidiary

A subsidiary of a tested foreign corporation is treated as a look-through subsidiary if both an asset test and an income test are satisfied. *See* § 1.1297–2(g)(3). If only one test is satisfied, the subsidiary is not treated as a look-through subsidiary. *See generally* id. The asset test is satisfied for any measuring period (for example, one quarter of a taxable year) if on the relevant measuring date (for example, the end of a quarter) the tested foreign corporation owns at least 25 percent of the value of the stock of the subsidiary. *See* § 1.1297–2(g)(3)(i). The income test is satisfied if either (i) the tested foreign corporation owns an average of at least 25 percent of the value of the subsidiary's stock on the measuring dates of an entire taxable year, or (ii) the tested foreign corporation owns at least 25 percent of the value of the subsidiary's stock on a measuring date and the subsidiary's gross income for the measuring period can be determined. *See* § 1.1297–2(g)(3)(ii). Consequently, if a tested foreign corporation owns at least 25 percent of a subsidiary's stock for part but not all of a taxable year, the subsidiary is treated as a look-through subsidiary for that part of the taxable year only if the tested foreign corporation can determine the subsidiary's gross income on the measuring dates within that part of the taxable year. These rules are intended to ensure that a subsidiary is not treated as a look-through subsidiary unless the tested foreign corporation can determine the proportionate share of the subsidiary's assets and income that it is treated as directly owning and deriving.

B. Look-Through Partnerships

1. Overview

The proposed regulations defined a look-through partnership as a partnership in which the tested foreign corporation owned at least 25 percent in value. *See* proposed § 1.1297–1(c)(2)(i), (d)(3)(i), and (f)(1). The preamble to the proposed regulations indicated that the look-through partnership rules were drafted to apply look-through treatment as provided in section 1297(c) consistently to lower-tier partnerships and lower-tier corporations. *See* 84 FR 33120, at 33124. The preamble stated that the difference between the 25 percent threshold for look-through partnerships in the proposed regulations and the treatment of partnership income for FPHCI purposes is warranted because of the flexibility that entities have in their characterization under § 301.7701–3 and because of the fact that treating a subsidiary as a partnership may not have U.S. income tax consequences for a tested foreign corporation as it could for a CFC. *See* id. The preamble also noted that this rule ensured that the tested foreign corporation would have significant control over the partnership activities, such that a partnership interest could represent an active business interest. *See* id. The preamble requested comments on whether 25 percent was the right threshold, whether different rules should apply to general partnerships and limited partnerships, and whether a material participation test should apply.

The definition of look-through partnership in the final regulations is revised to more closely align with the definition of look-through subsidiary. Under the final regulations, a look-through partnership is a partnership that would be a look-through subsidiary with respect to the tested foreign corporation if the partnership were a corporation. *See* § 1.1297–2(g)(4)(i)(A). Accordingly, as noted by one comment, the taxpayer-favorable rules of section 1297(c) will apply to look-through partnerships, for example by allowing attribution of the activities of other affiliates in determining whether rental or royalty income of the partnership is treated as passive or non-passive. In

response to other comments, additional changes have been made to the definition of look-through partnership to allow look-through treatment for certain minority interests in partnerships. *See* § 1.1297–2(g)(4)(i)(B). These changes are discussed in Part IV.B.2 of this Summary of Comments and Explanation of Revisions.

The look-through partnership rules were located in proposed § 1.1297–1, which provided general rules concerning the Income and Asset Tests. Because look-through treatment for purposes of PFIC testing is provided in section 1297(c) and § 1.1297–2 provides guidance on the application of section 1297(c), the rules in the final regulations concerning look-through partnerships are in § 1.1297–2 along with all of the other rules discussing look-through treatment. *See* § 1.1297–2(b)(3) and (g)(4).

2. Definition of Look-Through Partnership

Under the proposed regulations, a look-through partnership with respect to a tested foreign corporation was defined as a partnership if (i) for purposes of section 1297(a)(2), the tested foreign corporation owned at least 25 percent of its value on a measuring date and (ii) for purposes of section 1297(a)(1), the tested foreign corporation owned at least 25 percent of its value on the date on which income was received or accrued by the partnership. *See* proposed § 1.1297–1(f)(1). The proposed regulations also provided that, if a tested foreign corporation owns, directly or indirectly, less than 25 percent of the value of a partnership, the corporation's distributive share of the partnership's income was treated as passive income for purposes of the Income Test and the corporation's interest in the partnership was treated as a passive asset for purposes of the Asset Test. *See* proposed § 1.1297–1(c)(2)(ii) and (d)(3)(ii).

Three comments were received addressing these rules. The comments supported the proposed regulations' general treatment of look-through partnerships and addressed the determination of when a partnership is treated as a look-through partnership. Two comments recommended that the 25-percent threshold be eliminated so that look-through treatment would apply to all partnerships regardless of the ownership level by the tested foreign corporation. A third comment stated that the proper approach to partnerships in applying look-through rules raises difficult issues and made several alternative recommendations.

The two comments recommending that all partnerships be treated as look-through partnerships noted that partnerships are pass-through entities that are generally treated as aggregates for many purposes throughout the Code and asserted that section 1297(c) implicitly indicates that aggregate treatment was intended to apply to all partnerships because it provides a 25-percent threshold only for corporations. The comments also stated that the differences between corporate treatment and partnership treatment have ramifications for many other parts of the Code, such as subpart F, GILTI, and the anti-hybrid rules. The comments asserted that minority shareholders generally cannot compel an upper-tier foreign corporation to make an election for a lower-tier foreign corporation to be treated as a partnership under § 301.7701–3 and that it is unlikely that a tested foreign corporation would make a non-commercial investment in order to benefit minority shareholders.

The Treasury Department and the IRS do not agree with these comments, other than the comment that partnerships are treated as aggregates for many Code purposes. Many of the legal entities potentially treated as look-through partnerships under section 1297 would have been treated as corporations for U.S. federal income tax purposes when section 1297(c) was enacted, because the enactment of section 1297(c) preceded the promulgation of § 301.7701–3 by approximately ten years and before that time foreign corporate entities were generally classified as corporations for U.S. federal income tax purposes. The differences between corporate treatment and partnership treatment referred to by the comments generally are not relevant to foreign corporations that are not subject to U.S. net income taxation or to U.S. shareholders as to whom a foreign corporation is not treated as a CFC. As stated in the preamble to the proposed regulations, an election under § 301.7701–3 to treat a foreign subsidiary of such a foreign corporation as a partnership for U.S. federal income tax purposes may have no U.S. tax consequences other than to affect the determination of whether the foreign corporation is a PFIC.

The Treasury Department and the IRS recognize that minority shareholders may not be able to compel a foreign corporation to make a U.S. tax election or to make particular investments. However, a foreign corporation may cause a subsidiary to make an election to be treated as a partnership for U.S. tax purposes or take other steps in order to avoid classification as a PFIC in order to retain or attract U.S. investors, since there are likely to be no non-tax and no foreign tax consequences to the election.

The two comments indicated that the subpart F regime characterizes a partner's distributive share of partnership income without regard to the partner's level of control or involvement for purposes of determining subpart F income and recommended that the same approach apply in these regulations. The final regulations do not adopt this comment. The Treasury Department and the IRS believe that the difference in treatment between these regulations and the subpart F regime is warranted in light of the fact that Congress imposed a 25-percent threshold for look-through treatment for subsidiaries in section 1297 but not in subpart F, and that consistency of treatment for look-through subsidiaries and look-through partnerships in these regulations is consistent with Congressional intent.

One comment recommended, as an alternative to automatic passive treatment for less than 25-percent-owned interests, that the distributive share of income from, and the interest in, a less than 25-percent-owned partnership be characterized as passive only if the necessary information cannot be obtained for purposes of the Income Test and the Asset Test. The Treasury Department and the IRS agree that it may be difficult for a tested foreign corporation to obtain adequate information from a subsidiary in which a tested foreign corporation holds a less-than-25-percent investment, and that if that is the case, the investment should be treated as passive. The Treasury Department and the IRS have taken this comment into account in the new rules described at the end of this Part IV.B.2. The Treasury Department and the IRS do not agree that a tested foreign corporation that has less than a 25-percent-interest in an active partnership should be able to automatically treat such partnership interest as active if such information is available, for the reasons already stated.

A third comment stated that the approach proposed in the proposed regulations has the advantage of certainty and ease of administration because it provides a relatively clear bright-line test and limits the need to obtain information about the assets and income of a lower-tier partnership that may be difficult for small partners to obtain. The comment also noted that the proposed approach creates greater equivalence between lower-tier entities that have or have not elected to be treated as pass-through entities, but observed that the proposed regulations

did not create complete equivalence between such entities because the distributive share from a related partnership was not subject to the same rules as dividends from a related corporation. The final regulations address this concern by providing that the distributive share derived by a tested foreign corporation from a related partnership is subject to rules similar to such dividends. *See* § 1.1297–1(c)(4)(vii).

This comment also stated that a 25-percent threshold is not a good proxy for an active business interest and is not consistent with long-standing market practice. The comment recommended four alternatives for the threshold for partnership look-through treatment. Under the first alternative, the comment suggested that the final regulations adopt a 25 percent threshold similar to that of section 954(c)(4). Under a second alternative, the comment suggested that the final regulations not take into account elections under § 301.7701–3 for purposes of PFIC testing. Under a third alternative, the comment proposed that the final regulations treat every pass-through entity as an aggregate without regard to ownership threshold. Under the fourth alternative, the comment recommended that the final regulations adopt a ''material participation'' approach pursuant to which look-through with respect to a partnership applies if the tested foreign corporation materially participates in the underlying business of the partnership.

The Treasury Department and the IRS recognize that although Congress has mandated a 25-percent threshold in order to treat a corporate subsidiary as a look-through entity, that threshold may not be a good proxy for an active business interest. The Treasury Department and the IRS considered whether the alternatives suggested would better identify an active partnership interest. The final regulations do not adopt any of the alternatives suggested by the third comment but do adopt an approach similar in concept to the fourth of the alternatives. With respect to the first and third alternatives, the Treasury Department and the IRS have determined that the 25-percent threshold should be the same for lower-tier entities regardless of whether they have elected pass-through treatment for the reasons already discussed. With respect to the second alternative, the Treasury Department and the IRS do not believe that it is appropriate in this context to draw distinctions between entities in the legal form of a partnership and other entities treated as partnerships for U.S. federal income tax purposes.

In regard to the fourth alternative, the Treasury Department and the IRS agree that if a tested foreign corporation is actively involved in the business of a partnership with active business operations, look-through treatment may be appropriate, even if the tested foreign corporation is a minority investor in the partnership, so that the tested foreign corporation may take into account the active assets and income of the partnership rather than treating the partnership investment as passive. The Treasury Department and the IRS considered a material participation test but determined that the passive activity loss rules of section 469 are not appropriate for a foreign corporate investor in a partnership owned directly or indirectly by a tested foreign corporation. The section 469 material participation rules focus primarily on the activities of individuals. *See* § 1.469–5 and –5T. While section 469 also provides rules for partners that are closely held corporations, those rules are likely to be difficult to apply and to audit in the PFIC context.

The Treasury Department and the IRS also considered other participation and attribution rules of the Code, including proposed rules addressing when a corporate partner would be attributed the trade or business assets and activities of a partnership for purposes of the active trade or business requirement in section 355(b). *See* 88 FR 26012 (REG–123365–03) (proposing a rule that a partner that owns a meaningful interest in a partnership would be attributed the trade or business assets and activities of the partnership if the partner performs active and substantial management functions for the partnership with respect to the trade or business assets or activities (for example, by making decisions regarding significant business issues of the partnership and regularly participating in the overall supervision, direction, and control of the employees performing the operational functions for the partnership)). However, the Treasury Department and the IRS determined that such a rule would not be appropriate for purposes of section 1297. As stated in a comment, the disadvantage of participation-based tests is that they are factual and potentially subjective, and therefore less administrable. For example, the proposed section 355(b) test described above would be difficult for the IRS to audit in the case of a foreign corporation that is not controlled by U.S. shareholders. Moreover, if the ''meaningful interest'' requirement applied, look-through treatment might apply only to a small number of partnerships that are not already treated as look-through partnerships. The Treasury Department and the IRS did not consider these approaches to be more appropriate than applying the rules of section 1297 at the partner level as a means of testing whether an investment in a partnership is an active business interest. Accordingly, the definition of look-through partnership is further altered to include certain partnerships in which the tested foreign corporation owns a minority interest if the tested foreign corporation has sufficient active assets and income as determined under the rules of section 1297 apart from the partnership. *See* § 1.1297–2(g)(4)(i)(B).

Under the final regulations, a look-through partnership is defined as (i) a partnership that would be a look-through subsidiary if such partnership were a corporation—as discussed in Part IV.B.1 of this Summary of Comments and Explanation of Revisions—or (ii) any other partnership if the tested foreign corporation satisfies the active partner test. *See* § 1.1297–2(g)(4)(i). The active partner test is satisfied if the tested foreign corporation would not be a PFIC if both the Income and the Asset Test were applied to it without including its interest in any partnership that would not be a look-through subsidiary if such partnership were a corporation. *See* § 1.1297–2(g)(4)(ii). If the tested foreign corporation has no passive assets or income, even a very small active business would allow the interest to qualify as a look-through partnership under the active partner test. On the other hand, qualifying under the active partner test can only prevent a partnership interest from tainting an otherwise non-PFIC corporation, rather than be used affirmatively. Because the Treasury Department and the IRS understand that it may be difficult for minority investors in partnerships to obtain the information necessary to apply the Income and Asset Tests taking into consideration the income and assets of a look-through partnership, the final regulations provide an election out of the look-through partnership definition for partnerships that would not be a look-through subsidiary if such partnership were a corporation. *See* § 1.1297–2(g)(4)(iii). The final regulations also provide two new examples illustrating the active partner test. *See* § 1.1297–2(g)(4)(iv).

C. Overlap Between Section 1297(c) and Section 1298(b)(7)

The proposed regulations provided that the look-through rule of section 1297(c) does not apply to a domestic corporation if the stock of the domestic corporation is characterized under section 1298(b)(7) as a non-passive asset that produces non-passive income. *See* proposed § 1.1297–2(b)(2)(iii). The preamble to the proposed regulations noted that the Treasury Department and the IRS determined that section 1298(b)(7) should generally take precedence over section 1297(c) when both rules would apply simultaneously because section 1298(b)(7) contains the more specific rule applicable to a tested foreign corporation that owns a domestic subsidiary.

Comments asserted that the legislative history concerning section 1297(c) and section 1298(b)(7) does not support the approach taken by proposed § 1.1297–2(b)(2)(iii). These comments argued that section 1298(b)(7) was intended to apply only in circumstances in which income and assets would be passive if section 1297(c) applied. According to the comments, Congress did not intend for one section to take precedence over the other because the legislative history does not discuss whether section 1298(b)(7) is supposed to take precedence over section 1297(c) or express any limitations on the application of section 1297(c).

Because section 1298(b)(7) contains the more specific rule applicable to a tested foreign corporation that owns a domestic subsidiary, the Treasury Department and the IRS have determined that the section 1298(b)(7) coordination rule is consistent with the relevant statutory provisions and results in appropriate treatment with respect to look-through subsidiaries. Accordingly, the final regulations do not adopt these comments.

D. Elimination of Certain Assets and Income for Purposes of Applying Section 1297(a)

The proposed regulations provided that, for purposes of applying the Income and Asset Tests, certain intercompany payments of dividends and interest from a look-through entity, and the related stock and debt receivables, are eliminated. *See* proposed § 1.1297–2(c)(1) and (2). The preamble to the proposed regulations indicated that the Treasury Department and the IRS intended for the elimination of such items to prevent double counting of intercompany income and assets. In response to comments, the final regulations revise the rules relating to intercompany dividends and expand the elimination rules to address intercompany rents and royalties and to address distributions and the distributive share of income from a look-through partnership.

1. Treatment of Intercompany Dividends

Proposed § 1.1297–2(c)(2) provided that, for purposes of applying the Income Test, intercompany payments of dividends between a look-through subsidiary and a tested foreign corporation are eliminated to the extent the payment is attributable to income of a look-through subsidiary that was included in gross income by the tested foreign corporation for purposes of determining its PFIC status.

A comment expressed concern that the proposed regulation did not eliminate a payment of a dividend by a look-through subsidiary to a tested foreign corporation that is made out of earnings and profits not attributable to income of the subsidiary previously included in the gross income of the tested foreign corporation for purposes of determining its PFIC status. One example of such a case would be a dividend paid after a look-through subsidiary is acquired out of earnings and profits accumulated before the tested foreign corporation's acquisition of the look-through subsidiary. Another example of such a dividend would be a dividend paid to a tested foreign corporation from a subsidiary that was a subsidiary but not a look-through subsidiary when the relevant earnings and profits were accumulated and the dividend was paid but later became a look-through subsidiary. The comment questioned whether a dividend from pre-acquisition earnings and profits represents true economic income of the tested foreign corporation, since the tested foreign corporation ''purchased'' the pre-acquisition earnings and profits, and observed that it could be difficult for a tested foreign corporation to determine what portion of a dividend received is attributable to pre-acquisition earnings and profits, particularly if the acquisition was not recent. As a result, the tested foreign corporation might not in practice be able to determine when it can eliminate a dividend from a look-through subsidiary from its gross income.

The proposed regulation eliminated dividends from a look-through subsidiary only to the extent attributable to gross income included by the tested foreign corporation. The comment recommended that the final regulations remove the limitation. In the alternative, the comment requested that the final regulations provide that dividends in an amount equal to current-year earnings would be deemed attributable to income included by the tested foreign corporation and that dividends in excess of that amount would be deemed to be paid first from years in which the subsidiary was a look-through subsidiary and treated as attributable to income included by the tested foreign corporation during that period. As an additional alternative, the comment proposed that taxpayers be allowed to determine the earnings to which dividends were considered attributable in the case of an acquisition of the look-through subsidiary based on the ratio of pre-acquisition earnings to post-acquisition earnings over a limited period.

The Treasury Department and the IRS agree that dividends should be treated as paid out of current earnings and profits and then out of accumulated earnings and profits (beginning with the most recently accumulated), in accordance with section 316, and the final regulations so provide. *See* § 1.1297–2(c)(2). However, the final regulations do not adopt the comment's recommendation to treat all dividends from a look-through subsidiary as eliminated from the tested foreign corporation's gross income even if the dividend is paid out of earnings and profits that are attributable to gross income of the subsidiary that the tested foreign corporation has not included in income. As explained in the next two paragraphs, the rules regarding dividends paid out of earnings not taken into account by a tested foreign corporation must be coordinated with the rules that apply to determine residual gain when the stock of a look-through subsidiary is sold in order to avoid elimination of income for purposes of the Income Test.

Under § 1.1297–2(f), if a tested foreign corporation disposes of the stock of a look-through subsidiary, the amount of gain taken into account for purposes of the Income Test generally is the total gain recognized by the tested foreign corporation less unremitted earnings (residual gain). Unremitted earnings are the excess of income taken into account by the tested foreign corporation with respect to that look-through subsidiary less dividends from the subsidiary. The amount of gain derived from the disposition of stock of a look-through subsidiary and dividends received from the look-through subsidiary is determined on a share-by-share basis under a reasonable method, such as the rules under section 951 or 1248.

Thus, if a look-through subsidiary with a value of $1000 earns $20 that is taken into account by a tested foreign

corporation owner, any gain on a sale of the subsidiary's stock for $1020 will be reduced by $20 of unremitted earnings. If the subsidiary pays a $15 dividend before the sale, the receipt of the dividend is disregarded for purposes of the Income Test and a sale of the subsidiary's stock for $1005 should give rise to the same amount of residual gain. Thus, the $20 will be taken into account for purposes of the Income Test and will not affect the amount of residual gain regardless of whether a dividend is paid. By contrast, if the look-through subsidiary pays a $15 dividend out of earnings that do not reflect income taken into account by the tested foreign corporation, the dividend would reduce the amount of gain on the sale of the look-through subsidiary's stock compared to not paying a dividend because the dividend would reduce unremitted earnings pursuant to § 1.1297–2(f). Consequently, if the payment of the dividend were disregarded as requested by the comment, the $15 dividend would reduce potential future gain but never give rise to corresponding income to the tested foreign corporation for purposes of the Income Test.

In order to prevent such a dividend from reducing potential future gain on the sale of the look-through subsidiary, it would be necessary to reduce the basis of the stock of the look-through subsidiary held by the tested foreign corporation or make some other adjustment to the taxation of gain upon the disposition of the look-through subsidiary's stock. A basis reduction or adjustment of that kind raises potentially broader issues that were not addressed in the proposed regulations. The Treasury Department and the IRS continue to study this recommendation and additional guidance on such elimination is proposed in the 2020 NPRM. *See* proposed § 1.1297–2(c)(2).

2. Treatment of Intercompany Rents and Royalties

The proposed regulations provided that intercompany debt receivables and interest are eliminated in proportion to the shareholder's direct and indirect ownership (by value) in the look-through subsidiary with respect to a tested foreign corporation that owns less than 100 percent of a look-through subsidiary. *See* proposed § 1.1297–2(c)(1) and (2). The preamble to the proposed regulations explained that this rule was based on the legislative history of the PFIC rules and was intended to prevent duplication of passive assets or passive income, for example if a wholly-owned look-through subsidiary with entirely passive income paid a dividend to the tested foreign corporation parent.

Comments supported the approach taken in the proposed regulations with regard to interest. A comment indicated that payments of intercompany rents and royalties raises similar concerns with respect to double counting. Accordingly, the comment requested that, for purposes of applying the Income Test and the Asset Test, the final regulations extend the elimination rules to payments of intercompany rents and royalties and any associated intangible assets in proportion to the tested foreign corporation's direct and indirect ownership (by value) in the look-through subsidiary or look-through partnership. The Treasury Department and the IRS agree with the comments, and § 1.1297–2(c) accordingly extends the rules applicable to debt and interest to rents, royalties, leases, and licenses.

The application of the elimination rule to leases and licenses raises issues not present with debt receivables. A lease or license held by a look-through entity provides legal rights to use underlying property, such as a building or an intangible. If the lease or license is disregarded by a tested foreign corporation, it would not be taken into account by the tested foreign corporation in determining whether the underlying property produces non-passive income or is held for the production of non-passive income. Moreover, while the underlying property may be used as part of an active business, it may be used as part of the business of the lessee or licensee and not by the owner of the property. Accordingly, the final regulations provide that, for purposes of the Asset Test as applied to a tested foreign corporation, the underlying property that is the subject of the eliminated lease or license is characterized as a passive or non-passive asset by taking into account the activities of qualified affiliates of the tested foreign corporation (as discussed in Part IV.E of this Summary of Comments and Explanation of Revisions). A new example illustrates the expansion. *See* § 1.1297–2(c)(4)(v).

The final regulations also address more precisely the calculations required in order to determine how much of an obligation and related income is eliminated if the obligation runs between two look-through entities that are not wholly-owned. The final regulations provide that the tested foreign corporation's proportionate share of a LTS obligation (as defined in § 1.1297–2(c)(1)(ii)) or a TFC obligation (as defined in § 1.1297–2(c)(1)(ii)) is the value (or adjusted basis) of the item multiplied by the tested foreign corporation's percentage ownership (by value) in each relevant look-through subsidiary. *See* § 1.1297–2(c)(1)(ii). Examples 3 and 4 of § 1.1297–2(c)(4) illustrate that when an obligation runs between two non-wholly-owned look-through entities, the percentage ownership in each of those entities is taken into account. In Example 2, LTS2 has borrowed $200x from LTS1. The tested foreign corporation owns 40 percent of LTS1's stock and 30 percent of LTS2's stock. If the loan had been made to LTS2's shareholders, on a *pro rata* basis, 30 percent of the loan held by LTS1 ($60x) would be a TFC obligation and 70 percent of the loan held by LTS1 ($140x) would be a third-party obligation. The tested foreign corporation would be treated for purposes of the Asset Test as owning 40 percent of the TFC obligation, which would be eliminated. *See* § 1.1297–2(c)(1)(ii). The tested foreign corporation also would be treated for purposes of the Asset Test as owning 40 percent of the hypothetical $140x third-party loan, or $56x. Example 3 illustrates the same principle.

3. Ownership Interests and Obligations of a Look-Through Partnership

The final regulations provide that for purposes of the Asset Test and the Income Test, the principles applicable to the elimination of stock and obligations of look-through subsidiaries and dividends, interest, rents and royalties paid by look-through subsidiaries apply to look-through partnerships. *See* § 1.1297–2(c)(3). Since partnerships do not pay dividends, the regulations provide that those principles apply to distributions and the distributive share of income from a look-through partnership. *See* id. It is intended that the same amount of assets and income will be eliminated regardless of whether the look-through entity or entities involved are look-through subsidiaries or look-through partnerships that would be look-through subsidiaries absent an election under § 301.7701–3.

E. Attribution of Activities of Look-Through Subsidiaries and Look-Through Partnerships

1. Scope of Attribution

The proposed regulations provided that, for purposes of section 1297, an item of rent or royalty income received or accrued by a tested foreign corporation (or treated as received or accrued by the tested foreign corporation pursuant to section 1297(c)) that would otherwise be passive income

if character were determined based on the activities of the income-earning entity is not passive income if the item would be excluded from FPHCI under section 954(c)(2)(A) and § 1.954–2(b)(6), (c), and (d), determined by taking into account the activities performed by the officers and employees of the tested foreign corporation, certain look-through subsidiaries, and certain partnerships in which the tested foreign corporation or one of the look-through subsidiaries is a partner. *See* proposed § 1.1297–2(e)(1).

One comment agreed that the activities of the look-through subsidiary should be taken into account to determine whether an item of rent or royalty income of the tested foreign corporation is passive or non-passive and suggested that activity attribution be extended to apply to the section 954(h) and commodity producer tests. The comment indicated that such treatment would be proper because financial businesses generally segregate assets and operations that are part of an integrated business into different entities for non-tax reasons. Because these final regulations do not treat section 954(h) as applicable for purposes of section 1297(b)(1), the portion of the comment relating to section 954(h) is addressed in the preamble to the 2020 NPRM and not here. However, the Treasury Department and the IRS agree that it is appropriate to extend the activity attribution rules for purposes of certain exceptions under section 954(c) that are based on whether the entity is engaged in the active conduct of a trade or business. Accordingly, the final regulations extend the activity attribution rules to income that would be excluded from FPHCI under section 954(c)(1)(B) (relating to property transactions), (c)(1)(C) (relating to commodities), (c)(1)(D) (relating to foreign currency gains), (c)(2)(A) (relating to active rents and royalties), (c)(2)(B) (relating to export financing), and (c)(2)(C) (relating to dealers). *See* § 1.1297–2(e)(1).

Another comment noted that under the rule in the proposed regulations, the income or assets of a look-through subsidiary classified as non-passive in the hands of a tested foreign corporation might nevertheless be classified as passive in the hands of the look-through subsidiary, for example in the case where one look-through subsidiary held rental real estate and another look-through subsidiary employed the employees who managed the rental property. Under the rule in the proposed regulations the first look-through subsidiary would be a PFIC and residual gain with respect to the sale of the look-through subsidiary may be classified as passive, even if the attribution of both the property owned by the first subsidiary and the activities of the employees of the second subsidiary caused the rental income from the property to be treated as active for a tested foreign corporation owner. To mitigate this potential issue, the comment suggested the final regulations provide that such a look-through subsidiary be treated as a non-PFIC with respect to that tested foreign corporation under certain circumstances. The Treasury Department and the IRS have determined that the ultimate concerns raised by the comments should largely be addressed by the modifications to the activity attribution rules suggested by other comments and adopted in the final regulations, as discussed in Part IV.E.2 of this Summary of Comments and Explanation of Revisions. Those modifications should generally result in income and assets of a look-through subsidiary that are treated as non-passive in the hands of a tested foreign corporation also being treated as non-passive in the hands of the look-through subsidiary, in which case the look-through subsidiary could be a non-PFIC and residual gain on the sale of the look-through subsidiary could be characterized as non-passive.

One comment recommended that rules in the proposed regulations be modified to apply the rules for active rents and royalties under section 954(c)(2)(A) as they existed in 1986, as discussed in Part III.A of this Summary of Comments and Explanation of Revisions, and if the regulations were not modified in that manner the activity attribution rules should be revised to take into account the ''transition'' rules in the 2016 modifications to the active rents and royalties rules. *See* TD 9792 (81 FR 76497) (adding the express requirement to the active development tests in § 1.954–2(c)(1)(i) and (d)(1)(i) that the relevant activities be performed by the lessor's or licensor's own officers or staff of employees, and providing a transition rule that the modified active development tests apply only with respect to property manufactured, produced, developed, or created, or in the case of acquired property, property to which substantial value has been added, on or after September 1, 2015). The 2016 modifications are taken into account through the cross-reference in § 1.1297–1(c)(1)(i)(A) to section 954(c)(2)(A) (relating to active rents and royalties). The Treasury Department and the IRS have determined that no revisions to the PFIC activity attribution rule are necessary, given that the PFIC activity attribution rules clearly apply to take into account the activities of officers and employees of other specified entities whether the rules under section 954(c)(2)(A) apply as modified (in the case of property manufactured, produced, developed, or created, or in the case of acquired property, property to which substantial value has been added, on or after September 1, 2015) or the rules under section 954(c)(2)(A) pre-modification apply (because no changes to the property have occurred since September 1, 2015). Accordingly, the comment is not adopted.

2. Ownership Threshold for Activity Attribution

The proposed regulations provided that, for purposes of the activity attribution rule described in Part IV.E.1 of this Explanation of Comments and Summary of Revisions, a tested foreign corporation may take into account the activities performed only by those look-through subsidiaries or look-through partnerships with respect to which the tested foreign corporation owns (directly or indirectly) more than 50 percent by value. *See* proposed § 1.1297–2(e)(1). The preamble to the proposed regulations indicated that the Treasury Department and the IRS determined that an ownership level of more than 50-percent would prevent the activities of the look-through subsidiary or look-through partnership from being attributed to an unrelated entity.

In response to a request for comments in the preamble to the proposed regulations concerning the appropriate ownership threshold for attribution of activities, one comment recommended an affiliation approach for the ownership threshold. Under this approach, activities would be attributed among members of the income-earning entity's affiliated group, determined under principles of § 1.904–4(b)(2)(iii) modified to include partnerships that are owned at least 50 percent by value and corporations that are owned at least 50 percent by vote or value. For example, under this affiliation approach, the activities of a group member could be attributed not only ''up'' to a tested foreign corporation that owned a sufficient amount of stock in that group member (as would be the case under the approach in the proposed regulations), but also ''across'' to a sister member that is a part of the affiliated group or ''down'' to a subsidiary member that is a part of the affiliated group.

Some comments noted that an approach that takes into account voting rights in lieu of value may be

appropriate to take into account instances where more than one owner materially participates in the underlying activity. One of the comments suggested that an ownership threshold of at least 25 percent by vote would provide the tested foreign corporation with sufficient control over the subsidiary for it to be appropriate to attribute a portion of the subsidiary's activities to the tested foreign corporation. Another comment recommended an ownership threshold of more than 50 percent by vote or value by the tested foreign corporation, with a requirement that the tested foreign corporation materially participate in the same or complementary line of business of the activity-conducting subsidiary if it owns more than 50 percent by vote but less than 50 percent by value of the activity conducting subsidiary. In the alternative, the comment suggested that the activities be attributed in proportion to the ownership interest in the activity-conducting subsidiary.

The Treasury Department and the IRS disagree that satisfying a 25 percent threshold for ownership of an entity is sufficient to conclude that the entity's business is sufficiently integrated with that of a tested foreign corporation that the entity's activities should be taken into account for purposes of determining the character of income and assets of the tested foreign corporation. However, the Treasury Department and the IRS agree with the comments that it is generally appropriate to expand the activity attribution rule to attribute activities among members of an affiliated group, determined by applying a more than 50 percent threshold and by including partnerships and U.S. affiliates in which corporate members of the affiliated group satisfy such ownership requirements. Accordingly, the final regulations so provide. *See* § 1.1297–2(e)(1) and (2) (defining qualified affiliates of the affiliated group). However, the Treasury Department and the IRS have determined that because the rule applies for purposes of section 1297(c), which focuses on ownership of at least 25 percent by value, the threshold for inclusion in the group should be determined by value. *See* § 1.1297–2(e)(2)(iv). Moreover, the parent of the affiliated group must also be foreign (a foreign corporation or partnership) in order to apply the activity attribution rule. *See* § 1.1297–2(e)(2)(v). If the parent of the affiliated group were domestic (a U.S. corporation or partnership), then any qualified affiliate that is a foreign corporation (including the tested foreign corporation) would qualify as a controlled foreign corporation, and any U.S. investor with at least a 10 percent ownership interest in the tested foreign corporation would be subject to the subpart F rules rather than the PFIC rules under section 1297(d). Accordingly, an upstream foreign owner of the tested foreign corporation and entities that are held directly or indirectly by such same upstream foreign owner as the tested foreign corporation may be considered qualified affiliates, assuming the requisite ownership percentage requirements are met.

V. Comments and Revisions to Proposed § 1.1297–4—Qualifying Insurance Corporation

Section 1297(f) provides that a qualifying insurance corporation (''QIC'') is a foreign corporation that (1) would be subject to tax under subchapter L if it were a domestic corporation, and (2) either (A) has applicable insurance liabilities (''AIL'') constituting more than 25 percent of its total assets on its applicable financial statement (''AFS'') (''the 25 percent test''), or (B) meets an elective alternative facts and circumstances test which lowers the AIL ratio to 10 percent (''alternative facts and circumstances test''). Proposed § 1.1297–4 elaborated on these requirements accordingly.

A. 25 Percent Test

1. Applicable Insurance Liabilities

The 25 percent test in section 1297(f)(1)(B) requires that the ratio of a foreign corporation's AIL to total assets exceed 25 percent. Section 1297(f)(3)(A) defines AIL as loss and loss adjustment expenses (''LAE'') and reserves (other than deficiency, contingency, or unearned premium reserves) for life and health insurance risks and life and health insurance claims with respect to contracts providing coverage for mortality or morbidity risks.

Proposed § 1.1297–4(f)(2) provided that with respect to any life or property and casualty insurance business of a foreign corporation, AIL mean (1) occurred losses for which the foreign corporation has become liable but has not paid before the end of the last annual reporting period ending with or within the taxable year, including unpaid claims for death benefits, annuity contracts, and health insurance benefits; (2) unpaid expenses (including reasonable estimates of anticipated expenses) of investigating and adjusted unpaid losses described in (1); and (3) the aggregate amount of reserves (excluding deficiency, contingency, or unearned premium reserves) held for future, unaccrued health insurance claims and claims with respect to contracts providing coverage for mortality or morbidity risks, including annuity benefits dependent upon the life expectancy of one or more individuals.

Comments requested that the term ''occurred losses'' be changed because it is not an industry standard term. Some comments suggested that the word ''occurred'' be replaced with the word ''incurred'' or ''unpaid'' and be clarified to explicitly include incurred but not reported (''IBNR'') losses. Other comments suggested that the term be defined as the term is used in the Code, U.S. regulatory statements, or under U.S. generally accepted accounting principles (''GAAP'') or international financial reporting standards (''IFRS''). Two comments also requested clarification that unpaid LAE related to both paid and unpaid losses be included in the definition of AIL.

The Treasury Department and the IRS agree that further clarification of the definition of AIL is necessary. While still covering only losses that have occurred, the final regulations clarify the definition of AIL to adopt the comments which requested that AIL include incurred losses (both reported and unreported) and unpaid LAE on all incurred losses (whether the losses are paid or unpaid).

Comments differed as to what items should be included in the definition of AIL. For example, several comments suggested that AIL include insurance liabilities or loss reserves as reported on an AFS (without further modification) while other comments suggested that paid losses and paid LAE be included as AIL (even though they are not liabilities since they have been paid and, as a result, do not appear on the AFS as liabilities).

A comment also requested that special rules be created for financial guaranty insurers and another comment requested a special rule for mortgage guaranty insurers. The first comment recommended that final regulations permit a financial guaranty insurer to include in losses the greater of two amounts: (1) The aggregate amount of reserves (excluding deficiency, contingency, or unearned premium reserves) held for future unaccrued insurance claims or (2) the average of losses incurred for policies over the previous ten years of the life of the policy, whichever is shorter. The second comment requested that the 25 percent test be waived for a foreign corporation engaged in the business of mortgage insurance and reinsurance if at least 80 percent of its net written premiums are

derived from mortgage guaranty insurance (or reinsurance) and its gross investment income is less than 50 percent of its net written premiums as reported on its AFS.

The final regulations do not adopt the suggestion that paid losses or paid LAE be treated as AIL nor the proposed special rules for financial guaranty insurers and mortgage guaranty insurers. These suggestions are contrary to the statute and the intent of Congress. Section 1297(f) is limited to amounts that constitute liabilities, whereas losses and LAE that have been paid are no longer liabilities and therefore do not qualify as AIL. Further, when losses and LAE are paid, assets are also reduced. It would not be appropriate to include loss and LAE amounts in the numerator of the 25 percent test (or alternative facts and circumstances test), when the corresponding assets are no longer reported on the AFS and included in the denominator. The statute also requires that liabilities include only insurance liabilities and further excludes certain types of insurance liabilities that may be included in a financial statement, such as unearned premium reserves, contingency reserves, and deficiency reserves. *See* section 1297(f)(3)(A); H. Rpt. No. 115–409, 115th Cong. 1st Sess., at 411; and Conference Rpt. No. 115–466, 115th Cong. 1st Sess., at 670 (''Unearned premium reserves with respect to any type of risk are not treated as applicable insurance liabilities for purposes of the provision.''). Therefore, § 1.1297–4(f)(2)(ii) provides that liabilities not within the definition of AIL are not included in the numerator of the 25 percent test (or alternative facts and circumstances test) and also specifies that amounts that are not insurance liabilities (for example, liabilities related to non-insurance products issued by an insurance company that may be treated as debt, such as certain deposit arrangements, structured settlements, and guaranteed investment contracts or GICs) are not AIL. The statute also does not contemplate averaging liabilities over a multi-year period because section 1297(f)(1)(B) provides for an annual calculation by looking to the foreign corporation's AFS ''for the last year ending with or within the taxable year.'' Therefore, the final regulations do not include special rules for specialty insurers that would require multi-year averaging or disregard the liability requirement.

Section 1297(f) contemplates that QIC status is determined on an entity-by-entity basis. Therefore, § 1.1297–4(f)(2)(i)(D)(*2*) clarifies that the liabilities eligible to be taken into account in determining AIL include only the liabilities of the foreign corporation whose QIC status is being determined. For example, if a parent and subsidiary both issue insurance contracts to unrelated parties and the AFS is a combined financial statement, the AIL of parent and subsidiary must be separately determined and each of parent and subsidiary includes only the liabilities from the contracts that it has issued (without regard to the contracts issued by the other party). This rule is consistent with § 1.1297–4(f)(2)(i)(D)(*1*) which provides the general principle that no item may be taken into account more than once.

2. Conformity Among Financial Reporting Standards in Computing Applicable Insurance Liabilities

Section 1297(f)(4) contemplates that a foreign corporation can use GAAP, IFRS, or the accounting standard used for the annual statement required to be filed with the local regulator (if a statement prepared for financial reporting purposes using GAAP or IFRS is not available) as the starting point to determine AIL. The annual statement required to be filed with the local regulator may typically be prepared in compliance with local statutory accounting standards. The Treasury Department and IRS are aware that GAAP, IFRS, and local statutory accounting sometimes have different categories (and nomenclature) and different methods of measuring losses and reserves for insurance companies. The final regulations define AIL more specifically so that only those liabilities that meet the regulatory definition are included in AIL irrespective of differences in nomenclature and methods that may be used by different financial reporting standards.

It is anticipated that the starting point for determining the amount of AIL will be the AFS balance sheet. However, it may be necessary in some circumstances to disaggregate components of balance sheet liabilities to determine the amount of a company's insurance liabilities that meet the regulatory definition of AIL. For example, the International Accounting Standards Board (''IASB'') issued a new accounting standard called IFRS 17 for the accounting of insurance contracts which was expected to become effective January 1, 2021, and is now deferred to be effective January 1, 2023. Some companies may have already adopted IFRS 17 for financial reporting purposes on an optional basis. IFRS 17 generally does not use the terms unpaid losses and LAE or unearned premium reserve on its balance sheet. Instead, those amounts are included in the overall insurance liabilities on the balance sheet and are required to be separately identified in the notes, as respectively, ''liability for incurred claims'' and ''liability for remaining coverage.'' While they bear a different name, they are intended to be substantially the same in concept to claims reserves and unearned premium reserves. Therefore, it is expected that a foreign corporation using IFRS 17 only include those amounts derived from the balance sheet that fall within the final regulation's definition of AIL. Similarly, a foreign corporation using IFRS 17 (or any other financial reporting standard) is expected to exclude contingency reserves and deficiency reserves (in addition to unearned premium reserves), as applicable, even when those categories do not separately appear on the balance sheet as a liability and are subsumed within another reported line item.

The Treasury Department and IRS recognize that IFRS 17 is a new accounting standard and that questions may arise as to how amounts relevant to the PFIC insurance exception are derived from an IFRS 17 AFS. Similar questions may also arise with respect to financial statements prepared using GAAP and local statutory accounting, particularly as accounting reporting standards evolve. The Treasury Department and IRS request comments on whether further guidance is necessary to clarify how AILs are determined or make further adjustments to ensure that similarly situated taxpayers are treated similarly without regard to the financial reporting standard adopted by the foreign corporation.

B. Alternative Facts and Circumstances Test

If a foreign corporation predominantly engaged in an insurance business fails the 25 percent test solely due to runoff-related or rating-related circumstances involving its insurance business, and the ratio of its applicable insurance liabilities to its total assets is at least 10 percent, section 1297(f)(2) allows a United States person that owns stock in the corporation to elect to treat such stock as stock of a QIC. Proposed § 1.1297–4(d) provided guidance regarding this election.

1. Predominantly Engaged in an Insurance Business

Section 1297(b)(2)(B) provides that passive income does not include income derived in the active conduct of an insurance business by a QIC. Section 1297(f)(1)(A) provides that a QIC must be a foreign corporation which would be

subject to tax under subchapter L if such corporation were a domestic corporation. Then, for purposes of the alternative facts and circumstances test, section 1297(f)(2)(B)(i) adds another requirement that the foreign corporation be predominantly engaged in an insurance business under regulations provided by the Secretary based upon the applicable facts and circumstances.

Proposed § 1.1297–4(d)(2) provided more specific guidance regarding the circumstances under which a foreign corporation is considered to be predominantly engaged in an insurance business for purposes of the alternative facts and circumstances test by setting forth a predominantly engaged test (separate from the active conduct test and the requirements of subchapter L) by reference to the facts and circumstances that tend to show (or not show) that a foreign corporation is predominantly engaged in an insurance business based upon the factors set forth in the legislative history. The proposed rule provided that the determination is made based on whether the particular facts and circumstances of the foreign corporation are comparable to commercial insurance arrangements providing similar lines of coverage to unrelated parties in arm's length transactions.

A comment pointed to a number of ambiguities in the predominantly engaged standard and asked for clarification. First, it stated that it is not clear whether the proposed regulation's predominantly engaged test is in addition to the insurance company status test in subchapter L. Second, it stated that it is unclear how non-arm's length insurance transactions are taken into account when determining whether more than half the business of the foreign corporation is the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies and how to compare related party transactions to commercial insurance arrangements. Third, it stated that it is unclear whether the list of facts and circumstances is an exclusive set of factors.

In response to the comment, the final regulations make clear that the predominantly engaged requirement in the alternative facts and circumstances test is in addition to the subchapter L requirement that more than half the business of the foreign corporation is the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies. It also deletes the sentence regarding comparable commercial insurance arrangements because the standard was unclear and instead replaces it with a statement that the determination is made upon the character of the business actually conducted in the taxable year. Lastly, it clarifies that the list of facts and circumstances is not exclusive and can include other factors as may be relevant to a specific situation.

2. Runoff-Related Circumstances

Proposed § 1.1297–4(d)(3) provided that ''runoff-related circumstances'' means that the foreign corporation: (1) Was actively engaged in the process of terminating its pre-existing, active insurance or reinsurance underwriting operation pursuant to an adopted plan of liquidation or termination of operations under the supervision of its applicable insurance regulatory body; (2) did not issue or enter into any insurance, annuity, or reinsurance contract, other than a contractually obligated renewal of an existing insurance contract or a reinsurance contract pursuant to and consistent with the plan of liquidation or a termination of operations; and (3) made payments during the annual reporting period covered by the AFS to satisfy the claims under insurance, annuity, or reinsurance contracts, and the payments cause the corporation to fail to satisfy the 25 percent test.

A comment recommended that the final regulations remove the requirement that the runoff company have a plan of liquidation, remove the requirement that amounts paid by the runoff company cause the corporation to fail to satisfy the 25 percent test, and add a condition that the foreign corporation has no current plan or intention to enter into any insurance, annuity, or reinsurance contract other than in the case of a contractually obligated renewal. The comment stated that there is no prevailing practice in the insurance industry for a regulator to supervise a plan of liquidation or termination of a runoff company. The comment further stated that runoff carriers may be part of a larger insurance group, and that management of the runoff business is not necessarily a prelude to liquidation but can be a way for the active insurance businesses to shift their core business segments and maximize their use of capital. In addition, some companies (known as ''runoff specialists'') are in the business of acquiring reserve liabilities to profitably manage the settlement and payout of claims until all of the liabilities are exhausted.

The Treasury Department and IRS have considered these comments and believe that the exception from the 25 percent test should not be extended to runoff occurring in the context of the ordinary course of an ongoing business. The Conference Report to the Act describes a company with runoff-related circumstances as ''not taking on new insurance business'' and ''using its remaining assets to pay off claims with respect to pre-existing insurance risks on its books.'' *See* H.R. Rep. No. 115–466, at 671 (2017) (Conf. Rep.). The lower 10 percent threshold (which permits an insurance company to hold assets that are 1000 percent of its AIL) should be limited to extraordinary circumstances in which the insurance company fails the 25 percent test solely because it is in the process of exiting the insurance business and is required to hold additional capital in excess of the 400 percent of AIL permitted by the 25 percent test due to its business being in runoff.

The final regulations delete, however, the requirement that the runoff company have a plan of liquidation and instead require that the company be in the process of terminating its pre-existing, active conduct of an insurance business under the supervision of its applicable insurance regulatory body or any court-ordered receivership proceeding (liquidation, rehabilitation, or conservation), which covers a broader array of circumstances than the proposed regulation. *See* § 1.1297–4(d)(3)(i).

The final regulations retain the requirement in the proposed regulations that the insurance company make claims payments during the annual reporting period. *See* § 1.1297–4(d)(3)(iii). However, in response to comments, the final regulations do not require such payments to cause the insurance company's ratio of liabilities to assets to fail the 25 percent test and instead clarify in § 1.1297–4(d)(3)(i) that the company must fail to satisfy the 25 percent test because it is required to hold additional assets due to its business being in runoff. Finally, for clarity and consistent with the comment's suggestion, § 1.1297–4(d)(3)(ii) adds a condition that the foreign corporation has no plan or intention to enter into any insurance, annuity, or reinsurance contract other than in the case of a contractually obligated renewal.

3. Rating-Related Circumstances

Proposed § 1.1297–4(d)(4) provided that ''rating-related circumstances'' means that a foreign corporation's failure to satisfy the 25 percent test was a result of specific requirements with respect to its capital and surplus that a generally recognized credit rating agency imposes that the foreign corporation must comply with to

maintain the minimum credit rating required for it to be classified as secure to write new insurance business for the current year. This condition in the proposed regulations was based upon the premise that although the generally recognized credit rating agencies (A.M. Best, Fitch, Moody's, and Standard and Poor) may use separate rating codes, the ratings could be classified into ''secure'' and ''vulnerable'' categories, and that the rating agencies require reporting entities to maintain a minimum amount of capital appropriate to support its overall business operations in consideration of its size and risk profile.

Comments suggested that the proposed regulation's reference to ''secure'' be changed. Some comments suggested that the standard should be revised to reflect only a rating agency's requirements that are ''necessary'' to write new business in accordance with the foreign corporation's regulatory or board supervised business plan. Another comment requested that the term necessary be defined to mean that a foreign corporation complies with the requirements of the credit rating agency to maintain a rating equivalent to A− by A.M. Best for reinsurers or BBB+ by Standard & Poor's for all other insurers.

The Treasury Department and IRS agree that the use of the term ''secure'' should be amended. Therefore, the final regulations provide that the rating-related circumstances standard requires that the 25 percent test is not met due to capital and surplus amounts that a generally recognized credit rating agency considers necessary for the foreign corporation to obtain a public rating with respect to its financial strength, and the foreign corporation maintains such capital and surplus in order to obtain the minimum credit rating necessary for the current year by the foreign corporation to be able to write the business in its regulatory or board supervised business plan.

A comment also requested that the proposed regulations be revised to provide that the rating-related circumstances standard not be an annual test. The comment requested that once the foreign corporation satisfies the rating-related circumstances standard, the alternative facts and circumstances test should not need to be reapplied unless there is a change in circumstances. The final regulations do not adopt this comment because the test for a foreign corporation's PFIC status and the AIL tests are annual tests.

Several comments requested that additional categories of rating-related circumstances be included under which certain types of entities or businesses would be treated as per se meeting the rating-related circumstances requirement. These businesses include reinsurance that is fully collateralized, mortgage insurance and reinsurance, and financial guaranty insurance. Another comment noted that lines of business that require a higher level of capital as compared to reserves are those that cover risks that are low frequency but high severity, such as catastrophic risk (for example, hurricanes and earthquakes) and financial obligation insurance such as mortgage and financial guaranty insurance.

Comments noted that financial guaranty and mortgage guaranty insurers are generally required to operate as monoline businesses, such that the company does not have the option to pool its financial obligation risks with other types of risks (whereas pooling of different types of risks can reduce overall risk exposure, and thus capital needs). Comments also noted that the loss experience of mortgage and financial guaranty insurers is closely tied to the economy as a whole, such that insurance liabilities are relatively low when the economy is strong but much higher in times of economic crisis, and that credit rating agencies correspondingly expect such companies to hold additional capital to protect policyholders due to the monoline nature and volatility of the businesses.

With respect to mortgage insurers, the Federal Housing Agency (FHA), in its role as regulator of Fannie Mae and Freddie Mac (government-sponsored entities who purchase or guarantee a majority of U.S. home mortgage loans), also prescribes capital requirements that must be satisfied by private mortgage insurers to be eligible to provide mortgage insurance on loans owned or guaranteed by Fannie Mae or Freddie Mac. These guidelines were set after the 2007–2008 financial crisis and are designed to ensure that mortgage guaranty insurers maintain sufficient capital to cover obligations in times of financial distress, when defaults and foreclosures increase. Rating agencies evaluate satisfaction of FHA guidelines when rating mortgage guaranty insurers, and FHA and rating agency capital standards geared to ensuring capital adequacy in times of crisis may result in a mortgage guaranty insurer being required to hold an amount of capital that causes its current insurance liabilities to be less than 25 percent of its assets in low loss years when the economy is strong.

Financial guaranty insurance is a line of insurance business in which an insurance company guarantees scheduled payments of interest and principal on a bond or other debt security in the event of issuer default. A comment explained that financial guaranty insurance is unique in that the policyholder is effectively paying for use of the financial guaranty insurer's credit rating. For example, if a municipality insures its municipal bond obligations with a financial guarantee insurer, the municipality can charge a lower interest rate on its bond, because the obligation is guaranteed by the insurer's high credit rating. A very high credit rating is thus essential for a financial guarantee insurer to write new business. Further (and similar to mortgage guaranty insurers) rating agency capital standards for financial guaranty insurers are geared to ensuring capital adequacy in times of crisis and may require a higher level of capital to get the same rating as an insurer with a different portfolio of risks. The combination of enhanced rating agency capital requirements and the need for a very high credit rating to write new business often results in a financial guaranty insurer being required to hold capital such that its current insurance liabilities are less than 25 percent of its assets in low loss years.

The Treasury Department and IRS considered these comments and the circumstances under which an insurance company would need assets in excess of 400 percent of its insurance liabilities in order to obtain the credit rating needed to write new business. As described in comments, companies that may require a higher level of capital as compared to insurance liabilities are companies that provide primarily catastrophic loss coverage and also monoline companies providing mortgage or financial guaranty insurance that experience significant losses on a low frequency but high severity basis. In low loss years, these types of companies may have less than 25 percent insurance liabilities to assets, but the additional assets may be viewed as necessary by rating agencies for the companies to meet insurance obligations in high loss years, and thus to receive the credit rating that the companies require to write the business in their business plan. Thus, the final regulations provide that the rating related circumstances exception is only available to a foreign corporation if it is a company that exclusively provides mortgage insurance or if more than half of the foreign corporation's net written premiums for the annual reporting period (or the average of the net written premiums for the foreign corporation's annual reporting period and the two immediately preceding annual reporting

periods) are from insurance coverage against the risk of loss from a catastrophic loss event (that is, a low frequency but high severity loss event). *See* § 1.1297–4(d)(4)(i).

The final regulations also provide that a financial guaranty insurance company that fails the 25 percent test is deemed to satisfy the rating-related circumstances requirement. *See* § 1.1297–4(d)(4)(ii). The final regulations define a financial guaranty insurance company as an insurance company whose sole business is to insure or reinsure only the type of business written by (or that would be permitted to be written by) a company licensed under, and compliant with, a U.S. state law, modeled after the National Association of Insurance Companies Financial Guaranty Insurance Guideline, that specifically governs the licensing and regulation of financial guaranty insurance companies. *See* § 1.1297–4(f)(5).

The final regulations do not include a special rule for fully collateralized reinsurance because the decision to fully collateralize reinsurance obligations is not necessarily linked to rating agency requirements and (as noted in comments) many fully collateralized reinsurance companies do not obtain credit ratings.

4. Election To Apply Alternative Facts and Circumstance Test

Section 1297(f)(2) requires a United States person to make an election in order to treat a foreign corporation that satisfies the alternative facts and circumstances test as a QIC. Proposed § 1.1297–4(d)(5) provided that the election could not be made unless the foreign corporation directly provided the United States person with a statement or made a publicly available statement, in each case indicating that the foreign corporation satisfied the requirements of the alternative facts and circumstances test. However, the foreign corporation's statement could not be relied on if the shareholder knew or had reason to know that the statement was incorrect.

One comment objected to the proposed rule providing that a shareholder cannot rely on a statement of the foreign corporation if it has reason to know that the statement is incorrect. The comment asserted that a shareholder may not have access to the information needed to determine the accuracy of a foreign corporation's representations. In response to this comment, the final regulations clarify that a shareholder is permitted to rely on a statement provided by the foreign corporation unless it has reason to know the statement is incorrect based on reasonably accessible information. Whether information is reasonably accessible is determined based on all relevant facts and circumstances, including the size of the shareholder's ownership interest and whether the shareholder is an officer or employee of the foreign corporation. Thus, reliance is not permitted under circumstances in which a reasonable person in the shareholder's position would know, based on information to which the shareholder has reasonable access, that the foreign corporation's statement is incorrect. In any case, an election is not valid unless the foreign corporation actually meets the requirements of § 1.1297–4(d)(1), regardless of whether the foreign corporation represents that those requirements have been met.

A shareholder makes the election on Form 8621, which must be attached to the shareholder's U.S. federal income tax return (under the final regulations, there is no requirement to attach also the statement provided by the foreign corporation). A shareholder who makes the election is not required to disclose the value of the foreign corporation's stock and, therefore, is not treated as having reported the foreign corporation's stock as an asset on Form 8621 for purposes of § 1.6038D–7(a)(1)(i)(C). As a result, the shareholder would be required to report the stock on Form 8938, subject to the thresholds and exceptions provided in section 6038D and the regulations thereunder. The final regulations clarify that the election can be made by a United States person who holds an option to purchase stock in a foreign corporation that meets the requirements of section 1297(f)(2).

One comment requested a special rule for foreign corporations owned indirectly through a foreign parent corporation, under which the foreign parent corporation could provide (or make publicly available) the statement required by the proposed regulations, and the election could be made at the level of the foreign parent corporation. In response to this comment, the final regulations have been modified to allow a foreign parent corporation to make the required statement publicly available on behalf of its subsidiaries. However, the final regulations do not permit the election to be made at the foreign parent level.

Some comments asserted that it would be unduly burdensome for certain shareholders to file Form 8621 in order to make the election under section 1297(f)(2). The comments requested that shareholders of publicly traded companies or small shareholders of non-publicly traded companies be deemed to make the election under section 1297(f)(2) without the need for an affirmative filing.

In response to these comments, the final regulations provide that a shareholder in a publicly traded foreign corporation who owns stock (either directly or indirectly) with a value of $25,000 or less is deemed to make the election under section 1297(f)(2) with respect to the publicly traded foreign corporation and its subsidiaries. If a shareholder owns stock in a publicly traded foreign corporation through a domestic partnership, an election will not be deemed made unless the stock held by the partnership has a value of $25,000 or less. The same rule applies to stock owned through a domestic trust or estate, or through an S corporation. All the requirements necessary to permit an actual election under section 1297(f)(2) must be satisfied in order to permit a deemed election under this rule. For example, an election will not be deemed made unless the foreign corporation (or its foreign parent) provides a statement to the United States person or makes a publicly available statement indicating that it has satisfied the requirements of the alternative facts and circumstances test.

In addition, the final regulations provide that if a shareholder fails to make the election under section 1297(f)(2) on its original return for a taxable year, the election may be made on an amended return, provided there is reasonable cause for the failure to make the election on the original return. A United States person that makes the election on an amended return must be prepared to demonstrate reasonable cause upon request, but is not required to provide documentation of reasonable cause when the amended return is filed. This rule is intended to provide relief to a shareholder that inadvertently neglects to make the election under section 1297(f)(2) and does not qualify for a deemed election (for example, if the shareholder owns stock with a value in excess of $25,000).

C. Limitations on Amount of Applicable Insurance Liabilities

1. Mechanics of the Limitation

Proposed § 1.1297–4(e) provided rules limiting the amount of AIL for purposes of the 25 percent test and the alternative facts and circumstances test and stated that AIL may not exceed the lesser of (1) AIL shown on the most recent AFS, (2) the minimum AIL required by the applicable law or regulation of the jurisdiction of the applicable insurance regulatory body, and (3) AIL reported on the most recent financial statement

made on the basis of GAAP or IFRS if such financial statement was not prepared for financial reporting purposes.

A comment requested changes to the second limitation amount under the proposed regulations (the minimum AIL required by the applicable law or regulation of the jurisdiction of the applicable insurance regulatory body). The comment asserted that the reference to a ''minimum amount'' is either redundant (because the amount required under the applicable law or regulation will always be a minimum amount) or ambiguous (because the ''minimum amount'' could be interpreted to mean a hypothetical minimum amount required for any insurer without regard to its particular circumstances, including its lines of business). The same comment also noted that proposed § 1.1297–4(e)(2)(ii) did not take into account AIL actually reported to the applicable insurance regulatory body, if lower than the minimum required amount (which a local regulator sometimes allows as a permitted practice). Other comments requested that the minimum amount required under the applicable law or regulation be determined by reference to GAAP or IFRS requirements.

With respect to the third limitation amount under the proposed regulations (AIL reported on the most recent financial statement made on the basis of GAAP or IFRS if such financial statement was not prepared for financial reporting purposes), one comment expressed concern that a statement which is not prepared for financial reporting purposes is potentially unreliable and should not be used as a basis for determining AIL. In addition, the comment requested guidance as to the meaning of the terms ''financial statement'' and ''financial reporting standard.''

The limitation under § 1.1297–4(e) has been modified in response to these comments. Under the final regulations, a foreign corporation's AIL may not exceed the lesser of (1) the amount shown on any financial statement filed (or required to be filed) with the applicable insurance regulatory body for the same reporting period covered by the applicable financial statement; (2) the amount determined on the basis of the most recent AFS, if the AFS is prepared on the basis of GAAP or IFRS, regardless of whether the AFS is filed with the applicable insurance regulatory body; or (3) the amount required by the applicable law or regulation of the jurisdiction of the applicable regulatory body (or a lower amount allowed as a permitted practice). If one of the limitation amounts is not applicable (for example, if the AFS is not prepared on the basis of GAAP or IFRS), the limitation is equal to the lesser of the other amounts described.

Although the limitation under section 1297(f)(3) refers to the amount reported to the applicable insurance regulatory body in the AFS, the final regulations clarify that an AFS prepared under GAAP or IFRS is taken into account as part of the limitation under § 1.1297–4(e)(2)(ii) regardless of whether it is filed with the local regulator. This rule is intended to prevent foreign corporations that choose not to file GAAP or IFRS statements with the local regulator from relying on statutory accounting standards that define liabilities more broadly than GAAP or IFRS. The limitation in the proposed regulations addressing financial statements prepared for a purpose other than financial reporting has been deleted.

The definition of the term ''financial statement'' has been revised to treat a statement as such only if it is prepared for a reporting period in accordance with the rules of a financial accounting or statutory accounting standard and includes a complete balance sheet, statement of income, and a statement of cash flows (or equivalent statements under the applicable reporting standard). Consequently, a statutory accounting statement that is used for purposes of the limitation should provide all information necessary to apply the 25 percent test and the alternative facts and circumstances test.

2. Discounting

Under proposed § 1.1297–4(e)(3), if an AFS that was not prepared under GAAP or IFRS did not discount losses on an economically reasonable basis, AIL were required to be reduced under the discounting rules that would apply if a financial statement had been prepared under either GAAP or IFRS. Some comments requested that the discounting requirement be removed because GAAP does not require discounting of liabilities in certain circumstances.

The Treasury Department and the IRS agree that AIL reported on a financial statement that have been discounted to reflect the time value of money only to the extent required by GAAP or IFRS have been discounted on an economically reasonable basis. Therefore, additional discounting of AIL is not necessary under circumstances in which it is not required under either GAAP or IFRS. For example, IFRS 17 does not require discounting of liabilities under nonlife insurance contracts with terms of one year or less. However, the Treasury Department and the IRS have determined that discounting is required where AIL have not been otherwise discounted on a reasonable basis. Accordingly, the final regulations clarify that, where a financial statement described in § 1.1297–4(e)(2) does not discount AIL on an economically reasonable basis, the foreign corporation may meet this requirement by choosing to apply the discounting methods required under either GAAP or IFRS.

3. Change of Financial Reporting Standard

Under proposed § 1.1297–4(e)(4), if a foreign corporation had previously prepared a financial statement under GAAP or IFRS, it could not cease to do so in subsequent years without a non-Federal tax business purpose. If the foreign corporation failed to prepare a financial statement under GAAP or IFRS in a subsequent year without a non-Federal tax business purpose, it was treated as having no AIL for purposes of the 25 percent test and the 10 percent test.

A comment requested that this rule be removed because taxpayers should not be required to establish a business purpose for their choice of an accounting standard. In addition, financial reports are prepared to inform a corporation's stakeholders and regulators of its financial condition, and this function is so significant that a corporation is unlikely to change its accounting standard for tax purposes. The Treasury Department and the IRS have concluded that other rules and limitations provided in the final regulations are sufficient to protect the integrity of the amounts reported on the AFS. Therefore, the final regulations delete the special rule addressing a change of financial reporting standard.

D. Definition of an Insurance Business

The proposed regulations defined an insurance business to include the investment activities and administrative services that are required to support (or that are substantially related to) insurance, annuity, or reinsurance contracts issued or entered into by the QIC. *See* proposed § 1.1297–5(c)(2). One comment interpreted this definition as potentially excluding any investment activities in excess of the minimum amount required to meet the QIC's insurance obligations from the scope of the exception under section 1297(b)(2)(B). The comment requested that the definition be broadened to include all investment activities related to insurance, annuity, or reinsurance

contracts issued or entered into by the QIC. Although the definition of an insurance business (now contained in § 1.1297–4(f)(8)) has not been changed, it is not intended to provide a maximum threshold for investment assets and income that may qualify for non-passive treatment under section 1297(b)(2)(B). This definition merely requires a sufficient factual relationship between a company's insurance contracts and its investment activity.

VI. Comments and Revisions to Proposed § 1.1297–5 and New § 1.1297–6: Exception From the Definition of Passive Income for Active Insurance Income

Section 1297(b)(2)(B) provides an exclusion from the definition of passive income for income derived in the active conduct of an insurance business by a QIC. Proposed § 1.1297–5(b) provided a general rule that excluded from passive income certain income of a QIC and income of a qualifying domestic insurance corporation (QDIC). Proposed § 1.1297–5(c) described the requirements for income to be treated as derived in the active conduct of an insurance business and provided rules for determining the amount of a QIC's income that is excluded. Proposed § 1.1297–5(d) provided rules for determining whether income of a domestic corporation is income of a QDIC. Proposed § 1.1297–5(e) provided that assets of a QIC are not treated as passive assets if they are available to satisfy liabilities of the QIC related to its insurance business. In addition, proposed § 1.1297–5(e) provided that assets of a QDIC generally are not treated as passive assets. Proposed § 1.1297–5(f) provided a special look-through rule for interests held by a QIC in subsidiary entities.

A. Active Conduct of an Insurance Business

Under proposed § 1.1297–5(c)(1), a QIC's passive income was treated as derived in the active conduct of an insurance business only if its active conduct percentage was at least 50 percent. The active conduct percentage was computed for each taxable year based on the amount of expenses incurred by a QIC for services of its officers and employees (including employees of qualifying related entities) related to the production or acquisition of premiums and investment income as a fraction of all expenses related to the production or acquisition of premiums and investment income.

Proposed § 1.1297–5(c)(3)(i) provided that active conduct is determined based on all the facts and circumstances. In general, a QIC was treated as actively conducting an insurance business only if the officers and employees of the QIC carried out substantial managerial and operational activities. A QIC's officers and employees were considered to include the officers and employees of an affiliate if the QIC satisfied the control test under proposed § 1.1297–5(c)(3)(ii), which incorporated requirements relating to ownership, control and supervision, and compensation.

Comments were generally critical of the proposed active conduct test. Some noted that outsourcing is a common practice in the insurance industry for reasons of cost and efficiency, and an insurance company should be treated as engaged in the active conduct of an insurance business even if the fees it pays for outsourced activities (for example, to investment advisors or insurance brokers) exceed employee expenses. Others expressed concern that some reinsurers (which hold substantial investments but employ a limited staff) and alternative risk vehicles could have difficulty satisfying the active conduct test under the proposed regulations. Comments also criticized the ''cliff effect'' of the active conduct percentage, which precluded an insurance company with an active conduct percentage that is slightly below 50 percent from treating any of its income or assets as non-passive under section 1297(b)(2)(B).

Many comments recommended that the proposed active conduct test be replaced with a broader facts and circumstances test. Some comments alternatively requested that the active conduct percentage be used as a safe harbor alongside a more flexible test, or that the threshold for the active conduct percentage be reduced to 25 percent.

A number of comments requested that an insurance company be treated as engaged in the active conduct of an insurance business even if its day-to-day activities are not performed by employees, so long as its officers and employees adequately supervise the outsourced functions. For example, some comments recommended a management and control test based upon the Limitation on Benefits Article of the 2016 U.S. Model Income Tax Convention (which requires a company's executive officers and senior management employees to exercise day-to-day responsibility for strategic, financial, and operational policy decision-making) or regulations issued by the Bermuda Monetary Authority (which permit outsourcing subject to the insurance company's supervision and oversight). Others proposed that if an entity is treated as an insurance company under subchapter L or is treated as a QIC under section 1297(f), it should be deemed to be engaged in the active conduct of an insurance business without meeting any additional requirements.

Several comments recommended that the active conduct test focus on the assumption of insurance risk. One comment specifically identified underwriting as a core insurance function that must be performed by an insurance company's officers and employees. Another requested that an insurance company be treated as engaged in the active conduct of an insurance business if it assumes risk under contracts with multiple counterparties that are unrelated to one another, or under contracts covering multiple divergent lines of business. Some comments proposed an active conduct test tied to the amount of premium and investment income earned by the QIC.

For purposes of computing the active conduct percentage, some comments requested clarification about whether overhead and claims expenses are treated as expenses incurred to produce or acquire premium and investment income. One comment recommended that certain functions (for example, investment management) be excluded from both the numerator and denominator of the fraction.

Some comments requested that the control test be expanded to cover employees of entities that are related to the QIC within the meaning of section 954(d)(3) or are under common practical control with the QIC. Another proposed that a single active conduct percentage be computed on an aggregate basis when multiple insurance companies are wholly owned within a single corporate group.

The Treasury Department and the IRS have determined that the active conduct of an insurance business is a requirement mandated by the statute in addition to (and separate from) the requirements of subchapter L and section 1297(f), but that in response to comments, the active conduct test should be amended to provide more flexibility in determining whether a QIC is engaged in the active conduct of an insurance business. Therefore, the Treasury Department and the IRS are issuing a notice of proposed rulemaking (the 2020 NPRM) with a new proposed § 1.1297–5 published in the same issue of the **Federal Register** as these final regulations that proposes rules for determining whether an insurance company is engaged in the active conduct of an insurance business.

The new active conduct rules are proposed to apply to taxable years of

QICs beginning on or after the date the Treasury Decision adopting those rules as final regulations is published in the **Federal Register**. The rules contained in proposed § 1.1297–5(c) and (d) are withdrawn. The other rules in proposed § 1.1297–5 have been modified as described below and are provided in the final regulations under new § 1.1297–6.

B. Qualifying Domestic Insurance Corporations

Proposed § 1.1297–5(d) defined a QDIC as a domestic corporation that is subject to tax as an insurance company under subchapter L of chapter 1 of subtitle A of the Code and is subject to Federal income tax on its net income. Proposed §§ 1.1297–5(b)(2) and 1.1297–5(e)(2) provided that a QDIC's income and assets are non-passive for purposes of determining whether a non-U.S. corporation is treated as a PFIC (the QDIC Rule). However, proposed §§ 1.1297–5(b)(2) and 1.1297–5(e)(2) provided that the QDIC Rule did not apply for purposes of section 1298(a)(2) and determining if a U.S. person indirectly owns stock in a lower tier PFIC (QDIC Attribution Exception). Consequently, for attribution purposes, a tested foreign corporation was required to apply the section 1297(a) income and assets tests without applying the QDIC Rule.

Several comments requested that the QDIC Attribution Exception be removed because U.S. shareholders of a tested foreign corporation that would not otherwise be a PFIC but that owns a PFIC and a U.S. insurance subsidiary that is a QDIC can become indirect owners of a PFIC as a result of the section 1298(a)(2) attribution rule. Another comment requested that, if the QDIC Attribution Exception is retained, a special exception be provided for active domestic mortgage insurance companies if certain criteria are satisfied. The Treasury Department and IRS agree that the QDIC Attribution Exception is overbroad, and therefore the final regulations do not include it. However, the Treasury Department and IRS believe that it may be appropriate to limit the amount of a QDIC's assets and income that are treated as non-passive if they exceed a certain threshold. Accordingly, the 2020 NPRM proposes a new limitation.

The final regulations also clarify that a U.S. insurance company must be a look-through subsidiary in order to qualify as a QDIC. If a QDIC is a look-through subsidiary of a QIC, the QIC's proportionate share of the QDIC's assets that is treated as non-passive may be subject to limitation under the special look-through rule provided in § 1.1297–6(d), which is described in Part VI.C of this Summary of Comments and Explanation of Revisions. Because of the renumbering of sections described in Part VI.A of this Summary of Comments and Explanation of Revisions, the QDIC rules are now contained in § 1.1297–6(b)(2), (c)(2), and (e)(1) of the final regulations.

C. Treatment of Income and Assets of Certain Look-Through Subsidiaries and Look-Through Partnerships Held by a QIC

The proposed regulations provided a special look-through rule that applied to a subsidiary entity in which the QIC owned at least 25 percent by value (that is, a look-through subsidiary or a look-through partnership) and which was subject to the look-through rules provided in section 1297(c), proposed § 1.1297–1(c)(2) and (d)(3), and proposed § 1.1297–2(b)(2) (the ''general look-through rules,'' which are now provided in § 1.1297–2(b)(2) and (3)). Under the general look-through rules, a QIC is treated as earning directly its proportionate share of the income, and holding directly its proportionate share of the assets, of a look-through subsidiary or a look-through partnership.

Proposed § 1.1297–5(f) provided that, if a QIC was treated as earning passive income or holding passive assets of a subsidiary entity under the general look-through rules, then the income could be treated as derived by the QIC in the active conduct of an insurance business (and thus treated as non-passive under proposed § 1.1297–5(c)), and the assets could be treated as assets of the QIC held to satisfy liabilities related to its insurance business (and thus treated as non-passive under § 1.1297–5(e)). However, for this rule to apply, the subsidiary entity's assets and liabilities were required to be included in the QIC's AFS.

A number of comments asserted that look-through treatment should not be denied for subsidiary entities that do not have assets and liabilities included in the QIC's AFS (which would typically occur if a subsidiary entity is not consolidated with the QIC under the relevant financial accounting standard). The comments noted that the equity value of a subsidiary entity is reflected on a QIC's AFS even if it is not consolidated for financial reporting purposes. Some comments requested that the look-through rule under proposed § 1.1297–5(f) apply without regard to whether a subsidiary entity's assets and liabilities are included in the QIC's AFS. Others requested that the look-through rule be applied to a proportionate amount of the income and assets of a subsidiary entity, depending on how the value of the subsidiary entity is reflected on the AFS.

In response to these comments, the special look-through rule for assets and income of a subsidiary entity held by a QIC (now provided in § 1.1297–6(d)) has been modified to apply in all cases in which a QIC is treated as owning the assets or earning the income of the subsidiary entity under the general look-through rules. However, under § 1.1297–6(d)(2), the amount of assets or income that can be treated as non-passive under the revised rule is limited to the greater of two amounts. The first amount is determined by multiplying the QIC's proportionate share of the subsidiary entity's income or assets by a fraction equal to (i) the net equity value of the QIC's interests in the subsidiary entity divided by (ii) the value of the subsidiary entity's assets. The second amount is the amount of income or assets that are treated as non-passive in the hands of the subsidiary entity.

If assets are measured based on value for purposes of applying the asset test under section 1297(a)(2), the amount of otherwise passive assets that may be treated as non-passive under § 1.1297–6(d) (that is, the first amount described above) is limited to the net equity value of the interests held by the QIC in the subsidiary entity. If assets are measured instead using adjusted bases, the fraction test is designed to provide a proportionate limitation. Two examples are added to illustrate the operation of these rules. *See* § 1.1297–6(d)(3).

Several comments requested clarification regarding the treatment of an interest held by a QIC in an entity other than a look-through subsidiary or a look-through partnership (for example, a corporation in which a QIC owns less than 25 percent of the stock). The income and assets of such a subsidiary entity are not treated as earned or held by the QIC in the active conduct of an insurance business, consistent with the general look-through rules. However, the stock or partnership interest held by the QIC (and the income it derives from the subsidiary entity) is eligible for the exception under section 1297(b)(2)(B) and § 1.1297–6(b) and (c) in the same manner as any other (non-look-through) asset held by a QIC.

VII. Comments and Revisions to Proposed § 1.1298–4—Rules for Certain Foreign Corporations Owning Stock in 25-Percent-Owned Domestic Corporations

Section 1298(b)(7) provides a special characterization rule that applies when

a tested foreign corporation owns at least 25 percent of the value of the stock of a domestic corporation and is subject to the accumulated earnings tax under section 531 (or waives any benefit under a treaty that would otherwise prevent imposition of such tax). In that case, section 1298(b)(7) treats the qualified stock held by the domestic corporation as a non-passive asset, and the related income as non-passive income.

A. Interaction of the Domestic Subsidiary Rule and Section 1298(a)(2) Attribution Rule

The proposed regulations included rules that disregarded the application of section 1298(b)(7) for purposes of determining whether a foreign corporation is a PFIC for purposes of the ownership attribution rules in section 1298(a)(2) and § 1.1291–1(b)(8)(ii) (''domestic subsidiary attribution rules''). *See* proposed §§ 1.1291–1(b)(8)(ii)(B) and 1.1298–4(e).

Several comments recommended that the final regulations eliminate the domestic subsidiary attribution rules in proposed §§ 1.1291–1(b)(8)(ii)(B) and 1.1298–4(e). These comments asserted that Congress intended for stock that is treated as non-passive pursuant to section 1298(b)(7) to be characterized as non-passive for all purposes, including for purposes of section 1298(a)(2). Specifically, some of these comments noted that the statutory text of section 1298(a)(2) already specifies that application of section 1297(d) is excluded and, thus, asserted that an additional exclusion from section 1298(a)(2) is precluded. The comments also asserted that legislative history suggests that Congress intended for section 1298(b)(7) to incentivize investments in domestic corporations. Other comments argued that the domestic subsidiary attribution rules would be administratively burdensome on minority shareholders who would not be able to obtain information with respect to lower-tier PFICs to comply with the PFIC rules. One comment suggested that Congress acknowledged the lack of control that minority investors have in parent companies by providing the 50-percent threshold in section 1298(a)(2) to facilitate administrability. Another comment recommended that, if the domestic subsidiary attribution rules are retained, the final regulations provide an exception to allow shareholders who own less than 5-percent of the top-tier foreign corporation in a structure to apply section 1298(b)(7) to determine PFIC status for purposes of the ownership attribution rules in section 1298(a)(2).

The Treasury Department and the IRS have given further consideration to the purpose of section 1298(b)(7), and have determined that it is appropriate for section 1298(b)(7) generally to apply for purposes of the attribution of ownership rules of section 1298(a), provided that adequate measures are taken to prevent taxpayers from holding primarily passive assets in domestic subsidiaries in order to avoid PFIC classification. The Treasury Department and the IRS also agree with the comment that the domestic subsidiary attribution rule can be administratively burdensome. Accordingly, the Treasury Department and the IRS have determined that the application of the domestic subsidiary anti-abuse rule discussed in Part VII.B of this Explanation of Comments and Summary of Revisions is sufficient to address concerns about abusive planning related to section 1298(b)(7) without a need for the domestic subsidiary attribution rules. Therefore, the domestic subsidiary attribution rules are eliminated in the final regulations.

Several comments were received recommending clarification concerning the consequences of disregarding section 1298(b)(7) for purposes of the Income Test and the Asset Test and excepting minority shareholders from the domestic subsidiary rule. Because the final regulations do not adopt the domestic subsidiary attribution rules, these recommendations are not adopted.

B. Revisions to Domestic Subsidiary Anti-Abuse Rules

The proposed regulations provided that section 1298(b)(7) did not apply if (i) the tested foreign corporation would be a PFIC if the qualified stock held by the 25-percent-owned domestic corporation or any income received or accrued with respect thereto were disregarded (''qualified stock anti-abuse rule'') or (ii) a principal purpose for the tested foreign corporation's formation or acquisition of the 25-percent-owned domestic corporation was to avoid classification of the tested foreign corporation as a PFIC (''principal purpose anti-abuse rule''). *See* proposed § 1.1298–4(f). The preamble to the proposed regulations explained that the Treasury Department and the IRS believed that a taxpayer should not be permitted to use the domestic subsidiary rule in section 1298(b)(7) to avoid the PFIC rules by indirectly holding predominantly passive assets through a two-tiered chain of domestic subsidiaries.

1. Qualified Stock Anti-Abuse Rule

Several comments requested that the qualified stock anti-abuse rule in proposed § 1.1298–4(f)(1) be withdrawn. These comments asserted that Congress was aware of the potential for taxpayers to rely on section 1298(b)(7) to avoid PFIC status by treating otherwise passive investments as non-passive and intended for the accumulated earnings tax (''AET'') to mitigate potential abuse. The comments argued that the AET imposed on the tested foreign corporation, the U.S. corporate tax imposed on the domestic subsidiaries, and the withholding tax imposed on distributions to the tested foreign corporation serve to discourage a tested foreign corporation from artificially overweighting its investment assets held through domestic subsidiaries. Another comment asserted that the qualified stock anti-abuse rule creates a hypothetical PFIC test that supersedes the statute when it causes a tested foreign corporation to be a PFIC in a fact pattern in which the domestic subsidiary rule in section 1298(b)(7) would otherwise cause the tested foreign corporation to not be a PFIC.

The Treasury Department and the IRS have determined that the qualified stock anti-abuse rule is unnecessary to address the concerns of abuse that were expressed in the preamble to the proposed regulations and that tailoring the scope of the principal purpose anti-abuse rule as discussed in Part VII.B.2 of this Summary of Comments and Explanation of Revisions would better target the concerns of abuse. Accordingly, the qualified stock anti-abuse rule in proposed § 1.1298–4(f)(1) is withdrawn.

2. Principal Purpose Anti-Abuse Rule

Under the principal purpose anti-abuse rule in proposed § 1.1298–4(f)(2), a principal purpose was deemed to exist when the 25-percent-owned domestic corporation was not engaged in an active trade or business in the United States. One comment asserted that the principal purpose anti-abuse rule in proposed § 1.1298–4(f)(2) was overbroad and should be narrowly drawn to prevent potential abuse. Other comments requested that the principal purpose anti-abuse rule be eliminated, because, according to such comments, Congress contemplated that taxpayers would plan into section 1298(b)(7) and intended for the AET to be the sole limitation on the applicability of the domestic subsidiary rule. Some of these comments asserted that the principal purpose anti-abuse rule was inconsistent with two private letter rulings that, according to such comments, endorsed the use of domestic subsidiaries to manage PFIC status.

One comment noted that the 25-percent-owned domestic corporation is likely to be a holding company without an active trade or business and, thus, the tested foreign corporation would likely be deemed to have a principal purpose of avoiding PFIC classification. Another comment argued that the standard for deeming a principal purpose of avoiding PFIC status to exist is misguided because a corporation need not be engaged in an active trade or business in order to generate non-passive income. Other comments expressed concern that the principal purpose anti-abuse rule would disallow planning to manage the PFIC risk of start-up companies and active companies undergoing transition.

The Treasury Department and the IRS have determined that the final regulations should retain a principal purpose anti-abuse rule to prevent the holding of passive assets through a two-tiered chain of domestic subsidiaries for the purpose of avoiding the PFIC rules with respect to passive assets held in foreign affiliates. Absent an anti-abuse rule, a two-tiered chain of domestic subsidiaries could be used to shield U.S. investors in a tested foreign corporation from the application of the PFIC rules with respect to substantial amounts of passive assets held by the tested foreign corporation or its foreign subsidiaries. The Treasury Department and the IRS have concluded that the promulgation of a principal purpose anti-abuse rule is consistent with section 1298 and the broad regulatory authority under section 1298(g). The legislative history of section 1298(b)(7) envisions that U.S. shareholders that hold passive assets through a U.S. corporate structure rather than in a foreign corporation in order to avoid the PFIC regime will be subject to tax treatment essentially equivalent to that of the shareholders of a PFIC. While Congress intended that the AET serve this function, because the AET is rarely applied in practice, the Treasury Department and the IRS have determined that the AET is not, by itself, sufficient to curtail abuse. The imposition of U.S. net income tax on the income from passive assets held by a domestic subsidiary also does not serve as a sufficient disincentive to hold those assets in a domestic subsidiary, because the passive assets may generate a small amount of income or the domestic subsidiary may be leveraged so that its net income subject to taxation is much less than the gross income that would be taken into account under the PFIC rules if the assets were held by a foreign affiliate. Section 1298(g) provides authority to prevent abuse of the PFIC rules. Moreover, the Treasury Department and the IRS have determined that the comments did not appreciate the underlying facts of the private letter rulings and that the promulgation of the principal purpose anti-abuse rule is not inconsistent with the private letter rulings.

However, the Treasury Department and the IRS agree that it is appropriate to more closely tailor the scope of the principal purpose anti-abuse rule to the potential abuses of greatest concern. Accordingly, the principal purpose anti-abuse rule in the final regulations is modified to strike the appropriate balance between preventing section 1298(b)(7) from applying inappropriately to avoid the PFIC rules and allowing for planning to manage the PFIC risk of start-up companies and active companies undergoing transition phases in the business cycle. Under the principal purpose anti-abuse rule in the final regulations, section 1298(b)(7) does not apply if either (i) a principal purpose for the formation, acquisition, or holding of stock of either domestic corporation was to avoid PFIC classification or (ii) a principal purpose of the capitalization or other funding of the second-tier domestic corporation is to hold passive assets through such corporation to avoid PFIC classification. *See* § 1.1298–4(e)(1). Unlike the proposed regulations, which applied the principal purpose anti-abuse rule only at the level of the upper tier domestic corporation, the final regulations were modified to apply the principal purpose anti-abuse rule at both levels. *See* id. Because a two-tiered domestic structure can be planned into at either tier level in the structure, the first prong of the anti-abuse rule—which targets corporate formations, acquisitions, or stock holding—applies at both levels. *See* id. On the other hand, the second prong of the anti-abuse rule—which targets capitalizing or funding—applies at the level of the second-tier domestic subsidiary because the benefit of section 1298(b)(7) applies only with respect to assets held at that level. *See* id. The Treasury Department and the IRS continue to study the need to narrow the principal purpose anti-abuse test to avoid concerns with respect to temporary holdings of passive assets in a U.S. corporate structure for valid business reasons, and additional guidance on safe harbors to address those concerns is proposed in the 2020 NPRM. *See* proposed § 1.1298–4(e)(2) and (e)(3).

VIII. Comments and Revisions Regarding Applicability Dates

The preamble to the proposed regulations generally provided that until they were finalized, taxpayers could choose to apply the proposed regulations other than the rules related to the PFIC insurance exception in their entirety to all open tax years as if they were final regulations provided that taxpayers consistently applied those rules. Similarly, the preamble provided that the rules of proposed §§ 1.1297–4 and 1.1297–5 could be applied for taxable years beginning after December 31, 2017, provided those rules were applied consistently.

A. Applicability Dates Relating to the PFIC Insurance Exception

Comments related to the PFIC insurance income exception requested that the final regulations apply to taxable years of a U.S. shareholder beginning on or after December 31, 2020 (or such date that generally provides foreign corporations at least one year to comply with the final regulations) or the date of publication of the final regulations. Comments asserted that foreign corporations needed additional time to make changes to come into compliance with the regulations, and that U.S. shareholders needed additional time to evaluate whether they were shareholders of a PFIC. Because the final regulations have removed rules turning off the QDIC rule and section 1298(b)(7) for purposes of testing for indirect ownership of a PFIC and the rules defining active conduct of an insurance business have been revised and reproposed, the final regulations are significantly less burdensome than as originally proposed. Accordingly, the Treasury Department and the IRS have decided that additional time is not necessary to comply given that section 1297(f) has been in effect since January 1, 2018, and §§ 1.1297–4 and 1.1297–6 merely implement section 1297(f).

Sections 1.1297–4(g) and 1.1297–6(f) therefore provide that the final PFIC insurance regulations apply to taxable years beginning on or after January 14, 2021. Taxpayers may choose to apply the final PFIC insurance regulations to any taxable year beginning after December 31, 2017, provided that all of those rules are applied consistently with respect to that tested foreign corporation for the same year and all succeeding taxable years. Id.

B. Applicability Dates Relating to Other Rules

Comments with respect to the rules unrelated to the PFIC insurance

exception argued that allowing taxpayers to rely on the 2019 proposed regulations for open years would provide insufficient relief, given that a foreign corporation is generally treated as a PFIC on an ongoing basis with respect to a shareholder if it was ever treated as a PFIC with respect to that shareholder (the ''once-a-PFIC, always-a-PFIC'' rule). See sections 1291(a)(1) and 1298(b)(1) and § 1.1298–3(a). The comments expressed concern that a taxpayer that treated a tested foreign corporation as a PFIC in closed years, based on its understanding of the rules at that time, would be required to file amended returns. The comments stated that requiring taxpayers to file amended returns could limit the relief provided by allowing taxpayers to rely on the 2019 proposed regulations for open years. One comment expressed concern that the application of the once-a-PFIC, always-a-PFIC rule in this context would penalize taxpayers that took conservative positions under prior law, and that filing amended returns may involve significant administrative burdens. Another comment expressed concern that new investors in a tested foreign corporation that would have been a PFIC under prior law but not under the proposed regulations would be subject to more favorable rules than historic investors in that corporation. Accordingly, comments requested that taxpayers be permitted to apply the regulations to closed taxable years for purposes of section 1298(b)(1), provided that the relevant tested foreign corporation would never have been a PFIC during the taxpayer's holding period as a result.

The Treasury Department and the IRS agree that the once-a-PFIC, always-a-PFIC rule is implicated, because in some cases these regulations may cause a tested foreign corporation that was previously a PFIC with respect to a shareholder to not satisfy the Asset Test or Income Test going forward and therefore to become a ''former PFIC'' as defined in § 1.1291–9(j)(2)(iv), but the foreign corporation would still be treated as a PFIC with respect to the shareholder by reason of the once-a-PFIC, always-a-PFIC rule. The Treasury Department and the IRS do not agree that taxpayers subject to the once-a-PFIC, always-a-PFIC rule should be permitted to avoid the need to file amended returns or to make an election under section 1298(b)(1) and § 1.1298–3 (''purging election''). The possible applicability dates of the final regulations do not include closed years, and the Treasury Department and the IRS do not believe that it would be appropriate for the final regulations to apply in whole or part to closed years for purposes of alleviating the effects of the once-a-PFIC, always-a-PFIC rule. For example, providing the relief requested by commenters would afford a benefit to taxpayers that invested in a tested foreign corporation treated as a section 1291 fund in a now-closed year and continue to hold the stock compared to taxpayers that acquired the stock of the tested foreign corporation at the same time but sold the stock in a now-closed year, which may be viewed as unfair. If the tested foreign corporation would not be treated as a PFIC under the proposed regulations or the final regulations, the taxpayers who sold the stock during a closed year may have been subject to tax under section 1291 on an excess distribution while taxpayers who continue to hold the stock would be spared taxation under section 1291.

Finally, while it is true that the application of the once-a-PFIC, always-a-PFIC rule may apply to historic shareholders and not to new shareholders, the rule as enacted by Congress is designed to work in that manner. For example, an investor that buys shares in a tested foreign corporation that is a start-up with no operating income may be required to treat that corporation as a PFIC during its entire holding period for the shares, while an investor that buys shares in the same corporation once it is a going concern may never be required to treat the tested foreign corporation as a PFIC.

However, in light of the issues raised by commenters, the Treasury Department and the IRS have concluded that it is appropriate to provide taxpayers with some flexibility in choosing if and when to end PFIC treatment by causing a former PFIC to no longer be subject to the once-a-PFIC, always-a-PFIC rule. Under current law, a shareholder seeking to end PFIC treatment as a result of a change of facts or law would need to make a purging election under section 1298(b)(1) and § 1.1298–3(b) or (c) on Form 8621 attached to the shareholder's tax return (including an amended return filed within three years of the due date, as extended under section 6081, of the original return for the election year), or request the consent of the Commissioner to make an election with respect to a closed taxable year under section 1298(b)(1) and § 1.1298–3(e) (''late purging election'') on Form 8621–A. A timely purging election under section 1298(b)(1) and § 1.1298–3(b) or (c) may be made if the tested foreign corporation ceased to qualify as a PFIC under the Income Test and the Asset Test in an open taxable year, but the election would not affect the treatment of the tested foreign corporation as a PFIC in the earliest open year because it takes effect at the end of the year for which the election is made, as described in the next paragraph. If the tested foreign corporation ceased to qualify as a PFIC at the beginning of the earliest open year, the shareholder may request the consent of the Commissioner to make a late purging election, as described in the next paragraph.

When a deemed sale purging election is made, the stock of the former PFIC is deemed sold for its fair market value on the last day of the last taxable year of the tested foreign corporation during which it qualified as a PFIC (the ''termination date''). *See* § 1.1298–3(b)(2) and (d). Accordingly, a taxpayer that files a timely deemed sale purging election for an open taxable year is treated as selling the stock of the PFIC at the end of the tested foreign corporation's taxable year, and accordingly the shareholder is subject to the PFIC rules with respect to that stock during its relevant taxable year and any prior open years. If the taxpayer wishes to end PFIC treatment as of its earliest open taxable year, it must request the consent of the Commissioner to make a late purging election taking effect as of the end of the tested foreign corporation's taxable year in the taxpayer's most recent closed taxable year. For example, if a taxpayer had chosen to apply the proposed regulations to its earliest open taxable year with respect to a tested foreign corporation that has the same taxable year and that qualified as a PFIC in closed taxable years, and the application of the proposed regulations resulted in the tested foreign corporation no longer qualifying as a PFIC, to prevent PFIC treatment from continuing into that earliest open taxable year and beyond the taxpayer would have had to request the consent of the Commissioner to make a late purging election by filing Form 8621–A for the year immediately preceding its first open taxable year. See also § 1.1298–3(c) (deemed dividend purging election available if former PFIC was a CFC during its last taxable year that it qualified as a PFIC). The result of both timely and late purging elections with respect to former PFICs is that the shareholder's holding period resets solely for PFIC purposes, such that the shareholder is treated as no longer holding stock of a foreign corporation that was ever a PFIC during the shareholder's holding period, so the once-a-PFIC, always-a-PFIC rule no longer applies.

The Treasury Department and the IRS are aware that the reference to ''all open

tax years'' in the preamble to the proposed regulations may have caused confusion as to whether taxpayers could choose to apply the proposed regulations prospectively to the first taxable year for which they had not yet filed a return, or, alternatively, whether the proposed regulations, if applied at all, had to be applied to all open taxable years, including taxable years for which returns had already been filed, resulting in the necessity to amend returns. As suggested by the comments, there may also have been confusion regarding the need to make a purging election in order to end PFIC status, even though that is the result under the statute and regulations.

Given these considerations, a taxpayer may choose to apply the final regulations (other than the rules related to the PFIC insurance exception), with respect to a particular tested foreign corporation, to any open taxable year of the taxpayer, provided that all of the rules are applied consistently with respect to that tested foreign corporation for that year and all succeeding taxable years. *See* §§ 1.1291–1(j)(4), 1.1297–1(g)(1), 1.1297–2(h), 1.1297–4(g), 1.1297–6(f), 1.1298–2(g), and 1.1298–4(f). (This was also how the proposed regulations, other than the rules related to the PFIC insurance exception, were intended to apply.) For taxable years ending on or before December 31, 2020, a taxpayer may rely on proposed § 1.1297–1(c)(1)(A) in the 2019 proposed regulations concerning the application of section 954(h) rather than § 1.1297–1(c)(1)(i)(A) with respect to a tested foreign corporation.

The Treasury Department and the IRS recognize that the determination of whether to apply the 2019 proposed regulations or the final regulations to a tested foreign corporation may be advantageous with respect to some tested foreign corporations and not with respect to others. In order to provide flexibility to U.S. investors in tested foreign corporations, taxpayers may apply the final regulations in any open taxable year to all or less than all of the tested foreign corporations whose shares are owned by the taxpayer, subject to the consistency rule described in the prior paragraph with respect to any particular tested foreign corporation. However, if the consequence of applying either the proposed regulations or these final regulations to prior open taxable years is that, as of the date of application, a tested foreign corporation that was a PFIC ceases to qualify as a PFIC, then the once-a-PFIC, always-a-PFIC rule is implicated and a taxpayer seeking to end PFIC status must make a purging election or request the consent of the Commissioner to make a late purging election.

A taxpayer may choose to apply the rules to open taxable years even if a qualified electing fund election under section 1295 or a mark-to-market election under section 1296 was in effect. *See* section 6511(a) (period of limitation for filing refund claim).

Effect on Other Documents

The eighth (concerning the average value of assets for purposes of the Asset Test), ninth (concerning the characterization of assets for purposes of the Asset Test), fourteenth through sixteenth (concerning dealer inventory and investment assets for purposes of the Asset Test), eighteenth (concerning look-through rules for purposes of the Income Test), and nineteenth (concerning look-through treatment under section 1297(c)) paragraphs of Notice 88–22, 1988 1 C.B. 489, are obsoleted.

Special Analyses

I. Regulatory Planning and Review—Economic Analyses

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for this final rule is regulatory.

The final regulation has been designated by the Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. OIRA has determined that the final rulemaking is significant and subject to review under Executive Order 12866 and section 1(b) of the Memorandum of Agreement. Accordingly, the final regulations have been reviewed by OMB.

A. Background

Various provisions of the tax code allow tax on certain sources of income to be deferred, which means that the income is not taxed when it is earned but at some later date, based on specific events or conditions. Tax deferral is advantageous to taxpayers because the taxpayer can in the meantime earn a return on the amount that would otherwise have been paid as tax. Prior to the Tax Cuts and Jobs Act (TCJA), income earned abroad by foreign corporations owned by U.S. taxpayers generally was not taxed by the United States until the income was repatriated to the United States or, as holds broadly for capital gains, the stock of the corporation was sold. However, under controlled foreign corporation (CFC) and passive foreign investment company (PFIC) rules, U.S. persons owning stock of foreign corporations were in some circumstances subject to current tax on some or all of the foreign corporation's income. After TCJA, passive income and certain insurance income earned abroad by a CFC continues to be taxed immediately to the United States shareholders of the CFC. However, income of U.S. persons earned by foreign corporations that are not CFCs may still be eligible for deferral, or, in the case of certain corporate shareholders, exempt from U.S. corporate tax. Deferral is not available, however, for income of foreign corporations that are identified as PFICs. The immediate taxation of this income discourages U.S. taxpayers from holding mobile, passive investments, such as stock, in a foreign corporation in order to defer U.S. tax.

The PFIC rules of the Internal Revenue Code address situations in which taxable U.S. persons indirectly hold assets that earn passive income (generally interest, dividends, capital gains, and similar types of income) through a foreign corporation. Without the PFIC rules, the income earned by these assets would be subject to U.S. tax only when and if that income is distributed as dividends by the foreign corporation or, as capital gains, when the shares of the foreign corporate stock are sold by the U.S. shareholder. In the absence of the PFIC rules, these types of investment arrangements could significantly lower the effective tax rate on passive income faced by U.S. investors from that incurred if the assets were held directly.

Under the PFIC statutory rules, a foreign corporation is considered a PFIC if at least 75 percent of the corporation's gross income for a given taxable year is passive income (the Income Test) or if at least 50 percent of the corporation's assets are assets that produce passive income (the Asset Test). The PFIC itself is not subject to U.S. tax under the PFIC regime; rather, only the U.S. owner of a foreign corporation is subject to that regime. The U.S. owner of shares of a foreign corporation consequently must

obtain the appropriate information, usually from the corporation, in order to determine whether that corporation is a PFIC (by satisfying these and other tests) and if so what tax is due as a result.

The PFIC provisions provide a long-standing exception from these passive income rules for any income earned in the active conduct of an insurance business by an insurance company. This exception (the PFIC insurance exception) allows insurance companies, which hold significant amounts of investment assets (which generate income that would otherwise be classified as passive) in the normal course of business to fund their insurance obligations, to avoid PFIC status, provided they meet other statutory conditions.

TCJA substantially revised the PFIC insurance exception. Before its amendment by TCJA, this exception was provided to a foreign corporation that (i) was predominantly engaged in an insurance business and (ii) would be taxed as an insurance company if it were a domestic corporation. TCJA modified and narrowed the PFIC insurance exception by requiring that the excepted income be derived in the active conduct of an insurance business by a ''qualifying insurance corporation'' (QIC). To be a QIC, a foreign insurance corporation must be an entity that would be taxed as an insurance company if it were a domestic corporation (consistent with prior-law requirements) and, in addition, be able to show that its ''applicable insurance liabilities'' constitute more than 25 percent of its total assets. TCJA defines applicable insurance liabilities for this purpose as including a set of enumerated types of insurance-related loss and expense items. Failing this test, the Code provides that U.S. owners of the foreign corporation may elect to treat their stock in the corporation as stock of a QIC provided the corporation can satisfy an ''alternative facts and circumstances test.'' If a corporation is determined to be a QIC, only income that is derived in the active conduct of an insurance business qualifies as income eligible for the PFIC insurance exception.

The Treasury Department and the IRS previously published proposed regulations pertaining to the PFIC regime and changes due to TCJA (the proposed regulations.) *See* 84 FR 33120.

B. Need for the Final Regulations

The final regulations are needed because many of the terms and calculations required for the determination of PFIC status would benefit from greater specificity. The final regulations provide such details so that taxpayers can readily and accurately determine if their investment is in a PFIC, given the significant tax consequences of owning a PFIC. The regulations further resolve ambiguities in determining ownership of a PFIC and in the application of the PFIC Income and Asset Tests. These final regulations are also needed to respond to comments received on the proposed regulations.

The Treasury Department and the IRS have also identified actions or positions that foreign companies might take to claim qualification for the passive income exception for income earned in the active conduct of an insurance business even though the nature of their insurance business would not merit an exception under the intent and purpose of the statute. The final regulations are needed to prevent U.S. investors from taking certain of these tax avoidance measures.

C. Overview

The final regulations can be divided into two parts: General guidance regarding PFICs (the general rules) and guidance that relates specifically to the implementation of the PFIC insurance income exception (the PFIC insurance exception rules).

The economic analysis first discusses the regulations under the general rules that: (1) Clarify how assets are measured for the PFIC Asset Test; (2) provide rules for applying the statutory rules regarding look-through subsidiaries to partnerships; and (3) attribute activities undertaken by certain affiliates of the corporation being tested for its PFIC status for the purpose of applying certain exceptions contained in the passive income definitional rules.

The economic analysis then discusses the regulations under the PFIC insurance exception rules that provide guidance regarding: (1) The discounting of applicable insurance liabilities on certain financial statements; (2) issues related to the facts and circumstances test for treating a foreign corporation as a QIC, including (i) ''runoff-related circumstances,'' (ii) ''rating-related circumstances,'' and (iii) the deemed election under the facts and circumstances test for small shareholders; and (3) application of the insurance exception as it relates to look-through subsidiaries of a QIC.

D. Economic Analysis

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of the final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these final regulations.

2. Summary of Economic Effects

The final regulations provide certainty and consistency in the application of sections 1297 and 1298 of the Internal Revenue Code with respect to passive foreign investment companies and qualifying insurance corporations by providing definitions and clarifications regarding the statute's terms and rules. In the absence of such guidance, the chances that different U.S. owners (or potential owners) of foreign companies would interpret the statute differentially (either differently from each other or distinct from the intent and purpose of the statute) would be exacerbated. This divergence in interpretations could cause U.S. investors to choose investment vehicles based on different interpretations of the statute rather than on different economic prospects. For example, one investor might undertake an investment opportunity that another investor might forego based on different interpretations of how the income from that investment would be treated under the Code. When economic investment is not guided by uniform incentives across otherwise similar investors and otherwise similar investments, the resulting pattern of investment will generally be inefficient. Thus, in the context of U.S. investment in foreign corporations, the final regulations help to ensure that similar economic activities, representing similar passive and non-passive attributes, are taxed similarly. The Treasury Department and the IRS expect that the definitions and guidance provided in the final regulations will lead to an improved allocation of investment among U.S. taxpayers, contingent on the overall Code.

In assessing the economic effects of the final regulations, the Treasury Department and the IRS separately considered (i) those provisions that may reduce the opportunities for foreign corporations to avoid PFIC status, relative to the no-action baseline; and (ii) those provisions that may expand the opportunities for foreign corporations to avoid PFIC status, relative to the no-action baseline.

As a result of the first set of provisions, some corporations that may not have had PFIC status under the baseline may be treated for tax purposes as PFICs under the final regulations. In response to such provisions, some foreign companies that are close to qualifying as a QIC, for example, may take steps to adjust operations to ensure

that they meet the QIC qualifications.[5] Other foreign companies may not be able to profitably undertake these actions, possibly because of the business's structure or the local regulatory environment and thus would now be treated as a PFIC. Yet other foreign companies, particularly those that are not reliant on U.S. investors, may also remain (following these regulations) classified for U.S. tax purposes as PFICs. The Treasury Department and the IRS expect that in these latter two cases, current U.S. owners will largely continue to retain their holdings of these companies but future investors may turn to other foreign corporations that are not classified as PFICs under the final regulations or to domestic investments.

This reduction in the pool of non-PFIC investment opportunities can be expected to lower the after-tax return to U.S. investors relative to the no-action baseline. To the extent that investors retain their investments in companies that have been determined to be PFICs or turn to domestic investments, U.S. tax revenue may rise relative to the no-action baseline. These possible responses by U.S. investors (investing in a different non-PFIC; retaining investment in the PFIC; investing in U.S. companies) will also change the amount and nature of risk in the affected investors' portfolios. The nature of this shift is difficult to gauge because foreign companies whose PFIC status may change as a result of these final regulations (relative to the no-action baseline) will generally be earning a mix of passive and non-passive income. Thus, the change in the nature of the risk in U.S. investors' portfolios cannot be readily determined.

As a result of the second set of provisions (those that expand opportunities for foreign companies to avoid PFIC status relative to the no-action baseline), some corporations that may have had PFIC status under the baseline may be determined not to be PFICs under the final regulations. This expansion of the pool of non-PFIC investment opportunities can be expected to raise the after-tax return to U.S. investors relative to the no-action baseline and, to the extent that investors increase their investment in foreign non-PFICs as a substitute for domestic investment, U.S. tax revenue may fall. These effects again also change the amount and nature of risk in the affected investors' portfolios and in an undetermined direction.

The Treasury Department and the IRS project that these final regulations will have economic effects less than $100 million per year ($2020), relative to the no-action baseline. The Treasury Department and the IRS have not undertaken more precise estimates of the differences in economic activity that might result between the final regulations and the no-action baseline because they do not have readily available data or models that capture in sufficient detail the investments that taxpayers might make under the final regulations relative to the no-action baseline. They similarly have not estimated the differences in compliance costs or administrative burden that would arise under the final regulations or the no-action baseline because they do not have readily available data or models that capture these aspects in sufficient detail.

The proposed regulations solicited comments on the economic effects of the proposed regulations. No such comments were received.

3. Economic Analysis of Specific Provisions of the General PFIC Rules

a. Treatment of Look-Through Subsidiaries and Look-Through Partnerships

For the purpose of testing whether a foreign corporation is a PFIC, the look-through rule of section 1297(c) treats the tested foreign corporation (''TFC'') as holding its proportionate share of the assets of a look-through entity and having received directly its proportionate share of the income of the look-through entity. This rule affects both the amount of assets that the TFC is treated as owning and the characterization of those assets as passive or non-passive. The statute is silent regarding the application of look-through rules to a TFC's ownership interest in a partnership. Therefore, the Treasury Department and the IRS deemed it necessary to provide rules addressing the treatment of TFC ownership interests in partnerships.

One regulatory option was to apply rules similar to those that apply to subsidiaries treated as corporations for tax purposes. Under these rules, a partnership generally would be treated as a look-through partnership (LTP) only if the TFC owned at least 25 percent of the value of the partnership interest during a taxable year (''minimum ownership threshold'').

A second regulatory option was to apply a complete look-through rule to partnerships (''aggregate approach''). Under this option, a TFC would treat its proportionate share of partnership assets and income as assets and income of its own, regardless of the size of its partnership ownership share. This option is consistent with the ''aggregate'' theory of partnerships under which each partner is treated as incurring an allocable share of each partnership item, such as gain, loss, income, and expense, with the tax attributes of that item passing through to the partner.

A third regulatory option was to adopt an intermediate approach under which look-through rules would apply to partnerships if either (i) the partnership would be a look-through subsidiary if it were treated as a corporation, or (ii) the TFC partner is actively engaged in the business of the partnership. In practice, this approach is likely to have consequences similar to the aggregate approach for many TFCs engaged in an active business.

The proposed regulations adopted the first approach, using a minimum ownership threshold of 25 percent. The 2019 NPRM asked for comments regarding whether this threshold is the appropriate threshold for look-through partnership treatment. No comments were received recommending a lower threshold. Instead, commenters recommended that the aggregate approach be adopted, which in this context would be similar to a zero percent minimum ownership threshold.

Under the aggregate approach, TFCs that are interested in attracting capital from U.S. investors would have an incentive to purchase small minority investment interests in one or more active partnerships in order to increase their share of non-passive assets and income so as to enable the TFC to avoid PFIC status. The TFC could do this without having any of the partnership activities being connected with the business of the TFC and without requiring the TFC to exercise control over any of the business activities of these partnerships. In this fashion, the aggregate option would create a bias in favor of business structures containing entities treated for U.S. tax purposes as partnerships and against a structure using corporate subsidiaries, since those subsidiaries would require 25 percent ownership shares in order to obtain look-through status for the TFC. This bias toward such business structures would be tax-driven rather than market-driven and unlikely to confer general economic benefits.

[5] The Treasury Department and the IRS are aware of foreign companies that have redomiciled to the U.S. and thereby avoided PFIC status, although the number of such companies is believed to small and the business calculations likely involved more than PFIC/non-PFIC considerations. The Treasury Department and the IRS expect that the number of foreign companies that do not re-domicile but that are likely to change how they operate as the result of these final regulations will also be quite small.

An aggregate approach to LTPs could allow TFCs that hold significant amounts of passive investment assets to purchase sufficient amounts of minority investment interests in active business partnerships so as to increase the TFC's non-passive assets and income to levels that enable the TFC to avoid PFIC status. Thus, the purpose of the PFIC regime could be meaningfully defeated, especially if foreign corporate subsidiaries chose to be treated as partnerships for this purpose.

The Treasury Department and the IRS determined that minor investment shares of TFCs in partnerships are more indicative of passive investments on the part of TFCs, so that, in those cases, it is appropriate to treat the TFC's distributive share of partnership income as wholly passive. Moreover, a 25-percent minimum ownership threshold for partnerships has the advantage of being consistent with the look-through threshold for corporate subsidiaries. It is also broadly consistent with a rule (found in the statutory definition of passive income) that treats sales of partnership interests by a CFC as sales of the partnership's assets if the CFC owns 25 percent of the partnership's capital or profits interests. The drawing of a bright line for strictly passive treatment of limited partnership interests offers greater compliance certainty and ease of tax administration because it reduces the informational requirements concerning the character of the assets and income of a partnership when the partner has only very limited investments. It may be difficult for a TFC that holds a less-than-25-percent investment in either a subsidiary or partnership to obtain the necessary information for determining the character of its share of the entity's income. Furthermore, entities with ownership percentages below 25 percent generally do not exercise control of the decisions and actions of the owned entity. Consequently, there are both policy and administrability reasons supporting the treatment of ownership percentages of less than 25 percent in a similar fashion for PFIC purposes.

Because a 25-percent minimum ownership threshold for partnerships is not necessarily an accurate proxy for an active business interest, one commenter proposed an option under which a look-through approach would be taken if a TFC materially participates in the business of the partnership; in other words, an aggregate approach would be used but only if the TFC showed, through a separate demonstration, that the TFC is actively involved in the business of the partnership. The Treasury Department and the IRS agreed that, if a tested foreign corporation is actively involved in the business of a partnership with active business operations, then look-through treatment may be appropriate even if the TFC has less than a 25 percent ownership interest. In considering material participation and similar standards, however, the Treasury Department and the IRS found that current material participation standards under the passive activity loss rules are not appropriate in the PFIC context. Thus, the final regulations instead modify the LTP standard by introducing an active partner test in order to allow look-through treatment to be applied in certain cases when the ownership percentage falls below 25 percent. The active partner test is met as of a measurement date if the TFC would not be a PFIC if both the PFIC Asset Test and the PFIC Income Test were applied without regard to any partnership interest owned by the TFC other than interests in those partnerships that qualify as LTPs using the LTS tests. However, the final regulations did not make this modification of the look-through ownership test mandatory and instead provide an annual election to allow the TFC to not to treat a partnership qualifying under the active partner test as an LTP.

The Treasury Department and the IRS have not estimated the volume or character of investment that investors would undertake under the 25 percent minimum ownership threshold relative to other percentages or under the aggregate approach applied to taxpayers that satisfy an active partner test because they do not have readily available data or models that capture this level of specificity.

b. Attribution of Activities for Look-Through Entities

The definition of passive income contains exceptions for certain income that is derived in the active conduct of a trade or business or is a gain or loss from the sale of certain business property. Under the look-through rules of the statute and these final regulations, a tested foreign corporation is treated as if it holds its proportionate share of the income and assets of its look-through subsidiaries (LTSs) and look-through partnerships (LTPs), where a 25 percent ownership requirement is needed to define such entities. Further, the passive or non-passive character of the attributed income or assets is determined in the hands of the LTS or LTP. However, for legal or commercial reasons, some businesses structure their organizations to have all employees in one foreign corporation, say FC1, while the assets of the business are held in, and income is received by, another foreign corporation, say FC2. Without attribution of the business activities of FC1 to FC2, the assets and income of the latter corporation do not qualify for an exception from the definition of passive income. This can result in FC1 being designated as a PFIC even though its income and assets would be treated as non-passive if FC1 and FC2 were considered as a single entity.

To address the attribution of activities in foreign businesses having such structures, the Treasury Department and the IRS considered three options: (1) Do not allow any attribution of business activities among separate corporations; (2) allow attribution of business activities to a TFC from its LTSs or LTPs; or (3) allow attribution of business activities only if the entities are affiliated using an ownership standard of greater than 50 percent.

Under the no-attribution option, a foreign corporate structure that separates activities and income could satisfy the passive income exception only if it reorganizes in a manner that the TFC not only earns rents, royalties or other normally passive income items, but also employs the officers and employees that perform the related business activities or owns the property that is being sold. This reorganization is potentially costly or perhaps even infeasible, depending on requirements in the foreign jurisdiction and commercial considerations. The Treasury Department and the IRS determined that this alternative would either lead to costly reorganizations or, in the absence of such reorganizations, inhibit U.S. investment in a foreign corporation that carries on an active business activity, both of which are economically undesirable outcomes relative to other regulatory options.

Under the second option, activities of LTSs and LTPs could be attributed to a TFC in a manner similar to the look-through rules. The look-through rules attribute assets and income of a look-through entity to its owner on a proportionate share basis. There are some difficulties applying this concept in the context of attribution of activities. While income and assets can be allocated between owners based on their ownership percentages, activities are not as easily allocated among multiple owners. The purpose of activity attribution, in combination with the look-through rules, is effectively to treat the corporations as a single commercial enterprise; that is, as an affiliated group of corporations. But affiliation in this sense usually demands a recognition of

a unified business purpose and combined business activity. The typical thresholds in the Code for treating related parties as members of an affiliated or consolidated or similar group are more than 50 percent and 80 percent thresholds, not 25 percent.

The third option would require more-than-50-percent ownership in order to be able to attribute the business activities of one corporation to another. The proposed regulations adopted this third alternative but limited its application to rents and royalties earned in the active conduct of a trade or business, taking into account only the activities performed by the officers and employees of the TFC and those of an LTS or LTP in which the TFC owns more than 50 percent by value.

A comment pointed out this attribution rule would allow a TFC to recognize certain rents or royalties of an LTS as non-passive income if the business activity was conducted in one 50-percent subsidiary and assets and income were held in a separate 50-percent subsidiary. However, the rule would not prevent the look-through holder of the property from being a PFIC, since the rule applied only to income received by the TFC. Comments also requested that activity attribution apply to other types of income and not only to rents and royalties.

The final regulations modify the proposed regulations in two respects. First, they extend the application of the provision to other items of income other than rents and royalties that would be excluded from passive income if the income is earned in the active conduct of a trade or business. Second, they expand the types of affiliated entities from which activities could be attributed. Under these rules, an entity is deemed to be engaged in the active conduct of a trade or business by taking into account the activities performed by the officers and employees of the TFC as well as activities performed by the officers and employees of any qualified affiliate of the tested foreign corporation. For this purpose, a qualified affiliated group is defined using an affiliation standard of more than 50 percent. In addition, the group includes only LTSs and LTPs of the parent entity, and the parent entity must be a foreign corporation or partnership. This rule allows the LTS that holds the relevant assets in the preceding example to avoid PFIC status and extends the attribution rules to activities of sibling and parent companies of the TFC.

Accordingly, this final regulation is less restrictive than current law by allowing a greater variety of organizational structures among foreign corporations and partnerships than would be available by applying the passive income rules under current law. The Treasury Department and the IRS project that this final regulation will allow entities to satisfy the passive income exception under conditions consistent with the intent and purpose of the statute without requiring potentially substantial reorganization costs relative to alternative regulatory approaches or the no-action baseline. The adopted activity attribution rule is neither overly restrictive by causing certain active foreign corporations to be treated as PFICs nor overly permissive by allowing U.S. shareholders to evade the application of the PFIC regime through an overindulgent application of attribution rules.

4. Economic Analysis of Specific Provisions Related to the PFIC Insurance Exception

a. Description of the PFIC Insurance Exception

For PFIC purposes, passive income does not include income derived in the active conduct of an insurance business by a qualifying insurance corporation (QIC). Under the statute, a QIC must have ''applicable insurance liabilities'' (AIL) that generally constitute more than 25 percent of its total assets. AIL generally include amounts shown on a financial statement for unpaid loss reserves (including unpaid loss adjustment expenses) of insurance and reinsurance contracts and certain life and health insurance reserves and unpaid claims with respect to contracts providing coverage for mortality or morbidity risks.

For the purpose of the QIC test, AIL are based on insurance liabilities as they are accounted for on the taxpayer's applicable financial statement (AFS). Under the statute, an AFS is a financial statement prepared for financial reporting purposes that is based on U.S. generally accepted accounting principles (GAAP), or international financial reporting standards (IFRS) if there is no statement based on GAAP. If neither of these statements exists then an AFS can be an annual statement that is required to be filed with an applicable insurance regulatory body. Thus, the statute has a preference for financial statements prepared on the basis of GAAP or IFRS, which are rigorous and widely-respected accounting standards, but will permit a foreign corporation to have an AFS that uses a local regulatory accounting standard if the foreign corporation does not do financial reporting based on GAAP or IFRS.

b. Discounting of Applicable Insurance Liabilities

Accounting standards have different requirements regarding the use of discounting in the measurement of unpaid loss insurance reserves. Discounting of unpaid loss reserves would generally be appropriate to account for the amount of time expected before future loss payments are made. GAAP generally does not require the discounting of current non-life insurance liabilities but does require discounting for future liabilities under life insurance and annuity contracts. IFRS 17 (an IFRS standard applicable to insurance contracts with an anticipated effective date of January 1, 2023) requires discounting of all insurance liabilities whose expected payment exceeds one year.

To address the discounting of AIL in situations where the foreign corporation's AFS was not prepared on the basis of GAAP or IFRS, the proposed regulations provided that in situations where the taxpayer's AFS does not discount reserves on an economically reasonable basis, then the amount of AIL would be reduced in accordance with the discounting principles that would have applied under GAAP or IFRS. The foreign corporation could choose whether to apply either GAAP or IFRS for this purpose. In view of comments received, the Treasury and the IRS reconsidered these requirements.

As one alternative, the Treasury Department and the IRS considered not issuing a regulation to govern the discounting of insurance losses. This option was rejected as being possibly inconsistent with the intent and purpose of the statute because other financial standards specified by the statute have rules regarding the discounting of future cash flows.

As a second alternative, the Treasury Department and the IRS considered capping the amount of AIL at the amounts that would be permitted to a domestic insurance company under the Internal Revenue Code; these amounts would have been discounted according to the relevant rules. This approach would be considerably more burdensome to a foreign corporation than other regulatory alternatives because, as a practical matter, it would require foreign corporations to apply complex U.S. tax rules with which they are likely not familiar. An excessive compliance burden on foreign corporations not subject to U.S. taxation would make it less likely that they would do the work necessary to enable their minority U.S. owners to determine

if the corporation is a PFIC. Thus, this alternative was rejected because it was not reasonable to require foreign companies to recalculate insurance liabilities based on U.S. law requirements and it could unduly inhibit U.S. investors from investing in foreign corporations that are legitimate active insurance companies, an activity that is economically beneficial under the intent and purpose of the statute.

The final regulations specify that if an AFS is not prepared on the basis of GAAP or IFRS and does not discount AIL on an economically reasonable basis, the amount of AIL must be reduced by applying the discounting principles that would apply under either GAAP or IFRS. The choice of which accounting standard to use for discounting is left to the foreign corporation. Thus, if GAAP or IFRS would not require discounting for any of the AIL of the foreign insurer, then no additional discounting is required with respect to a non-GAAP/IFRS statement filed with a local regulator.

Compared to the no-action baseline, this regulation could impose additional compliance costs on foreign insurance companies, although those costs are incurred only if the foreign corporation files a financial statement with a local insurance regulator that is not based on GAAP or IFRS. This additional compliance cost is felt indirectly by U.S. investors and potential investors in these foreign insurers. A company may find it too costly to comply with these rules in order to attract U.S. investors, in which case it may not be possible for U.S. investors to determine whether the company qualifies as a QIC; an insurance company that is not a QIC would likely be a PFIC. Thus, the Treasury Department and the IRS recognize that under this regulation, some U.S. investors may avoid investing in such a company, when they would have done so under the no-action baseline. The Treasury Department and the IRS recognize further, however, that such investment (under the no-action baseline) would not have been consistent with efficient behavior under the intent and purpose of the statute.

The Treasury Department and the IRS have not estimated the amounts that U.S. shareholders might invest in foreign insurance companies with or without the discounting requirement because they do not have a model with this level of specificity. However, because the rule is quite flexible, the Treasury Department and the IRS project that the discounting requirement will not represent a significant cost burden for foreign corporations and thus will not have any meaningful effect on investment patterns by U.S. shareholders relative to the no-action baseline.

c. Issues Related to the Alternative Facts and Circumstances Test

Under the statute, a foreign corporation that fails the 25 percent AIL-to-total assets test (but satisfies the 10 percent AIL-to-total asset test) may still be treated as a QIC if it satisfies a ''facts and circumstances test,'' which requires that (1) the corporation is predominantly engaged in an insurance business, and (2) the failure to have AIL in excess of 25 percent of total assets is due solely to runoff-related or rating-relating circumstances involving the corporation's insurance business. Each of these items would benefit from guidance that provides further clarification of the terms involved.

i. Runoff-Related Circumstances

The proposed regulations defined a corporation satisfying the runoff-related circumstances requirement as one that (1) is actively engaged in the process of terminating its pre-existing, active insurance or reinsurance underwriting operation pursuant to an adopted plan of liquidation or a termination of operations under the supervision of its applicable insurance regulatory body, (2) does not issue or enter into any insurance, annuity, or reinsurance contract other than a contractually obligated renewal, consistent with the plan of liquidation or termination, and (3) is making payments during the year to satisfy claims, and the payments cause the corporation to fail the 25 percent test.

The Treasury Department and the IRS considered whether runoff-related circumstances should be limited to insurance companies that plan to terminate their business operations, as was required under the proposed regulations, or whether it should also include situations in which (1) an insurance company is merely shifting the focus of its business and running off contracts from an ''old'' business that it had entered into in the past, or (2) an insurance company acquires and manages insurance business that is in runoff, but the company itself does not have a plan of termination. Stated another way, this issue is whether or why an insurance company described in either of these two situations would require assets that are more than four times the company's AIL. For example, foreign companies facing a planned termination may be required by foreign regulators to hold additional capital and assets relative to their insurance liabilities in order to ensure that those liabilities will be satisfied when the companies are no longer able to rely on new business or new inflows of equity or debt to bolster cash flows from which to pay claims. This additional capital may not be needed by ongoing firms in either of the two situations described above. Unfortunately, no comments on the proposed regulations presented data or other information that address this issue.

The Treasury Department and the IRS concluded that the legislative history of the provision supported the argument that ''runoff-related circumstances'' was intended to be limited to situations in which a corporation is engaged in the process of terminating its pre-existing business, but they also concluded that such termination need not be pursuant to a supervised plan of liquidation or termination, and could also be pursuant to any court-ordered receivership proceeding for the company's liquidation, rehabilitation, or conservation. The final regulations also clarify that the reason for failing the 25 percent test must be that the corporation is required to hold additional assets due to its business being in runoff.

If the definition of runoff-related circumstances were broadened further to include active, non-terminating businesses, then, without additional restrictions and rules, the facts and circumstances test may provide a means by which companies could be treated as QICs in a manner that is not consistent with the intent and purpose of the statute. If any company with a terminating line of business could qualify, then the 25 percent test might effectively become a 10 percent test, an outcome that would not be consistent with the intent and purpose of the statute.

The final regulations broaden slightly the circumstances under which a runoff of business can be conducted, relative to the regulatory option provided in the proposed regulations. The Treasury Department and the IRS recognize that this change may increase the number of foreign insurance companies that are able to meet the requirements for being treated as a QIC relative to the proposed regulations.

The Treasury Department and the IRS have not estimated the number of QICs or the nature of their operations under the final regulations or alternative regulatory approaches or the no-action baseline because they do not have a model with this level of specificity. The Treasury Department and the IRS do not have readily available data on the number of foreign corporations that would currently be conducting a runoff

business under the conditions of the final regulations.

ii. Rating-Related Circumstances

The rating-related circumstances condition required under the alternative facts and circumstances test is not defined in the statute and thus requires regulatory guidance. The proposed regulations provided that a foreign corporation could satisfy the rating-related circumstances requirement if failure to satisfy the 25 percent QIC test was a result of specific capital and surplus requirements that a generally recognized credit rating agency (generally, A.M. Best, Fitch, Moody's, and Standard and Poor) imposes, and that the corporation complies with these requirements in order to maintain a minimum credit rating needed by the corporation to be classified as ''secure'' to write new business for any line of insurance that it is underwriting.

Upon further reflection and after reviewing comments on the proposed regulations, the Treasury Department and the IRS decided that the rating-related circumstances requirement should focus on those corporations that would need to hold assets in excess of 400 percent of their AIL because of unique circumstances. The Treasury Department and the IRS determined that the proposed rule failed to capture the purpose of the PFIC requirements for QICs, but that certain types of business often needed higher levels of capital and surplus in order to meet rating requirements. As a result, the above requirements were maintained in the final regulations, with some technical changes and clarifications, but the provision is limited to companies that might require at times a higher level of assets to insurance liabilities. These companies include insurers that cover risks that are typically low-frequency events but with high aggregate costs, such as coverage against the risk of loss from a catastrophic loss event, and coverage by certain financial guaranty insurance companies.

The final regulations restrict the application of the provision to a foreign corporation for which more than half of its net written premiums for the annual reporting period (or the average net written premiums over the current year and preceding two years) are from insurance coverage against the risk of loss from a catastrophic event. Such insurance is characterized by relatively frequent ''good'' years in which accumulated assets must be accrued as capital and surplus in order to provide sufficient funds to handle the relatively infrequent ''bad'' years in which losses are exceptionally large. Because unpaid loss reserves qualifying as AIL are limited to amounts that represent losses that have already been incurred prior to the end of the accounting period (whether or not a claim has been made), such reserves do not reflect the unknown future losses of the ''bad'' years.

Under the final regulations, the rating-related circumstances provision is also available for insurers whose sole business is to insure or reinsure against a lender's loss of all or a portion of the principal amount of a mortgage loan upon default of the mortgagor. Aggregate losses associated with such insurance are highly correlated with the business cycle. In low loss years, the ratio of total assets to AIL may exceed 400 percent, but the additional assets may be viewed as necessary by rating agencies for the companies to meet insurance obligations in high loss years. The two largest insurance reserve categories of mortgage guaranty insurers are their unearned premium reserves (often including single premium amounts for long-term contracts) and contingency reserves (usually established as a fixed percentage of net written premiums), but neither of these types of reserves are included in the definition of AIL. Consequently, AIL are relatively small on average compared with the assets of these insurers. In addition, a mortgage guaranty insurer under the final regulations is required to operate as monoline business to qualify for the exception (in order to isolate the benefit of this provision and as reflective of general industry practice), because a monoline company does not have the option to pool its financial obligation risks with other types of risks (whereas pooling of different types of risks can reduce overall risk exposure, and thus capital needs). Credit rating agencies correspondingly expect such companies to hold additional assets to protect policyholders due to the monoline requirements for such business and because of the volatility of their losses.

The final regulations also apply the rating-related circumstances provision to financial guaranty insurance companies. Financial guaranty insurance is a line of insurance business in which an insurer guarantees scheduled payments of interest and principal on a bond or other debt security in the event of issuer default. The policyholder of a financial guaranty insurer is effectively paying for use of the insurer's credit rating. For example, if a municipality insures its municipal bond obligations with a financial guarantee insurer, the municipality can charge a lower interest rate on its bond, because the obligation is effectively supported by the insurer's high credit rating. A very high credit rating is thus essential for a financial guarantee insurer to write new business. Furthermore (and similar to mortgage guaranty insurers), rating agency capital standards for financial guaranty insurers are geared to ensuring capital adequacy in times of crisis and may require a higher level of capital to obtain the same rating as an insurer with a different portfolio of risks. The combination of enhanced rating agency capital requirements and the need for a very high credit rating to write new business often results in a financial guaranty insurer being required at times to hold assets in excess of 400 percent of current insurance liabilities. The final regulations provide that a financial guaranty insurance company that fails the 25 percent test is deemed to automatically satisfy the rating-related circumstances requirement, but it must still satisfy the 10 percent test in order to be treated as a QIC. The Treasury Department and the IRS project that the final regulations will more accurately identify those insurance businesses whose activities are economically similar to the activities targeted by Congress in creating the PFIC insurance exception and the alternative facts and circumstances election for QIC treatment.

Relative to the proposed regulations, the final regulations will likely permit fewer foreign insurance corporations to qualify as QICs due to rating-related circumstances, and therefore may result in more such corporations being designated as PFICs absent other changes in business practices.

iii. Requirements for Making the Facts and Circumstances Election and Relief for Small Shareholders

Under the statute, a U.S. shareholder must make an election in order to treat a foreign corporation that would not otherwise be a QIC but that satisfies the alternative facts and circumstances test (including the 10 percent test) as a QIC. To specify the terms of this election, the final regulations specify that such election cannot be made unless the foreign corporation directly provides the U.S. person with a statement, or makes a publicly available statement, indicating that the foreign corporation satisfies the requirements of the alternative facts and circumstances test, including the 10 percent test, and includes a brief description of its runoff-related or rating-related circumstances. A shareholder generally makes the election on Form 8621, which must be attached to the shareholder's U.S.

federal income tax return for each year in which the election applies.

For this election, the final regulations further contain a provision under which a U.S. person who owns stock with a value of $25,000 or less ($50,000 or less if filing a joint return) in a publicly traded foreign corporation is deemed to make the alternative facts and circumstances election with respect to the publicly traded foreign corporation and its subsidiaries (''deemed election''). If a shareholder owns stock through a domestic partnership or other domestic passthrough entity, an election will not be deemed made unless the stock held by the passthrough entity has a value of $25,000 or less. All requirements necessary to permit an actual election must be satisfied in order to permit a deemed election under this rule. These dollar amounts were chosen in part because they were consistent with the filing thresholds for Part I of Form 8621.

A deemed election provision is not required by the statute. The Treasury Department and the IRS created the deemed election to relieve the burden from taxpayers of making an actual election. Small domestic taxpayers may not be very familiar with the PFIC rules, may have difficulty in determining their ownership shares of possible PFICs and QICs, or may not know how to obtain information on whether a foreign corporation has provided the requisite statement regarding the alternative facts and circumstances test, especially if they are indirect owners.

The Treasury Department and the IRS considered not providing such a deemed election by small shareholders but decided that the reduction in compliance burden that the deemed election would provide outweighed the tax administrative benefit that a requirement for an explicit election would provide. For example, under an explicit election, the IRS would know with certainty that the taxpayer has made the election.

The Treasury Department and the IRS have not estimated the change in compliance costs or administrative burden under the final regulations versus an alternative regulatory approach of requiring an affirmative election because they do not have data or models that capture such items.

d. Passive Income Exception for Income and Assets of QIC Look-Through Entities

Under the statute, passive income does not include income derived in the active conduct of an insurance business by a QIC, and assets held to produce such income are treated as assets that produce non-passive income. The final regulations contain rules to clarify the application of this rule. For example, certain companies structure their insurance operations by placing some or all of their investment assets in one or more lower-tier investment corporations or partnerships while investment managers are employed by the QIC or by a related or unrelated service provider. In these cases, unless there is an attribution of non-passive status to the income and assets of the lower-tier affiliated company, the QIC exclusion granted to income earned by the ''active'' entity is somewhat meaningless.

Under the general PFIC look-through rules, a tested foreign corporation (TFC) is treated as receiving directly its proportionate share of the income, or holding its proportionate share of the assets, of a look-through subsidiary (LTS) or look-through partnership (LTP), but the income and assets generally retain the character that they had in the hands of the LTS or LTP for purposes of determining the TFC's PFIC status. See § 1.1297–2(b) and (c). Under the proposed regulations and the final regulations, if certain requirements are met, otherwise-passive income or assets of an LTS or LTP owned by a QIC may be treated as active in the hands of the QIC, to the extent that such income is attributed to the active conduct of the QIC's insurance business and such assets are available to satisfy liabilities of the QIC's insurance business (''look-through recharacterization rule'').

Under the proposed regulations, this attribution of non-passive character to otherwise-passive income and assets of an LTS or LTP of a QIC was not allowed unless the applicable financial statement (AFS) used to test the QIC status of the foreign corporation included the assets and liabilities of the subsidiary entity. This rule was intended to ensure that all otherwise-passive LTS or LTP assets available to satisfy the QIC's insurance liabilities and treated as non-passive under the look-through recharacterization rule would also necessarily be taken into account for purposes of the 25 percent test for judging the corporation's QIC status. However, assets and liabilities of a subsidiary entity are not included on the parent's financial statement unless the financial statement is prepared on a consolidated basis. If the QIC's AFS is prepared using separate entity accounting, only the QIC's share of the net equity value of the lower-tier entity would be included in assets under the 25 percent QIC test. Thus, a QIC could not take advantage of the proposed QIC look-through recharacterization rule unless it used a consolidated financial statement as its AFS.

A consolidated financial statement generally (but not always) requires at least a 50 percent ownership share in a controlled subsidiary in order to include the assets and liabilities of the subsidiary in the consolidated financial statement. Less-than-50-percent subsidiaries generally must be accounted for on an equity basis, such that the financial statement reflects the net equity value of the subsidiary. Thus, the look-through recharacterization rule of the proposed regulations would not have allowed non-passive treatment of otherwise-passive assets of an LTS unless the QIC owned at least 50 percent interest in the subsidiary and had a consolidated AFS. This meant that the income and assets of an LTS in which the QIC owned between 25 percent and 50 percent interest would generally be treated as passive under the proposed regulations, even if all of those income and assets were available to satisfy the QIC's insurance liabilities, because consolidated accounting treatment was not available. A beneficial aspect of the rule, however, was that it treated QICs that chose to place their investment assets in a wholly-owned subsidiary (which would generally be consolidated with the QIC for financial statement purposes) in the same manner as QICs that conducted their insurance operations and held their investment assets in a single corporation.

These considerations led the Treasury Department and the IRS to adopt an alternative regulatory option. Under the final regulations, the amount of assets and income of an LTS or LTP that may be treated as non-passive assets and income of the QIC are limited, respectively, to the greater of (i) the QIC's proportionate share of assets and income of the LTS or LTP, respectively, multiplied by a fraction, the numerator of which is the net equity value of the interests held by the QIC in the LTS or LTP, and the denominator of which is the QIC's proportionate share of the value of assets of the LTS or LTP; or (ii) the QIC's proportionate share of assets and income that are treated as non-passive in the hands of the LTS or LTP without regard to the look-through recharacterization rule. This rule reflects the idea that only assets of the LTP or LTS that exceed the liabilities of the look-through entity are available to satisfy liabilities of the insurance business of the QIC and should be excludible from passive income under the QIC look-through recharacterization rule. However, if the general look-through rules determine a greater

amount of non-passive assets or income, then that rule prevails.

When assets are measured by value, rather than by adjusted basis, part (i) of the above asset formula reduces the amount of potentially non-passive assets to the net equity value of the QIC's ownership interest in the LTS or LTP. This is the same asset value used in the 25 percent test for testing QIC status in the case of a non-consolidated AFS. Thus, this solution ensures that assets treated as being available to satisfy insurance liabilities of the QIC are also taken into account for the purpose of the 25 percent test for judging the corporation's QIC status.

Whenever the QIC's subsidiary has liabilities, this rule will likely limit the amount of the subsidiary's assets and income that are treated as non-passive under the look-through recharacterization rule, in which case the QIC would have a greater value of non-passive assets if it operated instead as a single corporation. However, the value of total assets used in the 25 percent test would also be correspondingly higher in that case, perhaps making it less likely for the foreign insurance company to satisfy the 25 percent test.

The Treasury Department and the IRS have not estimated whether the adopted option would lead to different values for amounts treated as non-passive assets and non-passive income of QICs under the insurance exception relative to the no-action baseline. The Treasury and the IRS do not have data or models that could estimate quantitatively the relative impacts of the alternatives considered. However, the adopted option is expected to result in a more accurate identification of non-passive income used in the active conduct of the QIC's insurance business and non-passive assets used to satisfy the insurance liabilities of the QIC relative to the no-action baseline and alternative regulatory approaches.

5. Number of Affected Taxpayers

A U.S. person must generally file a separate Form 8621 for each PFIC for which it has an ownership interest. Exceptions currently exist for persons that indirectly own PFIC stock through another U.S. shareholder of a PFIC, unless such persons are required to report PFIC income or need to file a Form 8621 in order to make an election. Further exceptions exist under current rules, including exemptions for tax-exempt entities and for taxable U.S. shareholders owning less than $25,000 in aggregate PFIC stock ($50,000 if filing a joint return) that is not owned through another U.S. shareholder of a PFIC or through another PFIC (unless such shareholders are required to report PFIC income or need to file a Form 8621 in order to make an election).

The accompanying table indicates how many persons have filed at least one Form 8621 between 2016 and 2018 based on currently available IRS master files of tax return filings. To date, nearly 62,000 Forms 8621 have been filed for 2018. Over 70 percent of the filings are individuals. Another 27 percent are pass-through entities, the overwhelming number of which are partnerships, but which also include S corporations, estates, and non-grantor trusts. These pass-through entities primarily have individuals as partners, shareholders, or beneficiaries, but may also have corporate partners. It is likely there is some double counting whereby both partnerships and partners are filing a Form 8621 for the same PFIC. C corporations constitute just over one percent of these filings. Just under two percent of Forms 8621 do not identify on the form the filing status of the filer.

TABLE

	Number of U.S. persons filing Form 8621		
	2016	2017	2018
Individuals	36,978	40,891	43,406
Passthrough Entities	15,326	16,133	16,607
C Corporations	713	733	739
Unreported Filer Type	1,114	1,053	1,084
All Entities	54,131	58,810	61,836

In 2018, reporting taxpaying persons filed an average of 12 Forms 8621. This average was 11 forms for individuals, 16 forms for partnerships and other pass-through entities, and 28 forms for C corporations.

The Treasury Department and the IRS do not have information in current tax filings regarding how many U.S. persons own shares in qualifying insurance companies or how many potential filings of Form 8621 would be avoided by the regulatory provision regarding a small investor deemed election for applying the facts and circumstances test for purposes of the insurance income exception to passive income. In 2018 there were 40 actual such elections made on Form 8621, 26 of which involved partnerships and 11 of which involved non-grantor trusts, and only one that was an individual.

The numbers in the accompanying table provide a general idea of the number of entities that must pay attention to the final regulations but do not measure the number of investors whose investment decisions are affected by the final regulations. This is because most current PFICs will remain PFICs after application of the final regulations. Similarly, most non-PFIC foreign corporations will continue not to be PFICs after application of the final regulations. The Treasury Department and the IRS expect that only a small percentage of current PFIC and non-PFIC shareholders will be affected by these regulations.

II. Paperwork Reduction Act

The collections of information in these final regulations are in § 1.1297–1(d)(1)(ii)(B), (d)(1)(iii), and (d)(1)(iv), § 1.1297–4(d)(5)(i), (ii), and (iii), and § 1.1298–4(d)(2). The information in all of the collections of information provided will be used by the IRS for tax compliance purposes.

A. Collections of Information Under Existing Tax Forms

The collections of information in § 1.1297–1(d)(1)(ii)(B), (d)(1)(iii), and (d)(1)(iv) are required to be provided by taxpayers that make an election or revoke an election to use an alternative measuring period or adjusted bases to measure assets for purposes of the Asset Test with respect to a foreign corporation. These collections of information are satisfied by filing Form 8621 or attachments thereto. For purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (''PRA''), the reporting burden associated with the

collection of information in the Form 8621 will be reflected in the Paperwork Reduction Act Submission associated with that form (OMB control number 1545–1002). If a Form 8621 is not required to be filed, the collections of information under § 1.1297–1(d)(1)(ii)(B), (d)(1)(iii), and (d)(1)(iv) are satisfied by attaching a statement to the taxpayer's return. For purposes of the PRA, the reporting burden associated with these collections of information will be reflected in the Paperwork Reduction Act Submissions associated with Forms 990–PF and 990–T (OMB control number 1545–0047); Form 1040 (OMB control number 1545–0074); Form 1041 (OMB control number 1545–0092); Form 1065 (OMB control number 1545–0123); and Forms 1120, 1120–C, 1120–F, 1120–L, 1120–PC, 1120–REIT, 1120–RIC, and 1120–S (OMB control number 1545–0123).

The collection of information in § 1.1297–4(d)(5)(iii) is required to be provided by taxpayers that make an election under section 1297(f)(2) to treat a foreign corporation as a QIC in order to qualify for the exception from passive income under section 1297(b)(2)(B). In response to comments addressing the notice of proposed rulemaking preceding the final regulations, the Treasury Department and the IRS have revised the collection of information with respect to section 1297(f)(2).

The collection of information in § 1.1297–4(d)(5)(iii) requires a United States person to make an election with respect to an eligible foreign corporation under section 1297(f)(2) by completing the appropriate part of Form 8621 (or successor form) for each taxable year of the United States person in which the election applies. In response to comments, § 1.1297–4(d)(5)(iv) generally provides that any United States person that owns stock in a publicly traded foreign corporation eligible for the election with a value of $25,000 or less ($50,000 or less if a joint return) is deemed to make the election under section 1297(f)(2) without the need to file Form 8621. This rule is intended to provide relief to small shareholders who may not be aware that an election is required. In addition, § 1.1297–4(d)(5)(iii) provides that the election under section 1297(f)(2) may be made on an amended return.

The collection of information in § 1.1297–4(d)(5)(iii) is satisfied by filing Form 8621. For purposes of the PRA, the reporting burden associated with the collection of information in the Form 8621 will be reflected in the Paperwork Reduction Act Submission associated with Form 8621 (OMB control number 1545–1002).

The number of entities subject to these collections of information will be those entities filing Form 8621 or attaching a statement to their tax return. The number of filers of Form 8621 in 2018 based on current filings was approximately 62,000. The Treasury Department and the IRS project that at most, an additional 10 percent of filers (6,200) that were not required to file Form 8621 in 2018 may be subject to these collections of information. Thus, the upper bound estimate of the number of entities subject to these collections of information is 68,200.

The accompanying Table shows the upper bound estimates of the number of filers filing an election, by Form. The first column shows estimates under the assumption that all filers will file the required election by filing Form 8621. The second column shows these estimates under the assumptions that: (i) Filers who generally file Form 8621 will file the required election as part of the filing of Form 8621; and (ii) an additional ten percent of filers will file the required election as an attachment to Form 1040, 1065, 1120–S, 1120, or other form, as appropriate.[6]

	Number of filers (upper bound), assuming all elections are made on Form 8621	Number of filers (upper bound), assuming a portion of elections are made as attachments to standard forms
Attachment to Form 1040	0	4,300
Attachment to Form 1065 or 1120–S	0	1,700
Attachment to Form 1120 other than 1120–S	0	100
Attachment to Form 1040, 1065, 1120–S, 1120 or other form (2018 Filing status unknown)	0	100
Form 8621	68,200	62,000
Total	68,200	68,200

Source: Compliance Data Warehouse (IRS). See text for explanation.

The current status of the PRA submissions related to the tax forms on which reporting under these regulations will be required is summarized in the following table. The burdens associated with the information collections in the forms are included in aggregated burden estimates for the OMB control numbers 1545–0047 (which represents a total estimated burden time for all forms and schedules for tax-exempt entities of 50.5 million hours and total estimated monetized costs of $3.59 billion ($2018)), 1545–0074 (which represents a total estimated burden time for all forms and schedules for individuals of 1.784 billion hours and total estimated monetized costs of $31.764 billion ($2017)), 1545–0092 (which represents a total estimated burden time for all forms and schedules for trusts and estates of 307.8 million hours and total estimated monetized costs of $9.95 billion ($2016)), and 1545–0123 (which represents a total estimated burden time for all forms and schedules for corporations of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017)). The burden estimates provided in the OMB control numbers in the following table are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and will in the future include, but not isolate, the estimated burden of only those information collections associated with these final regulations. These numbers are therefore unrelated to the future

[6] Upper bound estimates of the number of filers who will file attachments to specific tax forms are derived by multiplying the number of filers shown in the Table in I.D.4. by 10 percent, for each filing status. The Table in I.D.4 shows that there were 43,406 individuals, 16,607 passthrough entities, 739 corporations, and 1,084 unknown filers who filed Form 8621 in 2018 using currently available filings, for a total of 61,836 filers.

calculations needed to assess the burden imposed by these regulations. To guard against over-counting the burden that international tax provisions imposed before the Act, the Treasury Department and the IRS urge readers to recognize that these burden estimates have also been cited by regulations (such as the foreign tax credit regulations, 84 FR 69022) that rely on the applicable OMB control numbers in order to collect information from the applicable types of filers.

In 2018, the IRS released and invited comment on drafts of Forms 990–PF (Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation), 990–T (Exempt Organization Business Income Tax Return), 1040 (U.S. Individual Income Tax Return), 1041 (U.S. Income Tax Return for Estates and Trusts), 1065 (U.S. Return of Partnership Income), 1120 (U.S. Corporation Income Tax Return), and 8621 (Return by a Shareholder of a Passive Foreign Investment Co. or Qualified Electing Fund). The IRS received comments only regarding Forms 1040, 1065, and 1120 during the comment period. After reviewing all such comments, the IRS made the forms available on December 21, 2018 for use by the public.

The Treasury Department and the IRS have not estimated the burden for any new information collections arising from either the Act or these final regulations. The Treasury Department and the IRS request comment on all aspects of information collection burdens related to the final regulations. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.*

Form	Type of filer	OMB No.(s)	Status
Forms 990	Tax exempt entities (NEW Model).	1545–0047	Approved by OIRA 2/12/2020 until 2/28/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201912-1545-014*		
Form 1040	Individual (NEW Model)	1545–0074	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1545-021*		
Form 1041	Trusts and estates	1545–0092	Approved by OIRA 5/08/2019 until 5/31/2022.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-1545-014*		
Form 1065 and 1120	Business (NEW Model)	1545–0123	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001*		
Form 8621	Share-holders	1545–1002	Approved by OIRA 12/31/2018 until 12/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201805-1545-007*		

B. Collections of Information Generally Not Included on Existing Forms

The collection of information in § 1.1298–4(d)(2) is required for a foreign corporation that relies on the rule in section 1298(b)(7) and § 1.1298–4(b)(1). This collection of information is satisfied by filing a statement attached to the foreign corporation's return. For purposes of the PRA, the reporting burden associated with this collection of information will be reflected in the Paperwork Reduction Act Submissions associated with Form 1120–F (OMB control number 1545–0123). The number of affected filers, burden estimates, and PRA status for this OMB control number are discussed in connection with the Form 1120 in Part II.A of the Special Analyses.

Alternatively, if a foreign corporation is not required to file a return, the collection of information in § 1.1298–4(d)(2) is satisfied by the foreign corporation's maintaining a statement in its records or including it in its public filings.

The collection of information in § 1.1297–4(d)(5)(i) and (ii) is required for a foreign corporation for which a taxpayer makes an election under section 1297(f)(2). In response to comments addressing the notice of proposed rulemaking preceding the final regulations, the Treasury Department and the IRS have revised the collection of information from foreign corporations with respect to section 1297(f)(2). The collection of information under § 1.1297–4(d)(5)(i) and (ii) requires a foreign corporation to provide a statement to a shareholder or make a statement publicly available. In response to comments, § 1.1297–4(d)(5)(i) permits a foreign parent corporation to make a publicly available statement on behalf of its subsidiaries.

The collection of information contained in § 1.1298–4(d)(2) (for foreign corporations that are not required to file Form 1120–F) and § 1.1297–4(d)(5)(i) and (ii) has been reviewed and approved by the Office of Management and Budget under control number [X].

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (''small entities'').

The statutory provisions in sections 1291 through 1298 (the ''PFIC regime'') generally affect U.S. taxpayers that have ownership interests in foreign corporations that are not CFCs.

A U.S. person must generally file a separate Form 8621 for each PFIC for which it has an ownership interest. To date, nearly 62,000 Forms 8621 have been filed for 2018. Over 70 percent of the filings are individuals. Another 27 percent are pass-through entities, the overwhelming number of which are

partnerships, but which also include S corporations, estates, and non-grantor trusts. These pass-through entities primarily have individuals as partners, shareholders, or beneficiaries, but may also have corporate partners. It is likely there is some double counting whereby both partnerships and partners are filing a Form 8621 for the same PFIC. C corporations constitute just over one percent of these filings. Nearly two percent of Forms 8621 do not identify the filing status of the filer.

Regardless of the number of small entities potentially affected by the final regulations, the Treasury Department and the IRS have concluded that there is no significant economic impact on small entities as a result of the final regulations based on the following argument.

To provide a bound on the impact of these regulations on businesses, the Treasury Department and the IRS calculated the ratio of the PFIC regime tax to (gross) total income for 2013 through 2018 for C corporations that filed the Form 8621. Total income was determined by matching each C corporation filing the Form 8621 to its Form 1120. Ordinary QEF income, QEF capital gains, and mark-to-market income were assumed to be taxed at 35 percent (21 percent for 2018), and the section 1291 tax and interest charge were included as reported. Only those corporations where a match was found and that had positive total income were included in the analysis. For the approximately 150 to 300 C corporations for which a match was available in a given year, the average annual ratio of the calculated tax to total income was never greater than 0.00035 percent. For the approximately 60 to 200 C corporations with total income of $25 million or less for which a match was available, the average annual ratio was never greater than 1.08 percent.

	2013	2014	2015	2016	2017	2018
	($ millions)					
All C corporations						
Tax	5	12	14	8	22	42
Total Income	4,204,795	10,154,520	19,935,845	20,076,876	21,625,159	13,317,244
Tax to Total Income	0.000%	0.000%	0.000%	0.000%	0.000%	0.000%
C corporations with total income of $25 million or less						
Tax	(*)	(*)	4	4	5	3
Total Income	463	563	627	573	460	741
Tax to Total Income	0.060%	0.014%	0.576%	0.689%	1.068%	0.400%

Source: RAAS, CDW.
* Indicates less than $1 million.

The economic impact of the final regulations will generally be a small fraction of the calculated tax and thus considerably smaller than the effects reported in the table. Thus, the economic impact of the final regulations should not be regarded as significant under the Regulatory Flexibility Act.

A portion of the economic impact of the final regulations may derive from the collection of information requirements imposed by § 1.1297–1(d)(1)(ii)(B), (d)(1)(iii)(B), and (d)(1)(iv) and § 1.1297–4(d)(5)(iii). The Treasury Department and the IRS have determined that the average burden is 1 hour per response. The IRS's Research, Applied Analytics, and Statistics division estimates that the appropriate wage rate for this set of taxpayers is $95 per hour. Thus, the annual burden per taxpayer from the collection of information requirement is $95. These requirements apply only if a taxpayer chooses to make an election or rely on a favorable rule.

Accordingly, it is hereby certified that the final rule would not have a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f), the proposed regulations preceding these final regulations (REG–105474–18) were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business. The proposed regulations also solicited comments from the public on both the number of entities affected (including whether specific industries are affected) and the economic impact of this proposed rule on small entities. No comments were received.

IV. Unfunded Mandates Reform Act

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

V. Executive Order 13132: Federalism

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

VI. Congressional Review Act

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

Statement of Availability of IRS Documents

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

Drafting Information

The principal drafters of these regulations are Josephine Firehock and Christina Daniels of the Office of Associate Chief Counsel (International). Other personnel from the Treasury Department and the IRS also participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries for §§ 1.1297–1, 1.1297–2, 1.1297–4, 1.1297–5, 1.1297–6, 1.1298–2, and 1.1298–4 in numerical order to read in part as follows:

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

Section 1.1297–1 also issued under 26 U.S.C. 1298(g).

Section 1.1297–2 also issued under 26 U.S.C. 1298(g).

* * * * *

Section 1.1297–4 also issued under 26 U.S.C. 1297(b)(2)(B) and 1298(g).

Section 1.1297–5 also issued under 26 U.S.C. 1297(b)(2)(B) and 1298(g).

Section 1.1297–6 also issued under 26 U.S.C. 1297(b)(2)(B) and 1298(g).

* * * * *

Section 1.1298–2 also issued under 26 U.S.C. 1298(b)(3) and (g).

Section 1.1298–4 also issued under 26 U.S.C. 1298(g).

* * * * *

■ **Par. 2.** Section 1.1291–0 is amended by:

■ 1. Redesignating the entry for § 1.1291–1(b)(8)(iv) as the entry for § 1.1291–1(b)(8)(v).

■ 2. Adding a new entry for § 1.1291–1(b)(8)(iv).

■ 3. Adding entries for newly redesignated § 1.1291–1(b)(8)(v)(A) and (B), (b)(8)(v)(A)(*1*) and (*2*), (b)(8)(v)(A)(*2*)(*i*) and (*ii*), (b)(8)(v)(B)(*1*) and (*2*), (b)(8)(v)(C), (b)(8)(v)(C)(*1*) and (*2*), (b)(8)(v)(D), (b)(8)(v)(D)(*1*) and (*2*).

The revisions and additions read as follows:

§ 1.1291–0 Treatment of shareholders of certain passive foreign investment companies; table of contents.

* * * * *

§ 1.1291–1 Taxation of U.S. persons that are shareholders of section 1291 funds.

* * * * *

(b) * * *

(8) * * *

(iv) Successive application.

(v) Examples.

(A) Example 1.

(*1*) Facts.

(*2*) Results.

(*i*) Treatment of DC.

(*ii*) Treatment of A.

(B) Example 2.

(*1*) Facts.

(*2*) Results.

(C) Example 3.

(*1*) Facts.

(*2*) Results.

(D) Example 4.

(*1*) Facts.

(*2*) Results.

* * * * *

■ **Par. 3.** Section 1.1291–1 is amended by:

■ 1. Redesignating paragraph (b)(8)(iv) as paragraph (b)(8)(v).

■ 2. Adding new paragraph (b)(8)(iv).

■ 3. Redesignating *Example 1* in newly redesignated paragraph (b)(8)(v) as paragraph (b)(8)(v)(A).

■ 4. Revising newly redesignated paragraph (b)(8)(v)(A).

■ 5. Adding paragraphs (b)(8)(v)(B), (C), and (D).

■ 6. Revising paragraph (j)(3).

■ 7. Adding paragraph (j)(4).

The revisions and additions read as follows:

§ 1.1291–1 Taxation of U.S. persons that are shareholders of section 1291 funds.

* * * * *

(b) * * *

(8) * * *

(iv) *Successive application.* Stock considered to be owned by a person by reason of paragraphs (b)(8)(ii) or (iii) of this section is, for purposes of applying such paragraphs, considered to be actually owned by such person. Subject to the limitations provided in section 1298(a) and paragraphs (b)(8)(ii) and (b)(8)(iii) of this section, this paragraph applies by successively considering a person as actually owning its proportionate share of stock or other equity interest directly held by an entity directly owned by the person. Paragraph (b)(8)(ii)(C)(*2*) of this section applies after the other subparagraphs of paragraph (b)(8) of this section.

(v) *Examples.* The rules of this paragraph (b)(8) are illustrated by the following examples:

(A) *Example 1*—(*1*) *Facts.* A is a United States person who owns 49% of the stock of FC1, a foreign corporation that is not a PFIC, and separately all of the stock of DC, a domestic corporation that is not an S corporation. DC, in turn, owns the remaining 51% of the stock of FC1, and FC1 owns 100 shares of stock in a PFIC that is not a controlled foreign corporation (CFC) within the meaning of section 957(a). The remainder of the PFIC's shares are owned by unrelated foreign persons.

(*2*) *Results*—(*i*) *Treatment of DC.* Under paragraph (b)(8)(ii)(A) of this section, DC is considered to actually own 51 shares of the PFIC stock directly held by FC1 because DC directly owns 50% or more of the stock of FC1.

(*ii*) *Treatment of A.* In determining whether A is considered to own 50% or more of the value of FC1 for purposes of applying paragraphs (b)(8)(ii)(A) and (b)(8)(iv) of this section to the PFIC stock held through FC1, A is considered under paragraphs (b)(8)(ii)(C)(*1*) and (b)(8)(iv) of this section as indirectly owning all the stock of FC1 that DC directly owns, before the application of paragraph (b)(8)(ii)(C)(*2*) of this section. Because A also directly owns 49% of the stock of FC1, before the application of paragraph (b)(8)(ii)(C)(*2*) of this section A would be treated as owning all 100 shares of PFIC stock held by FC1. However, because 51 shares of the PFIC stock held by FC1 are indirectly owned by DC under paragraph (b)(8)(ii)(A) of this section, pursuant to the limitation imposed by paragraph (b)(8)(ii)(C)(*2*) of this section, only the remaining 49 shares of the PFIC stock are considered as indirectly owned by A under paragraph (b)(8) of this section.

(B) *Example 2*—(*1*) *Facts.* B, a United States citizen, owns 50% of the interests in Foreign Partnership, a foreign partnership treated as a partnership for U.S. federal income tax purposes, the remaining interests in which are owned by an unrelated foreign person. Foreign Partnership owns 100% of the stock of FC1 and 50% of the stock of FC2, the remainder of which is owned by an unrelated foreign person. Both FC1 and FC2 are foreign corporations that are not PFICs. FC1 and FC2 each own 50% of the stock of FC3, a foreign corporation that is a PFIC.

(*2*) *Results.* Under paragraphs (b)(8)(iii)(A) and (b)(8)(iv) of this section, for purposes of determining whether B is a shareholder of FC3, B is considered to actually own 50% (50% × 100%) of the stock of FC1 and 25% (50% × 50%) of the stock of FC2. Under paragraphs (b)(8)(ii)(A) and (b)(8)(iv) of this section, B is then considered to own 25% (50% × 100% × 50%) of the stock of FC3 indirectly through FC1, and thus is a shareholder of FC3 for purposes of the PFIC provisions. Because B is considered to own less than 50% of FC2, B is not considered to own any stock of FC3 indirectly through FC2.

(C) *Example 3*—(*1*) *Facts.* The facts are the same as in paragraph (b)(8)(v)(B)(*1*) of this section (the facts in

Example 2), except that B owns 40% of the interests in Foreign Partnership.

(*2*) *Results.* Under paragraph (b)(8)(iii)(A) and (b)(8)(iv) of this section, for purposes of determining whether B is a shareholder of FC3, B is considered to actually own 40% (40% × 100%) of the stock of FC1 and 20% (40% × 50%) of the stock of FC2, and thus is not considered to own 50% or more of the stock of FC1 or FC2. Under paragraphs (b)(8)(ii)(A) and (b)(8)(iv) of this section, B is not considered to own any stock of FC3 indirectly through FC1 or FC2.

(D) *Example 4*—(*1*) *Facts.* The facts are the same as in paragraph (b)(8)(v)(C)(*1*) of this section (the facts in *Example 3*), except that FP owns only 80% of FC1 and B also directly owns 20% of FC1.

(*2*) *Results.* Under paragraph (b)(8)(iii)(A) and (b)(8)(iv) of this section, for purposes of determining whether B is a shareholder of FC3, B is considered to own 32% (40% × 80%) of the stock of FC1 and 20% (40% × 50%) of the stock of FC2. Because B directly owns 20% of FC1, B is considered to actually own 52% (32% + 20%) of the stock of FC1 in total. Under paragraphs (b)(8)(ii)(A) and (b)(8)(iv) of this section, B is considered to own 26% (52% × 50%) of the stock of FC3 indirectly through FC1, and thus is a shareholder of FC3 for purposes of the PFIC provisions. B is not considered to own any stock of FC3 indirectly through FC2.

* * * * *

(j) * * *

(3) Except as otherwise provided in paragraph (j)(4) of this section, paragraphs (b)(2)(ii) and (v), (b)(7) and (8), and (e)(2) of this section apply to taxable years of shareholders ending on or after December 31, 2013.

(4) Paragraphs (b)(8)(iv) and (b)(8)(v)(A), (B), (C), and (D) of this section apply for taxable years of shareholders beginning on or after January 14, 2021. A shareholder may choose to apply such paragraphs for any open taxable year beginning before January 14, 2021, provided that, with respect to a tested foreign corporation, the shareholder consistently applies such paragraphs and the provisions of §§ 1.1297–1 (except that consistent treatment is not required with respect to § 1.1297–1(c)(1)(i)(A)), 1.1297–2, 1.1297–4, 1.1297–6, 1.1298–2, and 1.1298–4 for such year and all subsequent years.

■ **Par. 4.** Section 1.1297–0 is amended by revising the introductory text and adding entries for §§ 1.1297–1, 1.1297–2, 1.1297–4, 1.1297–5, and 1.1297–6 in numerical order to read as follows:

§ 1.1297–0 Table of contents.

This section contains a listing of the headings for §§ 1.1297–1, 1.1297–2, 1.1297–3, 1.1297–4, 1.1297–5, and 1.1297–6.

§ 1.1297–1 Definition of passive foreign investment company.
(a) Overview.
(b) Dividends included in gross income.
(1) General rule.
(2) Example.
(i) Facts.
(ii) Results.
(c) Passive income.
(1) Foreign personal holding company income.
(i) General rule.
(ii) Determination of gross income or gain on a net basis for certain items of foreign personal holding company income.
(iii) Amounts treated as dividends.
(2) [Reserved].
(3) Passive treatment of dividends and distributive share of partnership income.
(4) Exception for certain interest, dividends, rents, and royalties received from a related person.
(i) In general.
(ii) Ordering rule.
(iii) Allocation of interest.
(iv) Allocation of dividends.
(A) In general.
(B) Dividends paid out of current earnings and profits.
(C) Dividends paid out of accumulated earnings and profits.
(v) Allocation of rents and royalties.
(vi) Determination of whether amounts are received or accrued from a related person.
(vii) Allocation of distributive share of income from related partnership.
(d) Asset test.
(1) Calculation of average annual value (or adjusted bases).
(i) General rule.
(ii) Measuring period.
(A) General rule.
(B) Election to use alternative measuring period.
(C) Short taxable year.
(iii) Adjusted basis election.
(iv) Time and manner of elections and revocations.
(A) Elections.
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§ 1.1297–4 Qualifying insurance corporation.
(a) Scope.
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(iv) Deemed election for small shareholders in publicly traded companies.
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(10) Mortgage insurance company.
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§ 1.1297–5 [Reserved].

§ 1.1297–6 Exception from the definition of passive income for active insurance income.
(a) Scope.
(b) Exclusion from passive income of active insurance income.
(c) Exclusion of assets for purposes of the passive asset test under section 1297(a)(2).
(d) Treatment of income and assets of certain look-through subsidiaries and look through partnerships for purposes of the section 1297(b)(2)(B) exception.
(1) General rule.
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(3) Examples.
(i) Example 1: QIC holds all the stock of an investment subsidiary.
(A) Facts.
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(*1*) Facts.
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(1) General rule.
(2) [Reserved].
(3) [Reserved].
(f) Applicability date.

■ **Par. 5.** Sections 1.1297–1 and 1.1297–2 are added to read as follows:

§ 1.1297–1 Definition of passive foreign investment company.

(a) *Overview.* This section provides rules concerning the income test set forth in section 1297(a)(1) and the asset test set forth in section 1297(a)(2). Paragraph (b) of this section provides a rule relating to the definition of gross income with respect to certain dividends that are excluded from gross income under section 1502 for purposes of section 1297. Paragraph (c) of this

section provides rules relating to the definition of passive income for purposes of section 1297. Paragraph (d) of this section provides rules relating to the asset test of section 1297. See §§ 1.1297–2 and 1.1297–6 for additional rules concerning the treatment of the income and assets of a corporation subject to look-through treatment under section 1297(c). Paragraph (e) of this section provides rules relating to the determination of passive foreign investment company (PFIC) status for stapled entities. Paragraph (f) of this section provides definitions applicable for this section, and paragraph (g) of this section provides the applicability date of this section.

(b) *Dividends included in gross income*—(1) *General rule.* For purposes of section 1297, gross income includes dividends that are excluded from gross income under section 1502 and § 1.1502–13.

(2) *Example*—(i) *Facts.* USP is a domestic corporation that owns 30% of TFC, a foreign corporation. The remaining 70% of TFC is owned by FP, a foreign corporation that is unrelated to USP. TFC owns 25% of the value of USS1, a domestic corporation. USS1 owns 80% of the value of USS2, a domestic corporation. USS1 and USS2 are members of an affiliated group (as defined in section 1504(a)) filing a consolidated return. USS2 distributes a dividend to USS1 that is excluded from USS1's income pursuant to § 1.1502–13 for purposes of determining the U.S. Federal income tax liability of the affiliated group of which USS1 and USS2 are members.

(ii) *Results.* Although the dividend received by USS1 from USS2 is excluded from USS1's income for purposes of determining the U.S. Federal income tax liability of the affiliated group of which USS1 and USS2 are members, pursuant to paragraph (b)(1) of this section, for purposes of section 1297, USS1's gross income includes the USS2 dividend. Accordingly, for purposes of section 1297, TFC's gross income includes 25% of the dividend received by USS1 from USS2 pursuant to section 1297(c) and § 1.1297–2(b)(2)(ii). See section 1298(b)(7) and § 1.1298–4 for rules concerning the characterization of the USS2 dividend.

(c) *Passive income*—(1) *Foreign personal holding company income*—(i) *General rule.* For purposes of section 1297(b)(1), except as otherwise provided in section 1297(b)(2), this section, and § 1.1297–6, the term *passive income* means income of a kind that would be foreign personal holding company income as defined under section 954(c). For the purpose of this paragraph (c)(1)—

(A) The exceptions to foreign personal holding company income in section 954(c)(1), 954(c)(2)(A) (relating to active rents and royalties), 954(c)(2)(B) (relating to export financing income), and 954(c)(2)(C) (relating to dealers) are taken into account;

(B) The exceptions in section 954(c)(3) (relating to certain income received from related persons), 954(c)(6) (relating to certain amounts received from related controlled foreign corporations), and 954(i) (relating to entities engaged in the active conduct of an insurance business) are not taken into account;

(C) The rules in section 954(c)(4) (relating to sales of certain partnership interests) and 954(c)(5) (relating to certain commodity hedging transactions) are taken into account; and

(D) An entity is treated as a controlled foreign corporation within the meaning of section 957(a) for purposes of applying an exception to foreign personal holding company income in section 954(c)(1)(B)'s flush language, (1)(C)(ii), (1)(D), (4), and (5) and § 1.954–2 and for purposes of identifying whether a person is a related person with respect to such entity within the meaning of section 954(d)(3).

(ii) *Determination of gross income or gain on a net basis for certain items of foreign personal holding company income.* For purposes of section 1297, the excess of gains over losses from property transactions described in section 954(c)(1)(B), the excess of gains over losses from transactions in commodities described in section 954(c)(1)(C), the excess of foreign currency gains over foreign currency losses described in section 954(c)(1)(D), and positive net income from notional principal contracts described in section 954(c)(1)(F) are taken into account as gross income. The excess of gains over losses (or, with respect to notional principal contracts, positive net income) for a category of transactions is calculated by a tested foreign corporation taking into account individual items of gain or loss (or, with respect to notional principal contracts, net income or net deduction) recognized by the tested foreign corporation and those items of gain or loss (or, with respect to notional principal contracts, net income or net deduction) treated as recognized by the tested foreign corporation with respect to its look-through subsidiaries and look-through partnerships pursuant to section 1297(c) and § 1.1297–2(b)(2) or (3).

(iii) *Amounts treated as dividends.* For purposes of section 1297, the term dividend includes all amounts treated as dividends for purposes of this chapter, including amounts treated as dividends pursuant to sections 302, 304, 356(a)(2), 964(e), and 1248.

(2) [Reserved].

(3) *Passive treatment of dividends and distributive share of partnership income.* For purposes of section 1297, a tested foreign corporation's share of dividends received from a corporation that is not a look-through subsidiary (as defined in § 1.1297–2(g)(3)) and distributive share of any item of income of a partnership that is not a look-through partnership (as defined in § 1.1297–2(g)(4)) with respect to a tested foreign corporation are treated as passive income, except to the extent that the item of income would not be treated as passive under section 1297(b)(2)(C) and paragraph (c)(4) of this section.

(4) *Exception for certain interest, dividends, rents, and royalties received from a related person*—(i) *In general.* For purposes of section 1297(b)(2)(C), interest, dividends, rents, or royalties actually received or accrued by a tested foreign corporation are considered received or accrued from a related person only if the payor of the interest, dividend, rent, or royalty is a related person (within the meaning of section 954(d)(3)) with respect to the tested foreign corporation, taking into account paragraph (c)(1)(i)(D) of this section. For rules determining when amounts received or accrued by a look-through subsidiary or look-through partnership (and treated as received directly by a tested foreign corporation pursuant to section 1297(c) and § 1.1297–2(b)(2) and (b)(3)) are treated as received from a related person, see § 1.1297–2(d).

(ii) *Ordering rule.* Gross income that is interest, a dividend, or a rent or royalty that is, in each case, received or accrued from a related person is allocated to income that is not passive under the rules of this paragraph (c)(4). If the related person is also a look-through subsidiary or a look-through partnership with respect to the tested foreign corporation, this paragraph (c)(4) applies after the application of the intercompany income rules of § 1.1297–2(c).

(iii) *Allocation of interest.* For purposes of section 1297(b)(2)(C), interest that is received or accrued, as applicable based on the recipient's method of accounting, from a related person is allocated to income of the related person that is not passive income in proportion to the ratio of the portion of the related person's non-passive gross income for its taxable year that ends with or within the taxable year of the recipient to the total amount of

the related person's gross income for the taxable year. If the related person does not have gross income for the taxable year that ends with or within the taxable year of the recipient, the interest is either allocated to income of the related person that is not passive income to the extent the related person's deduction for the interest would be allocable to non-passive income of the related person under the principles of §§ 1.861–9 through 1.861–13T, applied in a reasonable and consistent manner taking into account the general operation of the PFIC rules and the purpose of section 1297(b)(2)(C) or, alternatively, at the election of the tested foreign corporation is treated as allocated entirely to passive income.

(iv) *Allocation of dividends*—(A) *In general.* For purposes of section 1297(b)(2)(C), the principles of § 1.316–2(a) apply in determining from what year's earnings and profits a dividend from a related person is treated as distributed. A dividend is considered to be distributed, first, out of the earnings and profits of the taxable year of the related person that includes the date the dividend is distributed (current earnings and profits) and that ends with or within the taxable year of the recipient; second, out of the earnings and profits accumulated for the immediately preceding taxable year of the related person; third, out of the earnings and profits accumulated for the second preceding taxable year of the related person; and so forth. For purposes of paragraph (c)(4)(iv) of this section, the principles of § 1.243–4(a)(6) apply with respect to a deficit in an earnings and profits account for a prior year.

(B) *Dividends paid out of current earnings and profits.* To the extent that a dividend is paid out of current earnings and profits of the related person for its taxable year that ends with or within the taxable year of the recipient, the dividend is treated as paid ratably out of earnings and profits attributable to passive income and to non-passive income. The portion of the current earnings and profits that is treated as paid out of non-passive income of the related person may be determined by multiplying the current earnings and profits by the ratio of the related person's non-passive gross income as determined under this section (including paragraph (c)(1)(ii) of this section) for the taxable year to its total gross income as determined under this section (including paragraph (c)(1)(ii) of this section) for that year.

(C) *Dividends paid out of accumulated earnings and profits.* To the extent that a dividend from a related person is treated as paid out of the related person's accumulated earnings and profits, the dividend is treated as paid ratably out of accumulated earnings and profits of the related person for prior taxable years (beginning with the most recently accumulated) that are attributable to passive income and to non-passive income, which may be determined in the same manner as in paragraph (c)(4)(iv)(B) of this section. Alternatively, the accumulated earnings and profits may be allocated based on the ratio of accumulated earnings and profits that are attributable to passive income and to non-passive income during either the related party period or the three-year period. The related party period is the entire period during which the related person was related to the recipient. The three-year period is the three taxable years immediately preceding the related person's taxable year that ends with or within the current taxable year of the recipient. The three-year period may be used only if the related person has been related to the recipient for a period longer than the three taxable years immediately preceding the recipient's taxable year.

(v) *Allocation of rents and royalties.* For purposes of section 1297(b)(2)(C), rents and royalties that are received or accrued, as applicable based on the recipient's method of accounting, from a related person are allocable to income of the related person that is not passive income to the extent the related person's deduction for the rent or royalty is allocable to non-passive gross income of the related person under the principles of §§ 1.861–8 through 1.861–14T.

(vi) *Determination of whether amounts are received or accrued from a related person.* For purposes of section 1297(b)(2)(C), the determination of whether interest, dividends, rents, and royalties were received or accrued from a related person is made on the date of the receipt or accrual, as applicable based on the recipient's method of accounting, of the interest, dividend, rent, or royalty.

(vii) *Allocation of distributive share of income from related partnership.* For purposes of section 1297(a)(1), a tested foreign corporation includes its distributive share as provided in section 704 of the separate items of passive or non-passive income from a partnership that is a related person (and not a look-through partnership) with respect to the tested foreign corporation for the taxable year of the tested foreign corporation.

(d) *Asset test*—(1) *Calculation of average annual value (or adjusted bases)*—(i) *General rule.* For purposes of section 1297, the calculation of the average percentage of assets held by a tested foreign corporation during its taxable year that produce passive income or that are held for the production of passive income is determined based on the average of the fair market values, or the average of the adjusted bases, as appropriate, of the passive assets and total assets held (including assets treated as held pursuant to section 1297(c) and § 1.1297–2(b)(2)(i) and (b)(3)) by the foreign corporation on the last day of each measuring period (*measuring date*) of the foreign corporation's taxable year. The average of the fair market values (or the average of the adjusted bases) of the foreign corporation's passive assets or total assets for the taxable year is equal to the sum of the values (or adjusted bases) of the passive assets or total assets, as applicable, on each measuring date of the foreign corporation's taxable year, divided by the number of measuring dates in the taxable year.

(ii) *Measuring period*—(A) *General rule.* Except as otherwise provided in paragraph (d)(1)(ii)(B) of this section, the measuring periods for a tested foreign corporation are the four quarters that make up the foreign corporation's taxable year.

(B) *Election to use alternative measuring period.* The average percentage of assets held by a tested foreign corporation during its taxable year that produce passive income or that are held for the production of passive income may be calculated using a period that is shorter than a quarter (such as a week or month). The same period must be used to measure the assets of the foreign corporation for the first year (including a short taxable year) that this alternative measuring period is used, and for any and all subsequent years, unless a revocation is made. An election to use an alternative measuring period or a revocation of such an election must be made in accordance with the rules of paragraph (d)(1)(iv) of this section.

(C) *Short taxable year.* For purposes of applying section 1297 to a tested foreign corporation that has a taxable year of less than twelve months (short taxable year), the average values (or adjusted bases) are determined based on the measuring dates of the foreign corporation's taxable year that fall within the short taxable year, and by treating the last day of the short taxable year as a measuring date.

(iii) *Adjusted basis election.* An election under section 1297(e)(2)(B) with respect to an eligible tested foreign corporation or a revocation of such an election may be made by the tested foreign corporation or alternatively by the owner (as defined in paragraph (d)(1)(iv) of this section). If made by the

owner, the election must be made in accordance with the rules of paragraph (d)(1)(iv) of this section.

(iv) *Time and manner of elections and revocations*—(A) *Elections.* An owner (as defined in this paragraph (d)(1)(iv)) of a foreign corporation makes an election described in paragraph (d)(1)(ii)(B) or (d)(1)(iii) of this section for a taxable year in the manner provided in the Instructions to Form 8621 (or successor form), if the owner is required to file a Form 8621 (or successor form) with respect to the foreign corporation for the taxable year of the owner in which or with which the taxable year of the foreign corporation for which the election is made ends. If the owner is not required to file Form 8621 (or successor form) with respect to the foreign corporation for the taxable year, the owner makes such an election by filing a written statement providing for the election and attaching the statement to an original or amended Federal income tax return for the taxable year of the owner in which or with which the taxable year of the foreign corporation for which the election is made ends clearly indicating that such election has been made. An election can be made by an owner only if the owner's taxable year for which the election is made, and all taxable years that are affected by the election, are not closed by the period of limitations on assessments under section 6501. Elections described in paragraphs (d)(1)(ii)(B) and (d)(1)(iii) of this section are not eligible for relief under § 301.9100–3 of this chapter. For purposes of this paragraph (d)(1)(iv), an owner of a foreign corporation is a United States person that is eligible under § 1.1295–1(d) to make a section 1295 election with respect to the foreign corporation, or would be eligible under § 1.1295–1(d) to make a section 1295 election if the foreign corporation were a PFIC.

(B) *Revocations and subsequent elections.* An election described in paragraph (d)(1)(ii)(B) or (d)(1)(iii) of this section made pursuant to paragraph (d)(1)(iv)(A) of this section is effective for the taxable year of the foreign corporation for which it is made and all subsequent taxable years of such corporation unless revoked by the Commissioner or the owner (as defined in paragraph (d)(1)(iv)(A) of this section) of the foreign corporation. The owner of a foreign corporation may revoke such an election at any time. If an election described in paragraph (d)(1)(ii)(B) or (d)(1)(iii) of this section has been revoked under this paragraph (d)(1)(iv)(B), a new election described in paragraph (d)(1)(ii)(B) or (d)(1)(iii) of this section, as applicable, cannot be made until the sixth taxable year following the year for which the previous election was revoked, and such subsequent election cannot be revoked until the sixth taxable year following the year for which the subsequent election was made. The owner revokes the election for a taxable year in the manner provided in the Instructions to Form 8621 (or successor form), if the owner is required to file a Form 8621 (or successor form) with respect to the foreign corporation for the taxable year of the owner in which or with which the taxable year of the foreign corporation for which the election is revoked ends, or by filing a written statement providing for the revocation and attaching the statement to an original or amended Federal income tax return for the taxable year of the owner in which or with which the taxable year of the foreign corporation for which the election is revoked ends clearly indicating that such election has been revoked, if the owner is not required to file Form 8621 (or successor form) with respect to the foreign corporation for the taxable year.

(v) *Method of measuring assets*—(A) *Publicly traded foreign corporations.* For purposes of section 1297, the assets of a publicly traded foreign corporation as defined in paragraph (f)(7) of this section (including assets treated as held pursuant to section 1297(c) and § 1.1297–2(b)(2)(i) and (b)(3)(i), other than assets of a look-through subsidiary described in paragraph (d)(1)(v)(B) of this section) must be measured for all measuring periods of the taxable year on the basis of value.

(B) *Non-publicly traded controlled foreign corporation*—(*1*) *In general.* For purposes of section 1297, the assets of a controlled foreign corporation that is not described in paragraph (d)(1)(v)(A) of this section (including assets treated as held pursuant to section 1297(c) and § 1.1297–2(b)(2)(i) and (b)(3)(i), other than assets held by a look-through subsidiary described in paragraph (d)(1)(v)(A) of this section) must be measured for all measuring periods of the taxable year during which the foreign corporation is a controlled foreign corporation on the basis of adjusted basis.

(*2*) *Controlled foreign corporation determination.* For purposes of section 1297(e)(2)(A) and this paragraph (d)(1)(v), the term *controlled foreign corporation* has the meaning provided in section 957, determined without applying subparagraphs (A), (B), and (C) of section 318(a)(3) so as to consider a United States person as owning stock which is owned by a person who is not a United States person.

(C) *Other foreign corporations*—(*1*) *In general.* Except as provided in paragraph (d)(1)(v)(C)(*2*) of this section, the assets of a foreign corporation that is not described in paragraphs (d)(1)(v)(A) or (d)(1)(v)(B) of this section (including assets treated as held pursuant to section 1297(c) and § 1.1297–2(b)(2)(i)) and (b)(3)(i), other than assets held by a look-through subsidiary described in paragraphs (d)(1)(v)(A) or (d)(1)(v)(B) of this section) are measured for all measuring periods of the taxable year on the basis of value, unless a tested foreign corporation or a shareholder makes an election under section 1297(e)(2)(B) in accordance with paragraph (d)(1)(iii) of this section. In the case of a foreign corporation that is described in paragraph (d)(1)(v)(B) of this section for some but not all measuring periods during a taxable year, this paragraph (d)(1)(v)(C)(*1*) applies to the remaining measuring period or periods during that taxable year.

(*2*) *Lower-tier subsidiaries*—(*i*) *Lower-tier subsidiaries that are publicly traded foreign corporations.* For purposes of applying section 1297(a)(2) to the assets of a foreign corporation that is a lower-tier subsidiary of a foreign corporation that directly or indirectly owns all or part of the lower-tier subsidiary (a parent foreign corporation), if the lower-tier subsidiary is described in paragraph (d)(1)(v)(A), the rules of paragraph (d)(1)(v)(A) apply. The previous sentence applies both for purposes of applying section 1297(a)(2) to the lower-tier subsidiary as a tested foreign corporation, and for purposes of applying section 1297(a)(2) to a parent foreign corporation with respect to the assets of the lower-tier subsidiary.

(*ii*) *Lower-tier subsidiaries that are non-publicly traded controlled foreign corporations.* For purposes of applying section 1297(a)(2) to the assets of a foreign corporation that is a lower-tier subsidiary of a parent foreign corporation, if the lower-tier subsidiary is described in paragraph (d)(1)(v)(B), the rules of paragraph (d)(1)(v)(B) apply. The previous sentence applies both for purposes of applying section 1297(a)(2) to the lower-tier subsidiary as a tested foreign corporation, and for purposes of applying section 1297(a)(2) to a parent foreign corporation with respect to the assets of the lower-tier subsidiary.

(*iii*) *Other lower-tier subsidiaries.* For purposes of applying section 1297(a)(2) to a foreign corporation that is a lower-tier subsidiary of a parent foreign corporation, if the lower-tier subsidiary is not described in paragraphs

(d)(1)(v)(A) or (d)(1)(v)(B) of this section, the assets of the lower-tier subsidiary (including assets treated as held pursuant to section 1297(c) and § 1.1297–2(b)(2)(i) and (b)(3)(i)) must be measured under the rules of the same paragraph of this section (d)(1)(v) that applies to the parent foreign corporation. The previous sentence applies both for purposes of applying section 1297(a)(2) to the lower-tier subsidiary as a tested foreign corporation, and for purposes of applying section 1297(a)(2) to a parent foreign corporation. If a tested foreign corporation indirectly owns a lower-tier subsidiary that is not described in paragraphs (d)(1)(v)(A) or (d)(1)(v)(B) of this section through one or more other foreign corporations, the status of any parent foreign corporation in that chain of corporations that is described in paragraph (d)(1)(v)(A) of this section, or if there is no such parent foreign corporation then the status of any parent foreign corporation in that chain of corporations that is described in paragraph (d)(1)(v)(B) of this section, determines the basis on which the assets of the lower-tier subsidiary are measured. In the case of a foreign corporation that is a lower-tier subsidiary with respect to more than one parent foreign corporation, this rule applies separately to measure the assets of the lower-tier subsidiary with respect to each parent foreign corporation.

(D) [Reserved].

(E) *Examples.* The following examples illustrate the application of this paragraph (d)(1)(v).

(*1*) *Example 1*—(*i*) *Facts.* USP, a domestic corporation, owns 60% of TFC1, which is a foreign corporation. The remaining 40% of TFC1's stock is regularly traded on a national securities exchange that is registered with the Securities and Exchange Commission and continues to be until September 1 of the taxable year, when USP acquires all of TFC1's stock pursuant to a tender offer. TFC1 owns 30% of the stock of FS1, a foreign corporation that is neither a publicly traded foreign corporation nor a controlled foreign corporation.

(*ii*) *Results.* TFC1 is a controlled foreign corporation with respect to USP. TFC1 also is a publicly traded foreign corporation until September 1 of the taxable year. For purposes of section 1297, the assets of TFC1 (including the assets of FS1 treated as held by TFC1 pursuant to section 1297(c) and § 1.1297–2(b)(2)(i)) must be measured on the basis of value for each measuring period ending before September 1, pursuant to paragraph (d)(1)(v)(A) of this section. For purposes of applying section 1297 to FS1 as a tested foreign corporation with respect to USP, the assets of FS1 must be measured using the same method as is used for TFC1's assets, pursuant to paragraph (d)(1)(v)(C)(*2*) of this section.

(*2*) *Example 2*—(*i*) *Facts.* A, a United States person, owns 1% of the stock of TFC2, a foreign corporation that is neither a publicly traded foreign corporation nor a controlled foreign corporation. TFC2 owns 25% of the stock of FS2, a foreign corporation that is neither a publicly traded foreign corporation nor a controlled foreign corporation.

(*ii*) *Results.* For purposes of applying section 1297 to TFC2, the assets of TFC2 (including the assets of FS2 treated as held by TFC2 pursuant to section 1297(c) and § 1.1297–2(b)(2)(i)) are measured for all measuring periods of the taxable year on the basis of value, unless A or TFC2 makes an election under section 1297(e)(2)(B) in accordance with paragraph (d)(1)(iii) of this section, pursuant to paragraph (d)(1)(v)(C)(*1*) of this section. For purposes of applying section 1297 to FS2 as a tested foreign corporation with respect to A, the assets of FS2 must be measured using the same method as is used for TFC2's assets, pursuant to paragraph (d)(1)(v)(C)(*2*) of this section.

(*3*) *Example 3*—(*i*) *Facts.* The facts are the same as in paragraph (d)(1)(v)(E)(*2*)(*i*) (the facts in Example 2), except that the 75% of FS2's stock not owned by TFC2 is owned by TFC3, a publicly traded foreign corporation that is neither related to TFC2 nor to A. B, a United States person that is neither related to A nor to TFC2, owns 1% of the stock of TFC3.

(*ii*) *Results.* For purposes of applying section 1297 to TFC2, the results are the same as in paragraph (d)(1)(v)(E)(*2*)(*ii*) (the results in Example 2). For purposes of applying section 1297 to FS2 as a tested foreign corporation with respect to A, the assets of FS2 must be measured using the same method as is used for TFC2's assets, pursuant to paragraph (d)(1)(v)(C)(*2*) of this section. For purposes of applying section 1297 to TFC3, the assets of TFC3 must be measured by reference to value pursuant to paragraph (d)(1)(v)(A) because it is a publicly traded corporation. For purposes of applying section 1297 to FS2 as a tested foreign corporation with respect to B, the assets of FS2 must be measured by reference to value because TFC3 is a publicly traded foreign corporation, pursuant to paragraphs (d)(1)(v)(C)(*2*) and (d)(1)(v)(A) of this section.

(2) [Reserved].

(3) *Dual-character assets*—(i) *General rule.* Except as otherwise provided in paragraph (d)(3)(ii) or (d)(3)(iii) of this section and in § 1.1297–2(c), for purposes of section 1297, an asset (or portion of an asset) that produces both passive income and non-passive income during a taxable year (dual-character asset), including stock and other assets that produce passive and non-passive income under section 1297(b)(2)(C) and paragraph (c)(4) of this section, is treated as two assets for each measuring period in the taxable year, one of which is a passive asset and one of which is a non-passive asset. The value (or adjusted basis) of the dual-character asset is allocated between the passive asset and the non-passive asset in proportion to the relative amounts of passive income and non-passive income produced by the asset (or portion of an asset) during the taxable year. See paragraph (d)(3)(iii) of this section for a special rule concerning stock that has previously produced dividends subject to the exception provided in section 1297(b)(2)(C). For purposes of section 1297(b)(2)(C), a partnership interest in a partnership that is a related person to the tested foreign corporation is treated as producing passive or non-passive income in proportion to the tested foreign corporation's distributive share of partnership passive or non-passive income for the taxable year under paragraph (c)(4)(vii) of this section.

(ii) *Special rule when only part of an asset produces income.* For purposes of section 1297, when only a portion of an asset produces income during a taxable year or a portion of a taxable year, the asset is treated as two assets for that period, one of which is characterized as a passive asset or a non-passive asset based on the income that it produces, and one of which is characterized based on the income that it is held to produce. The value (or adjusted basis) of the asset is allocated between the two assets pursuant to the method that most reasonably reflects the uses of the property. In the case of real property, an allocation based on the physical use of the property generally is the most reasonable method.

(iii) *Special rule for stock that previously produced income that was excluded from passive income under section 1297(b)(2)(C).* Stock with respect to which no dividends are received during a taxable year, but with respect to which dividends were received during one or both of the prior two taxable years, is characterized based on the relative portion of the dividends received that was passive or non-passive. If the dividends were in whole excluded from passive income under section 1297(b)(2)(C) and paragraph (c)(4)(iv) of this section, the stock is

treated as a single non-passive asset. If the dividends were in part excluded from passive income under section 1297(b)(2)(C) and paragraph (c)(4)(iv) of this section, the stock is treated as two assets, one of which is a passive asset and one of which is a non-passive asset. The value (or adjusted basis) of the stock is allocated between the two assets in proportion to the average percentage of aggregate dividends received in the prior two taxable years that were characterized as passive income and the average percentage of aggregate dividends received in the prior two years that were characterized as non-passive income, for the previous two taxable years pursuant to section 1297(b)(2)(C) and paragraph (c)(4)(iv) of this section. If the tested foreign corporation did not receive any dividends from the stock for the current taxable year or within either of the prior two taxable years of the tested foreign corporation, then the stock is treated as a passive asset.

(iv) *Example.* The following example illustrates the application of this paragraph (d)(3).

(A) *Facts.* (*1*) USP is a domestic corporation that owns 30% of TFC, a foreign corporation. The remaining 70% of TFC is owned by FP, a foreign corporation that is unrelated to USP. TFC owns 20% of the value of FS1, a foreign corporation, and FP owns the remaining 80% of the value of FS1. FP, TFC, and FS1 are not controlled foreign corporations within the meaning of section 957(a), and each has a calendar year taxable year.

(*2*) In Year 1, FS1 had current earnings and profits of $1000x, attributable to passive income of $500x and non-passive income of $500x, and paid $300x of dividends to TFC. In Year 2, FS1 had current earnings and profits of $1000x, attributable to passive income of $100x and non-passive income of $900x, and paid $100x of dividends to TFC. In Year 3, FS1 has passive income of $200x and non-passive income of $800x and does not pay a dividend.

(*3*) Throughout Year 3, TFC holds an obligation of FS1 with respect to which FS1 pays $100x of interest.

(*4*) In addition to the stock in FS1 and the FS1 obligation, TFC holds an office building, 40% of which is rented to FP throughout Year 3 for $100x per quarter. During Year 3, FP has only passive income. The remaining 60% of the office building is leased throughout Year 3 to an unrelated person for $300x per quarter, and TFC's own officers or staff of employees regularly perform active and substantial management and operational functions while the property is leased.

(B) *Results.* (*1*) For purposes of section 1297(b)(2)(C), FP is a ''related person'' with respect to TFC because FP owns more than 50% of the vote or value of TFC, and FS1 is a ''related person'' with respect to TFC because FP owns more than 50% of the vote or value of both TFC and of FS1.

(*2*) Under paragraph (c)(4)(iv) of this section, the dividends paid by FS1 in Year 1 were characterized as 50% passive income ($150x) and 50% non-passive income ($150x). Under paragraph (c)(4)(iv) of this section, the dividends paid by FS1 in Year 2 were characterized as 10% passive income ($10x) and 90% non-passive income ($90x). Accordingly, the average percentage of dividends for the previous two taxable years that were characterized as passive income is 40% (((10% × $100x) + (50% × $300x))/($100x + $300x)), and the average percentage of dividends characterized as non-passive income is 60% (((90% × $100x) + (50% × $300x))/($100x + $300x)). Thus, under paragraph (d)(3)(iii) of this section, 60% of each share of stock of FS1 is characterized as a non-passive asset and 40% is characterized as a passive asset for each quarter of Year 3 for purposes of applying section 1297(a)(2) to determine whether TFC is a PFIC.

(*3*) Under paragraph (c)(4)(iii) of this section, the interest received by TFC from FS1 is characterized as 20% ($200x/($200x + $800x)) passive income and thus 80% non-passive income for purposes of applying section 1297(a)(1) to determine whether TFC is a PFIC. Accordingly, under paragraph (d)(3)(i) of this section, 20% of the obligation of FS1 is characterized as a passive asset and 80% as a non-passive asset for each quarter of Year 3 for purposes of applying section 1297(a)(2) to determine whether TFC is a PFIC.

(*4*) Under paragraph (c)(4)(v) of this section, the rent received from FP throughout Year 3 is characterized as 100% passive income. Under paragraph (c)(1)(i)(A) of this section and section 954(c)(2)(A), the rent received from the unrelated person is characterized as 100% non-passive income. Accordingly, under paragraph (d)(3)(i) of this section, the 40% of the office building rented to FP has a value of 25% (($100x × 4)/(($100x × 4) + ($300x × 4))) of the value of the office building and that 25% is a passive asset, and the 60% of the office building rented to the unrelated person has a value of 75% (($300x × 4)/(($100x × 4) + ($300x × 4))) of the value of the office building and is a non-passive asset for purposes of applying section 1297(a)(2) to determine whether TFC is a PFIC.

(4) *Passive treatment of stock and partnership interests.* For purposes of section 1297(a)(2), shares of stock in a corporation that is not a look-through subsidiary (as defined in § 1.1297–2(g)(3)) and partnership interests in a partnership that is not a look-through partnership (as defined in § 1.1297–2(g)(4)) with respect to a tested foreign corporation for a taxable year or portion thereof are treated as passive assets for the taxable year or relevant portion thereof, except to the extent the stock or partnership interest is treated as a dual-character asset under section 1297(b)(2)(C) and paragraph (d)(3) of this section because it produces both passive and non-passive income, or the stock or partnership interest produces solely non-passive income for the taxable year under section 1297(b)(2)(C) and paragraph (c)(4) of this section or under paragraph (d)(5) of this section.

(5) *Dealer property.* For purposes of section 1297(a)(2), an asset that produces, or would produce upon disposition, income or gain that is, or would be, excluded from passive income pursuant to section 954(c)(2)(C) is treated as a non-passive asset.

(e) *Stapled stock.* If a United States person that would be a shareholder (within the meaning of § 1.1291–1(b)(7) and (b)(8)) of a stapled entity (as defined in section 269B(c)(2)) owns stock in all entities that are stapled entities with respect to each other and the shares are stapled interests (as defined in section 269B(c)(3)), the United States person's interests in the stapled entities are treated as an interest in a single entity that holds all of the assets of the stapled entities, conducts all of the activities of the stapled entities, and derives all of the income of the stapled entities for all purposes of the PFIC regime.

(f) *Definitions.* The following definitions apply for purposes of this section and § 1.1297–2:

(1) *Measuring date.* The term *measuring date* has the meaning provided in paragraph (d)(1)(i) of this section.

(2) *Measuring period.* The term *measuring period* means a three-month period or an alternative measuring period, within the meaning provided in paragraph (d)(1)(ii) of this section.

(3) *Non-passive asset.* The term *non-passive asset* means an asset other than a passive asset.

(4) *Non-passive income.* The term *non-passive income* means income other than passive income.

(5) *Passive asset.* The term *passive asset* means an asset that produces passive income, or which is held for the

production of passive income, taking into account the rules in paragraphs (c) and (d) of this section.

(6) *Passive income.* The term *passive income* has the meaning provided in paragraph (c)(1) of this section.

(7) *Publicly traded foreign corporation.* The term *publicly traded foreign corporation* means a foreign corporation the stock of which is regularly traded on an exchange described in section 1297(e)(3), other than in de minimis quantities, for at least twenty trading days during a taxable year.

(8) *Related person.* For purposes of applying the rules with respect to section 1297(b)(2)(C), the term related person means a related person within the meaning of section 954(d)(3).

(9) *Tested foreign corporation.* The term *tested foreign corporation* means a foreign corporation the PFIC status of which is being tested under section 1297(a).

(g) *Applicability date*—(1) *In general.* Except as otherwise provided in paragraph (g)(2) of this section, the rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. A shareholder may choose to apply such rules for any open taxable year beginning before January 14, 2021, provided that, with respect to a tested foreign corporation, the shareholder consistently applies the provisions of this section (except that consistent treatment is not required with respect to paragraph (c)(1)(i)(A) of this section) and § 1.1291–1(b)(8)(iv) and (b)(8)(v)(A), (B), (C), and (D) and §§ 1.1297–2, 1.1298–2, and 1.1298–4 for such year and all subsequent years.

(2) *Paragraph (d)(1)(v)(B)(2) of this section.* Paragraph (d)(1)(v)(B)(*2*) of this section applies to taxable years of shareholders ending on or after October 1, 2019. For taxable years of shareholders ending before October 1, 2019, a shareholder may apply paragraph (d)(1)(v)(B)(*2*) of this section to the last taxable year of a foreign corporation beginning before January 1, 2018, and each subsequent taxable year of the foreign corporation, provided that the shareholder and United States persons that are related (within the meaning of section 267 or 707) to the taxpayer consistently apply such paragraph with respect to all foreign corporations.

§ 1.1297–2 Special rules regarding look-through subsidiaries and look-through partnerships.

(a) *Overview.* This section provides rules concerning the treatment of income and assets of a look-through subsidiary (as defined in § 1.1297–2(g)(3)) or look-through partnership (as defined in § 1.1297–2(g)(4)) for purposes of determining whether a tested foreign corporation (as defined in § 1.1297–1(f)(9)) is a passive foreign investment company (PFIC) under section 1297(a). Paragraph (b) of this section provides guidance for purposes of section 1297(c) on how to determine a tested foreign corporation's ownership in a corporation and how to determine a tested foreign corporation's proportionate share of a look-through subsidiary's or look-through partnership's assets and income. Paragraph (c) of this section provides rules that eliminate certain income and assets related to look-through subsidiaries and look-through partnerships for purposes of determining a tested foreign corporation's PFIC status. Paragraph (d) of this section provides a rule to determine whether certain income received or accrued by look-through subsidiaries and look-through partnerships is received or accrued from a related person for purposes of section 1297(b)(2)(C). Paragraph (e) of this section provides rules concerning the attribution of activities from qualified affiliates (as defined in § 1.1297–2(e)(2)) for purposes of characterizing the income and assets of a look-through subsidiary or look-through partnership. Paragraph (f) of this section provides rules for determining the amount of gain from the direct or indirect sale or exchange of stock of a look-through subsidiary or partnership interests in a partnership described in section 954(c)(4) that is taken into account under section 1297(a) and for determining the passive or non-passive character of gain from the sale of a look-through subsidiary. Paragraph (g) of this section provides definitions applicable for this section, and paragraph (h) of this section provides the applicability date of this section.

(b) *General rules*—(1) *Tested foreign corporation's ownership of a corporation.* For purposes of section 1297(c) and this section, the principles of section 958(a) and the regulations in this chapter under that section applicable to determining direct or indirect ownership by value apply to determine a tested foreign corporation's percentage ownership (by value) in the stock of another corporation. These principles apply whether an intermediate entity is domestic or foreign.

(2) *Tested foreign corporation's proportionate share of the assets and income of a look-through subsidiary*—(i) *Proportionate share of subsidiary assets.* For each measuring period (as defined in § 1.1297–1(f)(2)), a tested foreign corporation is treated as if it held its proportionate share of each asset of a look-through subsidiary, determined based on the tested foreign corporation's percentage ownership (by value) (as determined under paragraph (b)(1) of this section)) of the look-through subsidiary on the measuring date (as defined in § 1.1297–1(f)(1)). A tested foreign corporation's proportionate share of a look-through subsidiary's asset is treated as producing passive income, or being held to produce passive income, to the extent the asset produced, or was held to produce, passive income in the hands of such look-through subsidiary under the rules of paragraph (b)(2)(ii) of this section.

(ii) *Proportionate share of subsidiary income*—(A) *General rule.* A tested foreign corporation is treated as if it received directly its proportionate share of each item of gross income or loss of a corporation for a taxable year if the corporation is a look-through subsidiary with respect to the tested foreign corporation for the taxable year of the tested foreign corporation. In such case, a tested foreign corporation's proportionate share of a look-through subsidiary's gross income or loss is determined based on the corporation's average percentage ownership (by value) of the look-through subsidiary. The exceptions to passive income in section 1297(b)(2) and the relevant exceptions to foreign personal holding company income in section 954(c) that are based on whether income is derived in the active conduct of a business or whether a corporation is engaged in the active conduct of a business apply to such income only if the exception would have applied to exclude the income from passive income or foreign personal holding company income in the hands of the subsidiary, determined by taking into account only the activities of the subsidiary except as provided in paragraph (e) of this section. See paragraph (d) of this section for rules determining whether a person is a related person for purposes of applying section 1297(b)(2)(C) in the case of income received or accrued by a subsidiary that is treated as received directly by a tested foreign corporation pursuant to this paragraph (b)(2).

(B) *Partial year.* When a corporation is not a look-through subsidiary with respect to a tested foreign corporation for an entire taxable year of the tested foreign corporation, the tested foreign corporation may be treated as if it received directly its proportionate share of the gross income or loss of the first corporation for each measuring period in the year for which the first

corporation is a look-through subsidiary, if the conditions in paragraph (g)(3)(ii)(B) of this section are satisfied. In such case, a tested foreign corporation's proportionate share of a look-through subsidiary's gross income or loss is determined based on the tested foreign corporation's percentage ownership (by value) (as determined under paragraph (b)(1) of this section) of the look-through subsidiary on the relevant measuring date.

(iii) *Coordination of section 1297(c) with section 1298(b)(7).* A tested foreign corporation is not treated under section 1297(c) and this paragraph (b) as holding its proportionate share of the assets of a domestic corporation, or receiving directly its proportionate share of the gross income or loss of the domestic corporation, if the stock of the domestic corporation is treated as an asset that is not a passive asset (as defined in § 1.1297–1(f)(5)) that produces income that is not passive income (as defined in § 1.1297–1(f)(6)) under section 1298(b)(7) (concerning the treatment of certain foreign corporations owning stock in certain 25-percent-owned domestic corporations). See § 1.1298–4 for rules governing the application of section 1298(b)(7).

(3) *Tested foreign corporation's proportionate share of the assets and income of a look-through partnership*—(i) *Proportionate share of partnership assets.* For each measuring period (as defined in § 1.1297–1(f)(2)), a tested foreign corporation is treated as if it held its proportionate share of each asset of a look-through partnership, determined based on the tested foreign corporation's percentage ownership (by value) (as determined under paragraph (b)(1) of this section)) of the look-through partnership on the measuring date (as defined in § 1.1297–1(f)(1)). A tested foreign corporation's proportionate share of a look-through partnership's asset is treated as producing passive income, or being held to produce passive income, to the extent the asset produced, or was held to produce, passive income in the hands of the partnership under the rules in paragraph (b)(3)(ii) of this section.

(ii) *Proportionate share of partnership income*—(A) *General rule.* A tested foreign corporation is treated as if it received directly its proportionate share of any item of gross income or loss of a partnership that is a look-through partnership with respect to the tested foreign corporation for the taxable year of the tested foreign corporation. The exceptions to passive income in section 1297(b)(2) and the relevant exceptions to foreign personal holding company income in section 954(c) that are based on whether income is derived in the active conduct of a business or whether a corporation is engaged in the active conduct of a business apply to such income only if the exception would have applied to exclude the income from passive income or foreign personal holding company income in the hands of the partnership, determined by taking into account only the activities of the partnership except as provided in paragraph (e) of this section. See paragraph (d) of this section for rules determining whether a person is a related person for purposes of applying section 1297(b)(2)(C) in the case of income received or accrued by a partnership that is treated as received directly by a tested foreign corporation pursuant to this paragraph (b)(3).

(B) *Partial year.* When a partnership is not a look-through partnership with respect to a tested foreign corporation for an entire taxable year of the tested foreign corporation, the tested foreign corporation may be treated as if it received directly its proportionate share of the gross income of the partnership for each measuring period in the year for which the partnership is a look-through partnership, provided that the conditions set forth in paragraph (g)(3)(ii)(B) of this section would be satisfied if the partnership were a corporation.

(4) *Examples.* The following examples illustrate the rules of this paragraph (b). For purposes of these examples, USP is a domestic corporation; TFC, LTS, and FS are foreign corporations that are not controlled foreign corporations within the meaning of section 957(a); USP owns 30% of TFC; and LTS owns 25% of the only class of FS stock.

(i) *Example 1*—(A) *Facts.* TFC directly owns 80% of the only class of LTS stock for TFC's and LTS's entire taxable year.

(B) *Results*—(*1*) *LTS.* Under paragraph (b)(1) of this section and pursuant to the principles of section 958(a), LTS owns 25% of the value of FS. Under paragraph (b)(2)(i) and (ii) of this section, in determining whether LTS is a PFIC under section 1297(a), LTS is treated as if it held 25% of each of FS's assets on each of the measuring dates in its taxable year and received directly 25% of the gross income of FS for the taxable year.

(*2*) *TFC.* Under paragraph (b)(1) of this section and pursuant to the principles of section 958(a), TFC owns 80% of the value of LTS and indirectly owns 20% of the value of FS. Under paragraph (b)(2) of this section, in determining whether TFC is a PFIC under section 1297(a), TFC is treated as if it held 80% of each of LTS's assets on each of the measuring dates in its taxable year and received directly 80% of the gross income of LTS for the taxable year. However, because TFC indirectly owns less than 25% of FS, FS is not a look-through subsidiary with respect to TFC and, therefore, TFC is treated as if it held a 20% interest in the stock of FS (and not the assets of FS), and received 80% of any dividends paid from FS to LTS (and not any income of FS).

(ii) *Example 2*—(A) *Facts.* TFC directly owns 25% of the only class of LTS stock on the last day of each of the first three quarters of its taxable year but disposes of its entire interest in LTS during the fourth quarter of its taxable year.

(B) *Results.* Under paragraph (b)(1) and pursuant to the principles of section 958(a), on each of its first three measuring dates, TFC owns 25% of the value of LTS and indirectly owns 6.25% of the value of FS. Under paragraph (g)(3) of this section, if information about the gross income of LTS for each of the first three quarters of its taxable year is available to TFC, LTS is treated as a look-through subsidiary with respect to TFC for those quarters because TFC owned 25% of the value of LTS on the measuring dates with respect to those measuring periods. In that case, under paragraph (b)(2) of this section, in determining whether TFC is a PFIC under section 1297(a), TFC is treated as if it held 25% of each of LTS's assets and received directly 25% of the gross income of LTS on each of the first three measuring dates in its taxable year. For each of its first three quarters, if LTS is treated as a look-through subsidiary with respect to TFC under paragraph (g)(3) of this section, then TFC is treated as if it held a 6.25% interest in the stock of FS (and not the assets of FS) and received 25% of any dividends paid from FS to LTS (and not any income of FS). Under paragraph (g)(3) of this section, if information about the gross income of LTS for each of the first three quarters of its taxable year is not available to TFC, then LTS is not a look-through subsidiary with respect to TFC.

(iii) *Example 3*—(A) *Facts.* TFC directly owns 100% of the only class of LTS stock for TFC's and LTS's entire taxable year. TFC sells one item of property described in section 954(c)(1)(B)(i) for a gain of $25x and another for a loss of $10x, and no exception from passive income applies to either amount. During the taxable year, FS sells one item of property described in section 954(c)(1)(B)(i) for a gain of $50x and another for a loss of $55x; no exception from passive income applies to either amount.

(B) *Results.* Under paragraph (b)(1) of this section and pursuant to the principles of section 958(a), TFC owns 100% of the value of LTS, and TFC indirectly owns 25% of the value of FS. Under paragraph (b) of this section, in determining whether TFC is a PFIC under section 1297(a), TFC is treated as if it held 100% of LTS's assets on each of the measuring dates in its taxable year and received directly 100% of the gross income of LTS for the taxable year. Furthermore, TFC is treated as if it held 25% of each of FS's assets and received directly 25% of the gross income of FS. Pursuant to § 1.1297–1(c)(1)(ii), the excess of gains over losses from property transactions described in section 954(c)(1)(B) is taken into account as gross income for purposes of section 1297, and items of gain or loss of look-through subsidiaries are treated as recognized by a tested foreign corporation. Accordingly, TFC takes into account the net $5x loss from the sales of property by FS. TFC's income from its own sales of property constitutes passive income pursuant to § 1.1297–1(c) and section 954(c)(1)(B), although, pursuant to § 1.1297–1(c)(1)(ii), only the excess of gains over losses, $15x ($25x − $10x), is taken into account as gross income for purposes of section 1297. As a result, TFC's income (including the $5x loss from FS), all of which is passive income, equals $10x ($15x − $5x) of gross income.

(c) *Elimination of certain intercompany assets and income*—(1) *General rule for asset test*—(i) *LTS stock.* For purposes of section 1297(a)(2), a tested foreign corporation does not take into account the value (or adjusted basis) of stock of a look-through subsidiary (*LTS stock*), including LTS stock that the tested foreign corporation is treated as owning on a measuring date pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section. Furthermore, for purposes of section 1297(a)(2), a tested foreign corporation does not take into account the value (or adjusted basis) of its own stock that it is treated as owning on a measuring date pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section.

(ii) *LTS obligation.* For purposes of section 1297(a)(2), a tested foreign corporation does not take into account the value (or adjusted basis) of its proportionate share of a direct LTS obligation, an indirect LTS obligation or a TFC obligation that it is treated as owning on a measuring date. The term *direct LTS obligation* means a debt obligation of, lease to, or license to a look-through subsidiary (*LTS debt, LTS lease,* and *LTS license,* respectively, and *LTS obligation* collectively) from the tested foreign corporation that the tested foreign corporation owns on a measuring date, and the term *indirect LTS obligation* means a LTS obligation from a look-through subsidiary that the tested foreign corporation is treated as owning on a measuring date pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section. The term *TFC obligation* means a debt obligation of, lease to, or a license to the tested foreign corporation from a look-through subsidiary that the tested foreign corporation is treated as owning on a measuring date pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section. The tested foreign corporation's proportionate share of a LTS obligation or a TFC obligation is the value (or adjusted basis) of the item multiplied by the tested foreign corporation's percentage ownership (by value) in each relevant look-through subsidiary. For purposes of section 1297(a)(2) and § 1.1297–1(d) as applied to a tested foreign corporation, property subject to a LTS lease or LTS license or a lease or license to the tested foreign corporation is characterized as either producing passive income or non-passive income (or both) by taking into account the activities of the qualified affiliates (as defined in paragraph (e)(2) of this section) of the entity that owns the property. For this purpose, the activities of the entity that owns the property that is subject to the lease or license are not taken into account to the extent that they relate to the lease or license.

(2) *General rule for income test*—(i) *LTS stock.* For purposes of section 1297(a)(1), a tested foreign corporation does not take into account dividends derived with respect to LTS stock, including dividends that the tested foreign corporation is treated as receiving on a measuring date pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section; provided that, notwithstanding the foregoing, a tested foreign corporation takes into account dividends that are attributable to income that was not treated as received directly by the tested foreign corporation pursuant to paragraph (b)(2) of this section. For this purpose, the rules of § 1.1297–1(c)(4)(iv)(A) apply to determine the earnings and profits from which a dividend is paid, substituting the term ''look-through subsidiary'' for ''related person.''

(ii) *LTS obligation.* For purposes of section 1297(a)(1), a tested foreign corporation does not take into account its proportionate share of interest, rents, or royalties derived with respect to direct or indirect LTS obligations or TFC obligations. The tested foreign corporation's proportionate share of interest, rents, or royalties is the amount of the item multiplied by the tested foreign corporation's percentage ownership (by value) in each relevant look-through subsidiary.

(3) *Partnerships.* For purposes of section 1297(a)(1) and (a)(2), the principles of paragraphs (c)(1) and (2) of this section apply with respect to ownership interests in, debt of, and leases or licenses to a look-through partnership (as defined in paragraph (g)(4) of this section), and with respect to distributions and the distributive shares of income from a look-through partnership and interest, rents, or royalties derived with respect to the debt, leases or licenses of a look-through partnership.

(4) *Examples.* The following examples illustrate the rules of this paragraph (c). For purposes of these examples, USP is a domestic corporation; USP owns 30% of TFC; TFC, LTS, LTS1, LTS2, and FS are foreign corporations that are not controlled foreign corporations within the meaning of section 957(a); FPS is a foreign partnership; and TFC, LTS1, and LTS2 measure assets for purposes of section 1297(a)(2) based on value.

(i) *Example 1*—(A) *Facts.* TFC directly owns 80% of the only class of LTS stock for TFC's and LTS's entire taxable year, and LTS is a look-through subsidiary (as defined in paragraph (g)(3) of this section) with respect to TFC. LTS owns 25% of the only class of FS stock, and FS is a look-through subsidiary with respect to LTS. Pursuant to the principles of section 958(a), TFC owns 80% of the value of LTS, LTS owns 25% of the value of FS, and TFC indirectly owns 20% of the value of FS. During the first quarter of the taxable year, LTS received a $20x dividend from FS.

(B) *Results*—(*1*) *LTS.* Under paragraph (c)(1)(i) of this section, for purposes of applying section 1297(a)(2) to LTS, LTS's assets do not include the stock of FS. Under paragraph (c)(2)(i) of this section, for purposes of applying section 1297(a)(1) to LTS, LTS's income does not include the $20x dividend from FS.

(*2*) *TFC.* Under paragraph (c)(1)(i) of this section, for purposes of applying section 1297(a)(2) to TFC, TFC's assets do not include the stock of LTS. Under paragraph (b)(2)(ii)(A) of this section, for purposes of applying section 1297(a)(1) to TFC, TFC is treated as receiving directly the income of LTS. Because TFC indirectly owns less than 25% of FS, FS is not a look-through subsidiary with respect to TFC and, therefore, TFC's assets include the value of TFC's 20% interest in the stock of FS and do not include 20% of FS's assets.

Similarly, TFC is treated as if it received $16x (80% × $20x) of the $20x dividend paid from FS to LTS (and not any income of FS). Because the dividend constitutes gross income to LTS (although it is eliminated for purposes of applying section 1297(a)(1) to LTS), TFC is treated as receiving the dividend from FS directly under paragraph (b)(2)(ii)(A) of this section. Because the dividend is from a subsidiary that is not a look-through subsidiary with respect to TFC, paragraph (c)(2)(i) of this section does not apply to eliminate the $16x dividend for purposes of section 1297(a).

(ii) *Example 2*—(A) *Facts.* TFC directly owns 40% of the value of LTS1 stock on each of the measuring dates, and thus is treated under paragraph (b)(1) of this section as owning 40% of LTS1's assets on each of the measuring dates. TFC's assets include a loan to LTS1 with a balance of $1,000x on each of the measuring dates. During the first quarter of the taxable year, TFC received $20x of dividends from LTS1, which were attributable to income of LTS1 treated as received directly by TFC pursuant to paragraph (b)(2) of this section, and $30x of interest on the loan, both of which were paid in cash.

(B) *Results.* Under paragraph (c)(1)(i) of this section, for purposes of applying section 1297(a), TFC's assets do not include the stock of LTS1, and TFC's income does not include the $20x of dividends received from LTS1 pursuant to paragraph (c)(2)(i) of this section. Similarly, under paragraph (c)(1)(ii) of this section TFC's assets include only $600x ($1,000x loan − (40% × $1,000x)) of the loan to LTS1, and under paragraph (c)(2)(ii) of this section, TFC's income includes only $18x ($30x interest − (40% × $30x)) of the interest from LTS1. However, TFC's assets include the entire $50x of cash ($20x of dividends and $30x of interest) received from LTS1.

(iii) *Example 3*—(A) *Facts.* The facts are the same as in paragraph (c)(4)(ii)(A) of this section (the facts in *Example 2*), except that TFC also directly owns 30% of the value of LTS2 stock on each of the measuring dates, and thus is treated under paragraph (b)(1) of this section as owning 30% of LTS2's assets, and LTS1's assets also include a loan to LTS2 with a balance of $200x on each of the measuring dates. During the first quarter of the taxable year, LTS1 received $5x of interest on the loan, which was paid in cash.

(B) *Results.* The results are the same as in paragraph (c)(4)(i)(B) of this section (the results in *Example 1*), except that TFC's assets also do not include the stock of LTS2. Similarly, although TFC would be treated under paragraph (b)(2) of this section as owning $80x (40% × $200x) of the LTS1 loan to LTS2, under paragraph (c)(1)(ii) of this section TFC does not take into account its proportionate share of an indirect LTS obligation and accordingly, TFC does not take into account $24x (30% × $80x) of the loan to LTS2. As a result, TFC's assets include only $56x ($80x − $24x) of the LTS1 loan to LTS2. Furthermore, although TFC would be treated under paragraph (b)(2) of this section as receiving $2x (40% × $5x) of the interest received by LTS1 from LTS2, under paragraph (c)(2)(ii) of this section TFC does not take into account its proportionate share of interest with respect to an indirect LTS obligation and thus, TFC does not take into account $0.60x (30% × $2x) of the interest received by LTS1. Accordingly, TFC's income includes only $1.40x ($2x − $0.60x) of the interest from LTS2. Furthermore, TFC's assets include $2x (40% × $5x) of LTS1's cash received from LTS2.

(iv) *Example 4*—(A) *Facts.* TFC directly owns 80% of the value of LTS1 stock on each of the measuring dates, and thus is treated under paragraph (b)(1) of this section as owning 80% of LTS1's assets on each of the measuring dates. TFC also directly owns 50% of the value in FPS on each of the measuring dates. LTS1's assets include the remaining 50% of the value in FPS and a loan to FPS with a balance of $500x on each of the measuring dates. FPS's assets include a loan to TFC with a balance of $1000x on each of the measuring dates. During the first measuring period of the taxable year, FPS received $30x of interest from TFC, and LTS1 received $15x of interest from FPS, both of which were paid in cash. During the last measuring period of the taxable year, FPS received $80x of income from an unrelated person in cash and distributed $60x of such income in cash to TFC and LTS1 in proportion to their interests in FPS.

(B) *Results.* Under paragraph (c)(1)(i) and (ii) of this section, for purposes of applying section 1297(a), TFC's assets do not include the stock of LTS1, the interests in FPS owned by TFC directly and through LTS1, any of the loan by FPS to TFC, or any of the loan by LTS1 to FPS. Similarly, under paragraph (c)(2)(i) and (ii) of this section, TFC's income does not include any of the $30x of interest received by FPS from TFC, any of the $15x of interest received by LTS1 from FPS, or any of the $60x of distributions received by TFC and LTS1 from FPS. However, on each of the measuring dates, TFC's assets include $27x ((50% × $30x) + (80% × 50% × $30x)) of the $30 of cash received by FPS from TFC and $12x (80% × $15x) of the $15x of cash received by LTS1 from FPS. Moreover, on the last measuring date of the taxable year, TFC's assets include $18x ((50% × $20x) + (80% × 50% × $20x)) of the $20x ($80x − $60x) of cash received by FPS from the unrelated person and retained by FPS and $54x ((50% × $60x) + (80% × 50% × $60x)) of the $60x cash received by FPS from the unrelated person and distributed. Furthermore, TFC's income includes $72x ((50% × $80x) + (80% × 50% × $80x)) of the $80x of income received by FPS from an unrelated person.

(v) *Example 5*—(A) *Facts.* TFC directly owns 80% of the value of the stock of LTS1 and 60% of the value of the stock of LTS2 on each of the measuring dates, and thus is treated under paragraph (b)(1) of this section as owning 80% of LTS1's assets and 60% of LTS2's assets on each of the measuring dates. TFC's assets include a license for the use of its intangible property by LTS1 with a value of $5,000x on each of the measuring dates, LTS1's assets include a sub-license of such license to LTS2 with a value of $2,000x on each of the measuring dates, and LTS2's assets include a lease of its building to LTS1 with a value of $4,000x on each of the measuring dates. LTS1 and LTS2 each use the intangible property that is the subject of the license and sub-license in its respective trade or business, and LTS1 uses the building in its trade or business. During the last quarter of the taxable year, TFC received a royalty of $500x from LTS1 with respect to the license, and LTS1 received a royalty of $200x from LTS2 with respect to the sub-license, both of which were paid in cash. LTS2 received $100x of rent paid in cash from LTS1 during each quarter of the taxable year with respect to the building lease.

(B) *Results*—(*1*) *Asset test.* Under paragraph (c) of this section, for purposes of applying section 1297(a)(2) to TFC's final measuring period, the following analysis applies. TFC's assets do not include the stock of LTS1 and LTS2. Similarly, TFC's assets include only $1,000x ($5,000x license − (80% × $5,000x)) of the license to LTS1. However, TFC's assets include the entire $500x of cash it received from LTS1 as a result of the royalty. Moreover, although TFC would be treated under paragraph (b)(2) of this section as owning $1,600x (80% × $2,000x) of the LTS1 sub-license to LTS2, under paragraph (c)(1)(ii) of this section TFC does not take into account its proportionate share of an indirect LTS obligation, and accordingly TFC

does not take into account $960x (60% × $1,600x) of LTS1's sub-license to LTS2. As a result, TFC's assets include $640x ($1,600x − $960x) of the sub-license. In addition, TFC's assets include $160x (80% × $200x) of LTS1's cash received from LTS2 as a result of the royalty to LTS1. Similarly, although TFC would be treated under paragraph (b)(2) of this section as owning $2,400x (60% × $4,000x) of the LTS2 lease to LTS1, under paragraph (c)(1)(ii) of this section TFC does not take into account $1,920x (80% × $2,400x) of the LTS2 building lease, and accordingly, its assets include $480x ($2,400x − $1,920x) of the lease. TFC's assets also include $240x (60% × $100x × 4) of LTS2's cash received from LTS1 as a result of the rental payment to LTS2.

(*2*) *Income test.* Under paragraph (c)(2)(ii) of this section, because TFC does not take into account its proportionate share of a direct LTS obligation, TFC's income includes only $100x ($500x royalty − (80% × $500x)) of the royalties from LTS1. Furthermore, although TFC would be treated under paragraph (b)(2) of this section as receiving $160x (80% × $200x) of the royalty received by LTS1 from LTS2, under paragraph (c)(2)(ii) of this section TFC does not take into account its proportionate share of royalties derived with respect to an indirect LTS obligation, and accordingly TFC does not take into account $96x (60% × $160x) of the royalty received by LTS1. As a result, TFC's income includes only $64x ($160x − $96x) of the royalty from LTS2. Similarly, although TFC would be treated under paragraph (b)(2) of this section as receiving $240x (60% × $100x × 4) of the rent received by LTS2 from LTS1, under paragraph (c)(2)(ii) of this section TFC does not take into account its proportionate share of rent derived with respect to an indirect LTS obligation, and accordingly TFC does not take into account $192x (80% × $240) of the rent received by LTS2. Therefore, TFC's income includes only $48 ($240x − $192x) of the rent received from LTS1.

(*3*) *Treatment of intangible and rental property.* For purposes of determining whether the intangible property that TFC owns and the building that TFC is treated as owning under paragraph (b)(2) of this section is held in the production of passive income, the activities performed by TFC and its qualified affiliates with respect to the property are taken into account under paragraphs (c)(1)(ii) and (e) of this section. Because TFC is the common parent of the affiliated group (as determined under paragraph (e)(2) of this section) that includes LTS1 and LTS2, LTS1 and LTS2 are qualified affiliates of TFC and the activities of their officers and employees with respect to the intangible property and building are taken into account to determine whether the building and intangible property would be treated as passive assets.

(d) *Related person determination for purposes of section 1297(b)(2)(C)*—(1) *General rule.* For purposes of section 1297(b)(2)(C), interest, dividends, rents or royalties received or accrued by a look-through subsidiary (and treated as received directly by a tested foreign corporation pursuant to section 1297(c) and paragraph (b)(2) of this section) are considered received or accrued from a related person only if the payor of the interest, dividend, rent or royalty is a related person (within the meaning of section 954(d)(3)) with respect to the look-through subsidiary, taking into account § 1.1297–1(c)(1)(i)(D). Similarly, for purposes of 1297(b)(2)(C), interest, dividends, rents or royalties received or accrued by a look-through partnership (and treated as received directly by a tested foreign corporation pursuant to paragraph (b)(3) of this section) are considered received or accrued from a related person only if the payor of the interest, dividend, rent or royalty is a related person (within the meaning of section 954(d)(3)) with respect to the look-through partnership, taking into account § 1.1297–1(c)(1)(i)(D).

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

(i) *Facts.* USP is a domestic corporation that owns 30% of TFC. TFC directly owns 30% of the value of FS1 stock, and thus under paragraph (b) of this section is treated as owning 30% of FS1's assets and earning 30% of FS1's gross income. The remaining FS1 stock is owned by an unrelated foreign person. FS1 directly owns 60% of the vote of FS2 stock and 20% of the value of FS2 stock. The remaining vote and value of FS2 stock are owned by an unrelated foreign person. TFC, FS1, and FS2 are foreign corporations that are not controlled foreign corporations within the meaning of section 957(a). FS1 receives a $100x dividend from FS2.

(ii) *Results.* Pursuant to section 1297(c) and paragraph (b)(2) of this section, TFC is treated as receiving directly $30x of the dividend income received by FS1. FS2 is a related person (within the meaning of section 954(d)(3)) with respect to FS1 for purposes of section 1297(b)(2)(C) because FS1 owns more than 50% of the vote of FS2. FS2 is not a related person (within the meaning of section 954(d)(3)) with respect to TFC for purposes of section 1297(b)(2)(C) because TFC indirectly does not own more than 50% of the vote or value of the FS2 stock. Under paragraph (d)(1) of this section, for purposes of determining whether the dividend income received by FS1 is subject to the exception in section 1297(b)(2)(C) for purposes of testing the PFIC status of TFC, the dividend is treated as received from a related person because FS1 and FS2 are related persons within the meaning of section 1297(b)(2)(C). Therefore, to the extent the dividend income received by FS1 would be properly allocable to income of FS2 that is not passive income, the dividend income that TFC is treated as receiving under section 1297(c) and paragraph (b)(2)(ii) of this section is treated as non-passive income (as defined in § 1.1297–1(f)(4)).

(e) *Treatment of activities of certain look-through subsidiaries and look-through partnerships for purposes of certain exceptions*—(1) *General rule.* An item of income received by a tested foreign corporation (including an amount treated as received or accrued pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section) that would be passive income in the hands of the entity that actually received or accrued it is not passive if the item would be excluded from foreign personal holding company income under the following exceptions contained in section 954(c) that are based on whether the entity is engaged in the active conduct of a trade or business, determined by taking into account the activities performed by the officers and employees of the tested foreign corporation as well as activities performed by the officers and employees of any qualified affiliate of the tested foreign corporation—

(i) Section 954(c)(1)(B) and § 1.954–2(e)(1)(ii) and (3)(ii), (iii) and (iv);

(ii) Section 954(c)(1)(C) and § 1.954–2(f)(1)(ii) and (2)(iii)(D);

(iii) Section 954(c)(1)(D) and § 1.954–2(g)(2)(ii);

(iv) Section 954(c)(2)(A) and § 1.954–2(b)(6), (c), and (d);

(v) Section 954(c)(2)(B) and § 1.954–2(b)(2); and

(vi) Section 954(c)(2)(C) and § 1.954–2(h)(3)(ii).

(2) *Qualified affiliate.* The term *qualified affiliate* means a corporation or a partnership that is included in an affiliated group that includes the tested foreign corporation. For purposes of this paragraph (e), the term *affiliated group* has the meaning provided in section 1504(a), except that—

(i) The affiliated group is determined without regard to sections 1504(a)(2)(A), (b)(2) and (b)(3);

(ii) Subject to paragraph (e)(2)(iii) of this section, a partnership is treated as an includible corporation;

(iii) The common parent of the affiliated group is not a domestic corporation or domestic partnership;

(iv) Section 1504(a)(2)(B) is applied by substituting ''more than 50 percent'' for ''at least 80 percent'';

(v) A foreign corporation or foreign partnership must be the common parent of the affiliated group;

(vi) Subject to paragraph (e)(2)(vii) of this section, a partnership is included as a member of the affiliated group if more than 50 percent of the value of its capital interests or profits interests is owned by one or more corporations or partnerships that are included in the affiliated group; and

(vii) A corporation or a partnership that is not the common parent of an affiliated group is included in the affiliated group only if it would be a look-through subsidiary or look-through partnership, as applicable, of the common parent if the common parent were a tested foreign corporation.

(3) *Examples.* The following examples illustrate the rule of this paragraph (e).

(i) *Example 1*—(A) *Facts.* USP is a domestic corporation that directly owns 20% of the outstanding stock of FS1. The remaining 80% of the outstanding stock of FS1 is directly owned by a foreign person that is not related to USP. FS1 directly owns 100% of the value of the outstanding stock of FS2 and directly owns 80% of the value of the outstanding stock of FS3. The remaining 20% of the value of the outstanding stock of FS3 is directly owned by a foreign person that is not related to USP. FS2 directly owns 80% of the value of the outstanding stock of FS4. The remaining 20% of the value of the outstanding stock of FS4 is directly owned by a foreign person that is not related to USP. FS1, FS2, FS3 and FS4 are all organized in Country A and are not controlled foreign corporations within the meaning of section 957(a). FS4 owns real property that is leased to a person that is not a related person, but does not perform any activities. FS1 and FS2 also do not perform any activities. Officers and employees of FS3 in Country A perform activities with respect to the real property of FS4 that, if performed by officers or employees of FS4, would allow the rental income in the hands of FS4 to qualify for the exception from foreign personal holding company income in section 954(c)(2)(A) and § 1.954–2(b)(6) and (c)(1)(ii).

(B) *Results*—(*1*) *Qualified affiliates.* FS1 is the common parent of the affiliated group (as determined under paragraph (e)(2) of this section) that includes FS2, FS3, and FS4 because (i) FS1 owns more than 50% by value of FS2 and FS3, (ii) FS2 owns more than 50% by value of FS4, and (iii) FS2, FS3, and FS4 would be look-through subsidiaries with respect to FS1 if FS1 were the tested foreign corporation. Accordingly, each of FS1, FS2, FS3 and FS4 are qualified affiliates (as determined under paragraph (e)(2) of this section) with respect to the other members of the group for purposes of determining whether FS1, FS2, FS3, or FS4 is a PFIC .

(*2*) *FS1 and FS2.* Under this paragraph (e), for purposes of determining whether the rental income actually received by FS4 with respect to the real property owned and rented by FS4 and treated under section 1297(c) and paragraph (b)(2) of this section as received directly by FS1 or by FS2, respectively, is passive income for purposes of section 1297, the activities of FS3 are taken into account because FS3 is a qualified affiliate of FS1 and FS2, respectively. Thus, the exception in section 954(c)(2)(A) would apply, and the rental income treated as received by FS1 or by FS2, respectively, would be treated as non-passive income for purposes of determining whether FS1 or FS2 is a PFIC.

(*3*) *FS4.* Under this paragraph (e), for purposes of determining whether the rental income received by FS4 with respect to the real property owned and rented by FS4 is passive income for purposes of section 1297, the activities of FS3 are taken into account, because FS3 is a qualified affiliate of FS4. Thus, the exception in section 954(c)(2)(A) would apply, and the rental income received by FS4 would be treated as non-passive income for purposes of determining whether FS4 is a PFIC.

(ii) *Example 2*—(A) *Facts.* The facts are the same as in paragraph (e)(3)(i)(A) of this section (the facts in *Example 1*), except that FS2 also owns real property that is leased to a person that is not a related person, and the officers and employees of FS2 in Country A engage in activities that would allow rental income received by FS2 with respect to its real property to qualify for the exception in section 954(c)(2)(A) and § 1.954–2(b)(6) and (c)(1)(iv), relying on the rule in § 1.954–2(c)(2)(ii) that provides that an organization is substantial in relation to rents if active leasing expenses equal or exceed 25% of adjusted leasing profit. However, the active leasing expenses of FS1 are less than 25% of its adjusted leasing profit, which includes the rental income of FS4 treated as received directly by FS1 as well as the rental income of FS2 treated as received directly by FS1.

(B) *Results.* Because FS2's rental income constitutes non-passive income as a result of the application of § 1.1297–1(c)(1)(i)(A) and section 954(c)(2)(A), it is treated as non-passive income that FS1 is treated as receiving directly under section 1297(c) and paragraph (b)(2) of this section for purposes of determining whether FS1 is a PFIC, and accordingly, it is not necessary to rely on paragraph (e) of this section.

(iii) *Example 3*—(A) *Facts.* The facts are the same as in paragraph (e)(3)(i)(A) of this section (the facts in *Example 1*), except that USP directly owns 60% of the outstanding stock of FS1.

(B) *Results.* Under paragraph (e)(2)(iii) of this section, USP cannot be the common parent of an affiliated group for purposes of paragraph (e)(2) of this section because it is a domestic corporation. Because FS1 is a foreign corporation, FS1 may be the common parent of an affiliated group for purposes of paragraph (e)(2) of this section. The results therefore are the same as in paragraph (e)(3)(i)(B) of this section (the results in Example 1).

(f) *Gain on disposition of a look-through subsidiary or look-through partnership*—(1) [Reserved].

(2) *Amount of gain taken into account from disposition of look-through subsidiary.* For purposes of section 1297(a)(1), section 1298(b)(3), and § 1.1298–2, the amount of gain that is taken into account by a tested foreign corporation from the tested foreign corporation's direct disposition of stock of a look-through subsidiary, or an indirect disposition resulting from the disposition of stock of a look-through subsidiary by other look-through subsidiaries or by look-through partnerships, is the residual gain. The residual gain equals the total gain recognized by the tested foreign corporation (including gain treated as recognized by the tested foreign corporation pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section) from the disposition of the stock of the look-through subsidiary reduced (but not below zero) by unremitted earnings. *Unremitted earnings* are the excess (if any) of the aggregate income (if any) taken into account by the tested foreign corporation pursuant to section 1297(c) and paragraph (b)(2) or (b)(3) of this section with respect to the stock of the disposed-of look-through subsidiary (including with respect to any other look-through subsidiary, to the extent it is owned by the tested foreign corporation indirectly through the disposed-of look-through subsidiary) over the aggregate dividends (if any)

received by the tested foreign corporation from the disposed-of look-through subsidiary with respect to the stock, determined without regard to paragraph (c)(2)(i) of this section. For purposes of this paragraph (f)(2), the amount of gain derived from the disposition of stock of a look-through subsidiary and income of and dividends received from the look-through subsidiary is determined on a share-by-share basis under a reasonable method.

(3) *Characterization of residual gain as passive income.* For purposes of section 1297(a)(1), section 1298(b)(3), and § 1.1298–2, the residual gain from the direct or indirect disposition of stock of a look-through subsidiary is characterized as passive income or non-passive income based on the relative amounts of passive assets and non-passive assets (as defined in § 1.1297–1(f)(5) and (3), respectively) of the disposed-of look-through subsidiary (and any other look-through subsidiary to the extent owned indirectly through the look-through subsidiary) treated as held by the tested foreign corporation on the date of the disposition of the look-through subsidiary. For the purpose of this paragraph (f)(3), the relative amounts of passive assets and non-passive assets held by the look-through subsidiary are measured under the same method (value or adjusted bases) used to measure the assets of the tested foreign corporation for purposes of section 1297(a)(2).

(4) *Gain taken into account from disposition of 25%-owned partnerships and look-through partnerships*—(i) *Section 954(c)(4) partnerships.* The amount of gain derived from a tested foreign corporation's direct or indirect (through a look-through subsidiary or look-through partnership) disposition of partnership interests in a partnership described in section 954(c)(4) (treating the tested foreign corporation as if it were a controlled foreign corporation) that is taken into account by the tested foreign corporation for purposes of section 1297(a)(1), section 1298(b)(3), and § 1.1298–2 is determined under section 954(c)(4).

(ii) *Look-through partnerships.* In the case of a look-through partnership that is not described in paragraph (f)(4)(i) of this section, the principles of paragraphs (f)(2) and (f)(3) of this section apply to determine the amount and characterization of gain derived from a tested foreign corporation's direct or indirect (through a look-through subsidiary or look-through partnership) disposition of partnership interests of the look-through partnership that is taken into account by the tested foreign corporation for purposes of section 1297(a)(1), section 1298(b)(3), and § 1.1298–2.

(5) *Examples.* The following examples illustrate the rules of this paragraph (f). For purposes of the examples in this paragraph (f)(5), USP is a domestic corporation, TFC and FS are foreign corporations that are not controlled foreign corporations within the meaning of section 957(a), and USP, TFC, and FS each has a single class of stock with 100 shares outstanding and a calendar taxable year.

(i) *Example 1*—(A) *Facts.* USP owned 30% of the outstanding stock of TFC throughout Years 1, 2, 3, and 4. In Year 1, TFC purchased 5 shares of FS stock, representing 5% of the stock of FS, from an unrelated person. On the first day of Year 3, TFC purchased 20 shares of FS stock, representing 20% of the stock of FS, from an unrelated person. TFC owned 25% of the outstanding stock of FS throughout Years 3 and 4. Before Year 3, TFC did not include any amount in income with respect to FS under section 1297(c)(2). During Years 3 and 4, for purposes of section 1297(a)(1), TFC included in income, in the aggregate, $40x of income with respect to FS under section 1297(c) and paragraph (b)(2) of this section. TFC did not receive dividends from FS during Year 1, 2, 3, or 4. For purposes of section 1297(a)(2), TFC measures its assets based on their fair market value as provided under section 1297(e). On the last day of Year 4, TFC recognizes a loss with respect to the sale of 5 shares of FS stock, and a $110x gain with respect to the sale of 20 shares of FS stock. On the date of the sale, FS owns non-passive assets with an aggregate fair market value of $150x, and passive assets with an aggregate fair market value of $50x.

(B) *Results.* For purposes of applying section 1297(a)(1) to TFC for Year 4, TFC must take into account $78x of residual gain, as provided by paragraph (f)(2) of this section, which equals the amount by which the $110x gain recognized on the sale of 20 shares in FS exceeds the aggregate pro rata share of $32x income ($40x × 20/25) taken into account by TFC with respect to the 20 shares in FS under section 1297(c) and paragraph (b)(2) of this section during Years 3 and 4. There is zero residual gain on the sale of 5 shares of FS stock because they were sold at a loss. Under paragraph (f)(3) of this section, $58.50x of the residual gain is non-passive income ($78x × ($150x/$200x)) and $19.50x is passive income ($78x × ($50x/$200x)).

(ii) *Example 2*—(A) *Facts.* The facts are the same as in paragraph (f)(5)(i)(A) of this section (the facts in *Example 1*), except that in Year 1, TFC purchased 15 shares of FS stock, representing 15% of the stock of FS, from an unrelated person, and on the first day of Year 3, TFC purchased an additional 15 shares of FS stock, representing 15% of the stock of FS, from an unrelated person, and on the last day of Year 4, TFC recognizes gain of $10x of the sale of 15 shares of FS stock purchased in Year 1, and gain of $60x on the sale of the other 15 shares of FS stock purchased in Year 3.

(B) *Results.* For purposes of applying section 1297(a)(1) to TFC for Year 4, TFC must take into account $40x of residual gain with respect to the 15 shares acquired in Year 3, as provided by paragraph (f)(2) of this section, which equals the amount by which the $60x gain recognized on the sale of those 15 shares exceeds the aggregate pro rata share of $20x income ($40x × 15/30) taken into account by TFC with respect to those 15 shares in FS under section 1297(c)(2) during Years 3 and 4. There is zero residual gain on the sale of the 15 shares of FS stock acquired in Year 1 because the $10x of gain does not exceed the aggregate pro rata share of $20x income taken into account by TFC with respect to those 15 shares of FS under section 1297(c) and paragraph (b)(2) of this section. Under paragraph (f)(3) of this section, $30x of the residual gain is non-passive income ($40x × ($150x/$200x)) and $10x is passive income ($40x × ($50x/$200x)).

(iii) *Example 3*—(A) *Facts.* The facts are the same as in paragraph (f)(5)(ii)(A) of this section (the facts in *Example 2*), except that TFC received, in the aggregate, $20x of dividends from FS during Year 2.

(B) *Results.* The results are the same as in paragraph (f)(5)(ii)(B) of this section (the results in *Example 2*) with respect to the 15 shares acquired in Year 3 ($40x of residual gain attributable to the 15 shares acquired in Year 3). For purposes of applying section 1297(a)(1) to TFC for Year 4, TFC must also take into account $10x of residual gain with respect to the 15 shares acquired in Year 1. As provided by paragraph (f)(2) of this section, the residual gain equals the amount by which the $10x gain recognized on the sale of those 15 shares exceeds the unremitted earnings with respect to those shares. The unremitted earnings with respect to the 15 shares acquired in Year 1 are $0x, the amount by which the pro rata share of aggregate income ($20x) taken into account by TFC with respect to those 15 shares of FS stock under section 1297(c) and paragraph (b)(2) of this section in Years 3 and 4 exceeds the aggregate pro rata amount of dividends with respect to those 15 shares of FS stock ($20x)

received by TFC from FS in Year 2. Total residual gain therefore is $50x ($40x + $10x). Under paragraph (f)(3) of this section, $37.50x of the residual gain is non-passive income ($50x × ($150x/$200x)) and $12.50x is passive income ($50x × ($50x/$200x)).

(g) *Definitions.* The following definitions apply for purposes of § 1.1297–1 and this section:

(1) *Direct LTS obligation.* The term *direct LTS obligation* has the meaning provided in paragraph (c)(1)(ii) of this section.

(2) *Indirect LTS obligation.* The term *indirect LTS obligation* has the meaning provided in paragraph (c)(1)(ii) of this section.

(3) *Look-through subsidiary.* The term *look-through subsidiary* means, with respect to a tested foreign corporation, a corporation as to which the asset test of paragraph (g)(3)(i) and the income test of paragraph (g)(3)(ii) of this section are satisfied on each measuring date during the taxable year of a tested foreign corporation. If a corporation satisfies both the asset test of paragraph (g)(3)(i) and the income test of paragraph (g)(3)(ii)(B) for some but not all measuring periods within the taxable year of a tested foreign corporation, the subsidiary is treated as a look-through subsidiary only for those measuring periods in which both tests are satisfied.

(i) For purposes of section 1297(a)(2) and paragraph (b)(2)(i) of this section, a corporation at least 25 percent of the value of the stock of which is owned (as determined under paragraph (b)(1) of this section) by the tested foreign corporation on the measuring date (as defined in § 1.1297–1(f)(1));

(ii) For purposes of section 1297(a)(1), either—

(A) For the taxable year, a corporation with respect to which the average percentage ownership (which is equal to the percentage ownership (by value) (as determined under paragraph (b)(1) of this section) on each measuring date during the taxable year, divided by the number of measuring dates in the year) by the tested foreign corporation during the tested foreign corporation's taxable year is at least 25 percent; or

(B) For a measuring period (as defined in § 1.1297–1(f)(2)), a corporation at least 25 percent of the value of the stock of which is owned (as determined under paragraph (b)(1) of this section) by the tested foreign corporation on the measuring date, provided all items of gross income of the corporation for each of the measuring periods in the taxable year for which the tested foreign corporation owns at least 25 percent of the value (as determined under paragraph (b)(1) of this section) on the relevant measuring dates can be established; and

(iii) For purposes of paragraph (f) of this section and § 1.1298–2, a corporation at least 25 percent of the value of the stock of which is owned (as determined under paragraph (b)(1) of this section) by the tested foreign corporation immediately before the disposition of stock of the corporation.

(4) *Look-through partnership*—(i) *In general.* The term *look-through partnership* means, with respect to a tested foreign corporation—

(A) A partnership that would be a look-through subsidiary (as defined in paragraph (g)(3) of this section) if such partnership were a corporation; or

(B) A partnership that is not described in paragraph (g)(4)(i)(A) of this section, if the tested foreign corporation satisfies both of the active partner tests set forth in paragraphs (g)(4)(ii)(A) and (B) of this section on the measurement date or for the taxable year, as applicable, unless an election is made under paragraph (g)(4)(iii) of this section.

(ii) *Active partner test*—(A) *Partnership interest under asset test.* For purposes of paragraph (b)(3)(i) of this section, paragraph (g)(4)(i)(B) of this section applies for the measuring period only if the tested foreign corporation would not be a PFIC if section 1297(a)(1) and (2) and the regulations thereunder were applied to the tested foreign corporation without regard to any partnership interest owned by the tested foreign corporation that is not a partnership described in paragraph (g)(4)(i)(A) of this section. For purposes of the preceding sentence, the active partner test is applied on the measurement date (as defined in § 1.1297–1(f)(1)).

(B) *Partnership income under income test.* For purposes of paragraph (b)(3)(ii) of this section, paragraph (g)(4)(i)(B) of this section applies for the taxable year of the tested foreign corporation or for a measuring period (as defined in § 1.1297–1(f)(2)), as applicable, only if the tested foreign corporation would not be a PFIC if section 1297(a)(1) and (2) and the regulations thereunder were applied to the tested foreign corporation without regard to any partnership interest owned by the tested foreign corporation that is not a partnership described in paragraph (g)(4)(i)(A) of this section. For purposes of the preceding sentence, the active partner test is applied on the measuring date (as defined in § 1.1297–1(f)(1)) or for the taxable year, as applicable using the same period that was used under paragraph (g)(3)(ii) of this section.

(iii) *Election.* For any taxable year, an election may be made with respect to a partnership described in paragraph (g)(4)(i)(B) of this section to not apply the provisions of this paragraph (g)(4) to such partnership.

(iv) *Examples.* The following examples illustrate the rules of this paragraph (g)(4). For purposes of the examples in this paragraph (g)(4)(iv), TFC is a foreign corporation that is not a controlled foreign corporation; FC1 and FC2 are foreign corporations that are not controlled foreign corporations; FPS is a foreign partnership; TFC owns 100% of the single class of stock of FC1 and FC2; FC2 owns 10% of the value of FPS, and the remaining 90% of FPS is owned by an unrelated foreign person; and TFC, FC1, FC2, and FPS are all calendar year taxpayers.

(A) *Example 1*—(*1*) *Facts.* During Year 1, FC1 generated $100x of non-passive income, FC2 generated $150x of non-passive income, and FPS generated $50x of income. On all of the measurement dates in Year 1, FC1 has assets with a value of $1000x that FC1 uses in its trade or business generating non-passive income, FC2 has assets with a value of $1500x that FC2 uses in its trade or business generating non-passive income, and FPS has assets with a value of $500x.

(*2*) *Results*—(*i*) *Active partner test with respect to partnership interest.* Pursuant to section 1297(c) and § 1.1297–2(b)(2), TFC is treated as holding directly the assets held by FC1 and FC2. For purposes of the active partner test under paragraph (g)(4)(ii)(B) of this section, TFC does not take into account its interest in FPS to determine whether it would be a PFIC. Because 100% ($2500x/$2500x) of the assets of FC1 and FC2 that TFC is treated as directly holding, without taking into account the interest in FPS, generates non-passive income, TFC satisfies the active partner test in paragraph (g)(4)(ii)(B) of this section.

(*ii*) *Active partner test with respect to partnership income.* Pursuant to section 1297(c) and paragraph (b)(2) of this section, TFC is treated as if it received directly its proportionate share of income of FC1 and FC2. For purposes of the active partner test under paragraph (g)(4)(ii)(A) of this section, TFC does not take into account its interest in FPS to determine whether it would be a PFIC. Because 100% ($250x/$250x) of the income of FC1 and FC2 that TFC is treated as directly receiving, without taking into account the interest in FPS, is non-passive income, TFC satisfies the active partner test in paragraph (g)(4)(ii)(A) of this section with respect to the income of FPS.

(*iii*) *Qualification of look-through partnership.* For purposes of paragraph

(b)(3) of this section, FPS qualifies as a look-through partnership because TFC satisfies the active partner tests of both paragraphs (g)(4)(i)(A) and (B) of this section. Unless an election is made not to treat FPS as a look-through partnership under paragraph (g)(4)(iii) of this section, TFC is treated as receiving directly $5x of income (10% × $50x), TFC's pro rata share of the income of FPS, the character of which is determined at the level of FPS for purposes of section 1297. In addition, TFC is treated as holding directly $50x of FPS's assets (10% × $500x), TFC's proportionate share of the assets held by FPS. The character of those assets as passive or non-passive is determined in the hands of FPS for purposes of section 1297.

(B) *Example 2*—(*1*) *Facts.* During Year 1, FC1 generated $50x of passive income, FC2 earned $175x of non-passive income, and FPS generated $50x of income. On all of the measurement dates in Year 1, FC1 has assets with a value of $1100x that produce passive income, and FC2 has assets with a value of $900x that FC2 uses in its trade or business generating non-passive income. The value of FPS is $1000x taking into account its assets and liabilities.

(*2*) *Results*—(*i*) *Active partner test with respect to partnership interest.* Pursuant to section 1297(c) and § 1.1297–2(b)(2), TFC is treated as holding directly the assets held by FC1 and FC2. For purposes of the active partner test under paragraph (g)(4)(ii)(B) of this section, TFC does not take into account its interest in FPS to determine whether it would be a PFIC. Accordingly, 55% ($1100x/$2000x) of the assets that TFC is treated as directly holding, without taking into account the interest in FPS, generate passive income.

(*ii*) *Active partner test with respect to partnership income.* Pursuant to section 1297(c) and § 1.1297–2(b)(2), TFC is treated as if it received directly its proportionate share of income of FC1 and FC2. For purposes of the active partner test under paragraph (g)(4)(ii)(A) of this section, TFC does not take into account its interest in FPS to determine whether it would be a PFIC. Accordingly, 77.8% ($175x/$225x) of the income that TFC is treated as directly receiving, without taking into account the interest in FPS, is non-passive income.

(*iii*) *Failure to qualify as look-through partnership.* TFC satisfies the active partner test in paragraph (g)(4)(ii)(A) of this section but does not satisfy the active partner test in paragraph (g)(4)(ii)(B) of this section. Therefore, FPS does not qualify as a look-though partnership. Under paragraph (b)(3)(iii) of this section, TFC's share of income with respect to FPS is treated as passive income for purposes of section 1297 and TFC's $100x interest (10% × $1000x) in FPS is treated as a passive asset for purposes of section 1297.

(5) *LTS debt.* The term *LTS debt* has the meaning provided in paragraph (c)(1)(ii) of this section.

(6) *LTS lease.* The term *LTS lease* has the meaning provided in paragraph (c)(1)(ii) of this section.

(7) *LTS license.* The term *LTS license* has the meaning provided in paragraph (c)(1)(ii) of this section.

(8) *LTS obligation.* The term *LTS obligation* has the meaning provided in paragraph (c)(1)(ii) of this section.

(9) *LTS stock.* The term *LTS stock* has the meaning provided in paragraph (c)(1)(i) of this section.

(10) *Qualified affiliate.* The term *qualified affiliate* has the meaning provided in paragraph (e)(2) of this section.

(11) *Residual gain.* The term *residual gain* has the meaning provided in paragraph (f)(2) of this section.

(12) *TFC obligation.* The term *TFC obligation* has the meaning provided in paragraph (c)(1)(ii) of this section.

(13) *Unremitted earnings.* The term *unremitted earnings* has the meaning provided in paragraph (f)(2) of this section.

(h) *Applicability date.* The rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. A shareholder may choose to apply such rules for any open taxable year beginning before January 14, 2021, provided that, with respect to a tested foreign corporation, the shareholder consistently applies the provisions of § 1.1291–1(b)(8)(iv) and (b)(8)(v)(A), (B), (C), and (D) and §§ 1.1297–1 (except that consistent treatment is not required with respect to § 1.1297–1(c)(1)(i)(A)), 1.1298–2, and 1.1298–4 for such year and all subsequent years.

■ **Par. 6.** Sections 1.1297–4, 1.1297–5, and 1.1297–6 are added to read as follows:

§ 1.1297–4 Qualifying insurance corporation.

(a) *Scope.* This section provides rules for determining whether a foreign corporation is a qualifying insurance corporation for purposes of section 1297(f). Paragraph (b) of this section provides the general rule for determining whether a foreign corporation is a qualifying insurance corporation. Paragraph (c) of this section describes the 25 percent test in section 1297(f)(1)(B). Paragraph (d) of this section contains rules for applying the alternative facts and circumstances test in section 1297(f)(2). Paragraph (e) of this section contains rules limiting the amount of applicable insurance liabilities for purposes of the 25 percent test described in paragraph (c) of this section and the alternative facts and circumstances test described in paragraph (d) of this section. Paragraph (f) of this section provides definitions that apply for purposes of this section. Paragraph (g) of this section provides the applicability date of this section.

(b) *Qualifying insurance corporation.* For purposes of section 1297(b)(2)(B), this section, and §§ 1.1297–5 and 1.1297–6, with respect to a U.S. person, a qualifying insurance corporation (QIC) is a foreign corporation that—

(1) Is an insurance company as defined in section 816(a) that would be subject to tax under subchapter L if the corporation were a domestic corporation; and

(2) Satisfies—

(i) The 25 percent test described in paragraph (c) of this section; or

(ii) The requirements for an election to apply the alternative facts and circumstances test as described in paragraph (d) of this section and a United States person has made an election as described in paragraph (d)(5) of this section.

(c) *25 percent test.* A foreign corporation satisfies the 25 percent test if the amount of its applicable insurance liabilities exceeds 25 percent of its total assets. This determination is made on the basis of the applicable insurance liabilities and total assets reported on the corporation's applicable financial statement for the applicable reporting period.

(d) *Election to apply the alternative facts and circumstances test*—(1) *In general.* A United States person that owns stock in a foreign corporation that fails to qualify as a QIC solely because of the 25 percent test may elect to treat the stock of the corporation as stock of a QIC if the foreign corporation—

(i) Is predominantly engaged in an insurance business as described in paragraph (d)(2) of this section;

(ii) Failed to satisfy the 25 percent test solely due to runoff-related circumstances, as described in paragraph (d)(3) of this section, or rating-related circumstances, as described in paragraph (d)(4) of this section; and

(iii) Reports an amount of applicable insurance liabilities that is at least 10 percent of the amount of the total assets on the corporation's applicable financial

statement for the applicable reporting period.

(2) *Predominantly engaged in an insurance business*—(i) *In general.* A foreign corporation is not considered predominantly engaged in an insurance business in any taxable year unless more than half of the business of the foreign corporation is the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies. This determination is made based on the character of the business actually conducted in the taxable year. The fact that a foreign corporation has been holding itself out as an insurer for a long period is not determinative of whether the foreign corporation is predominantly engaged in an insurance business.

(ii) *Facts and circumstances.* Facts and circumstances to consider in determining whether a foreign corporation is predominantly engaged in an insurance business include (but are not limited to)—

(A) Claims payment patterns for the current year and prior years;

(B) The foreign corporation's loss exposure as calculated for a regulator or for a credit rating agency, or, if those are not calculated, for internal pricing purposes;

(C) The percentage of gross receipts constituting premiums for the current and prior years; and

(D) The number and size of insurance contracts issued or taken on through reinsurance by the foreign corporation.

(iii) *Examples of facts indicating a foreign corporation is not predominantly engaged in an insurance business.* Examples of facts that may indicate a foreign corporation is not predominantly engaged in an insurance business include (but are not limited to)—

(A) A small overall number of insured risks with low likelihood but large potential costs;

(B) Employees and agents of the foreign corporation focused to a greater degree on investment activities than underwriting activities; and

(C) Low loss exposure.

(3) *Runoff-related circumstances.* During the annual reporting period covered by the applicable financial statement, a foreign corporation fails to satisfy the 25 percent test solely due to runoff-related circumstances only if the corporation—

(i) Was engaged in the process of terminating its pre-existing, active conduct of an insurance business (within the meaning of section 1297(b)(2)(B)) under the supervision of its applicable insurance regulatory body or pursuant to any court-ordered receivership proceeding (liquidation, rehabilitation, or conservation) and fails to satisfy the 25 percent test because the corporation is required to hold additional assets due to its business being in runoff;

(ii) Has no plan or intention to enter into, and did not issue or enter into, any insurance, annuity, or reinsurance contract, other than a contractually obligated renewal of an existing insurance contract or a reinsurance contract pursuant to and consistent with the termination of its active conduct of an insurance business; and

(iii) Made payments during the annual reporting period covered by the applicable financial statement as required to satisfy claims under insurance, annuity, or reinsurance contracts.

(4) *Rating-related circumstances.* A foreign corporation fails to satisfy the 25 percent test solely due to rating-related circumstances only if—

(i) The 25 percent test is not met due to capital and surplus amounts that a generally recognized credit rating agency considers necessary for the foreign corporation to obtain a public rating with respect to its financial strength, and the foreign corporation maintains such capital and surplus in order to obtain the minimum credit rating necessary for the annual reporting period by the foreign corporation to be able to write the business in its regulatory or board supervised business plan. This paragraph (c)(4)(i) applies only if the foreign corporation is a mortgage insurance company (as defined in paragraph (f)(10) of this section) or if more than half of the foreign corporation's net written premiums for the annual reporting period (or the average of the net written premiums for the foreign corporation's annual reporting period and the two immediately preceding annual reporting periods) are from insurance coverage against the risk of loss from a catastrophic loss event (that is, a low frequency but high severity loss event); or

(ii) The foreign corporation is a financial guaranty insurance company (as defined in paragraph (f)(5) of this section).

(5) *Election*—(i) *In general.* A United States person may make the election under section 1297(f)(2) for its taxable year if the foreign corporation directly provides the United States person a statement, signed by a responsible officer of the foreign corporation or an authorized representative of the foreign corporation, or the foreign corporation (or its foreign parent corporation on its behalf) makes a publicly available statement (such as in a public filing, disclosure statement, or other notice provided to United States persons that are shareholders of the foreign corporation) that it satisfied the requirements of section 1297(f)(2) and paragraph (d)(1) of this section during the foreign corporation's applicable reporting period. However, a United States person may not rely upon any statement by the foreign corporation (or its foreign parent corporation) to make the election under section 1297(f)(2) if the shareholder knows or has reason to know based on reasonably accessible information that the statement made by the foreign corporation (or its foreign parent corporation) was incorrect.

(ii) *Information provided by foreign corporation.* In addition to a statement that the foreign corporation satisfied the requirements of section 1297(f)(2) and paragraph (d)(1) of this section, the statement described in paragraph (d)(5)(i) of this section also must include:

(A) The ratio of applicable insurance liabilities to total assets for the applicable reporting period; and

(B) A statement indicating whether the failure to satisfy the 25 percent test described in paragraph (c) of this section was the result of runoff-related or rating-related circumstances, along with a brief description of those circumstances.

(iii) *Time and manner for making the election.* Except as provided in paragraph (d)(5)(iv), the election described in paragraph (d)(1) of this section may be made by a United States person who owns stock in the foreign corporation by completing the appropriate part of Form 8621 (or successor form) for each taxable year of the United States person in which the election applies. A United States person must attach the Form 8621 (or successor form) to its original or amended Federal income tax return for the taxable year of the United States person to which the election relates. A United States person can attach the Form 8621 (or successor form) to an amended return for the taxable year of the United States person to which the election relates if the United States person can demonstrate the reason for not filing the form with its original return was due to reasonable cause.

(iv) *Deemed election for small shareholders in publicly traded companies*—(A) *In general.* A United States person who owns publicly traded stock in a foreign corporation will be deemed to make the election under section 1297(f)(2) with respect to the foreign corporation and its subsidiaries

if the following requirements are satisfied:

(*1*) The stock of the foreign corporation that is owned by the United States person (including stock owned indirectly) has a value of $25,000 or less ($50,000 or less in the case of a joint return) on the last day of the United States person's taxable year and on any day during the taxable year on which the United States person disposes of stock of the foreign corporation; and

(*2*) If the United States person owns stock of the foreign corporation indirectly through a domestic partnership, domestic trust, domestic estate, or S corporation (a *domestic pass-through entity*), the stock of the foreign corporation that is owned by the domestic pass-through entity has a value of $25,000 or less on the last day of the taxable year of the domestic pass-through entity that ends with or within the United States person's taxable year and on any day during the taxable year of the domestic pass-through entity on which it disposes of stock of the foreign corporation.

(B) *Publicly traded stock.* For the purpose of paragraph (d)(5)(iv)(A) of this section, stock is publicly traded if it would be treated as marketable stock within the meaning of section 1296(e) and § 1.1296–2 (without regard to § 1.1296–2(d)) if the election under section 1297(f)(2) is not made.

(v) *Options.* If a United States person is considered to own stock in a foreign corporation by reason of holding an option, the United States person may make the election under section 1297(f)(2) (or may be deemed to make an election under paragraph (d)(5)(iv) of this section) with respect to the foreign corporation or its subsidiaries in the same manner as if the United States person owned stock in the foreign corporation.

(6) *Stock ownership.* For purposes of this section, ownership of stock in a foreign corporation means either direct ownership of such stock or indirect ownership determined using the rules specified in § 1.1291–1(b)(8).

(e) *Rules limiting the amount of applicable insurance liabilities*—(1) *In general.* For purposes of determining whether a foreign corporation satisfies the 25 percent test described in paragraph (c) of this section or the 10 percent test described in paragraph (d)(1)(iii) of this section, the rules of this paragraph (e) apply to limit the amount of applicable insurance liabilities of the foreign corporation.

(2) *General limitation on applicable insurance liabilities.* The amount of applicable insurance liabilities may not exceed any of the amounts described in paragraphs (e)(2)(i) to (iii) of this section. This paragraph (e)(2) applies after applying paragraph (e)(3) of this section.

(i) The amount of applicable insurance liabilities of the foreign corporation shown on any financial statement that the foreign corporation filed or was required to file with its applicable insurance regulatory body for the financial statement's applicable reporting period;

(ii) If the foreign corporation's applicable financial statement is prepared on the basis of either GAAP or IFRS, the amount of the foreign corporation's applicable insurance liabilities determined on the basis of its applicable financial statement, whether or not the foreign corporation files the statement with its applicable insurance regulatory body; or

(iii) The amount of applicable insurance liabilities required for the foreign corporation by the applicable law or regulation of the jurisdiction of the applicable insurance regulatory body at the end of the applicable reporting period (or a lesser amount of applicable insurance liabilities, if the foreign corporation is holding a lesser amount as a permitted practice of the applicable regulatory body).

(3) *Discounting.* If an applicable financial statement or a financial statement described in paragraph (e)(2) of this section is prepared on the basis of an accounting method other than GAAP or IFRS and does not discount applicable insurance liabilities on an economically reasonable basis, the amount of applicable insurance liabilities may not exceed the amount of applicable insurance liabilities on the financial statement reduced by applying the discounting methods that would apply under either GAAP or IFRS to the insurance or annuity contracts to which the applicable insurance liabilities at issue relate. The foreign corporation may choose whether to apply either GAAP or IFRS discounting methods for this purpose.

(4) [Reserved].

(5) [Reserved].

(f) *Definitions.* The following definitions apply for purposes of this section.

(1) *Applicable financial statement.* The term *applicable financial statement* means the foreign corporation's financial statement prepared for financial reporting purposes, listed in paragraphs (f)(1)(i) through (iii) of this section, and that has the highest priority. The financial statements are, in order of descending priority—

(i) *GAAP statements.* A financial statement that is prepared in accordance with GAAP;

(ii) *IFRS statements.* A financial statement that is prepared in accordance with IFRS; or

(iii) *Regulatory annual statement.* A financial statement required to be filed with the applicable insurance regulatory body.

(iv) [Reserved].

(2) *Applicable insurance liabilities*—(i) *In general.* The term *applicable insurance liabilities* means, with respect to any life or property and casualty insurance business—

(A) Reported losses (which are expected payments to policyholders for sustained losses related to insured events under an insurance contract that have occurred and have been reported to, but not paid by, the insurer as of the financial statement end date), and incurred but not reported losses (which are expected payments to policyholders for sustained losses relating to insured events under an insurance contract that have occurred but have not been reported to the insurer as of the financial statement end date);

(B) Unpaid loss adjustment expenses (including reasonable estimates of anticipated loss adjustment expenses) associated with investigating, defending, settling, and adjusting paid losses, unpaid reported losses, and incurred but not reported losses (of the type described in paragraph (f)(2)(i)(A) of this section) as of the financial statement end date; and

(C) The aggregate amount of reserves (excluding deficiency, contingency, or unearned premium reserves) held as of the financial statement end date to mature or liquidate potential, future claims for death, annuity, or health benefits that may become payable under contracts providing, at the time the reserve is computed, coverage for mortality or morbidity risks;

(D) Provided, however, that—

(*1*) No item or amount shall be taken into account more than once in determining applicable insurance liabilities;

(*2*) The applicable insurance liabilities eligible to be taken into account in applying this paragraph (f)(2) include only the applicable insurance liabilities of the foreign corporation whose QIC status is being determined; and

(*3*) [Reserved].

(ii) *Amounts not specified in paragraph (f)(2)(i) of this section.* Amounts not specified in paragraph (f)(2)(i) of this section are not applicable insurance liabilities. For example, the term applicable insurance liability does

not include any amount held by an insurance company as a deposit liability that is not an insurance liability, such as a funding agreement, a guaranteed investment contract, premium or other deposit funds, structured settlements, or any other substantially similar contract issued by an insurance company. The term applicable insurance liabilities also does not include the amount of any reserve for a life insurance or annuity contract the payments of which do not depend on the life or life expectancy of one or more individuals.

(3) *Applicable insurance regulatory body.* The term *applicable insurance regulatory body* means the entity that has been established by law to license or authorize a corporation to engage in an insurance business, to regulate insurance company solvency, and, in the case of an applicable financial statement described in paragraph (f)(1)(iii), is the entity to which the applicable financial statement is provided.

(4) *Applicable reporting period.* The term *applicable reporting period* is the last annual reporting period for a financial statement ending with or within the taxable year of a U.S. person owning stock in a foreign corporation, within the meaning of paragraph (d)(6) of this section.

(5) *Financial guaranty insurance company.* The term *financial guaranty insurance company* means any insurance company whose sole business is to insure or reinsure only the type of business written by, or that would be permitted to be written by a company licensed under, and compliant with, a U.S. state law, modeled after the Financial Guaranty Insurance Guideline as established by National Association of Insurance Companies, that specifically governs the licensing and regulation of financial guaranty insurance companies.

(6) *Financial statements*—(i) *In general.* The term *financial statement* means a statement prepared for a legal entity for a reporting period in accordance with the rules of a financial accounting or statutory accounting standard that includes a complete balance sheet, statement of income, and a statement of cash flows (or equivalent statements under the applicable reporting standard).

(ii) [Reserved].

(iii) [Reserved].

(7) *Generally accepted accounting principles or GAAP.* The term *generally accepted accounting principles* or *GAAP* means United States generally accepted accounting principles described in standards established and made effective by the Financial Accounting Standards Board.

(8) *Insurance business.* For purposes of this section, § 1.1297–5, and § 1.1297–6, *insurance business* means the business of issuing insurance and annuity contracts and the reinsuring of risks underwritten by insurance companies, together with those investment activities and administrative services that are required to support (or are substantially related to) insurance, annuity, or reinsurance contracts issued or entered into by the foreign corporation.

(9) *International financial reporting standards* or *IFRS.* The term *international financial reporting standards* or *IFRS* means accounting standards established and made effective by the International Accounting Standards Board.

(10) *Mortgage insurance company.* For purposes of this section, *mortgage insurance company* means any insurance company whose sole business is to insure or reinsure against a lender's loss of all or a portion of the principal amount of a mortgage loan upon default of the mortgagor.

(11) *Total assets.* For purposes of section 1297(f) and this section, a foreign corporation's *total assets* are the aggregate value of the real property and personal property that the foreign corporation reports on its applicable financial statement as of the financial statement end date.

(g) *Applicability date.* The rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. A shareholder may choose to apply such rules for any open taxable year beginning after December 31, 2017 and before January 14, 2021, provided that, with respect to a tested foreign corporation, it consistently applies the provisions of this section and § 1.1297–6 for such year and all subsequent years.

§ 1.1297–5 [Reserved].

§ 1.1297–6 Exception from the definition of passive income for active insurance income.

(a) *Scope.* This section provides rules pertaining to the exception from passive income under section 1297(b)(2)(B) for income derived in the active conduct of an insurance business and rules related to certain income of a qualifying domestic insurance corporation. Paragraph (b) of this section provides a general rule that excludes from passive income certain income of a qualifying insurance corporation (QIC), as defined in § 1.1297–4(b), and certain income of a qualifying domestic insurance corporation. Paragraph (c) of this section provides rules excluding certain assets for purposes of the passive asset test under section 1297(a)(2). Paragraph (d) of this section provides rules concerning the treatment of income and assets of certain look-through subsidiaries and look-through partnerships of a QIC. Paragraph (e) of this section provides rules relating to qualifying domestic insurance corporations. Paragraph (f) of this section provides the applicability date of this section.

(b) *Exclusion from passive income of active insurance income.* For purposes of section 1297 and § 1.1297–1, passive income does not include—

(1) Income that a QIC derives in the active conduct of an insurance business (within the meaning of section 1297(b)(2)(B)); and

(2) Income of a qualifying domestic insurance corporation.

(c) *Exclusion of assets for purposes of the passive asset test under section 1297(a)(2).* For purposes of section 1297 and § 1.1297–1, passive assets (as defined in § 1.1297–1(f)(5)), do not include—

(1) Assets of a QIC available to satisfy liabilities of the QIC related to its insurance business (as defined in § 1.1297–4(f)(8)), if the QIC is engaged in the active conduct of an insurance business (within the meaning of section 1297(b)(2)(B)); and

(2) Assets of a qualifying domestic insurance corporation.

(d) *Treatment of income and assets of certain look-through subsidiaries and look-through partnerships for purposes of the section 1297(b)(2)(B) exception*—(1) *General rule.* For purposes of applying paragraphs (b)(1) and (c)(1) of this section, a QIC is treated as receiving the income or holding the assets of a look-through subsidiary or look-through partnership to the extent provided in section 1297(c) and § 1.1297–2(b)(2) or § 1.1297–2(b)(3). Subject to the limitation of paragraph (d)(2) of this section, a QIC's proportionate share of the income or assets of a look-through subsidiary or look-through partnership may be treated as earned or held directly by the QIC, and thus as non-passive under paragraphs (b)(1) and (c)(1) of this section, if the requirements of those paragraphs are satisfied.

(2) *Limitation.* A QIC that is engaged in the active conduct of an insurance business (within the meaning of section 1297(b)(2)(B)) may not treat its proportionate share of the income or assets of a look-through subsidiary or look-through partnership as non-passive to the extent that it exceeds the greater of—

(i) The QIC's proportionate share of the income or assets, respectively, of the look-through subsidiary or look-through partnership multiplied by a fraction, the numerator of which is the net equity value of the interests held by the QIC in the look-through subsidiary or look-through partnership, and the denominator of which is the value of the QIC's proportionate share of the assets of the look-through subsidiary or look-through partnership; and

(ii) The QIC's proportionate share of the income or assets, respectively, of the look-through subsidiary or look-through partnership that are treated as non-passive in the hands of the look-through subsidiary or look-through partnership.

(3) *Examples.* The following examples illustrate the rules of this section.

(i) *Example 1: QIC holds all the stock of an investment subsidiary*—(A) *Facts.*

(*1*) F1 is a foreign corporation. In Year 1, F1 meets the definition of a QIC under section 1297(f) and § 1.1297–4 and is engaged in the active conduct of an insurance business within the meaning of section 1297(b)(2)(B). Throughout Year 1, F1 owns all the stock of F2, a foreign corporation that is not a QIC and is engaged solely in the investment of passive assets. The stock of F2 is an asset that is available to satisfy liabilities of F1 related to its insurance business within the meaning of paragraph (c)(1) of this section. The assets of F1 are measured on the basis of value under § 1.1297–1(d)(1)(v)(C).

(*2*) Throughout Year 1, F2 owns assets with a value of $1,000x and adjusted bases of $500x, all of which are treated as passive in the hands of F2. F2 has outstanding debt with a principal amount of $250x. On the financial statement end date of F1's applicable financial statement, the net equity value of the F2 stock held by F1 is $750x. In Year 1, F2 earned $100x of income that is treated as passive in the hands of F2.

(B) *Result*—(*1*) Because F1 owns all of the stock of F2, F2 is a look-through subsidiary of F1 within the meaning of § 1.1297–2(g)(3). Under section 1297(c) and § 1.1297–2(b)(2), F1 is treated as if it held 100% of the assets of F2 and received directly 100% of the income of F2. Under paragraph (d)(1) of this section, because F1 is engaged in the active conduct of an insurance business and the stock of F2 is an asset that is available to satisfy the insurance liabilities of F1, F1 treats its proportionate share of the income and assets of F2 as non-passive. The amount of income and assets that is treated as non-passive is subject to the limitation of paragraph (d)(2) of this section.

(*2*) Under paragraph (d)(2) of this section, the amount of F1's proportionate share of F2's income that is treated as non-passive cannot exceed the greater of two amounts: $75x, which is F1's proportionate share of F2's income ($100x) multiplied by 75% (the net equity value of the F2 stock held by F1, which is $750x, divided by the value of F1's proportionate share of F2's assets, which is $1,000x); and zero, which is F1's proportionate share of the income of F2 that is treated as non-passive in the hands of F2. Therefore, for the purpose of characterizing F1's proportionate share of F2's income, $75x is treated as non-passive, and $25x is treated as passive.

(*3*) Under paragraph (d)(2) of this section, the amount of F1's proportionate share of F2's assets that is treated as non-passive cannot exceed the greater of two amounts: $750x, which is F1's proportionate share of F2's assets ($1,000x) multiplied by 75% (the net equity value of the F2 stock held by F1, which is $750x, divided by the value of F1's proportionate share of F2's assets, which is $1,000x); and zero, which is F1's proportionate share of the assets of F2 that are treated as non-passive in the hands of F2. Therefore, for the purpose of characterizing F1's proportionate share of the assets of F2, $750x is treated as non-passive, and $250x is treated as passive.

(C) *Alternative facts*—(*1*) *Facts.* The facts are the same as in paragraph (d)(3)(i)(A) of this section (paragraph (A) of this Example 1), except that the assets of F1 are measured on the basis of adjusted basis under § 1.1297–1(d)(1)(v)(C) pursuant to a valid election under § 1.1297–1(d)(1)(iii).

(*2*) *Result.* The result with respect to F1's proportionate share of the income of F2 is the same as in paragraph (d)(3)(i)(B)(*2*) of this section (paragraph (B)(*2*) of this Example 1). Because the assets of F1 are measured on the basis of adjusted basis under § 1.1297–1(d)(1)(v)(C), F1's proportionate share of the passive assets of F2 is equal to $500x (100% of $500x adjusted bases). Under paragraph (d)(2) of this section, the amount of F1's proportionate share of F2's assets that may be treated as non-passive cannot exceed the greater of two amounts: $375x, which is F1's proportionate share of F2's passive assets ($500x) multiplied by 75% (the net equity value of the F2 stock held by F1, which is $750x, divided by the value of F1's proportionate share of F2's assets, which is $1,000x); and zero, which is F1's proportionate share of the assets of F2 that are treated as non-passive in the hands of F2. Therefore, for the purpose of characterizing F1's proportionate share of the assets of F2, $375x is treated as non-passive, and $125x is treated as passive.

(ii) *Example 2: QIC holds all the stock of an operating subsidiary*—(A) *Facts.*

(*1*) F1 is a foreign corporation. In Year 1, F1 meets the definition of a QIC under section 1297(f) and § 1.1297–4 and is engaged in the active conduct of an insurance business within the meaning of section 1297(b)(2)(B). Throughout Year 1, F1 owns all the stock of F2, a foreign corporation engaged in a manufacturing business that is not a QIC. The stock of F2 is an asset that is available to satisfy liabilities of F1 related to its insurance business within the meaning of paragraph (c)(1) of this section. The assets of F1 are measured on the basis of value under § 1.1297–1(d)(1)(v)(C).

(*2*) Throughout Year 1, F2 owns assets with a value of $1,200x, of which $1,000x is treated as non-passive and $200x is treated as passive in the hands of F2. F2 has outstanding debt of $600x. On the financial statement end date of F1's applicable financial statement, the net equity value of the F2 stock held by F1 is $600x. In Year 1, F2 earned $120x of income, of which, in the hands of F2, $100x is treated as non-passive and $20x is treated as passive.

(B) *Result*—(*1*) Because F1 owns all the stock of F2, F2 is a look-through subsidiary of F1 within the meaning of § 1.1297–2(g)(3). Under section 1297(c) and § 1.1297–2(b)(2), F1 is treated as if it held 100% of the assets of F2 and received directly 100% of the income of F2. Under paragraph (d)(1) of this section, because F1 is engaged in the active conduct of an insurance business and the stock of F2 is an asset that is available to satisfy the insurance liabilities of F1, F1 treats its proportionate share of the income and assets of F2 as non-passive. The amount of income and assets that is treated as non-passive is subject to the limitation of paragraph (d)(2) of this section.

(*2*) Under paragraph (d)(2) of this section, the amount of F1's proportionate share of F2's income that is treated as non-passive cannot exceed the greater of two amounts: $60x, which is F1's proportionate share of F2's income ($120x) multiplied by 50% (the net equity value of the F2 stock held by F1, which is $600x, divided by the value of F1's proportionate share of F2's assets, which is $1,200x); and $100x, which is F1's proportionate share of the income of F2 that is treated as non-passive in the hands of F2. Therefore, for the purpose of characterizing F1's proportionate share of F2's income, $100x is treated as non-passive, and $20x is treated as passive.

(*3*) Under paragraph (d)(2) of this section, the amount of F1's proportionate share of F2's assets that is treated as non-passive cannot exceed the greater of two amounts: $600x, which is F1's proportionate share of F2's income ($1,200x) multiplied by 50% (the net equity value of the F2 stock held by F1, which is $600x, divided by the value of F1's proportionate share of F2's assets, which is $1,200x); and $1,000x, which is F1's proportionate share of the assets of F2 that are treated as non-passive in the hands of F2. Therefore, for the purpose of characterizing F1's proportionate share of the assets of F2, $1,000x is treated as non-passive, and $200x is treated as passive.

(e) *Qualifying domestic insurance corporation*—(1) *General rule.* A domestic corporation (or a foreign corporation that is treated as a domestic corporation pursuant to a valid section 953(d) election and that computes its reserves as a domestic insurance company would under subchapter L) is a qualifying domestic insurance corporation if it is—

(i) Subject to tax as an insurance company under subchapter L of the Internal Revenue Code;

(ii) Subject to federal income tax on its net income; and

(iii) A look-through subsidiary of a tested foreign corporation.

(2) [Reserved].

(3) [Reserved].

(f) *Applicability date.* The rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. A shareholder may choose to apply such rules for any open taxable year beginning after December 31, 2017 and before January 14, 2021, provided that, with respect to a tested foreign corporation, it consistently applies the provisions of this section and § 1.1297–4, for such year and all subsequent years.

■ **Par. 7.** Section 1.1298–0 is amended by:

■ 1. Revising the introductory text.

■ 2. Adding entries for §§ 1.1298–2 and 1.1298–4 in numerical order.

The revision and additions read as follows:

§ 1.1298–0 Passive foreign investment company—table of contents.

This section contains a listing of the paragraph headings for §§ 1.1298–1, 1.1298–2, 1.1298–3, and 1.1298–4.

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§ 1.1298–2 *Rules for certain corporations changing businesses.*

(a) Overview.

(b) Change of business exception.

(c) Special rules.

(d) Disposition of stock in a look-through subsidiary or partnership interests in a look-through partnership.

(e) Application of change of business exception.

(f) Examples.

(1) Example 1.

(i) Facts.

(ii) Results.

(2) Example 2.

(i) Facts.

(ii) Results.

(g) Applicability date.

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1.1298–4 *Rules for certain foreign corporations owning stock in 25-percent-owned domestic corporations.*

(a) Overview.

(b) Treatment of certain foreign corporations owning stock in a 25-percent-owned domestic corporation.

(1) General rule.

(2) Qualified stock and second-tier domestic corporation.

(c) Indirect ownership of stock through a partnership.

(d) Section 531 tax.

(1) Subject to section 531 tax.

(2) Waiver of treaty benefits.

(i) Tested foreign corporation that files, or is required to file, a Federal income tax return.

(ii) Tested foreign corporation that is not required to file a Federal income tax return.

(e) Anti-abuse rule.

(1) General rule.

(2) [Reserved].

(3) [Reserved].

(f) Applicability date.

■ **Par. 8.** Section 1.1298–2 is added to read as follows:

§ 1.1298–2 Rules for certain corporations changing businesses.

(a) *Overview.* This section provides rules under section 1298(b)(3) and 1298(g) that apply to certain foreign corporations that dispose of one or more active trades or businesses for purposes of determining whether a foreign corporation is treated as a passive foreign investment company (PFIC). Paragraph (b) of this section provides a rule that applies to certain foreign corporations that dispose of one or more active trades or businesses. Paragraph (c) of this section provides special rules. Paragraph (d) of this section provides a rule for the treatment of the disposition of the stock of a look-through subsidiary (as defined in § 1.1297–2(g)(3)) or partnership interests in a look-through partnership (as defined in § 1.1297–2(g)(4)). Paragraph (e) of this section provides guidance on when a tested foreign corporation can apply the change of business exception. Paragraph (f) provides examples illustrating the application of the rules in this section. Paragraph (g) provides the applicability date for this section.

(b) *Change of business exception.* A corporation is not treated as a PFIC for a taxable year if—

(1) Neither the corporation (nor any predecessor) was a PFIC for any prior taxable year;

(2) Either—

(i) Substantially all of the passive income of the corporation for the taxable year is attributable to proceeds from the disposition of one or more active trades or businesses; or

(ii) Following the disposition of one or more active trades or businesses, substantially all of the passive assets of the corporation on each of the measuring dates that occur during the taxable year and after the disposition are attributable to proceeds from the disposition; and

(3) The corporation reasonably does not expect to be and is not a PFIC for either of the first two taxable years following the taxable year.

(c) *Special rules.* The rules in this paragraph (c) apply for purposes of section 1298(b)(3) and this section.

(1) Income is attributable to proceeds from the disposition of one or more active trades or businesses to the extent the income is derived from the investment of the proceeds from the disposition of assets used in the active trades or businesses.

(2) Assets are attributable to proceeds from the disposition of one or more active trades or businesses only to the extent the assets are the proceeds of the disposition of assets used in the active trades or businesses, or are derived from the investment of the proceeds.

(3) The determination of the existence of an active trade or business and whether assets are used in an active trade or business is made under § 1.367(a)–2(d)(2), (3), and (5), except that officers and employees do not include the officers and employees of related entities as provided in § 1.367(a)–2(d)(3). However, if activities performed by the officers and employees of a look-through subsidiary of a corporation (including a look-through subsidiary with respect to which paragraph (d) of this section applies) or of a look-through partnership would be taken into account by the corporation pursuant to § 1.1297–2(e) if it applied, such activities are taken into account for purposes of the determination of the existence of an active trade or business and the determination of whether assets are used in an active trade or business.

(4) In the case of a corporation that satisfies the condition in paragraph (b)(2)(ii) of this section, the condition in paragraph (b)(3) of this section is deemed to be satisfied if the corporation

completely liquidates by the end of the taxable year following the year with respect to which the tested foreign corporation applies the exception in paragraph (b) of this section.

(d) *Disposition of stock of a look-through subsidiary or partnership interests in a look-through partnership.* For purposes of paragraph (b) of this section, the proceeds from a tested foreign corporation's disposition of the stock of a look-through subsidiary or of partnership interests in a look-through partnership are treated as proceeds from the disposition of a proportionate share of the assets held by the look-through subsidiary or look-through partnership on the date of the disposition, based on the method (value or adjusted bases) used to measure the assets of the tested foreign corporation for purposes of section 1297(a)(2). The proceeds attributable to assets used by the look-through subsidiary or look-through partnership in an active trade or business are treated as proceeds attributable to the disposition of an active trade or business.

(e) *Application of change of business exception.* A tested foreign corporation can apply the exception in paragraph (b) of this section with respect to a taxable year of a disposition of an active trade or business or an immediately succeeding taxable year, but cannot apply the exception with respect to more than one taxable year for a disposition.

(f) *Examples.* The following examples illustrate the rules of this section. For purposes of these examples: USP is a domestic corporation; TFC and FS are foreign corporations that are not controlled foreign corporations (within the meaning of section 957(a)); each corporation has outstanding a single class of stock; USP has owned its interest in TFC since the formation of TFC; each of USP, TFC, and FS have a calendar taxable year; and for purposes of section 1297(a)(2), TFC measures the amount of its assets based on value.

(1) *Example 1*—(i) *Facts.* (A) USP owns 15% of the outstanding stock of TFC. TFC owns 30% of the outstanding stock of FS. FS operates an active trade or business and 100% of its assets are used in the active trade or business. The value of FS's non-passive assets (as defined in § 1.1297–1(f)(3)) is $900x; the value of FS's passive assets (which include cash and cash equivalents) is $100x. TFC has not been treated as a PFIC for any taxable year before Year 1 and has no predecessor. In addition to holding the FS stock, TFC directly conducts its own active trade or business. The value of TFC's non-passive assets (other than FS stock) is $50x; the value of TFC's passive assets (other than FS stock and assets received during Year 1) is $30x. TFC earns $1x of non-passive income (as defined in § 1.1297–1(f)(4)) from its directly conducted active trade or business.

(B) On January 1, Year 1, TFC sells all of its FS stock for $300x. The residual gain computed under § 1.1297–2(f)(1) on the sale of the FS stock is $10x. Under § 1.1297–2(f)(3), $9x of residual gain is characterized as non-passive income and $1x of residual gain is characterized as passive income. TFC earned $5x of passive income from the investment of the proceeds from the disposition of the FS stock during each quarter of Year 1, and TFC maintained those earnings ($20x in total) as well as the disposition proceeds in cash for the remainder of the year. TFC reinvests the proceeds of the FS stock sale in an active trade or business during Year 2, and, thus, TFC is not a PFIC in Year 2 and Year 3. Less than 75% of TFC's gross income in Year 1 is passive income (($20x + $1x)/($10x + $20x + $1x) = 68%). However, subject to the application of section 1298(b)(3) and this section, TFC would be a PFIC in Year 1 under section 1297(a)(2) because the proceeds from the sale of the FS stock ($300x) together with TFC's other passive assets exceed 50% of TFC's total assets on each quarterly measuring date. For example, on the first quarterly measuring date TFC's ratio of passive assets to total assets is (($300x + $30x + $5x)/($300x + $30x + $5x + $50x)) and on the fourth quarterly measuring date TFC's ratio of passive assets to total assets is (($300x + $30x + $20x)/($300x + $30x + $20x + $50x)), each of which exceeds 87%. Therefore, TFC chooses to apply the change of business exception in paragraph (b) of this section to Year 1.

(ii) *Results.* (A) Under paragraph (d) of this section, for purposes of applying section 1298(b)(3)(B)(i) in Year 1, TFC's proceeds from the disposition of the stock of FS that are attributable to assets used by FS in an active trade or business are considered as from the disposition of an active trade or business. Because 100% of FS's assets are used in its active trade or business, all of TFC's proceeds are considered as from the disposition of an active trade or business. Therefore, under paragraph (c)(1) of this section, the passive income considered attributable to proceeds from a disposition of one or more active trades or businesses is $20x (from investment of disposition proceeds). Because TFC reasonably does not expect to be a PFIC in Year 2 and Year 3, and TFC is not, in fact, a PFIC for those years, TFC will not be treated as a PFIC in Year 1 by reason of section 1298(b)(3) and paragraph (b) of this section, based on the satisfaction of the condition in paragraph (b)(2)(i) of this section, because the 95% ($20x/($20x + $1x)) of TFC's passive income for Year 1 that is attributable to proceeds of the disposition of FS's active trade or business constitutes substantially all of its passive income.

(B) TFC would also not be treated as a PFIC in Year 1 by reason of section 1298(b)(3) and paragraph (b) of this section, based on the satisfaction of the condition in paragraph (b)(2)(ii) of this section, because the over 91% of TFC's passive assets on the quarterly measuring dates during Year 1 following the disposition of the stock of FS that is attributable to proceeds of the disposition of FS's active trade or business constitutes substantially all of its passive assets. For example, on the first quarterly measuring date TFC's ratio of passive assets attributable to the proceeds of the disposition of FS's active trade or business to its total passive assets is 91% ($305x/($305x + $30x)), and the same ratio for the fourth quarterly measuring date is 91.4% ($320x/($320x + $30x)).

(C) Under paragraph (e) of this section, TFC cannot claim the section 1298(b)(3) exception in relation to the income attributable to the proceeds of the FS stock sale in Year 2 because TFC already claimed the exception for Year 1.

(2) *Example 2*—(i) *Facts.* The facts are the same as in paragraph (f)(1)(i) of this section (the facts in *Example 1*), except that during the first quarter of Year 1, TFC earned only $4x of passive income ($1x per quarter) from the investment of the proceeds from the disposition of the FS stock and earned $12x of passive income ($3x per quarter) from its other passive assets and maintained such earnings in cash for the remainder of the year.

(ii) *Results.* The results are the same as in paragraph (f)(1)(ii) of this section (the facts in *Example 1*), except that under paragraph (c)(1) of this section, the passive income considered attributable to proceeds from a disposition of one or more active trades or businesses is $4x (from investment of disposition proceeds). Because 24% ($4x/($4x + $12x + $1x)) of TFC's passive income for Year 1 is attributable to proceeds of the disposition of FS's active trade or business, and 24% does not constitute substantially all of TFC's passive income for Year 1, TFC does not qualify for the exception from treatment as a PFIC in section 1298(b)(3) and paragraph (b)(2)(i) of this section for Year 1. However, under paragraphs (b)(2)(ii) and (d) of this section, more

than $300x ($300x disposition proceeds + amounts earned from investment of disposition proceeds) of TFC's passive assets held on each quarterly measuring date after the disposition is considered attributable to the disposition of an active trade or business. Because TFC reasonably does not expect to be a PFIC in Year 2 and Year 3, and TFC is not, in fact, a PFIC for those years, TFC will not be treated as a PFIC in Year 1 by reason of paragraph (b) of this section, based on the satisfaction of the condition in paragraph (b)(2)(ii) of this section, assuming that the average 89% of TFC's passive assets on the quarterly measuring dates during Year 1 following the disposition of the stock of FS that is attributable to proceeds of the disposition of FS's active trade or business constitutes substantially all of its passive assets.

(g) *Applicability date.* The rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. A shareholder may choose to apply such rules for any open taxable year beginning before January 14, 2021, provided that, with respect to the tested foreign corporation, the shareholder consistently applies the provisions of this section and § 1.1291–1(b)(8)(iv) and (b)(8)(v)(A), (B), (C), and (D) and §§ 1.1297–1 (except that consistent treatment is not required with respect to § 1.1297–1(c)(1)(i)(A)), 1.1297–2, and 1.1298–4 for such year and all subsequent years.

■ **Par. 9.** Section 1.1298–4 is added to read as follows:

§ 1.1298–4 Rules for certain foreign corporations owning stock in 25-percent-owned domestic corporations.

(a) *Overview.* This section provides rules under section 1298(b)(7) that apply to certain foreign corporations that own stock in 25-percent-owned domestic corporations (as defined in paragraph (b) of this section) for purposes of determining whether a foreign corporation is a passive foreign investment company (PFIC). Paragraph (b) of this section provides the general rule. Paragraph (c) of this section provides rules concerning ownership of 25-percent-owned domestic corporations or qualified stock (as defined in paragraph (b)(2) of this section) through partnerships. Paragraph (d) of this section provides rules for determining whether a foreign corporation is subject to the tax imposed by section 531 (the section 531 tax) and for waiving treaty benefits that would prevent the imposition of such tax. Paragraph (e) of this section provides an anti-abuse rule for the application of section 1298(b)(7). Paragraph (f) provides the applicability date for this section.

(b) *Treatment of certain foreign corporations owning stock in a 25-percent-owned domestic corporation*—(1) *General rule.* Except as otherwise provided in paragraph (e) of this section, when a tested foreign corporation (as defined in § 1.1297–1(f)) is subject to the section 531 tax (or waives any benefit under any treaty that would otherwise prevent the imposition of the tax), and owns (directly or indirectly under the rules in paragraph (c) of this section) at least 25 percent (by value) of the stock of a domestic corporation (a *25-percent-owned domestic corporation*), for purposes of determining whether the foreign corporation is a PFIC, any qualified stock held directly or indirectly under the rules in paragraph (c) of this section by the 25-percent-owned domestic corporation is treated as an asset that does not produce passive income (and is not held for the production of passive income), and any amount included in gross income with respect to the qualified stock is not treated as passive income.

(2) *Qualified stock and second-tier domestic corporation.* For purposes of this section, the term *qualified stock* means any stock in a C corporation that is a domestic corporation and that is not a regulated investment company or real estate investment trust and the term *second-tier corporation* means the corporation.

(c) *Indirect ownership of stock through a partnership.* For purposes of paragraph (b)(1) of this section, a tested foreign corporation that is a partner in a partnership is considered to own its proportionate share of any stock of a domestic corporation held by the partnership, and a domestic corporation that is a partner in a partnership is considered to own its proportionate share of any qualified stock held by the partnership. An upper-tier partnership's attributable share of the stock of a domestic corporation or of qualified stock held by a lower-tier partnership is treated as held by the upper-tier partnership for purposes of applying the rule in this paragraph (c).

(d) *Section 531 tax*—(1) *Subject to section 531 tax.* For purposes of paragraph (b) of this section, a tested foreign corporation is considered subject to the section 531 tax regardless of whether the tax is imposed on the corporation and of whether the requirements of § 1.532–1(c) are met.

(2) *Waiver of treaty benefits*—(i) *Tested foreign corporation that files, or is required to file, a Federal income tax return.* For purposes of paragraph (b) of this section, a tested foreign corporation that files, or is required to file, a Federal income tax return waives the benefit under a treaty that would otherwise prevent the imposition of the section 531 tax by attaching to its original or amended return for the taxable year for which section 1298(b)(7) and paragraph (b)(1) of this section are applied or any prior taxable year a statement that it irrevocably waives treaty protection against the imposition of the section 531 tax, effective for all prior, current, and future taxable years, provided the taxable year for which the return is filed and all subsequent taxable years are not closed by the period of limitations on assessments under section 6501.

(ii) *Tested foreign corporation that is not required to file a Federal income tax return.* For purposes of paragraph (b) of this section, a tested foreign corporation that is not required to file a Federal income tax return waives the benefit under a treaty that would otherwise prevent the imposition of the section 531 tax by a date no later than nine months following the close of the taxable year for which section 1298(b)(7) and paragraph (b)(1) of this section are applied by—

(A) Adopting a resolution or similar governance document that confirms that it has irrevocably waived any treaty protection against the imposition of the section 531 tax, effective for all prior, current, and future taxable years, and maintaining a copy of the resolution (or other governance document) in its records; or

(B) In the case of a tested foreign corporation described in section 1297(e)(3), including in its public filings a statement that it irrevocably waives treaty protection against the imposition of the section 531 tax, effective for all prior, current, and future taxable years.

(e) *Anti-abuse rule*—(1) *General rule.* Paragraph (b) of this section does not apply with respect to qualified stock in a second-tier domestic corporation owned by a 25-percent-owned domestic corporation if a principal purpose for the formation of, acquisition of, or holding of stock of the 25-percent-owned domestic corporation or the second-tier domestic corporation, or for the capitalization or other funding of the second-tier domestic corporation, is to hold passive assets (as defined in § 1.1297–1(f)(5)) through the second-tier domestic corporation to avoid classification of the tested foreign corporation as a PFIC.

(2) [Reserved].

(3) [Reserved].

(f) *Applicability date.* The rules of this section apply to taxable years of shareholders beginning on or after

Janyuary 14, 2021. A shareholder may choose to apply such rules for any open taxable year beginning before January 14, 2021, provided that, with respect to a tested foreign corporation, the shareholder consistently applies the provisions of this section and § 1.1291–1(b)(8)(iv) and (b)(8)(v)(A), (B), (C), and (D) and §§ 1.1297–1 *(*except that consistent treatment is not required with respect to § 1.1297–1(c)(1)(i)(A)), 1.1297–2, and 1.1298–2 for such year and all subsequent years.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: November 19, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

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Part VI

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Guidance on Passive Foreign Investment Companies and the Treatment of Qualified Improvement Property Under the Alternative Depreciation System for Purposes of Sections 250(b) and 951A(d); Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–111950–20]

RIN 1545–BP91

Guidance on Passive Foreign Investment Companies and the Treatment of Qualified Improvement Property Under the Alternative Depreciation System for Purposes of Sections 250(b) and 951A(d)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking; notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations regarding the determination of whether a foreign corporation is treated as a passive foreign investment company (''PFIC'') for purposes of the Internal Revenue Code (''Code''). The proposed regulations also provide guidance regarding the treatment of income and assets of a qualifying insurance corporation (''QIC'') that is engaged in the active conduct of an insurance business (''PFIC insurance exception''). This document also contains proposed regulations addressing the treatment of qualified improvement property (''QIP'') under the alternative depreciation system (''ADS'') for purposes of calculating qualified business asset investment (''QBAI'') for purposes of the global intangible low-taxed income (''GILTI'') and the foreign-derived intangible income (''FDII'') provisions, which were added to the Code in the Tax Cuts and Jobs Act. The proposed regulations affect United States persons with direct or indirect ownership interests in certain foreign corporations, United States shareholders of controlled foreign corporations, and domestic corporations eligible for the deduction for FDII.

DATES: Written or electronic comments and requests for a public hearing must be received by April 14, 2021. Requests for a public hearing must be submitted as prescribed in the ''Comments and Requests for a Public Hearing'' section.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–111950–20) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket.

Send paper submissions to: CC:PA:LPD:PR (REG–111950–20), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning proposed regulations §§ 1.250(b)–1(b)(2) and 1.250(b)–2(e)(2), Lorraine Rodriguez, (202) 317–6726; concerning proposed regulations § 1.951A–3(e)(2), Jorge M. Oben and Larry R. Pounders, (202) 317–6934; concerning proposed regulations §§ 1.1297–0 through 1.1297–2, 1.1298–0 and 1.1298–4, Christina G. Daniels at (202) 317–6934; concerning proposed regulations §§ 1.1297–4 through 1.1297–6 (the PFIC insurance exception), Josephine Firehock at (202) 317–4932; concerning submissions of comments and requests for a public hearing, Regina L. Johnson at (202) 317–6901 (not toll-free numbers) or by sending an email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

I. Passive Foreign Investment Companies

A. In General

This document contains proposed amendments to 26 CFR part 1 under sections 1297 and 1298. Under section 1297(a), a foreign corporation (''tested foreign corporation'') qualifies as a PFIC if it satisfies either of the following tests: (i) 75 percent or more of the tested foreign corporation's gross income for a taxable year is passive (''Income Test''); or (ii) the average percentage of assets held by the tested foreign corporation during a taxable year that produce (or that are held for the production of) passive income is at least 50 percent (''Asset Test''). Section 1297(b)(1) generally defines passive income as any income of a kind that would constitute foreign personal holding company income (''FPHCI'') under section 954(c), and section 1297(b)(2) provides exceptions to this general definition. In addition, section 1297(c) provides a look-through rule that applies when determining the PFIC status of a tested foreign corporation that directly or indirectly owns at least 25 percent of the stock (determined by value) of another corporation. Section 1298(b)(7) provides that certain stock (''qualified stock'') in a domestic C corporation owned by a tested foreign corporation through a 25-percent-owned domestic corporation is treated as an asset generating non-passive income for purposes of section 1297(a), provided that the tested foreign corporation is subject to the accumulated earnings tax or waives any treaty protections against the imposition of the accumulated earnings tax.

B. PFIC Insurance Exception

Before its amendment by section 14501 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2234 (2017) (the ''Act''), former section 1297(b)(2)(B) provided that passive income generally did not include investment income derived in the active conduct of an insurance business by a corporation that is predominantly engaged in an insurance business and that would be subject to tax under subchapter L if it were a domestic corporation. Congress was concerned about a lack of clarity and precision in the PFIC insurance exception, and in particular about the lack of precision regarding how much insurance or reinsurance business a company must do to qualify under the exception, which made the exception difficult to enforce. H.R. Report 115–409 at 409–10. To address these concerns, the Act modified the PFIC insurance exception to provide that passive income does not include investment income derived in the active conduct of an insurance business by a QIC.

Thus, for taxable years beginning after December 31, 2017, the PFIC insurance exception provides that a foreign corporation's income attributable to an insurance business will not be passive income if three requirements are met. First, the foreign corporation must be a QIC as defined in section 1297(f). Second, the foreign corporation must be engaged in an ''insurance business.'' Third, the income must be derived from the ''active conduct'' of that insurance business.

C. Prior Proposed Regulations

On April 24, 2015, the **Federal Register** published a notice of proposed rulemaking (REG–108214–15) at 80 FR 22954 (the ''2015 proposed regulations'') under former sections 1297(b)(2)(B) and 1298(g). The 2015 proposed regulations addressed the

PFIC insurance exception and provided guidance regarding the extent to which a foreign corporation's investment income and the assets producing that income are excluded from passive income and passive assets for purposes of the passive income and passive asset tests in section 1297(a). Comments were received on the previously proposed regulations. A public hearing was requested and was held on September 18, 2015.

On July 11, 2019, the **Federal Register** published a notice of proposed rulemaking (REG–105474–18) at 84 FR 33120 (the ''2019 proposed regulations'') under sections 1291, 1297, and 1298. The 2019 proposed regulations provided guidance with respect to the application of the Income Test and the Asset Test under section 1297(a), the look-through rule under section 1297(c), and indirect ownership rules under section 1291. The 2019 proposed regulations also addressed the PFIC insurance exception under section 1297(b)(2)(B), including the definition of a QIC under section 1297(f) and the requirements for a foreign corporation to be engaged in the active conduct of an insurance business.

A public hearing on the 2019 proposed regulations was scheduled for December 9, 2019, but it was not held because there were no requests to speak. The Treasury Department and the IRS received written comments with respect to the 2019 proposed regulations. Concurrently with the publication of these proposed regulations, the Treasury Department and the IRS are publishing in the Rules and Regulations section of this edition of the **Federal Register** (RIN 1545–BO59) final regulations under sections 1291, 1297, and 1298 (the ''final regulations''). In response to certain comments, the Treasury Department and the IRS are publishing this notice of proposed rulemaking to provide additional proposed regulations under sections 1297 and 1298.

II. QBAI Rules for GILTI and FDII

A. GILTI and FDII—In General

Section 951A(a) requires a United States shareholder (as defined in section 951(b)) (''U.S. shareholder'') of any controlled foreign corporation (as defined in section 957) (''CFC'') for any taxable year to include in gross income the U.S. shareholder's GILTI for such taxable year (''GILTI inclusion amount''). The U.S. shareholder's GILTI inclusion amount is calculated based on its pro rata share of certain items—such as tested income, tested loss, and QBAI—of each CFC owned by the U.S. shareholder. *See* § 1.951A–1(c). Section 951A(d)(3) [1] requires a taxpayer to calculate QBAI by determining the adjusted basis of property using the ADS under section 168(g) ''notwithstanding any provision of this title (or any other provision of law) which is enacted after the date of the enactment of [section 951A].'' Section 1.951A–3(e)(2) states that ''[t]he adjusted basis in specified tangible property is determined without regard to any provision of law enacted after December 22, 2017, unless such later enacted law specifically and directly amends the definition of qualified business asset investment under section 951A.'' The GILTI provisions in section 951A apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end. *See* section 14201(d) of the Act.

The definition of QBAI in section 951A(d) also applies for purposes of determining deemed tangible income return under section 250. *See* section 250(b)(2)(B) and § 1.250(b)–2(b). Section 250 generally allows a domestic corporation a deduction equal to 37.5 percent (21.875 percent for taxable years after 2025) of its FDII (as defined in section 250(b)(1) and § 1.250(b)–1(b)). For purposes of FDII, QBAI is used to determine the deemed tangible income return of a corporation, which in turn reduces the amount of FDII of a corporation. *See* section 250(b)(1) and (2). Section 250(b)(2)(B) and § 1.250(b)–2 incorporate the definition of QBAI in section 951A(d)(3), with some modifications. Similar to the GILTI rule provided in § 1.951A–3(e)(2), § 1.250(b)–2(e)(2) provides that ''[t]he adjusted basis in specified tangible property is determined without regard to any provision of law enacted after December 22, 2017, unless such later enacted law specifically and directly amends the definition of QBAI under section 250 or section 951A.'' The FDII provisions in section 250 apply to taxable years beginning after December 31, 2017. *See* section 14202(a) of the Act.

B. ADS Depreciation

ADS depreciation under section 168(g) is determined by using the straight-line method (without regard to salvage value), the applicable convention determined under section 168(d), and the applicable recovery period as determined under section 168(g)(2)(C).[2] On December 22, 2017, the date the Act was enacted, section 168(g)(2)(C)(iv) provided that the recovery period for purposes of ADS depreciation for nonresidential real property under section 168(e)(2)(B) was 40 years. Nonresidential real property is defined under section 168(e)(2)(B) as section 1250 property (that is, real property not described in section 1245) that is not residential rental property or property with a class life of less than 27.5 years.

Section 168(g)(2)(C)(i) provided that the recovery period for property not described in section 168(g)(2)(C)(ii) or (iii) [3] is the property's class life. Class life is generally determined under section 168 or Rev. Proc. 87–56; 1987–42 I.R.B. 4; however, section 168(g)(3) specifies class lives for certain types of property for ADS purposes.

C. Qualified Improvement Property

1. The Act

Effective for property placed in service after December 31, 2017, section 13204 of the Act amended section 168(e) by removing references to qualified leasehold improvement property, qualified restaurant improvement property, and qualified retail improvement property, and instead referring only to QIP. Under section 168(e)(6), QIP includes certain improvements made by a taxpayer [4] to the interior of a nonresidential building that are placed in service after the building was first placed in service. The conference report under the Act states that Congress intended QIP to be classified as 15-year property under the general depreciation system and be assigned a 20-year ADS recovery period. *See* Conference Report to Accompany H.R. 1 at 366–367.

2. The CARES Act

The Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (the ''CARES Act'') was enacted on March 27, 2020. According to the Description of the Tax Provisions of Public Law 116–136, the Coronavirus Aid, Relief, and Economic Security

[1] As enacted, section 951A(d) contains two paragraphs designated as paragraph (3). The section 951A(d)(3) discussed in this preamble relates to the determination of the adjusted basis in property for purposes of calculating QBAI.

[2] Although the applicable convention for nonresidential real property under section 168(d)(2)(A) is the mid-month convention, § 1.951A–3(e)(1) provides that for the purpose of determining QBAI, the period in the CFC inclusion year to which such depreciation relates is determined without regard to the applicable convention under section 168(d).

[3] Section 168(g)(2)(C)(ii) and (iii) refer to personal property with no class life and residential rental property, respectively.

[4] The phrase ''made by a taxpayer'' was added by section 2307(a)(2) of Public Law 116–136, discussed below.

(''CARES'') Act, prepared by the Staff of the Joint Committee on Taxation, when Congress added the definition of QIP in section 168(e)(6) of the Code, it intended for QIP to be classified as 15-year property under section 168(e)(3)(E) of the Code, with a 15-year recovery period under the general depreciation system in section 168(a) of the Code and a 20-year ADS recovery period but inadvertently omitted from the statute such language. *See* Joint Committee on Taxation, Description of the Tax Provisions of Public Law 116–136, The Coronavirus, Relief, and Economic Security (''CARES'') Act (JCX–12R–20) at 69–70 (Apr. 23, 2020) (''JCT CARES Act Report''). Section 2307(a)(2) of the CARES Act amended section 168(e) by adding clause (vii) to paragraph (E)(3), providing that QIP is classified as 15-year property, and amending the table in section 168(g)(3)(B) to provide a recovery period of 20 years for QIP for purposes of the ADS (the ''technical amendment''). The technical amendment is effective as if it had been included in the Act.[5]

D. Notice 2020–69

Notice 2020–69, 2020–30 I.R.B. 604, announced that the Treasury Department and the IRS intend to issue regulations addressing the treatment of QIP under the ADS depreciation provisions in section 168(g) for purposes of calculating QBAI under the FDII and GILTI provisions. The notice provided that the Treasury Department and the IRS expect the regulations under sections 250 and 951A to clarify that the technical amendment to section 168 enacted in section 2307(a) of the CARES Act applies to determine the adjusted basis of property under section 951A(d)(3) as if it had originally been part of section 13204 of the Act.

Explanation of Provisions

The proposed regulations provide guidance on the valuation of assets and on the treatment of working capital for purposes of the Asset Test. They modify the treatment of dividends paid out of earnings and profits not previously taken into account, such as dividends paid out of pre-acquisition earnings, and provide safe harbors for application of the principal purpose anti-abuse test that may prohibit the use of the qualified stock rules of section 1298(b)(7). The proposed regulations also provide guidance regarding whether the income of a foreign corporation is excluded from passive income pursuant to section 1297(b)(2)(B) because the income is derived in the active conduct of an insurance business by a QIC.

Part I.A of this Explanation of Provisions describes rules for income derived in the active conduct of a banking business, asset valuation, and working capital in proposed § 1.1297–1; the special dividend rules in proposed § 1.1297–2; and the proposed safe harbors for the qualified stock principal purpose anti-abuse test in proposed § 1.1298–4(e). Part I.B of this Explanation of Provisions describes the rules in proposed § 1.1297–4 for determining whether a foreign corporation is a QIC. Part I.C of this Explanation of Provisions describes the rules in proposed § 1.1297–5 for determining whether a foreign corporation is engaged in the active conduct of an insurance business. Part I.D of this Explanation of Provisions describes the rules in proposed § 1.1297–6 regarding the treatment of income and assets of a qualifying domestic insurance company.

The proposed regulations also provide guidance on the treatment of QIP under the ADS for purposes of calculating QBAI under the GILTI and FDII provisions. See Part II of this Explanation of Provisions.

I. Passive Foreign Investment Companies

A. General PFIC Rules

1. Income Derived in the Active Conduct of a Banking Business

a. Active Banking Business Exception

Section 1297(b)(1) generally defines the term passive income to mean any income which is of a kind which would be FPHCI as defined in section 954(c). Section 1297(b)(2) provides exceptions to this general definition. Section 1297(b)(2)(A) provides that passive income does not include any income derived in the active conduct of a banking business by an institution licensed to do business as a bank in the United States (or, to the extent provided in regulations, by any other corporation) (the ''section 1297(b)(2)(A) banking exception''), and section 1297(b)(2)(B) provides a similar exception for income derived in the active conduct of an insurance business. The Treasury Department and the IRS have determined that in light of this statutory framework, qualifying banking income should be treated as non-passive under the section 1297(b)(2)(A) banking exception (and qualifying insurance income should be treated as non-passive under the similar rule in section 1297(b)(2)(B)) and not under the general rule of section 1297(b)(1). Otherwise, an exception for active banking and insurance income of a tested foreign corporation would apply indirectly under section 1297(b)(1) and also directly under sections 1297(b)(2)(A) and (B), which would be duplicative and would effectively narrow the scope of the statutory exceptions in section 1297(b)(2). Accordingly, the Treasury Department and the IRS have determined that section 954(h)(1), which provides that for purposes of section 954(c)(1) FPHCI does not include qualified banking or financing income of an eligible controlled foreign corporation, does not apply for purposes of section 1297(b)(1). *See* Part III.B.1 of the preamble to the final regulations.

Notice 88–22, 1988–1 C.B. 489, states that assets held by foreign corporations described in section 1297(b)(2)(A) (then section 1296(b)(2)(A)) that are utilized to produce income in the active conduct of a banking business will be treated as non-passive assets. Notice 89–81, 1989–2 C.B. 399, provides guidance addressing the characterization of income derived in a banking business by a foreign corporation that is not licensed to do business as a bank in the United States for purposes of the definitional tests of the PFIC provisions, and states that the rules contained in Notice 89–81 will be incorporated into future regulations. In 1995, regulations were proposed to implement the section 1297(b)(2)(A) banking exception. *See* proposed § 1.1296–4, 60 FR 20922, April 28, 1995. In light of the fact that the 1995 proposed regulations have not been finalized, the Treasury Department and the IRS are aware that taxpayers need guidance on how to properly apply section 1297(b)(2)(A).

Section 1297(b)(2)(A) requires that income be derived in the active conduct of a banking business, and grants authority for regulations to expand the scope of entities that are eligible for the section 1297(b)(2)(A) exception beyond U.S.-licensed banks. The preamble to the 1995 proposed regulations states that the Treasury Department and the IRS believe that Congress intended to grant the banking exception only to corporations that conform to a traditional U.S. banking model. 1995–1 C.B. 978. The Treasury Department and IRS continue to believe that the section 1297(b)(2)(A) banking exception should apply to foreign banks and not to other

[5] Rev. Proc. 2020–25, 2020–19 I.R.B. 785, generally allows a taxpayer to change its depreciation method under section 168 for QIP placed in service by the taxpayer after December 31, 2017, by amending the applicable tax returns or requesting an accounting method change. The determination of a taxpayer's adjusted basis for purposes of determining QBAI is not addressed in the revenue procedure and is not treated as a method of accounting. T.D. 9866, 84 FR 29288, 29304 (2019).

types of financial institutions, based on both the statutory framework and the history of section 1297(b).[6]

In the Tax Reform Act of 1986, Congress repealed broad FPHCI exceptions under section 954, including an exception for active banks, while simultaneously enacting PFIC rules, including current section 1297(b)(2)(A) (as subsequently renumbered in 1997). Thus, when the PFIC rules were enacted, section 1297(b)(2)(A) was the exclusive means by which an active bank could avail itself of a passive income exception to the PFIC rules.

Since 1986, Congress has repeatedly amended section 1297(b) to add, repeal, and modify the exceptions therein as they apply to financial institutions. For example, in 1993 a new paragraph (3) was added to section 1297(b) (then section 1296(b)) providing that income earned in the active conduct of a securities business by a CFC was not treated as passive for PFIC purposes for a United States shareholder (''U.S. shareholder'') as defined in section 951(b). Public Law 103–66, Omnibus Budget Reconciliation Act of 1993, section 13231(d)(3). In 1997, that paragraph was repealed, in connection with the enactment of section 1297(d) (then section 1297(e)), which eliminated the need for rules relating to CFCs in section 1297 with respect to US shareholders. Public Law 105–34, Taxpayer Relief Act of 1997, section 1122(d)(4). In 2017, TCJA amended section 1297(b)(2)(B), relating to income earned in the active conduct of an insurance business, and added section 1297(f). Congress has thus expressly addressed when income of a kind earned by various active financial institutions should be treated as non-passive. Because section 1297(b)(2)(A) applies to income derived in the active conduct of a banking business, the relevant class of foreign financial institutions is foreign banks.

The Treasury Department and the IRS have considered alternatives to the analysis set forth above. In particular, because the PFIC rules when enacted in 1986 provided broader exclusions for income of active foreign financial institutions than the subpart F rules did, and because broader exclusions for active financial businesses for PFIC purposes may be appropriate in light of the fact that U.S. investors in a PFIC do not control the PFIC, the Treasury Department and the IRS have considered whether a wholesale incorporation of section 954(h) into either section 1297(b)(1) or section 1297(b)(2)(A) would be appropriate as an exercise of regulatory discretion. A broader approach of that kind could be of particular relevance to finance companies whose income is eligible for the section 954(h) exception.

The Treasury Department and the IRS concluded that such a broader approach is not warranted by the statutory language or history, as described in Part I.A.1.a of this Explanation of Provisions. Furthermore, the 1993 legislative history to the expansion of section 1297(b)'s passive income exceptions makes clear that the PFIC rules as in effect at that time did not apply to finance companies, that is, entities that did not engage in the deposit-taking activities characteristic of banks.[7] Consequently, if all of section 954(h) were permitted to apply for purposes of section 1297(b)(2)(A), finance companies, which can qualify for the section 954(h) exception, would obtain a privileged treatment for PFIC purposes that Congress intended to deny in 1993 and has not expressly approved in the interim.

However, section 954(h) provides some useful guideposts that can be applied to interpret section 1297(b)(2)(A) in the absence of final regulations, because the two provisions have similar and complementary purposes. Sections 954(h)(2)(B)(ii) and 1297(b)(2)(A) construe the same statutory phrase: Income ''derived in the active conduct of a banking business.'' And they both are limited to banks licensed to do business as a bank in the United States or any other corporation as prescribed by the Secretary. Moreover, the legislative history to section 954(h) explicitly states that the phrase ''active conduct of a banking business'' under section 954(h) is intended to have the same meaning as under the 1995 proposed regulations issued under section 1297(b)(2)(A).[8] Finally, section 954(h) is a more recent expression of Congressional intent as to the conditions under which banking income of a foreign entity should be treated as non-passive than section 1297(b)(2)(A).

Accordingly, in order to provide guidance to foreign banks and in light of the close connection between section 1297(b)(2)(A) and section 954(h)(2)(B)(ii), the Treasury Department and the IRS propose to apply certain principles of section 954(h) for purposes of section 1297(b)(2)(A), under section 1297(b)(2)(A)'s specific grant of regulatory authority. *See* proposed § 1.1297–1(c)(2). Alternatively, taxpayers also may rely upon Notice 89–81 or proposed § 1.1296–4 (relating to banking income of active banks) to determine whether income of a foreign entity may be treated as non-passive under section 1297(b)(2)(A).

b. Proposed Exception for Active Banking Income of Foreign Banks

Proposed § 1.1297–1(c)(2) provides that income of a tested foreign corporation will not be treated as passive if the income would be eligible for section 954(h) if the tested foreign corporation were a CFC, and the income is derived in the active conduct of a banking business by a foreign bank. The term active conduct of a banking business has the meaning given to it by section 954(h)(2)(B)(ii). *See* proposed § 1.1297–1(c)(2)(i)(B). The term foreign bank is defined in a manner similar to the definition of active bank under proposed § 1.1296–4, and is intended to have the same meaning, except where the proposed regulations provide a different rule. For example, a foreign bank must engage in one or more of the list of relevant banking activities provided by section 954(h)(4) rather than being required to make loans. *See* proposed § 1.1297–1(c)(2)(ii). Some clarifying changes have been made to the definition to ensure that it applies only to entities that are banks as that

[6] *See* Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986,* at 1025 (JCS–10–87) (May 4, 1987) (''The Act provides regulatory authority to expand the exception to passive income for income derived by a foreign bank licensed to do business in the United States to *any other foreign corporation engaged in the active conduct of a banking business, as well.*'') (emphasis added); *cf.* H.R. Rep. No. 99–841, at II–644 (1986) (Conf. Rep.) (providing that ''the Secretary has regulatory authority to apply the PFIC provisions to any '*bank*' where necessary to prevent U.S. individuals from earning what is essentially portfolio investment income in a tax deferred entity'') (emphasis added).

[7] *See* H.R. Conf. Rep. No. 103–213, *Omnibus Budget Reconciliation Act of 1993,* at 641 (Aug. 4, 1993) (''These rules [the banking exception and the securities dealer exception], however, do not apply to income derived in the conduct of financing and credit services businesses'').

[8] H.R. Rep. No. 817, 105th Cong. 2d Sess. 37 (Oct. 12, 1988) (''It generally is intended that these requirements for the active conduct of a banking or securities business be interpreted in the same manner provided in the regulations proposed under prior law section 1296(b) . . . See Prop. Treas. Reg. secs. 1.1296–4 and 1.1296–6. Specifically, it is intended that these requirements include the requirements for foreign banks under Prop. Treas. Reg. sec. 1.1296–4 as currently drafted.''); *see also H.R. Rep. No.* 220, 105th Cong. 1st Sess. 642 (July 30, 1997) (similar language); Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 1997,* at 330 (JCS–23–97) (Dec. 17, 1997) (''The Congress generally intended that the income of a corporation engaged in the active conduct of a banking or securities business that would have been eligible for this exception would have been the income that is treated as nonpassive under the regulations proposed under prior law section 1296(b). *See* Prop. Treas. Reg. secs. 1.1296–4 and 1.1296–6.'').

term is ordinarily understood, and not, for example, to payment service providers or money transmitters. As is the case under section 954(h), the exception is intended to apply to the income of qualified business units of a foreign bank.

As proposed, the exception does not apply to affiliates of a foreign bank that do not independently qualify for the exception, in light of the fact that section 954(h) takes affiliates into account only for purposes of treating the activities of same-country related persons that are CFCs as activities that are conducted directly by an eligible CFC if certain conditions are satisfied. *See* section 954(h)(3)(E). Proposed § 1.1297–1(c)(2)(i)(A) permits such related persons to be treated as if they were CFCs so that section 954(h)(3)(E) may apply for purposes of proposed § 1.1297–1(c)(2).

A comment on the 2019 proposed regulations suggested that the attribution of activities of look-through subsidiaries to other affiliates that is permitted by § 1.1297–2(e) for purposes of specified provisions of section 954(c) be extended to apply for purposes of section 954(h). The comment indicated that such treatment would be proper because financial businesses generally segregate assets and operations that are part of an integrated business into different entities for non-tax reasons. Because section 954(h)(3)(E) operates to attribute activities among entities for purposes of determining whether income constitutes qualified banking income, the Treasury Department and the IRS have determined that it would be inappropriate to adopt additional rules for attribution of activities for purposes of the incorporation of section 954(h) into section 1297(b)(2)(A) and did not adopt this comment in the final regulations. However, as an alternative to proposed § 1.1297–1(c)(2), taxpayers may rely upon Notice 89–81 or proposed § 1.1296–4, which provide rules treating banking income of qualified bank affiliates as non-passive. If a foreign bank is a look-through subsidiary of a tested foreign corporation, then under section 1297(c) and § 1.1297–2(b)(2) the income and assets of the foreign bank are treated as passive or non-passive at the level of the tested foreign corporation to the extent they are treated as passive or non-passive at the level of the foreign bank. If that foreign bank itself owns a look-through subsidiary, then under section 1297(c) and § 1.1297–2(b)(2) the income and assets of the look-through subsidiary are treated as passive or non-passive at the level of the foreign bank to the extent they are treated as passive or non-passive at the level of the look-through subsidiary.

Another comment noted that, in the case of tested foreign corporations with look-through subsidiaries that are domestic corporations, section 954(h)(3)(A)(ii)(I) would result in the section 954(h) exception being inapplicable to active financing income earned by these subsidiaries from transactions with local customers, even though it would otherwise be of a type that would not be passive. The comment suggested that section 954(h) should be applied in the PFIC context by treating income as qualified banking or financing income even if the income is derived from transactions with customers in the United States.

Section 1298(b)(7) provides an exception for income derived from certain 25-percent owned domestic subsidiaries that treats such income as non-passive. The Treasury Department and the IRS do not agree that an additional rule should be provided to treat income of a domestic subsidiary that is not eligible for section 1298(b)(7) as non-passive, and accordingly these proposed regulations do not adopt this recommendation.[9]

The preamble to the 2019 proposed regulations requested comments addressing the question of whether the section 954(h) exception, if adopted as proposed in the 2019 proposed regulations, should continue to apply if final regulations implementing section 1297(b)(2)(A), for example final regulations similar to proposed § 1.1296–4, are adopted. Several comments recommended that the section 954(h) exception continue to apply in the PFIC context under section 1297(b)(1) in such a case. In light of the different approach taken by these proposed regulations compared to the 2019 proposed regulations, the Treasury Department and the IRS request comments on whether proposed § 1.1297–1(c)(2) provides sufficient guidance to foreign banks, such that Notice 89–81 and proposed § 1.1296–4 can be withdrawn, whether alternatively proposed § 1.1296–4 should be finalized rather than proposed § 1.1297–1(c)(2), whether both proposed § 1.1296–4 and proposed § 1.1297–1(c)(2) should be finalized, or whether a single harmonized set of rules should be provided. Until Notice 89–81 and proposed § 1.1296–4 are withdrawn, taxpayers may rely upon them as alternatives to proposed § 1.1297–1(c)(2).

The Treasury Department and the IRS also request comments on the general approach taken by proposed § 1.1297–1(c)(2), on whether further guidance is needed to address when income is derived in the active conduct of a banking business, on whether the definition of foreign bank is drafted in a manner that does not exclude *bona fide* foreign banks and does not include other types of financial institutions, and on how income of affiliates of foreign banks should be taken into account.

2. Valuation of Assets for Purposes of the Asset Test

Under section 1297(e), the determination of whether a tested foreign corporation satisfies the Asset Test either must or may be made on the basis of the value of the assets of the tested foreign corporation, unless the tested foreign corporation is a controlled foreign corporation the shares of which are not publicly traded. Accordingly, it is typically necessary to determine the relative value of a tested foreign corporation's passive and non-passive assets in order to determine whether the tested foreign corporation satisfies the Asset Test.

The value of individual assets of an operating company may not be readily determinable. However, financial accounting standards generally provide rules that are intended to provide stakeholders with an economically realistic understanding of a company's financial position, including the cost or value of its assets. Financial statement information also often is accessible by tested foreign corporations and their shareholders, and is prepared for non-tax purposes. The Treasury Department and the IRS understand that, for these reasons, taxpayers often utilize financial statements in order to determine the value of a tested foreign corporation's assets. Section 1297(f)(4) specifically requires the use of information from financial statements prepared under U.S. generally accepted accounting principles (''GAAP'') or international financial reporting standards (''IFRS'') for purposes of the QIC rules, indicating that Congress believes that such information is appropriate in some circumstances as a basis for determining whether a tested foreign corporation qualifies as a PFIC.

Accordingly, proposed § 1.1297–1(d)(1)(v)(D) generally permits a taxpayer to rely upon the information in a tested foreign corporation's financial

[9] The legislative history of section 954(h) states that the active banking test is not intended to apply to affiliates that do not independently satisfy the test. H.R. Rep. No. 817, 105th Cong. 2d Sess. 37 (Oct. 12, 1988) (''[I]t is not intended that these requirements be considered to be satisfied by a CFC merely because it is a qualified bank affiliate . . . within the meaning of the proposed regulations under former section 1296(b).'')

statements in order to determine the value of the corporation's assets. The Treasury Department and the IRS request comments on whether ordering rules similar to those of section 1297(f)(4) and proposed § 1.1297–4(f)(1) should apply, and whether other safeguards such as requiring that financial statements be audited should be required.

The Treasury Department and the IRS are aware that financial statements do not include values for some types of assets that are important to companies in certain industries, for example self-created intangibles. Accordingly, proposed § 1.1297–1(d)(1)(v)(D) provides that if a shareholder has reliable information about the value of an asset that differs from its financial statement valuation, that information must be used to determine the value of the asset. Whether valuation information is more reliable than financial statement valuation is based on the facts and circumstances, including the experience and knowledge of the source of the information, whether the information is recent and whether there have been intervening developments that would affect the accuracy of the information, and whether the information specifically addresses the value of the asset in question. Another fact pattern that may raise questions as to whether divergence from a financial statement valuation is warranted is when a tested foreign corporation or look-through entity owns property that is subject to a lease or license that is disregarded under the rules for intercompany obligations between a tested foreign corporation and a look-through entity, and similar fact patterns. *See* § 1.1297–2(c)(1)(ii). The Treasury Department and the IRS request comments on whether the Asset Test should take into account the value of the property subject to the lease or license and the value of the lease or license, or whether instead the Asset Test should take into account the value of the property disregarding the lease or license. The Treasury Department and the IRS request comments on additional considerations that may be relevant to determining when shareholders may use information other than financial statement valuations for purposes of the Asset Test.

3. Treatment of Working Capital and Goodwill for Purposes of the Asset Test, and Other Asset Test Rules Provided by Notice 88–22

Notice 88–22, 1988–1 C.B. 489 (''Notice 88–22''), provides guidance on the application of the Asset Test pending the issuance of regulations. The Treasury Department and the IRS propose to adopt final regulations that will address the portions of Notice 88–22 that have not already been addressed by regulations, for example the guidance relating to depreciable property used in a trade or business, trade or service receivables, intangible property, working capital, and tax-exempt assets. After the issuance of those regulations Notice 88–22 would be obsoleted. Except as described in the remainder of this Part I.A.3 of this Explanation of Provisions section, the rules provided in Notice 88–22 are proposed to be adopted in final form as set forth in Notice 88–22. The Treasury Department and the IRS request comments on whether any changes should be made to those rules when they are adopted in final regulations.

Notice 88–22 provides that cash and other current assets readily convertible into cash, including assets that may be characterized as the working capital of an active business, are treated as passive assets for purposes of the Asset Test. Notice 88–22 indicated that passive treatment is warranted because working capital produces passive income (that is, interest income).

Comments have noted that the approach taken in Notice 88–22 with respect to working capital may be inconsistent with the intent of the PFIC regime to distinguish between investments in passive assets and investments in active businesses. It has been asserted that the working capital rule in Notice 88–22 causes many foreign corporations otherwise engaged in active operating businesses to be classified as PFICs because Notice 88–22 treats working capital as a passive asset even though it is an asset used in the active conduct of business operations. Critics of Notice 88–22's working capital rule have also noted that, for some purposes of the Code, cash is treated as a business (non-passive) asset to the extent it is held as working capital for use in a trade or business. *See generally* section 1202(e)(6) and §§ 1.864–4(c)(2) and 1.897–1(f)(1)(iii).

The Treasury Department and the IRS recognize that, because any active operating company must have some cash or cash equivalents on hand to pay operating expenses, Notice 88–22's working capital rule, which treats all working capital as a passive asset, does not reflect the manner in which *bona fide* businesses operate. The Treasury Department and the IRS also are aware that some foreign companies engaged in active businesses hold cash or liquid securities in amounts that substantially exceed the present needs of the business for extended periods. Therefore, the proposed regulations provide a limited exception to the treatment of working capital as passive. Under proposed § 1.1297–1(d)(2), an amount of cash held in a non-interest bearing account that is held for the present needs of an active trade or business and is no greater than the amount reasonably expected to cover 90 days of operating expenses incurred in the ordinary course of the trade or business of the tested foreign corporation (for example, accounts payable for ordinary operating expenses or employee compensation) is not treated as a passive asset.

The Treasury Department and the IRS understand that this definition is narrower than the ordinary business meaning of working capital and the definitions used in some other Treasury regulations. Because the PFIC rules are based on numeric formulas, it is important that taxpayers and the IRS can determine what the amount treated as working capital is for purposes of the PFIC asset test with some level of precision. Moreover, because the statutory PFIC rules (and FPHCI rules) generally treat an asset held to produce interest as passive, it may not be appropriate to treat an interest-bearing instrument held by an operating company as working capital other than as an asset that produces passive income. Those rules permit interest-bearing assets to be treated as active assets for limited classes of taxpayers like banks, insurance companies and securities dealers, and also permit interest from related persons to be treated in whole or part as active, but in those cases there are specific statutory exceptions from passive treatment. *See* sections 1297(b)(2)(A) (banks), 1297(b)(2)(B) and (f) (insurance companies), 1297(b)(2)(C) (interest from related persons) and 954(c)(2)(C) (securities dealers). The Treasury Department and the IRS request comments on this exception to the general rule of Notice 88–22 that cash is a passive asset, including the scope of statutory authority to treat interest-bearing accounts or instruments held as working capital as an active asset and the ways in which the exception might be broadened while maintaining appropriate safeguards to avoid uncertainty as to how to determine the amounts and types of instruments properly treated as held for the present needs of a business and to ensure that a business's investments and capital held for future needs continue to be characterized as passive assets.

Like working capital, goodwill was not addressed by the 2019 proposed

regulations. Notice 88–22 provides that, for purposes of the Asset Test, goodwill or going concern value must be identified with a specific income-producing activity of the corporation and characterized as a passive or non-passive asset based on the income derived from the activity. The Treasury Department and the IRS understand that some taxpayers believe that Notice 88–22 takes an improper approach with respect to the treatment and characterization of goodwill for purposes of the Asset Test and argue that goodwill related to an active trade or business should be treated in its entirety as a non-passive asset or, in the alternative, that the dual-character asset rule in the proposed regulations should be read to apply to goodwill.

The Treasury Department and the IRS agree that goodwill should be allocated to business activities but do not agree that goodwill should always be treated entirely as a non-passive asset because the PFIC rules may treat certain business assets as passive and it is therefore possible that goodwill would be associated with those assets. Because companies in different lines of business may be valued as an economic matter under different valuation models, some of which may give more weight to income and others to assets or to other aspects of a business like customer relationships, there is no single basis for allocating goodwill that is likely to be best suited to every company as an economic matter. The Treasury Department and the IRS believe that the approach provided by Notice 88–22 for determining the character of goodwill for purposes of the Asset Test is a reasonable approach although other approaches may be more economically accurate for a particular tested foreign corporation. In light of the complex nature of goodwill as an economic and accounting matter, and developments in tax law since 1988 with respect to the treatment of goodwill and similar assets, the Treasury Department and the IRS request comments on alternative approaches to addressing the treatment of goodwill for purposes of the Asset Test.

4. Elimination of Intercompany Dividends for Purposes of the Income Test and Related Adjustments

Proposed § 1.1297–2(c)(2) provided that, for purposes of applying the Income Test, intercompany payments of dividends between a look-through subsidiary and a tested foreign corporation are eliminated to the extent the payment is attributable to income of a look-through subsidiary that was included in gross income by the tested foreign corporation for purposes of determining its PFIC status. The preamble to the proposed regulations indicated that the Treasury Department and the IRS intended for the elimination of such items to prevent double counting of intercompany income and assets.

A comment expressed concern that the proposed regulation did not eliminate a payment of a dividend by a look-through subsidiary to a tested foreign corporation that is made out of earnings and profits not attributable to income of the subsidiary previously included in the gross income of the tested foreign corporation for purposes of determining its PFIC status (''dividends from non-accounted-for earnings''), for example a dividend paid out of earnings and profits accumulated before the tested foreign corporation's acquisition of the look-through subsidiary. The comment recommended that final regulations provide for the elimination of all dividends from look-through subsidiaries and made a number of alternative suggestions intended to reduce or eliminate the likelihood that a dividend from a look-through subsidiary would be treated as a dividend from non-accounted-for earnings. The final regulations did not adopt these recommendations, because treating a distribution from a look-through subsidiary as not giving rise to gross income to the tested foreign corporation for purposes of the Income Test could reduce gain on a future sale of the stock of the look-through subsidiary unless a basis or other adjustment were made to the stock or gain.

The final regulations indicate that for purposes of applying the Income Test, a tested foreign corporation must take into account its gain on the disposition of stock in a look-through subsidiary. *See* § 1.1297–2(f)(2). In the final regulations, the amount of gain derived from a tested foreign corporation's direct disposition of stock of a look-through subsidiary, or an indirect disposition resulting from the disposition of stock of a look-through subsidiary by other look-through subsidiaries or by look-through partnerships, that is taken into account by the tested foreign corporation for purposes of section 1297(a)(1), section 1298(b)(3), and § 1.1298–2 is the residual gain. *See* § 1.1297–2(f)(2). The residual gain equals the total gain recognized by the tested foreign corporation from the disposition of the stock of the look-through subsidiary reduced (but not below zero) by unremitted earnings. Id. Unremitted earnings are the excess of the aggregate income taken into account by the tested foreign corporation pursuant to section 1297(c) with respect to the stock of the disposed-of look-through subsidiary over the aggregate dividends received by the tested foreign corporation from the disposed-of look-through subsidiary with respect to the stock. Id.

Reducing unremitted earnings to take dividends into account as provided by the final regulations does not fully account for the effect of dividends from non-accounted-for earnings, for example where there are no unremitted earnings after taking into account distributions of earnings and profits previously included in the gross income of the tested foreign corporation for purposes of determining its PFIC status but the stock of the look-through subsidiary is sold at a gain. Consequently, either such dividends should be treated as giving rise to income to the recipient, as provided by the final regulations, or some other adjustment such as to basis should be made in order to prevent the disappearance of potential gain. *See* Part IV.D.1 of the Summary of Comments and Explanation of Revisions for the final regulations.

The PFIC regulations do not provide rules for determining or adjusting the basis of the stock of a look-through subsidiary. In addition to the fact pattern described above, many other fact patterns could raise questions about how the basis of stock of a look-through subsidiary should be adjusted. Examples of such transactions include unremitted earnings, certain reorganizations the parties to which are look-through subsidiaries, in-kind dividend distributions that could give rise to gain at the level of the distributing subsidiary but the elimination of dividends from the income of the dividend recipient, and other transactions governed by subchapter C. Additional questions arise if a subsidiary becomes, or ceases to be, a look-through subsidiary while its shares continue to be held by the same shareholder, and with respect to transactions that shift property between a look-through entity and a tested foreign corporation that owns the look-through entity (or between two look-through entities) in light of the fact that the transaction may give rise to gain or loss if it is regarded but the tested foreign corporation is treated as owning the asset for Asset Test purposes both before and after the transaction.

Rules addressing similar issues exist for members of a consolidated group, which might provide a possible model for rules addressing ''corporate'' transactions between a look-through subsidiary and its owner(s). However, the consolidated return regulations are

highly complex and may not be suitable for foreign corporations that do not follow U.S. tax principles. The consolidated return regulations are also based on a single-entity paradigm that may not be relevant for section 1297(c) given that the stock ownership threshold for treating a subsidiary as a look-through subsidiary is 25 percent rather than 80 percent. Accordingly, those rules may not be an appropriate model for basis and related rules for look-through subsidiaries.

Proposed § 1.1297–2(c)(2) and (f) provide rules that would—for purposes of determining a tested foreign corporation's PFIC status—eliminate from the gross income of the corporation a dividend it receives from a look-through subsidiary that is made out of earnings and profits not attributable to income of the subsidiary previously included in the gross income of the tested foreign corporation. The rules also would make corresponding adjustments to the basis of a look-through subsidiary's stock for purposes of determining gain upon the disposition of such stock in applying the Income Test. For the reasons already described, these rules may or may not be a desirable approach to addressing the issues with respect to earnings and distributions of look-through subsidiaries. For example, the basis reduction rule could apply if a subsidiary paid a dividend when it was not a look-through subsidiary but later became one. The Treasury Department and the IRS invite comments addressing these issues—in particular, comments are requested on the treatment of pre-acquisition earnings and profits.

5. Safe Harbors for the Domestic Subsidiary Anti-Abuse Rule

Section 1298(b)(7) provides a special characterization rule that applies when (i) a tested foreign corporation owns at least 25 percent of the value of the stock of a domestic corporation (''25-percent-owned domestic corporation''), (ii) the 25-percent-owned domestic corporation owns stock in another domestic corporation (''the second-tier domestic corporation), and (iii) the tested foreign corporation is subject to the accumulated earnings tax under section 531 (or waives any benefit under a treaty that would otherwise prevent imposition of such tax). In that case, section 1298(b)(7) treats the stock of the second-tier domestic corporation held by the 25-percent-owned domestic corporation (''qualified stock'') as a non-passive asset, and the related income as non-passive income.

The 2019 proposed regulations provided that section 1298(b)(7) did not apply if, among other matters, a principal purpose for the tested foreign corporation's formation or acquisition of the 25-percent-owned domestic corporation was to avoid classification of the tested foreign corporation as a PFIC (''principal purpose anti-abuse rule''). *See* proposed § 1.1298–4(f)(2). A modified version of the principal purpose anti-abuse rule is adopted in the final regulations. *See* § 1.1298–4(e)(1).

The proposed regulations provide two safe harbors from the principal purpose anti-abuse rule in § 1.1298–4(e)(1). The Treasury Department and the IRS request comments on the application of the safe harbors discussed in this Part I.A.5 of the Explanation of Provisions.

Under the first safe harbor, the anti-abuse rule will not apply if more than 80 percent of the assets of the second-tier domestic corporation are used in an active U.S. trade or business, as determined under modified section 367 rules. *See* proposed § 1.1298–4(e)(2)(i). For purposes of the safe harbor, the assets of the domestic subsidiary qualified affiliates (as defined in proposed § 1.1298–4(e)(2)(i)(B)) are also taken into account in determining whether the assets of the second-tier domestic corporation are used in a U.S. trade or business. *See* proposed § 1.1298–4(e)(2)(i)(A).

The proposed regulations provide a second safe harbor for active companies undergoing transition and start-up companies. *See* proposed § 1.1298–4(e)(2)(ii). Under this safe harbor, the anti-abuse rule will not apply if the second-tier domestic corporation engages in an active U.S. trade or business that satisfies the first safe harbor by the end of the transition period following the testing date. *See* proposed § 1.1298–4(e)(2)(ii). Proposed § 1.1298–4(e)(2)(ii)(B) defines testing date as the last day of the month in which either (i) the second-tier domestic corporation is created, organized, or acquired (''start-up testing date'') or (ii) a second-tier domestic corporation that previously satisfied the first safe harbor disposes of substantially all its active U.S. trade or business (''change-of-business testing date''). Proposed § 1.1298–4(e)(2)(ii)(C) provides that the transition period is thirty-six months after a testing date. If the requirements of the business transition and start-up safe harbor are not satisfied within the transition period, the benefit of the safe harbor is lost retroactively for the entire period in which the safe harbor was claimed. *See* proposed § 1.1298–4(e)(2)(ii)(D). In these instances, the general anti-abuse rule in § 1.1298–4(e)(1) will be applied to the tested foreign corporation to determine whether a principal purpose to avoid PFIC classification existed for the preceding years, which would be within the normal statute of limitations on assessments under section 6501.

B. Proposed Revisions to § 1.1297–4—Qualifying Insurance Corporation

Section 1297(f) provides that a QIC is a foreign corporation that (1) would be subject to tax under subchapter L if it were a domestic corporation, and (2) either (A) has applicable insurance liabilities (''AIL'') constituting more than 25 percent of its total assets on its applicable financial statement (''AFS'') (''the 25 percent test''), or (B) meets an elective alternative facts and circumstances test which lowers the required AIL-to-total assets ratio to 10 percent (''alternative facts and circumstances test'').

Most of the rules for determining whether a foreign corporation is a QIC under section 1297(f) are provided in the final regulations under § 1.1297–4. Proposed § 1.1297–4 contains additional rules relating to the definition of an applicable financial statement, the definition of applicable insurance liabilities, and an optional adjustment to total assets.

1. Definition of Applicable Financial Statement

Proposed § 1.1297–4(f)(1) defines the term applicable financial statement (''AFS'') in a manner that provides ordering rules for how to prioritize between multiple financial statements prepared at the same level of priority, for example multiple financial statements prepared on the basis of GAAP or multiple financial statements prepared on the basis of IFRS, and between multiple financial statements prepared taking into account the assets and liabilities of different legal entities. The definition is modeled on similar definitions elsewhere in the Code and Treasury regulations, such as regulations under section 451, but has been adapted to the QIC context.

The term financial statement is defined to mean a complete balance sheet, income statement, and cash flow statement, or the equivalent statements under the relevant accounting standard, and ancillary documents typically provided together with such statements. As regards an AFS, in addition to the general levels of priority set forth in section 1297(f)(4)(A) (GAAP, IFRS, and insurance regulatory (statutory) statements), ordering rules provide sub-priority levels (based on the purpose for which the statement is prepared), with higher priority being accorded to

accounting statements viewed as more reliable. Since the AFS is the financial statement of a non-U.S. entity, financial statements provided to foreign regulatory bodies generally are treated as having the same priority as if provided to an equivalent U.S. regulatory body. The requirement that a non-U.S. regulatory agency have standards not less stringent than those of the U.S. Securities & Exchange Commission is intended to provide a standard similar to the definition of a qualified exchange or other market for purposes of section 1296, with respect to reporting standards. Because audited financial statements have been reviewed by independent auditors, and it is anticipated that insurance regulators will require audited financial statements, only audited statements can qualify as AFS.

If a tested foreign corporation has multiple financial statements, the order of priority described above is determinative. However, if there are multiple financial statements within a single level of priority and sub-priority (for example, multiple GAAP financial statements provided to creditors), additional ordering rules are provided to assign priority first to a financial statement that is not prepared on a consolidated basis (and that accounts for investments in the tested foreign corporation's subsidiaries (if any) on a cost or equity basis), and then to a consolidated financial statement that has the tested foreign corporation as the parent of the consolidated group. These rules are intended to make it more likely that the AFS reflects the same or similar assets and liabilities as the financial statement used to determine whether the section 1297(f)(3)(B) limitation on the amount of applicable insurance liabilities applies.

A financial statement prepared on a consolidated basis that takes into account affiliates that are not owned by the tested foreign corporation (for example, sister companies) is not treated as the AFS unless it is the only financial statement of the tested foreign corporation and is provided to an insurance regulator. It is anticipated that the only financial statement likely to fall within that category is a financial statement that includes the tested foreign corporation and subsidiaries if any, and a parent corporation.

Accordingly, if there are multiple financial statements with the same level of priority, non-consolidated financial statements take priority over consolidated financial statements. However, a consolidated financial statement prepared on the basis of GAAP that has the tested foreign corporation as the parent of the consolidated group has priority over a non-consolidated statement prepared on the basis of statutory accounting standards, because financial statements prepared on the basis of GAAP are higher priority than financial statements prepared on the basis of statutory accounting standards. Similarly, a consolidated statement prepared on the basis of IFRS would have priority over a non-consolidated statement prepared on the basis of statutory accounting standards.

The Treasury Department and IRS request comments on the expanded definition of an AFS and the priority rules provided, including whether special rules are needed to properly apply the limitation under § 1.1297–4(e)(2) if the statutory accounting statement covers a different period than the AFS, and whether other more detailed rules are necessary in order to identify the AFS when a foreign corporation operates in multiple jurisdictions and is subject to the authority of more than one insurance regulatory body.

2. Definition of Applicable Insurance Liabilities

As described in Part V.A.2 of the Summary of Comments and Explanation of Revisions to the final regulations, section 1297(f)(4) contemplates that a foreign corporation can use GAAP, IFRS, or the accounting standard used for the annual statement required to be filed with the local regulator (if a statement prepared for financial reporting purposes using GAAP or IFRS is not available) as the starting point to determine AIL. The preamble to the final regulations notes, however, that AIL is defined more specifically so that only those liabilities that meet the requirements of section 1297(f)(3) and the related regulatory definitions in § 1.1297–4(f)(2) are included in AIL, irrespective of differences in nomenclature and methods that may be used by different financial reporting standards.

Proposed § 1.1297–4(f)(2)(i)(D)(*3*) clarifies that, in determining AIL, liabilities are reduced by an amount equal to the assets reported on the corporation's financial statement that represent amounts relating to those liabilities that may be recoverable from other parties through reinsurance. The rule is necessary because GAAP and the newest IFRS accounting standard for insurance contracts, IFRS 17, (and possibly local statutory accounting depending on the laws of the foreign jurisdiction) record amounts recoverable from other parties as reinsurance with respect to unpaid insurance losses and other reserves on the asset side of the balance sheet, rather than reducing balance sheet liabilities. In contrast, insurance regulatory accounting rules (including those in the United States) often reduce a ceding company's insurance liabilities by those amounts instead of including them as assets on the balance sheet. Both methods result in the same amount of shareholder equity for a foreign corporation but create different ratios of AIL to total assets and, thus, can potentially produce a difference in a foreign corporation's QIC status.

The Treasury Department and IRS have determined that AIL should exclude amounts that have been reinsured because the ratio test would otherwise be subject to manipulation, and because the Treasury Department and IRS believe that a uniform approach is appropriate for the treatment of reinsured risk regardless of the particular accounting standard that may apply. In addition, proposed § 1.1297–4(f)(2)(i)(D)(*3*) clarifies that, if a tested foreign corporation's financial statement is prepared on a consolidated basis, liabilities of the tested corporation must be reduced (to the extent not reduced under other provisions) by an amount equal to the assets relating to those liabilities that may be recoverable through reinsurance from another entity included in the consolidated financial statement, regardless of whether the reinsurance transaction is eliminated in the preparation of the consolidated financial statement. This proposed rule is consistent with the rules of § 1.1297–4(f)(2)(i)(D)(*1*) and (*2*), which provide that no item may be taken into account more than once and that AIL include only the liabilities of the foreign corporation whose QIC status is being tested, and not liabilities of other entities within a consolidated group.

The Treasury Department and IRS are aware that certain arrangements permit a ceding company to continue to hold the reserves and assets required to support the insurance liabilities for the reinsured contracts during the policy term (so-called modified coinsurance or modco). It has been held that life insurance reserves on policies reinsured under a modco arrangement are attributed to the ceding company, and not the assuming company. *See* Rev. Rul. 70–508, 1970–2 C.B. 136 (1970). *See generally Colonial Am. Life Ins.* v. *United States,* 491 U.S. 244, 248, n.2 (1989); *Anchor National Life Ins.* v. *Commissioner,* 93 T.C. 382, 423 (1989). Proposed § 1.1297–4(f)(2)(i)(D)(*3*) is not intended to apply to modco arrangements where the ceding

company retains the assets supporting the insured risks (because they do not create an amount recoverable from another party), but the Treasury Department and IRS request comments as to whether the rule appropriately addresses modco arrangements and whether additional rules may be necessary in the final regulations. The Treasury Department and IRS also request comments as to whether to more specifically define amounts recoverable from another party through reinsurance and whether there are other special circumstances in which modification of the definition of AIL is appropriate.

3. Optional Asset Adjustment

Due to the manner in which AIL are defined under § 1.1297–4(f)(2), it may be necessary to adjust the amount of a foreign corporation's total assets to avoid distortions in applying the 25 percent test and the 10 percent test. First, if a foreign corporation's AFS is prepared on a consolidated basis, total assets may be reduced by the amount equal to the amount of insurance liabilities of affiliated entities that are reported on the AFS and would be included in AIL if its definition did not limit AIL to the AIL of the subject foreign corporation. *See* proposed § 1.1297–4(e)(4)(i). This adjustment is appropriate because insurance liabilities of an affiliate, though excluded from the definition of AIL, can have the effect of reducing the assets available to satisfy the foreign corporation's insurance liabilities.

Second, if a foreign corporation reports amounts recoverable from other parties through reinsurance as assets on its AFS, proposed § 1.1297–4(e)(4)(ii) provides that total assets may be reduced by the amount by which AIL are reduced under proposed § 1.1297–4(f)(2)(i)(D)(*3*). As explained in Part I.B.2 of this Explanation of Provisions, proposed § 1.1297–4(f)(2)(i)(D)(*3*) requires a foreign corporation's AIL to be reduced to reflect those amounts. Without a corresponding adjustment to total assets, the same reinsurance contract could have the effect of reducing a foreign corporation's AIL while also increasing its total assets. The Treasury Department and IRS request comments as to whether there are other situations that warrant an adjustment to total assets.

C. Proposed § 1.1297–5: Active Conduct of an Insurance Business

Section 1297(b)(2)(B) provides an exclusion from the definition of passive income for income derived in the active conduct of an insurance business by a QIC. As described in Part VI.A of the Summary of Comments and Explanation of Revisions to the final regulations, proposed § 1.1297–5 revises previously proposed rules for determining whether a QIC is engaged in the active conduct of an insurance business.

1. Overview

As explained in Part VI.A of the Summary of Comments and Explanation of Revisions to the final regulations, the Treasury Department and the IRS have determined that the active conduct of an insurance business is a requirement mandated by the statute in addition to (and separate from) the requirements of subchapter L and section 1297(f), but that in response to comments, the active conduct test should be amended to provide more flexibility in determining whether a QIC is engaged in the active conduct of an insurance business. Proposed § 1.1297–5(b)(1) provides that a QIC is treated as engaged in the active conduct of an insurance business if it satisfies either the factual requirements test under proposed § 1.1297–5(c) or the active conduct percentage test under proposed § 1.1297–5(d). The Treasury Department and IRS request comments on the active conduct test, including the addition of the new factual requirements test and revisions to the active conduct percentage test.

2. Exclusions From Active Conduct

Under § 1.1297–5(b)(2), two categories of insurance companies are precluded from meeting the active conduct test. First, a QIC is not engaged in the active conduct of an insurance business if it has no employees (or a nominal number of employees) and relies exclusively (or almost exclusively) on independent contractors to perform its core functions. Second, the active conduct test excludes securitization vehicles (such as vehicles used to issue catastrophe bonds, sidecars, or collateralized reinsurance vehicles) and insurance linked securities funds that invest in securitization vehicles. These vehicles are excluded because they are designed to provide a passive investment return tied to insurance risk rather than participation in the earnings of an active insurance business.

3. Factual Requirements Test

As noted in Part VI.A of the Summary of Comments and Explanation of Revisions to the final regulations, several comments requested the addition of a facts and circumstances test; other comments recommended that the active conduct test focus on the assumption of insurance risk; and a comment specifically identified underwriting as a core insurance function that must be performed by an insurance company's officers and employees. The factual requirements test has been added in response to these comments. The active conduct percentage test has been retained (in modified form) as an alternative means of satisfying the active conduct requirement.

Proposed § 1.1297–5(c) provides that the factual requirements test is satisfied if the QIC's officers and employees carry out substantial managerial and operational activities on a regular and continuous basis with respect to all of its core functions and perform virtually all of the active decision-making functions relevant to underwriting. A QIC's core functions are generally defined to include underwriting, investment, contract and claim management, and sales activities. *See* proposed § 1.1297–5(f) for definitions of these terms. See Part I.C.5 of this Explanation of Provisions for rules concerning officers and employees of related entities.

A QIC's officers and employees are considered to carry out substantial managerial and operational activities relevant to its core functions only if they are involved in all levels of planning and implementation related to the QIC's core functions as described in proposed § 1.1297–5(c)(2). The required activities must be conducted by officers or senior employees with appropriate experience who devote all (or virtually all) of their work to those activities and similar activities for related entities.

The active decision-making functions relevant to a QIC's underwriting activities are those underwriting activities most important to decisions of the QIC relating to the assumption of specific insurance risks. *See* proposed § 1.1297–5(c)(3). To meet this requirement, officers and employees of the QIC must carry out virtually all of the activities related to a QIC's decision to assume an insurance risk and must conduct virtually all of the decision-making with respect to the execution of an insurance contract on a contract-by-contract basis. Development of underwriting policies and parameters that are changed infrequently is not an active decision-making function in the absence of further ongoing involvement by the QIC's officers and employees. *See* proposed § 1.1297–5(c)(3)(iii)(A).

4. Active Conduct Percentage Test

The active conduct percentage test is provided in proposed § 1.1297–5(d). To meet this test, two requirements must be satisfied. First, the total costs incurred by a QIC with respect to its officers and employees for services rendered with

respect to its core functions (other than investment activities) must equal at least 50 percent of the total costs incurred for all services rendered with respect to the QIC's core functions (other than investment activities). In response to comments to the 2019 proposed regulations, investment activities have been excluded from both the numerator and denominator of the percentage calculation. Second, if any part of a QIC's core functions (including investment management) is outsourced to an unrelated entity, the QIC's officers and employees must conduct robust oversight with respect to the outsourced activities. *See* proposed § 1.1297–5(d)(2).

The proposed regulations provide a definition of total costs that is used to apply the active conduct percentage test. *See* § 1.1297–5(f)(8). With respect to a QIC's own officers and employees, total costs are defined as compensation costs plus other expenses reasonably allocable to the services provided (determined in accordance with section 482 and taking into account all expenses that would be included in the total services costs under § 1.482–9(j) and § 1.482–9(k)(2)). With respect to services performed by employees of another entity (whether related or unrelated), total costs are equal to the amount paid or accrued by the QIC to the other entity for the relevant services. Ceding commissions paid with respect to reinsurance contracts and commissions paid to brokers or sales agents to procure reinsurance contracts are excluded from the definition of total costs.

5. Officers and Employees of Related Entities

For purposes of applying the factual requirements test and the active conduct percentage test, a QIC's officers and employees are considered to include the officers and employees of related entities, where such entities are qualified affiliates of the QIC within the meaning of § 1.1297–2(e)(2), except that the 50 percent ownership standard is based on both value and voting power. *See* proposed § 1.1297–5(e). A qualified affiliate is a corporation or a partnership that is included in an affiliated group that includes the QIC. Affiliated group has the meaning provided in section 1504(a), determined without regard to section 1504(b)(2) and (3) (which would otherwise exclude foreign corporations and life insurance companies from membership) and substituting ''more than 50 percent'' ownership for ''at least 80 percent''. In addition, consistent with the rules of § 1.1297–2(e)(2), the common parent of the group must be a foreign corporation or foreign partnership, and a corporation or a partnership is included in the affiliated group only if it is a look-through subsidiary or look-through partnership, as applicable, of the common parent. Also, a partnership is included in the affiliated group only if more than 50 percent of the value of its capital interests, profits interests and any other partnership interests is owned by one or more corporations that are included in the affiliated group. The related entity rule applies only if the QIC bears the compensation costs on an arm's length basis and exercises oversight and supervision with respect to the services provided by affiliated officers and employees. *See* proposed § 1.1297–5(e)(3).

As noted in Part VI.A of the Summary of Comments and Explanation of Revisions to the final regulations, comments requested broader attribution rules that would cover employees of entities that are related to the QIC within the meaning of section 954(d)(3) or are under common practical control with the QIC. These comments have not been adopted. Because the active conduct test is designed to assess the activities of a QIC on a separate entity basis (rather than the activities conducted by an insurance group as a whole), services performed by officers and employees of other entities cannot be attributed to a QIC except in the circumstances described in proposed § 1.1297–5(e). However, the Treasury Department and the IRS determined that it was appropriate to align the common ownership requirements for purposes of the insurance active conduct rule with the ownership requirements used in § 1.1297–2(e)(2) for look-through subsidiary activity attribution purposes, except including a vote as well as value requirement to ensure a heightened level of common control of the related entity officers and employees.

D. Proposed § 1.1297–6(e)(2): Qualifying Domestic Insurance Corporation Non-Passive Income and Asset Limitations

1. Qualifying Domestic Insurance Corporation Rule

Sections 1.1297–6(b)(2) and (c)(2) of the final regulations provide that income and assets, respectively, of a qualifying domestic insurance corporation (''QDIC'') are non-passive for purposes of determining whether a non-U.S. corporation is treated as a PFIC (the ''QDIC Rule''). Section 1.1297–6(e)(1) of the final regulations defines a QDIC as a domestic corporation that is subject to tax as an insurance company under subchapter L, is subject to Federal income tax on its net income, and is a look-through subsidiary of a tested foreign corporation. The QDIC Rule is intended to address situations where a tested foreign corporation owns a 25 percent or greater interest in a domestic insurance corporation through a structure to which section 1298(b)(7) does not apply, such that the income and assets of the QDIC are taken into account in determining whether the tested foreign corporation is a PFIC.

The previous 2019 proposed regulations also provided that the QDIC Rule did not apply for purposes of section 1298(a)(2) and determining if a U.S. person indirectly owns stock in a lower tier PFIC (''Proposed QDIC Attribution Exception''). Consequently, for attribution purposes, the 2019 proposed regulations required a tested foreign corporation to apply the Income Test and Asset Test without applying the QDIC Rule.

Several comments on the 2019 proposed regulations requested that the Proposed QDIC Attribution Exception be removed because U.S. shareholders of a tested foreign corporation that would not otherwise be a PFIC but owns a PFIC and a U.S. insurance subsidiary that is a QDIC could become indirect owners of a PFIC as a result of the section 1298(a)(2) attribution rule. Comments asserted that turning off the QDIC Rule when testing for lower-tier PFIC ownership attribution would undermine the purpose of the rule and create significant burden for U.S. minority shareholders of the tested foreign corporation, who would have to separately evaluate the PFIC status of all of the tested foreign corporation's foreign subsidiaries.

2. Proposed § 1.1297–6(e)(2) QDIC Limitation Rule

The Treasury Department and IRS agree that the Proposed QDIC Attribution Exception was overbroad and removed it from the final regulations. However, the Treasury Department and IRS believe that limits on the amount of a QDIC's assets and income that are treated as non-passive may be appropriate in cases where a QDIC holds substantially more passive assets than necessary to support its insurance and annuity obligations. Thus, proposed § 1.1297–6(e)(2) provides that the amount of a QDIC's otherwise passive income and assets that may be treated as non-passive is subject to a maximum based on an applicable percentage of the QDIC's total insurance liabilities (''QDIC Limitation Rule'').

Proposed § 1.1297–6(e)(2)(i) provides that the amount of a QDIC's passive

assets that are treated as non-passive under the QDIC Rule may not exceed an applicable percentage of the corporation's total insurance liabilities. This amount is the QDIC's non-passive asset limitation. Proposed § 1.1297–6(e)(2)(ii) provides that the amount of a QDIC's passive income that is treated as non-passive under the QDIC Rule may not exceed the corporation's passive income multiplied by the proportion that the QDIC's non-passive asset limitation bears to its total passive assets (determined without the application of the rules under § 1.1297–6(c)(2)).

Under proposed § 1.1297–6(e)(2)(iii), the applicable percentage is 200 percent for a life insurance company and 400 percent for a nonlife insurance company. Proposed § 1.1297–6(e)(2)(iv)(A) provides that, for a QDIC taxable under Part I of Subchapter L (that is, a life insurance company), total insurance liabilities means the sum of the company's total reserves (as defined in section 816(c)) plus (to the extent not included in total reserves) the reserve items referred to in paragraphs (3), (4), (5), and (6) of section 807(c). For a company taxable under Part II of Subchapter L (that is, a nonlife insurance company), the term total insurance liabilities means the sum of unearned premiums and unpaid losses. *See* proposed § 1.1297–6(e)(2)(iv)(B). Because a QDIC will be subject to tax under Subchapter L, it is appropriate to determine the amount of its insurance liabilities for purposes of the QDIC Limitation Rule in accordance with Subchapter L rules governing insurance liabilities because the QDIC will already be determining these amounts for U.S. income tax purposes. *See* proposed § 1.1297–6(e)(3) for an example illustrating the application of these rules.

The Treasury Department and the IRS request comments on the QDIC Limitation Rule and in particular on whether the specified applicable percentages are reasonable based on industry data. The Treasury Department and IRS expect most QDICs to not exceed the passive asset and income limitations based on the applicable percentages. In addition, a tested foreign corporation may hold less than 50 percent passive assets and receive less than 75 percent passive income without being classified as a PFIC. Thus, the QDIC Limitation Rule provides a disincentive for a foreign corporation to shift excessive passive assets into its U.S. insurance subsidiary in order not to qualify as a PFIC and is likely to affect the PFIC classification of only a very small number of companies. Comments are also requested on whether final regulations should specifically allow for the applicable percentages to be adjusted or supplemented in subregulatory guidance (for example, to reflect possible future changes in industry practice).

E. Life Insurance and Annuity Contract Status

Section 1297(f)(1)(A) provides that a QIC must be a foreign corporation that would be subject to tax under subchapter L if it were a domestic corporation. An insurance company is defined in sections 816(a) and 831(c), which limit insurance company status to a company more than half the business of which during the taxable year is the issuing of insurance or annuity contracts or the reinsurance of risks underwritten by insurance companies. Thus, the status of a company as an insurance company under subchapter L depends upon the characterization of the contracts that a company issues or reinsures. In addition, section 816(a) provides that if more than half of the company's total reserves (as defined in section 816(c)) are life insurance reserves (as defined in section 816(b)) or unearned premiums and unpaid losses on non-cancellable life, accident, or health contracts, then the company is a life insurance company taxable under part 1 of subchapter L; otherwise, an insurance company is taxable under part II of subchapter L.

Life insurance contracts and annuity contracts must meet certain statutory requirements to be treated as contracts giving rise to life insurance reserves for subchapter L purposes. Section 7702(a) defines a life insurance contract for purposes of the Code as a life insurance contract under applicable law (which includes foreign law) that satisfies one of two actuarial tests set forth in section 7702. Similarly, section 72(s) sets forth distribution on death requirements that an annuity contract must satisfy in order to be considered an annuity contract for purposes of the Code. In addition, if a contract is a variable contract within the definition of section 817(d), it must satisfy the diversification requirements for variable contracts under section 817(h) to be treated as a life insurance or annuity contract for purposes of subchapter L. These statutory requirements reflect Congress's concern that the tax-favored treatment generally accorded to life insurance and annuity contracts under the Code should not be available to contracts that are too investment oriented or provide for undue tax deferral.

A taxpayer request (and follow-up submission) was received by the Treasury Department and the IRS regarding promulgating regulations that would provide that these statutory requirements do not apply for purposes of determining whether a foreign corporation satisfies the section 1297(f)(1)(A) requirement that the corporation would be subject to tax under subchapter L if it were a domestic corporation (as well as for other PFIC purposes), if certain requirements are met. The request suggested an approach to the statutory requirements analogous to the approach Congress took in section 953(e)(5). Section 953(e)(5) waives the statutory requirements for purposes of the subpart F insurance and foreign base company income rules if a contract is regulated as a life insurance or annuity contract in the issuer's home country and no policyholder, insured, annuitant, or beneficiary with respect to the contract is a U.S. person. The request asserts that such a waiver is warranted for PFIC purposes because contracts issued by non-U.S. insurance companies are unlikely to satisfy the statutory requirements, since non-U.S. insurance companies that do not target sales to the U.S. market typically do not take the statutory requirements into account when setting the terms of their life insurance and annuity contracts. The request also states that local law requirements may in some cases conflict with the statutory requirements. The follow-up submission suggested that additional qualification rules could be imposed that restrict the rule to cases in which the issuing company meets substantial home country requirements (such as deriving more than 50 percent of its aggregate net written premiums from insuring or reinsuring home country risks of unrelated persons).

The proposed regulations do not address the request as it is beyond the scope of the current rulemaking. The Treasury Department and the IRS are evaluating whether further guidance is necessary or appropriate regarding the application of these provisions in the context of PFICs and request comments on this issue.

II. QIP's 20-Year ADS Recovery Period Applies To Determine QBAI for FDII and GILTI

The proposed regulations contain certain rules announced in Notice 2020–69. Proposed § 1.250(b)–2(e)(2) and proposed § 1.951A–3(e)(2) clarify that the technical amendment to section 168 enacted in section 2307(a) of the CARES Act applies to determine the adjusted basis of property under section 951A(d)(3) as if it had originally been

part of section 13204 of the Act. The Treasury Department and the IRS have determined that this clarification is consistent with congressional intent. *See* JCT CARES Act Report at 69–70.

The Treasury Department and the IRS request comments on whether a transition rule should be provided that would allow a corrective adjustment in the first taxable year ending after the date of publication in the **Federal Register** of the Treasury Decision adopting proposed § 1.250(b)–2(e)(2) and proposed § 1.951A–3(e)(2) as final regulations for taxpayers that took a position that is inconsistent with proposed § 1.250(b)–2(e)(2) and proposed § 1.951A–3(e)(2) on a return filed before September 1, 2020 and that do not file an amended return with respect to such year.[10]

Applicability Dates

I. Applicability Dates Relating to the General PFIC Rules

These regulations are proposed to apply to taxable years of United States persons that are shareholders in certain foreign corporations beginning on or after the date of filing of the Treasury Decision adopting these rules as final regulations in the **Federal Register**. However, until these regulations are finalized, taxpayers may rely on one or more of the following proposed rules with respect to a tested foreign corporation for any open taxable year beginning before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, provided they consistently follow each such rule for each subsequent taxable year beginning before the date of filing of the Treasury decision adopting these rules as final regulations in the **Federal Register**: Proposed § 1.1297–1(c)(1)(i)(B) (exceptions to section 954 not taken into account); proposed § 1.1297–1(c)(2) (exception for active banking income of certain foreign banks); proposed § 1.1297–1(d)(1)(v)(D) (valuation of assets); proposed § 1.1297–1(d)(2) (regarding working capital); proposed § 1.1297–2(b)(2)(ii)(A), (b)(3)(ii)(A), and (e)(4) (regarding application of exception for active banking income of certain foreign banks); proposed § 1.1297–2(c)(2)(i) and (4)(ii)(A) (regarding not taking into account certain dividends); proposed § 1.1297–2(f)(1) and (2) (regarding gain on disposition of stock in a look-through subsidiary), and proposed § 1.1298–4(e) (regarding safe harbors to the domestic subsidiary anti-abuse rule). For a taxable year ending on or before December 31, 2020, a taxpayer may rely on proposed § 1.1297–1(c)(1)(A) of the 2019 proposed regulations concerning the application of section 954(h) rather than proposed § 1.1297–1(c)(2) with respect to a tested foreign corporation, without regard to whether the taxpayer consistently applies all of the provisions of these proposed regulations or the 2019 proposed regulations with respect to the tested foreign corporation. As discussed in greater detail in the preamble to the final regulations published in the Rules and Regulations section of this edition of the **Federal Register** (RIN 1545–BO59), when a tested foreign corporation no longer qualifies as a PFIC (due to a change in facts or law), the foreign corporation nonetheless retains its PFIC status with respect to a shareholder unless and until the shareholder makes an election under section 1298(b)(1) and § 1.1298–3 (''purging election'') on Form 8621 attached to the shareholder's tax return (including an amended return), or requests the consent of the Commissioner to make a late election under section 1298(b)(1) and § 1.1298–3(e) (''late purging election'') on Form 8621–A.

II. Applicability Dates Relating to the Insurance Exception

For a taxable year beginning after December 31, 2017 and before the date of filing of the Treasury Decision adopting these rules as final regulations in the **Federal Register**, taxpayers may rely on §§ 1.1297–4, 1.1297–5, and 1.1297–6 of the proposed regulations with respect to a tested foreign corporation, provided they consistently follow the rules of §§ 1.1297–4, 1.1297–5, and 1.1297–6 of the proposed regulations with respect to such tested foreign corporation for such taxable year and for each subsequent taxable year beginning before the date of filing of the Treasury decision adopting these rules as final regulations in the **Federal Register**. In addition, taxpayers may rely on proposed § 1.1297–4(e)(4), provided they consistently apply § 1.1297–4 of the final regulations for the same taxable year.

Alternatively, for a taxable year beginning after December 31, 2017 and before January 14, 2021, taxpayers may rely on proposed §§ 1.1297–4 and 1.1297–5 of the 2019 proposed regulations with respect to a tested foreign corporation, provided they consistently apply the rules of proposed §§ 1.1297–4 and 1.1297–5 of the 2019 proposed regulations with respect to such tested foreign corporation for such taxable year.

III. Applicability Dates Relating to Regulations Under Sections 250 and 951A

Consistent with section 2307(b) of the CARES Act, the proposed regulations addressing QIP are proposed to apply retroactively. The modification to proposed § 1.951A–3(e)(2) is proposed to apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end. The modification to proposed § 1.250(b)–2(e)(2) is proposed to apply to taxable years beginning after December 31, 2017.[11] *See* section 7805(b)(2). U.S. shareholders and domestic corporations (including any individuals that elect to apply section 962) may, before the date of publication of the Treasury Decision adopting these rules as final regulations in the **Federal Register**, rely on proposed §§ 1.951A–3(e)(2) and 1.250(b)–2(e)(2) for any taxable year beginning after December 31, 2017, provided they consistently apply those rules for purposes of FDII and GILTI under sections 250 and 951A to such taxable year and all subsequent taxable years.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for any final rule resulting from the final regulations will be informed by comments received.

[10] The Treasury Department and the IRS requested comments on the need for a transition rule in Notice 2020–69. The Treasury Department and the IRS will consider comments that are timely submitted in response to the request for comments in Notice 2020–69, along with any comments received in response to this notice of proposed rulemaking, when finalizing proposed § 1.250(b)–2(e)(2) and proposed § 1.951A–3(e)(2).

[11] The rule in proposed § 1.250(b)–2(e)(2) in this notice of proposed rulemaking applies to taxable years beginning after December 31, 2017 and before January 1, 2021 regardless of whether the taxpayer has relied on proposed §§ 1.250(a)–1 through 1.250(b)–6 (as proposed in REG–104464–18, 84 FR 8188), the final regulations under §§ 1.250(a)–1 through 1.250(b)–6 under § 1.250–1(b) (T.D. 9901, 85 FR 43042), or neither.

This proposed regulation has been designated by the Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. OIRA has determined that the final rulemaking is significant and subject to review under Executive Order 12866 and section 1(b) of the Memorandum of Agreement. Accordingly, the final regulations have been reviewed by OMB.

A. Background

The passive foreign investment company (PFIC) rules of the Internal Revenue Code address situations in which taxable U.S. persons indirectly hold assets that earn ''passive income'' (generally, interest, dividends, capital gains, and similar types of income) through a foreign corporation. If not subject to the PFIC rules, the income earned on these assets would be subject to U.S. tax only when that income is distributed as dividends by the foreign corporation or when shares of the foreign corporate stock are sold for a gain by the U.S. shareholder. If the income were subject to a low or zero rate of foreign tax, the U.S. investor would have a tax incentive to hold passive assets in this manner rather than hold the securities directly. By creating tax-deferral opportunities, these types of investment arrangements could significantly lower the effective tax rate on passive income ultimately received by participating U.S. investors. This potential result would decrease U.S. tax revenues and possibly lower the cost of capital faced by foreign and domestic corporations whose securities were held in this manner.

A foreign corporation is considered a PFIC if at least 75 percent of the corporation's gross income for a given taxable year is passive income or if assets that produce passive income, or that are held for the production of passive income, comprise at least 50 percent of the corporation's total assets. A PFIC is not subject to U.S. tax under the PFIC regime; rather, U.S. shareholders of a PFIC are subject to tax on a current, or current-equivalent, basis in proportion to their ownership share in the PFIC's income.

Passive income generally consists of dividends, interest, rents, royalties, annuities, gains on the sale of property that is not inventory or property used in an active business, and similar forms of income. Passive income is distinguished generally from non-passive income in that it is not earned in the active conduct of a trade or business by the foreign corporation, by a party closely affiliated with the foreign corporation, or by other corporations or partnerships that can be assumed to be controlled by the foreign corporation.

The ''subpart F'' rules in the Code also address the taxation of passive income earned by foreign corporations but only in the context of U.S. controlled foreign corporations (CFCs), defined as being more than 50 percent owned by U.S. shareholders (where a U.S. shareholder of a CFC is a U.S. person owning at least ten percent of the vote or value of the foreign corporation's shares). There is no such minimum ownership requirement for a U.S. shareholder of a PFIC. A PFIC that is also a CFC during a portion of a U.S. PFIC shareholder's holding period is not treated as a PFIC with respect to a U.S. shareholder of a CFC during that portion of the holding period.

A U.S. shareholder of a PFIC is responsible for determining its proportionate share of ownership in the PFIC and the appropriate amount of PFIC income to include on the shareholder's tax return. The Code and regulations provide ownership attribution rules for determining indirect ownership of PFICs by U.S. persons and rules for determining amounts of a corporation's annual total and passive income and the amounts of total and passive assets on each of several measuring periods (generally quarterly) throughout the year. Compliance with the PFIC regime requires an ability to negotiate its often-complicated rules and generally means that those willing to invest in potential PFICs are relatively sophisticated taxpayers that have access to professional tax advice in order to navigate the tax complexities presented by the PFIC regime. It is also possible that a less sophisticated taxpayer could invest in a PFIC without a full understanding of the tax treatment of that investment.

The PFIC definition of passive income refers to the passive income definition of ''foreign personal holding company income'' (FPHCI) used for purposes of the CFC rules. That definition contains exceptions from passive income that involve certain income derived by a CFC in the active conduct of a banking or financing business and certain income derived by a CFC in the active conduct of an insurance business. However, the PFIC statutory rules have separate exceptions from the definition of passive income that include any income ''derived in the active conduct of a banking business by an institution licensed to do business as a bank in the United States (or, to the extent provided in regulations, by any other corporation)'' and any income ''derived in the active conduct of an insurance business by a qualifying insurance corporation.'' Regulations under the PFIC banking exception were proposed in 1995 (the ''1995 proposed regulations'') to provide greater clarity and additional specification of this exception to passive income. These 1995 proposed regulations have not been finalized. Regulations under the PFIC insurance exception were proposed in 2015 to clarify further the meaning of ''active conduct'' in this context, but these regulations have not been finalized. More recently, the Tax Cuts and Jobs Act (TCJA) of 2017 amended the statutory provision by requiring that the PFIC insurance exception applies only to an insurance business conducted by a qualifying insurance corporation (QIC) and provided a statutory definition of a QIC.

The Treasury Department and the IRS previously published proposed regulations pertaining to sections 1291, 1297, and 1298 of the Code (the ''2019 proposed regulations''). *See* 84 FR 33120. These regulations dealt with several general PFIC implementation issues and with the new requirement (beginning in 2018) that a foreign corporation must be a QIC for its insurance-related income to qualify as non-passive under the insurance business exception. Regulations to finalize these proposed regulations (the ''2020 final regulations'') are being published contemporaneously with these newly proposed regulations (''these regulations'' or the ''2020 proposed regulations''). *See* TD 9936. Upon further reflection on certain issues, and in response to public comments received with respect to the 2019 proposed regulations, certain revised rules and additional specifications are being re-proposed.

B. Need for the Proposed Regulations

These regulations are needed because a number of the details behind the relevant terms and necessary calculations required for the determination of PFIC status would benefit from greater specificity beyond that provided by the 2020 final regulations. In particular, these 2020 proposed regulations further clarify the determination of the banking and insurance ''active conduct'' statutory exceptions to the definition of passive income.

C. Economic Analysis

This economic analysis provides a summary of the economic effects of the regulations relative to the no-action baseline. It further analyzes, first, proposed regulations under the general rules that implement the exception from passive income for income derived in the active conduct of a banking business and, second, proposed regulations under the passive income exception for income earned in the active conduct of an insurance business by a qualifying insurance corporation (QIC). This latter analysis covers, in particular, elements of these proposed regulations as they relate to the primary test ratio that must be satisfied by a QIC. This test requires measurement of certain applicable insurance liabilities (AIL) and total assets of a tested corporation.

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of these regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these proposed regulations.

2. Summary of Economic Effects

These 2020 proposed regulations will provide improved certainty and consistency in the application of sections 1297 and 1298 of the Internal Revenue Code with respect to passive foreign investment companies (PFICs) and qualified insurance corporations (QICs) by providing definitions and clarifications regarding application of the statute's terms and rules. Efficient investment requires planning, and good planning requires knowledge of the proper and consistent application of tax rules. Furthermore, uncertainty regarding the applicability of tax rules invites aggressive taxpayer interpretations and increased enforcement costs, including increased litigation.

Divergence in taxpayers' interpretations of the statute can cause similarly situated U.S. persons to allocate investment funds differently. If economic investment is not guided by uniform tax incentives, the resulting pattern of investment may be inefficient, leading to relatively lower incomes. By providing clarity to the law and greater uniformity in its application, the 2020 proposed regulations, when finalized, will help to ensure that similar economic activities are taxed similarly. Thus, the Treasury Department and the IRS expect that the definitions and guidance provided in the proposed regulations will lead to an improved allocation of investment among U.S. taxpayers as well as more equitable treatment of those taxpayers.

To the extent that certain regulatory provisions provide greater opportunities for foreign corporations to avoid PFIC status relative to the no-action baseline, they provide U.S. investors with additional tax deferral opportunities relative to a no-action baseline. An increased use of these tax deferral opportunities would decrease effective shareholder taxes and generally lower the cost of real investment by both domestic businesses and foreign corporations for which U.S. investors are investment funding sources. This would likely increase such investment and thereby increase U.S. GNP relative to the no-action baseline. However, such actions would reduce U.S. tax revenues, although this effect could be offset to a degree by increased taxable capital gains due to a resultant increase in the valuation of corporate equities.

To the extent that other provisions of the regulations reduce the opportunities for foreign corporations to avoid PFIC status, they would eliminate deferral by U.S. persons and thereby increase U.S. shareholder tax burdens. This may dissuade U.S. persons from pursuing profitable investment opportunities in active foreign corporations that would be sought under a no-action baseline. Such provisions also could cause some active foreign corporations to incur additional economic costs in order to avoid designations as PFICs, resulting in lower investment returns and less investment in such corporations. The avoidance of otherwise profitable foreign investment opportunities by U.S. persons can result in a loss of U.S. GNP.

It is unclear whether these proposed regulations have a net effect of increasing or decreasing the ability of foreign corporations to avoid PFIC status relative to the no-action baseline.

The Treasury Department and the IRS have not estimated the differences in economic activity that might result from implementation of these proposed regulations relative to alternative regulatory approaches, including the no-action baseline. They do not have readily available data or models that capture in sufficient detail the economic activities that taxpayers might undertake under each of these regulatory approaches. The Treasury Department and the IRS have similarly not estimated the differences in compliance costs of U.S. persons or IRS administrative burden that would arise under each of the alternative regulatory approaches because they do not have readily available data or models that capture these aspects in sufficient detail.

The Treasury Department and the IRS solicit comments on this economic analysis and particularly solicit data, models, or other evidence that could be used to enhance the rigor with which the final regulations are developed.

3. Economic Analysis of Specific Provisions

a. Income Derived in the Active Conduct of a Banking Business

The PFIC provisions define passive income as income which is of a kind that would be foreign personal holding company income (FPHCI) as defined in section 954(c), which is part of the subpart F rules of the Internal Revenue Code. A related provision, section 954(h), excludes from FPHCI for subpart F purposes the ''qualified banking or financing income'' of an ''eligible controlled foreign corporation,'' that is, a CFC that is predominantly engaged in the active conduct of a banking, financing, or similar business and that conducts substantial activity with respect to such business. A banking, financing or similar business includes (i) a lending or finance business, (ii) a banking business conducted by an institution that is licensed to do business as a bank in the United States or is a corporation specified in regulations, and (iii) a securities business conducted by a corporation that is either registered with the SEC as a securities broker or dealer or is otherwise specified in regulations.

The 2019 PFIC proposed regulations would have incorporated this section 954(h) exception to FPHCI into the definition of passive income for the purpose of the PFIC rules. However, the Treasury Department and the IRS subsequently determined that this exception does not apply for purposes of the PFIC definition of passive income absent regulations and that any such regulations should be issued under the separate PFIC statutory rule described in the next paragraph. Accordingly, these 2020 proposed regulations specify that the FPHCI exception for active banking income of CFCs is not to be taken into account in the general definition of passive income for the purpose of the PFIC regime.

The Treasury Department and the IRS considered two options for the implementation of an active banking exception under the PFIC tax regime. The first alternative would re-propose the 1995 proposed regulations. The second alternative would adopt the statutory rules of the FPHCI exception for CFCs, with modifications (such as

not limiting the rule to CFCs). Each alternative is discussed in turn.

i. 1995 Proposed Regulations

The 1995 proposed regulations treat ''banking income'' of ''active banks'' and ''qualified bank affiliates'' as non-passive. An active bank is either a domestic or foreign corporation that is licensed by federal or state regulators to do business as a bank in the United States or a foreign corporation that satisfies the following requirements:

1. It must be licensed or authorized to accept deposits from its home country residents and must actively conduct a banking business;
2. It must regularly accept such deposits in the ordinary course of business; in addition, the amount of deposits shown on the corporation's balance sheet must be substantial; and
3. It must regularly make loans to customers in the ordinary course of business.

Banking income is defined as gross income that is derived from the active conduct of a specified banking activity. The regulations list 14 banking activities (plus a provision that allows the IRS Commissioner to specify additional banking activities). The major activities listed include lending activities, the purchasing or selling of notes or other debt instruments for customers, issuing of letters of credit, performing trust services, arranging foreign exchange transactions, interest rate or currency futures, etc., underwriting issues of securities for customers, engaging in finance leases, and providing credit card services.

The 1995 proposed regulations also extend the banking income definition to certain affiliates of active banks that are not themselves active banks. To be a qualified bank affiliate, at least 60 percent of a foreign corporation's gross income must be income that qualifies as non-passive income under the PFIC active conduct exceptions. In addition, a qualified bank affiliate must be a member of an affiliated group (based on an affiliation ownership standard of more than 50 percent voting power), and at least 30 percent of the group's ''aggregate gross financial services income'' (defined in foreign tax credit regulations) must be banking income earned by active banks that are group affiliates. Also, at least 70 percent of such group income must be income excepted under the PFIC active conduct rules.

ii. FPHCI Exception for Banking, Finance, or Similar Income of CFCs

The FPHCI exception, while limited to eligible CFCs, applies to a broader group of eligible corporations and qualified financial activities than the 1995 proposed regulations for banking income. The FPHCI rules for CFCs define an eligible business as including a banking business, a securities business, and a ''lending or finance'' business. While the FPHCI statutory rules include identical language regarding banks as does the PFIC statutory exception; neither set of statutory rules specifically define eligible banks, leaving the definition to regulations.

The FPHCI exception for CFCs applies to qualified banking or financing income. A CFC that is not engaged in a banking or securities business must derive more than 70 percent of its gross income from a lending or finance business with unrelated customers. A ''lending or finance'' business includes a business that is making loans, purchasing or discounting accounts receivable or certain other assets, engaging in leasing, issuing letters of credit or providing guarantees, providing credit card services, and rendering services related to the other listed activities. This list is similar to, but not the same as, the list of banking activities provided in the 1995 proposed regulations.

Qualified banking or other financing income can be derived in the active conduct of a branch or other ''qualified business unit'' (QBU) of an eligible CFC. A QBU is a separate and clearly identified unit that maintains its own separate books and records. Qualified banking or financing income must be derived from transactions with customers located in a country other than the United States. Substantially all of the activities of the business must be conducted directly by the corporation in its home country, or by its QBU in the home country of the QBU. There are no similar requirements in the 1995 proposed regulations. Under the FPHCI exception for CFCs, business activity may include the activity of the employees of a related CFC located in the same home country as that of the corporation or QBU, provided the activity is conducted in the home country of the related person. Unlike the 1995 proposed regulations, the FPHCI exception for CFCs does not treat income of affiliates of an eligible CFC that are not themselves eligible CFCs as non-passive income.

iii. 2020 Proposed Regulations—Definition of a Foreign Bank

The 2020 proposed regulations generally adopt the approach taken under the FPHCI statutory language but substitute a tested foreign corporation (TFC) (or a related person of the TFC) for a CFC. As in the case of the PFIC banking exception adopted in the 1995 proposed regulations, the 2020 proposed regulations apply only to foreign banks.

Similar to the ''active bank'' definition of the 1995 regulations, the 2020 proposed regulations require a ''foreign bank'' to be either licensed as a bank in the United States or as a bank in the country in which it is chartered or incorporated (its ''home country''). The 2020 proposed regulations also require that a foreign bank accept bank deposits from home country residents, and indirectly incorporate the ''substantial deposits'' requirement of the 1995 proposed regulations. Unlike the 1995 proposed regulations, the 2020 proposed regulations do not require a foreign bank to regularly make loans to customers in the ordinary course of its business. Instead, the bank must carry out with unrelated customers one or more of the activities listed in the FPHCI statute that constitute a lending or finance business. One of those activities is the making of loans, but a foreign bank can have as its business activity any of the other listed finance business activities in order to qualify for the PFIC banking exception. This change in the definition of a qualifying foreign bank may be a significant difference from the 1995 proposed regulations, depending on what activities are required of and permitted to be carried out by a bank under bank regulatory rules. If bank regulatory rules do not require a bank to make loans to customers as part of a banking business, the definition of foreign bank may represent a broadening of the type of institutions that may qualify for an exception under the PFIC active conduct exception for banking compared to the 1995 proposed regulations.

In contrast to the 1995 proposed regulations, the 2020 proposed regulations provide that the banking exception applies separately to the income and activities of a qualified branch (*i.e.,* a QBU) of a foreign bank. Depending on the activities of a branch, this may either increase or decrease the likelihood that income of a foreign bank is treated as non-passive.

iv. 2020 Proposed Regulations—Banking Income

While it may be easier to qualify as a foreign bank under the 2020 proposed regulations than as an active bank under the 1995 proposed regulations, the conditions that must be satisfied in order to treat income as qualified banking or financing income eligible for

the FPHCI exception are more stringent than the requirements for treating income as banking income under the 1995 proposed regulations. The 2020 proposed regulations require that substantially all activities that produce active banking income must be performed by the TFC or its QBU in the home country of the bank or that of the QBU, respectively. However, an affiliated entity can provide employees to perform the requisite activity, but only if the affiliate is created or organized in the relevant home country and the activity is performed in the home country of the related person. No such requirement exists under the 1995 proposed regulations. This home country activity requirement limits the variety of organizational structures that foreign banks may use in order to qualify for the new PFIC banking exception. If a bank must restructure its operations in order to satisfy the home-country requirement, this might be considered a significant PFIC compliance cost by foreign banks and therefore it may impact the investment choices of U.S. persons.

In addition, under the FPHCI exception, eligible income must be derived in transactions with customers located in a country other than the United States. Relative to the 1995 regulations, this rule imposes an additional compliance burden on foreign corporations that desire to access the U.S. investment community. It requires them to distinguish income derived from U.S.-based customers from income derived from other customers.

v. 2020 Proposed Regulations—Affiliates

Under the 2020 final regulations, a tested foreign corporation (TFC) that owns at least 25 percent (by value) of a corporation or partnership may be treated as if it held its proportionate share of the assets of the look-through subsidiary (LTS) or look-through partnership (LTP) and received its proportionate share of the income of the LTS or LTP. The income and assets of the subsidiary entity are treated as passive or non-passive in the hands of the TFC in the same manner as such items are treated in the hands of the LTS or LTP. In general, an exception to the passive income rules applies to income of an LTS or LTP only if the exception would have applied to exclude the income from passive income in the hands of the LTS or LTP. For this purpose, the activities of a specified affiliated group of entities that includes the TFC may be taken into account to judge the active conduct nature of the LTS's or LTP's income.

Under certain conditions, the 1995 proposed regulations permit the banking income of a qualified bank affiliate to be treated as non-passive income for the purpose of determining the PFIC status of its affiliated companies. No similar rule applies under the 2020 proposed regulations for bank affiliates. Thus, for banking income of an LTS to be treated as excepted income, the LTS must itself be an eligible foreign bank.

The income of an LTS that is a U.S. bank conducting business with U.S. residents does not qualify as having excepted income under the 2020 proposed regulations. Such a bank would likely qualify as an active bank under the 1995 proposed regulations and, under the look-through rules, that income would be considered non-passive in the hands of the TFC. In this respect the 2020 proposed regulations make it more difficult for certain foreign corporations to avoid PFIC status relative to the 1995 proposed regulations.

vi. Summary of Economic Effects

The Treasury Department and the IRS expect that the 2020 proposed regulations may produce different outcomes relative to the no-action baseline. However, whether ''on net'' these different outcomes make it more difficult for income of certain foreign corporations to qualify as non-passive under the banking active conduct exception or make it more likely that income of foreign banking institutions will be treated as non-passive depends heavily on the individual facts and circumstances of the TFC and its affiliates, so that no general conclusion can be drawn in that regard.

b. Applicable Financial Statement and Applicable Insurance Liabilities

For PFIC purposes, passive income does not include income derived in the active conduct of an insurance business by a qualifying insurance corporation (QIC). Under the statute, a QIC must have ''applicable insurance liabilities'' (AIL) that constitute more than 25 percent of its total assets (the ''QIC test''). AIL generally include amounts shown on a financial statement for unpaid loss reserves (including unpaid loss adjustment expenses) of insurance and reinsurance contracts and certain life and health insurance reserves and unpaid claims with respect to contracts providing coverage for mortality or morbidity risks.

i. Definition of an AFS

For the purpose of the QIC test, AIL are based on insurance liabilities as they are accounted for on the taxpayer's applicable financial statement (AFS). Under the statute and the 2020 final regulations, an AFS is a financial statement prepared for financial reporting purposes that is based on U.S. generally accepted accounting principles (GAAP), or international financial reporting standards (IFRS) if there is no statement based on GAAP. If neither of these statements exist, then an AFS can be an annual statement that is required to be filed with an applicable insurance regulatory body. Such a statement would be one that is prepared on the basis of a local regulatory accounting standard. Thus, the statute has a preference for financial statements prepared on the basis of GAAP or IFRS, which are rigorous and widely-respected accounting standards, but will permit a foreign corporation to have an AFS that is prepared on the basis of a local regulatory accounting standard if the foreign corporation does not do financial reporting based on GAAP or IFRS.

This definition of an AFS does not necessarily produce a single financial statement that can be deemed ''the'' AFS of a foreign insurance company. GAAP and IFRS statements may be prepared for several financial reporting purposes, and there may be differences in the value of assets or in the presentation of results, depending on the purpose and jurisdiction for which it is prepared. This may be particularly true in the case of a financial statement filed with local regulatory bodies. For example, a company that operates branches in more than one jurisdiction may be filing multiple regulatory financial statements, each based on a separate local accounting standard. This variability may be tempered, however, if the local regulatory authorities require their regulatory statements to be filed on a GAAP or IFRS basis.

The Treasury Department and the IRS determined that it was appropriate to modify the definition of AFS in order to impose greater structure on the identification of the AFS used for purposes of the QIC test. These 2020 proposed regulations refine the definition of a financial statement to ensure that an AFS includes a complete balance sheet, statement of income, a statement of cash flows and related exhibits, schedules, forms, and footnotes that are normal components of such a filing. A complete financial statement is more likely to present an accurate picture of a company's financial position. These 2020 proposed regulations also require that an AFS be an audited financial statement. While an audit requirement may impose additional accounting costs on the

foreign corporation (and, therefore, on its shareholders), a financial statement reviewed by independent auditors insures adherence to the relevant accounting standard. The Treasury Department and the IRS have determined that local jurisdictions generally will require audited financial statements to be filed with insurance regulatory bodies, so that this requirement should not impose a significant additional compliance burden on foreign corporations.

The 2020 proposed regulations impose a new set of sub-priorities on financial statements prepared under GAAP and a similar set of sub-priorities on statements prepared under IFRS. These sub-priorities have been used in other regulatory contexts. They are based on the purpose for which a financial statement is being released or filed. In the opinion of the Treasury Department and the IRS, these different priorities represent the reliability of the statement. Thus, a GAAP statement filed by publicly regulated corporations with the Securities and Exchange Commission or with an equivalent foreign agency is deemed highly reliable and is preferred to a statement that is used, say, for credit purposes or for reporting in shareholder reports.

The new rule narrows the potential number of financial statements that might be considered as AFSs relative to the no-action baseline and should thereby reduce compliance and tax administrative costs, while bringing taxpayer behavior closer in line with the intent and purpose of the statute.

If an AFS is a consolidated financial statement in which the tested corporation is not the parent, such statement could include AIL and assets of the parent, as well as AIL and assets of other sibling corporations. Nevertheless, under the 2020 final regulations, the amount of AIL on an AFS that can be AIL for the purpose of the QIC test includes only the AIL of the corporation being tested. Consequently, the 2020 proposed regulations stipulate that a financial statement that includes parent and sibling assets and liabilities cannot be an AFS unless it is a financial statement filed with a local regulator and is the only such financial statement available, in which case the AIL as reported on the statement would have to be adjusted to remove the double counted parental and sibling AIL. This rule is expected to reduce the likelihood that the AIL shown on an AFS would have to be adjusted prior to the application of the QIC test and thereby reduce compliance costs relative to alternative regulatory approaches. The Treasury Department and the IRS have not estimated this reduction in compliance costs because they do not have data or models with this level of specificity.

If more than one financial statement exists for an AFS subcategory and that subcategory is the highest priority subcategory of AFS for which an AFS is available, then the 2020 proposed regulations dictate that any financial statement prepared on a non-consolidated basis has priority over a statement prepared on a consolidated basis. In most cases, a non-consolidated AFS will be preferred by the tested corporation because assets of the tested corporation will generally include the corporation's net equity share of its subsidiaries and not the full value of its assets. A consolidated statement will include all assets and liabilities of lower-tiered subsidiaries (whether fully or partially owned) other than eliminated items that represent intra-corporate transactions when viewed from a consolidated perspective. Nevertheless, AIL eligible to be taken into account for purposes of the QIC test includes only AIL of the tested corporation. Therefore, use of a consolidated AFS requires that any AIL of entities other than the tested corporation (such as subsidiaries) that are recorded on the consolidated statement must be eliminated for the purpose of the QIC test. Because this would bias downward the QIC test statistic (because the subsidiary assets supporting these eliminated AIL remain on the AFS), the 2020 proposed regulations allow a tested corporation to reduce its assets by the amount of AIL that are eliminated for this reason.

Any AIL of the tested corporation that have been eliminated because of the preparation of a consolidated statement (for example, if the tested corporation had insured or reinsured a subsidiary) are not added back to the AIL reported on the AFS. The corresponding subsidiary assets have also been eliminated in the preparation of the consolidated AFS, so that the reverse process of that described in the previous paragraph is accomplished automatically.

ii. Limitations on Applicable Insurance Liabilities

Pursuant to statutory mandate and explicitly granted regulatory authority, the 2020 final regulations specify that any amount of AIL used in the QIC test cannot exceed the smallest of following three amounts:

(1) The amount of AIL of the tested corporation shown on any financial statement that is filed or required to be filed with the corporation's applicable insurance regulatory body;

(2) The amount of AIL determined on an AFS that is prepared on the basis of GAAP or IFRS, whether or not such statement is filed by the tested corporation with its applicable insurance regulatory body;

(3) The amount of AIL required by law or regulation to be held by the tested corporation (or a lesser amount, if the corporation is holding a lesser amount as a permitted practice of the applicable insurance regulatory body).

These limitation amounts may induce local regulators to require the filing of financial statements based on GAAP or IFRS instead of filing statements based on a local regulatory accounting standard. Such actions would eliminate limitation amount 1) above, and assuming that limitation amount 3) does not apply, would leave the amount of AIL reported on a GAAP- or IFRS-prepared statement as the relevant AIL. This approach will improve the application of the QIC test, relative to the no-action baseline, by increasing the likelihood that AIL and total assets are both derived from consistent accounting principles by the tested corporations affected by the PFIC insurance rules.

A tested corporation that has an AFS based on GAAP or IFRS may be required to file a financial statement with its home country regulator using local statutory accounting rules, where the AIL on the latter statement are less than those shown on the AFS. The difference in AIL could perhaps be due to the use of dissimilar accounting rules, the use of different discounting assumptions or other assumptions regarding the measurement of liabilities, or disparate methods of valuing assets. Under the 2020 proposed regulations, such accounting differences are not accounted for by prescribed asset adjustments or by other means.

As a regulatory alternative, the Treasury Department and the IRS considered whether to require asset or liability adjustments based on certain identified differences between an AFS based on GAAP or IFRS and a financial statement based on local accounting standards, where the differences were due solely to different accounting standard requirements. For example, in preparing the 2020 final regulations, the Treasury Department and the IRS considered imposing the discounting rules specified by the Code for measuring property and casualty unpaid losses for domestic tax purposes on losses measured on a non-GAAP or non-IFRS basis. Such an option was rejected due partly to its anticipated heavy compliance costs (and thus the

possibility that the foreign corporation may not take the steps necessary to attract U.S. investors) without any accompanying, identifiable general economic benefit. The Treasury Department and the IRS determined that prescribing other requirements or adjustments could have similar compliance costs and that the impacts of such accounting discrepancies on the QIC test ratio are generally either unknown or without a consistent bias. In this regard, the Treasury Department and the IRS further determined that they did not have and could not practically obtain sufficient information regarding the differences among GAAP, IFRS, and the various local accounting standard requirements that might apply to tested corporations in different foreign jurisdictions to formulate additional appropriate rules.

iii. Reinsurance Recoverable

In the context of reinsurance, however, the differences in the measurement of AIL and assets under different accounting standards are in some cases due merely to a different presentation of the accounting results with respect to reinsurance, rather than more fundamental differences in measurement or accounting methods. Companies that have ceded business to another insurer under a contract of reinsurance will have amounts recoverable from those reinsurers that could represent a reimbursement of AIL. These amounts may be related to claims that have been paid or unpaid. Generally, if the insurer has paid a claim, the reinsurance recoverable is shown as a receivable (that is, an asset) on its balance sheet. However, the treatment of amounts recoverable with respect to unpaid losses and unpaid loss adjustment expenses can differ amongst different accounting standards. For example, under current GAAP, reinsurance recoverable with respect to unpaid claims is reported as an asset. The same is true under IFRS 17 (an insurance accounting standard that will be effective generally beginning in 2023), where a single reinsurance asset may be reported with respect to both paid and unpaid claims. The situation is different under U.S. statutory accounting rules as specified by the National Association of Insurance Commissioners and implemented by the various states. Under U.S. statutory accounting, reinsurance recoverable for unpaid losses and loss adjustment expenses is treated as an offset to the unpaid loss reserves and would thus reduce AIL. It is likely that some non-U.S. local statutory accounting standards similarly reduce unpaid loss reserves (and thus AIL) by amounts recoverable through reinsurance.

Measuring AIL on a ''gross'' basis, as under GAAP and IFRS 17, necessarily increases the QIC test ratio relative to a ''net'' AIL measure. However, if the local accounting standard governing the financial statement filed with an applicable regulatory body requires a ''net'' measure of AIL, then the AIL of the GAAP- or IFRS-based AFS will generally be limited for the purpose of the QIC test.

Reporting AIL on a ''gross'' basis could enable a foreign insurer to raise its QIC test ratio to almost any desired level simply by being a reinsurance conduit (that is by reinsuring business and then retroceding all, or virtually all, of that business to other reinsurers). Such a possibility could allow corporations that might otherwise be designated as PFICs instead to qualify as QICs and thereby avoid PFIC status.

For these reasons the 2020 proposed regulations specify that amounts recoverable from reinsurance and related to AIL, if reported as assets on a financial statement of the tested corporation, must be subtracted from the reported AIL. That is, all AIL are to be determined on a ''net'' basis with respect to reinsurance recoverable. Furthermore, if such reinsurance amounts are recoverable from an insurance subsidiary of the tested corporation, and such amounts of reinsurance recoverable are eliminated in the preparation of a consolidated financial statement, the AIL of the tested corporation nevertheless must be reduced by the recoverable amount. Under the 2020 proposed regulations, total assets reported on the AFS of the tested corporation may be reduced by amounts equal to the reductions in AIL for the purpose of the QIC test.

4. Number of Potentially Affected Taxpayers

An entity must file a separate Form 8621 for each PFIC for which it has an ownership interest. The accompanying table indicates how many entities have filed at least one form 8621 between 2016 and 2018. These data are based on IRS master files of tax return filings and do not encompass late filings that have not yet been received. For 2018, nearly 62,000 Forms 8621 were filed. Over 70 percent of the entities filing a Form 8621 are individuals, although certain individuals are exempt from filing a Form 8621 if their aggregate holdings are less than $25,000 ($50,000 if filing a joint return) and they do not have PFIC income to report. Another 27 percent are pass-through entities, the overwhelming number of which are partnerships, but which also include S corporations, estates, and non-grantor trusts. These pass-through entities primarily have individuals as partners, shareholders, or beneficiaries. It is possible there is some double counting whereby both partnerships and partners are filing a Form 8621 for the same PFIC. C corporations comprise just over one percent of total entities, while another nearly two percent of Forms 8621 do not identify on the form the filing status of the filer.

In general, only the taxpayer that is the lowest tier U.S. entity owning a PFIC needs to file a Form 8621. Thus, an individual that is a PFIC shareholder because he or she owns an interest in a U.S. partnership that holds shares of a PFIC does not need to file a Form 8621 if the individual is not required to report PFIC-related income on the Form 8621. This may happen if, for example, the individual and the partnership have made a Qualifying Electing Fund (QEF) election with respect to the PFIC. In that case, only the partnership files the Form 8621. The partnership records the QEF income for the year, and that taxable income is reported to the taxpayer as part of his or her distributive share of partnership income.

TABLE

	Number of entities filing Form 8621		
	2016	2017	2018
Individuals	36,978	40,891	43,406
Passthrough Entities	15,326	16,133	16,607
C Corporations	713	733	739
Unreported Filer Type	1,114	1,053	1,084

TABLE—Continued

	Number of entities filing Form 8621		
	2016	2017	2018
All Entities	54,131	58,810	61,836

In 2018, each reporting taxpaying entity filed an average of 12 Forms 8621. This average was 11 forms per entity for individuals, 16 forms per entity for partnerships and other pass-through entities, and 28 forms per entity for C corporations.

The Treasury Department and the IRS do not have information in current tax filings regarding how many shareholders own shares in qualifying insurance companies or qualifying banks.

5. Regulatory Flexibility Act

It is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). The proposed regulations provide guidance with respect to the statutory provisions in sections 1291 through 1298 (the ''PFIC regime''), which generally affect U.S. taxpayers that have ownership interests in foreign corporations that are not CFCs. The proposed regulations do not impose any new costs on taxpayers. Consequently, the Treasury Department and the IRS have determined that the proposed regulations will not have a significant economic impact on a substantial number of small entities. Notwithstanding this certification, the Treasury Department and the IRS invite comments on the impact of these rules on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. The Treasury Department and the IRS request comments on the impact of these proposed regulations on small business entities.

II. Unfunded Mandates Reform Act

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

III. Executive Order 13132: Federalism

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

Comments and Requests for a Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. See also the specific requests for comments in the following Parts of the Explanation of Provisions: I.A.1 (concerning rules for foreign banks and the ongoing application of Notice 89–81 and proposed § 1.1296–4), I.A.2 (regarding financial statement valuation), I.A.3 (on the treatment of working capital in applying the Asset Test), I.A.4 (concerning the elimination of intercompany dividends and the treatment of pre-acquisition earnings and profits), I.A.5 (on the safe harbor for the anti-abuse rule for section 1298(b)(7)), I.B.1 (on the expanded definition of an AFS and the priority rules provided), I.B.2 (concerning modco arrangements and other special circumstances in which modification of the definition of AIL is appropriate), I.B.3 (on situations that may warrant an adjustment to total assets), I.C.1 (concerning the active conduct test), I.D.2 (on the QDIC Limitation Rule), I.E (concerning the application of statutory requirements relating to life insurance contracts and annuity contracts), and II (concerning a transition rule). Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically by sending an email to *publichearings@irs.gov*. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020–4, 2020–17 I.R.B. 667 (April 20, 2020), provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Statement of Availability of IRS Documents

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

Drafting Information

The principal drafters of these regulations are Christina G. Daniels, Josephine Firehock, Jorge M. Oben, and Larry R. Pounders of the Office of Associate Chief Counsel (International). Other personnel from the Treasury Department and the IRS also participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** In § 1.250–1 amend paragraph (b) by revising the first sentence and adding a sentence at the end of the paragraph to read as follows:

§ 1.250–1 Introduction.

* * * * *

(b) * * * Except as otherwise provided in this paragraph (b)(2), §§ 1.250(a)–1 and 1.250(b)–1 through 1.250(b)–6 apply to taxable years beginning on or after January 1, 2021. * * * The last sentence in § 1.250(b)–2(e)(2) applies to taxable years beginning after December 31, 2017.

* * * * *

■ **Par. 3.** Section 1.250(b)–2 is amended by adding a sentence at the end of paragraph (e)(2) to read as follows:

§ 1.250(b)–2 Qualified business asset investment (QBAI).

* * * * *

(e) * * *

(2) * * * For purposes of applying section 250(b)(2)(B) and this paragraph (e), the technical amendment to section 168(g) enacted in section 2307(a) of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020) is treated as enacted on December 22, 2017.

■ **Par. 4.** Section 1.951A–3 is amended by adding a sentence at the end of paragraph (e)(2) to read as follows:

§ 1.951A–3 Qualified business asset investment.

* * * * *

(e) * * *

(2) * * * For purposes of applying section 951A(d)(3) and this paragraph (e), the technical amendment to section 168(g) enacted in section 2307(a) of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020) is treated as enacted on December 22, 2017.

* * * * *

■ **Par. 5.** Section 1.1297–0 is amended by:

■ 1. Revising the entries for § 1.1297–2(f)(1) and (2).

■ 2. Revising the entries for § 1.1297–4(e)(4) and (5), (f)(1)(iv), (f)(6)(i), (ii), and (iii), and (g)(1) and (2).

■ 3. Adding an entry for § 1.1297–5.

■ 4. Revising the entries for § 1.1297–6(e)(2) and (3) and (f)(1) and (2).

The revisions and additions read as follows:

§ 1.1297–0 Table of contents.

* * * * *

§ 1.1297–1 Definition of passive foreign investment company.

* * * * *

(c) * * *

(2) Exception for certain income derived in the active conduct of a banking businesses by a foreign bank.

(i) In general.

(ii) Foreign bank determination.

* * * * *

(d) * * *

(1) * * *

(v) * * *

(D) Valuation.

* * * * *

(2) Working capital.

* * * * *

(g) * * *

(3) Paragraphs (c)(1)(i)(B), (c)(2), (d)(1)(v)(D), and (d)(2) of this section.

§ 1.1297–2 Special rules regarding look-through subsidiaries and look-through partnerships.

* * * * *

(e) * * *

(4) Active banking business.

(f) * * *

(1) Stock basis adjustment.

(2) Amount of gain taken into account.

* * * * *

§ 1.1297–4 Qualifying insurance corporation.

* * * * *

(e) * * *

(4) Corresponding adjustment to total assets.

(i) Consolidated applicable financial statement

(ii) Insurance risk transferred through reinsurance.

(5) Example.

(i) Facts.

(ii) Results.

(A) AIL reduction.

(B) Asset reduction.

* * * * *

(f) * * *

(1) * * *

(iv) Priority of financial statements.

* * * * *

(6) * * *

(i) In general.

(ii) Consolidated and non-consolidated financial statement.

(iii) Audited financial statement.

* * * * *

(g) * * *

(1) General applicability date.

(2) Exception.

(3) Early application.

§ 1.1297–5 Active conduct of an insurance business.

(a) Scope.

(b) Active conduct of an insurance business.

(1) In general.

(2) Exceptions.

(c) Factual requirements test.

(1) In general.

(2) Substantial managerial and operational activities with respect to core functions.

(i) Substantial managerial and operational activities.

(ii) Regular and continuous basis.

(3) Performance of virtually all of the active decision-making functions relevant to a QIC's underwriting activities.

(i) Active decision-making functions.

(ii) Performance requirements.

(iii) Exclusions.

(4) Number of officers and employees.

(d) Active conduct percentage test.

(1) Percentage test.

(2) Outsourcing.

(e) Related officers and employees.

(1) Modified qualified affiliate requirement.

(2) Oversight and supervision requirement.

(3) Compensation requirement.

(f) Definitions.

(1) Applicable reporting period.

(2) Compensation costs.

(3) Contract and claims management activities.

(4) Core functions.

(5) Investment activities.

(6) Qualifying insurance corporation or QIC.

(7) Sales activities.

(8) Total costs.

(9) Underwriting activities.

(10) Virtually all.

(g) Applicability date.

§ 1.1297–6 Exception from the definition of passive income for active insurance income.

* * * * *

(e) * * *

(2) Qualifying domestic insurance corporation non-passive asset and income limitations.

(i) Qualifying domestic insurance corporation's non-passive assets.

(ii) Qualifying domestic insurance corporation's non-passive income.

(iii) Non-passive asset limitation.

(iv) Total insurance liabilities.

(A) Companies taxable under Part I of Subchapter L.

(B) Companies taxable under Part II of Subchapter L.

(3) Example.

(i) Facts.

(ii) Result.

(A) Non-passive asset limitation.

(B) Non-passive income limitation.

(f) * * *

(1) General applicability date.

(2) Exception.

(3) Early application.

■ **Par. 6.** Section 1.1297–1 is amended by:

■ 1. Revising paragraphs (c)(1)(i)(B), (c)(2), (d)(1)(v)(D), and (d)(2).

■ 2. Revising the first sentence of paragraph (g)(1).

■ 3. Adding paragraph (g)(3).

The revisions and addition read as follows:

§ 1.1297–1 Definition of passive foreign investment company.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(B) The exceptions in sections 954(c)(3) (relating to certain income received from related persons), 954(c)(6) (relating to certain amounts received from related controlled foreign corporations), 954(h) (relating to entities engaged in the active conduct of a banking, financing, or similar business), and 954(i) (relating to entities engaged in the active conduct of an insurance business) are not taken into account; * * *

* * * * *

(2) *Exception for certain income derived in the active conduct of a banking business by a foreign bank*—(i) *In general.* For purposes of section 1297(b)(2)(A), income of a tested foreign corporation is treated as non-passive if—

(A) The income would not be treated as foreign personal holding company income under section 954(h) (relating to entities engaged in the active conduct of a banking, financing, or similar business) if the tested foreign corporation (and, to the extent relevant, any related person as defined by section 954(d)(3)) were a controlled foreign corporation within the meaning of section 957(a); and

(B) The tested foreign corporation is a foreign bank that is engaged in the active conduct of a banking business (within the meaning of section 954(h)(2)(B)(ii)) and the income is derived in the conduct of that banking business.

(ii) *Foreign bank determination.* A tested foreign corporation will be treated as a foreign bank only if it—

(A) is licensed by federal or state bank regulatory authorities to do business as a bank in the United States, or is licensed or authorized by a bank regulatory authority in the country in which it is chartered or incorporated (or, in the case of a qualified business unit, in the country in which the unit maintains its principal office) to do business as a bank in that country, including to—

(I) Accept bank deposits from residents of that country; and

(II) Carry out one or more of the activities listed in section 954(h)(4), and

(B) regularly receives bank deposits from and carries out one or more of the activities listed in section 954(h)(4) with unrelated customers in the ordinary course of a banking business.

* * * * *

(d) * * *

(1) * * *

(v) * * *

(D) *Valuation.* For purposes of determining the value of assets during a measuring period when the shares of a tested foreign corporation are not publicly traded, valuation may be determined on the basis of periodic financial accounting statements provided at least annually. If the tested foreign corporation or one or more shareholders has actual knowledge or reason to know based on readily accessible information that the financial accounting statements do not reflect a reasonable estimate of an asset's value and the information provides a more reasonable estimate of the asset's value, then the information must be used to determine the value of the assets to which it relates.

* * * * *

(2) *Working capital.* For purposes of section 1297(a)(2), an amount of currency denominated in functional currency (as defined in section 985(b)) held in a non-interest bearing financial account that is held for the present needs of an active trade or business and is no greater than the amount necessary to cover operating expenses incurred in the ordinary course of the trade or business of the tested foreign corporation (for example, accounts payable for ordinary operating expenses) and reasonably expected to be paid within 90 days is not treated as a passive asset. For purposes of the preceding sentence, cash equivalents are not treated as currency, and amounts held for purposes other than to meet the ordinary course operating expenses of the trade or business, including for the purpose of providing for (i) future diversification into a new trade or business, (ii) expansion of trade or business activities, (iii) future plant replacement, or (iv) future business contingencies, are treated as passive assets.

* * * * *

(g) * * *

(1) *In general.* Except as otherwise provided, the rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. * * *

* * * * *

(3) *Paragraphs (c)(1)(i)(B), (c)(2), (d)(1)(v)(D), and (d)(2) of this section.* Paragraphs (c)(1)(i)(B), (c)(2), (d)(1)(v)(D), and (d)(2) of this section apply to taxable years of shareholders beginning on or after [the date these regulations are filed as final regulations in the **Federal Register**]. A shareholder may choose to apply the paragraphs in the preceding sentence for any open taxable year beginning before [the date these regulations are filed as final regulations in the **Federal Register**] without regard to whether the rules of this section are applied consistently, provided that once applied, each rule must be applied for each subsequent taxable year beginning before [the date these regulations are filed as final regulations in the **Federal Register**].

■ **Par. 7.** Section 1.1297–2 is amended by:

■ 1. Revising the third sentence in paragraph (b)(2)(ii)(A), the second sentence in paragraph (b)(3)(ii)(A), the first sentence in paragraph (c)(2)(i), and the second sentence in (c)(4)(ii)(A).

■ 2. Adding subparagraph (e)(4).

■ 3. Revising the first sentence and adding two sentences to the end of paragraph (h).

The revisions and additions read as follows:

§ 1.1297–2 Special rules regarding look-through subsidiaries and look-through partnerships.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(A) * * * The exceptions to passive income in section 1297(b)(2) and the relevant exceptions to foreign personal holding company income in sections 954(c) and (h) that are based on whether income is derived in the active conduct of a business or whether a corporation is engaged in the active conduct of a business apply to such income only if the exception would have applied to exclude the income from passive income or foreign personal holding company income in the hands of the subsidiary, determined by taking into account only the activities of the subsidiary except as provided in paragraph (e) of this section. * * *

* * * * *

(3) * * *

(ii) * * *

(A) * * * The exceptions to passive income in section 1297(b)(2) and the relevant exceptions to foreign personal holding company income in sections 954(c) and (h) that are based on whether income is derived in the active conduct of a business or whether a corporation is engaged in the active conduct of a business apply to such income only if the exception would have applied to exclude the income from passive income or foreign personal holding company income in the hands of the partnership, determined by taking into account only the activities of the partnership except as provided in paragraph (e) of this section. * * *

* * * * *

(c) * * *

(2) * * *

(i) *LTS stock.* For purposes of section 1297, a tested foreign corporation does

not take into account dividends derived with respect to LTS stock, including dividends that the tested foreign corporation is treated as receiving on a measurement date pursuant to section 1297(c) and paragraphs (b)(2) or (b)(3) of this section. * * *

* * * * *

(4) * * *

(ii) * * *

(A) * * * During the first quarter of the taxable year, TFC received $20x of dividends from LTS1 and $30x of interest on the loan, both of which were paid in cash.

* * * * *

(e) * * *

(4) *Active banking business.* For purposes of § 1.1297–1(c)(2), the activities of the employees of a person that is a related person with respect to a look-through subsidiary or partnership are taken into account to the extent provided in section 954(h)(3)(E).

* * * * *

(f) *Gain on disposition of a look-through subsidiary or look-through partnership*—(1) *Stock basis adjustment.* For purposes of determining gain in paragraph (2) of this paragraph (f), a tested foreign corporation's basis in the stock of a look-through subsidiary is decreased, but not below zero, by the aggregate amount of distributions made by the look-through subsidiary with respect to the look-through subsidiary's stock that are attributable to income of the look-through subsidiary not treated as received directly by the tested foreign corporation pursuant to paragraph (b)(2) of this section.

(2) *Amount of gain taken into account.* The amount of gain derived from a tested foreign corporation's direct disposition of stock of a look-through subsidiary, or an indirect disposition resulting from the disposition of stock of a look-through subsidiary by other look-through subsidiaries or by look-through partnerships, that is taken into account by the tested foreign corporation for purposes of section 1297(a)(1), section 1298(b)(3), and § 1.1298–2 is the residual gain. The residual gain equals the total gain recognized by the tested foreign corporation (including gain treated as recognized by the tested foreign corporation pursuant to section 1297(c) and paragraph (b)(2) of this section or § 1.1297–1(c)(2)) from the disposition of the stock of the look-through subsidiary reduced (but not below zero) by unremitted earnings. *Unremitted earnings* are the excess (if any) of the aggregate income (if any) taken into account by the tested foreign corporation pursuant to section 1297(c) and paragraph (b)(2) of this section or § 1.1297–1(c)(2) with respect to the stock of the disposed-of look-through subsidiary (including with respect to any other look-through subsidiary, to the extent it is owned by the tested foreign corporation indirectly through the disposed-of look-through subsidiary) over the aggregate dividends (if any) received by the tested foreign corporation from the disposed-of look-through subsidiary with respect to the stock other than dividends described in paragraph (f)(1) of this section. For purposes of this paragraph (f)(2), the amount of gain derived from the disposition of stock of a look-through subsidiary and income of and dividends received from the look-through subsidiary is determined on a share-by-share basis, determined under a reasonable method.

* * * * *

(h) *Applicability date.* Except as otherwise provided, the rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021. * * * Paragraphs (b)(2)(ii)(A), (b)(3)(ii)(A), (c)(2)(i), (c)(4)(ii)(A), (e)(4), (f)(1), and (f)(2) of this section apply to taxable years of shareholders beginning on or after [the date these regulations are filed as final regulations in the **Federal Register**]. A shareholder may choose to apply the paragraphs in the preceding sentence for any open taxable year beginning before [the date these regulations are filed as final regulations in the **Federal Register**] without regard to whether the rules of this section are applied consistently, provided that once applied, each rule must be applied for each subsequent taxable year beginning before [the date these regulations are filed as final regulations in the **Federal Register**].

■ **Par. 8.** Section 1.1297–4 is amended by revising paragraphs (e)(4), (e)(5), (f)(1), (f)(2)(i)(D)(*3*), (f)(6)(i), (ii), and (iii), and (g) to read as follows:

§ 1.1297–4 Qualifying insurance corporation.

* * * * *

(e) * * *

(4) *Corresponding adjustment to total assets.* For purposes of determining whether a foreign corporation satisfies the 25 percent test or the 10 percent test, the amount of total assets reported on the foreign corporation's applicable financial statement may be reduced as described in paragraphs (e)(4)(i) through (iii) of this section.

(i) *Consolidated applicable financial statement.* If a foreign corporation's applicable financial statement is prepared on a consolidated basis, the amount of total assets may be reduced by the amount of liabilities of another entity that are reported on the applicable financial statement and would be treated as applicable insurance liabilities but for the application of paragraphs (e)(2) or (f)(2)(i)(D)(*2*) of this section.

(ii) *Insurance risk transferred through reinsurance.* If the applicable financial statement is prepared on the basis of an accounting method that measures insurance liabilities without a reduction for amounts that may be recovered from other parties through reinsurance and the amount that may be recovered through reinsurance is reported as an asset on the applicable financial statement (rather than as a reduction in the amount of an insurance liability), the foreign corporation's total assets may be reduced by the amount of the corporation's insurance liabilities that are reinsured to another party and are excluded from the definition of applicable insurance liabilities under paragraph (f)(2)(i)(D)(*3*) of this section.

(iii) No amount may be used more than once to reduce total assets under paragraphs (e)(4)(i) and (ii) of this section.

(5) *Example.* The following example illustrates the application of paragraph (e)(4) of this section.

(i) *Facts.* P, a foreign corporation, issues property and casualty insurance contracts and has a consolidated applicable financial statement (AFS) constructed using IFRS accounting principles, including those of IFRS 17, for the applicable reporting period. The AFS reports insurance contract liabilities for incurred claims that meet the requirements of paragraphs (f)(2)(i)(A) and (f)(2)(i)(B) of this section in an amount equal to 1,100x, 200x of which are liabilities under contracts issued by S, a wholly owned insurance subsidiary, and 900x of which are liabilities under contracts issued by P. The AFS also reports 2,500x of total assets, including 250x of assets related to P's insurance contract liabilities for incurred claims that are recoverable from unrelated parties through reinsurance.

(ii) *Results*—(A) Reduction to applicable insurance liabilities (*AIL*). Under paragraph (f)(2)(i)(D)(*2*) of this section, only AIL of the foreign corporation whose QIC status is being determined may be included in AIL. Thus, P's AIL do not include the 200x of insurance contract liabilities on P's consolidated AFS that are liabilities under contracts issued by S. Under paragraph (f)(2)(i)(D)(*3*) of this section, the amount of insurance liabilities determined under paragraphs (f)(2)(i)(A)

through (C) and (D)(*1*) and (*2*) of this section are reduced by an amount equal to the assets reported on P's AFS that represent amounts relating to those liabilities that may be recoverable from other parties through reinsurance. Thus, P's AIL are reduced by an amount equal to the 250x of assets for incurred claims related to the insurance liabilities of P that are recoverable from another party through reinsurance. Assuming no other limitation applies (such as those contained in paragraph (e) of this section), P's AIL equals 650x (1,100x − 200x − 250x).

(B) *Reduction to total assets.* Pursuant to paragraph (e)(4)(i) of this section, P may reduce its total assets by amounts of liabilities of another entity that are excluded from P's AIL because of paragraphs (e)(2) or (f)(2)(i)(D)(*2*) of this section. Under paragraph (f)(2)(i)(D)(*2*) of this section, P's AIL may include only the liabilities of P, the entity whose QIC status is being determined. Therefore, P may reduce its total assets by 200x, the amount of liabilities under contracts issued by S that are included on P's AFS but excluded from P's AIL. Pursuant to paragraph (e)(4)(ii) of this section, P may also reduce its total assets by 250x, the amount of P's liabilities that are reinsured by another party and excluded from the definition of AIL under paragraph (f)(2)(i)(D)(*3*) of this section. After these adjustments, P has total assets of 2,050x (2,500x − 200x − 250x).

(C) *AIL to total assets tests.* Accordingly, for purposes of the 25 percent and 10 percent tests, P has AIL of 650x and total assets of 2,050x, for a test ratio of 650x/2,050x, or 31.7%.

(f) *Definitions.* * * *

(1) *Applicable financial statement.* The term applicable financial statement means the foreign corporation's financial statement prepared for the financial reporting purposes listed in paragraphs (f)(1)(i) through (iii) of this section that has the highest priority, including priority within paragraphs (f)(1)(i)(B) and (f)(1)(ii) of this section. Subject to paragraph (f)(1)(iv) of this section, the financial statements are, in order of descending priority—

(i) *GAAP statements.* A financial statement that is prepared in accordance with GAAP and is:

(A) A Form 10–K (or successor form), or annual statement to shareholders, filed with the United States Securities and Exchange Commission (SEC), or filed by the taxpayer with an agency of a foreign government that is equivalent to the SEC, and has reporting standards not less stringent than the standards required by the SEC;

(B) An audited financial statement of the taxpayer that is used for:

(*1*) Credit purposes;

(*2*) Reporting to shareholders, partners, or other proprietors, or to beneficiaries;

(*3*) Filing with the Federal government or any Federal agency, other than the SEC or the Internal Revenue Service or an applicable insurance regulatory body, or filing with a state or foreign government or an agency of a state or foreign government, other than an agency that is equivalent to the SEC or the Internal Revenue Service or is an applicable insurance regulatory body; or

(*4*) Any other substantial non-tax purpose, including filing with the applicable insurance regulatory body; or

(ii) *IFRS statements.* A financial statement that is prepared in accordance with IFRS and is described in paragraphs (f)(1)(i)(A) or (B) of this section, in the order of priority set forth in those paragraphs; or

(iii) *Regulatory annual statement.* An audited financial statement required to be filed with the applicable insurance regulatory body that is not prepared in accordance with GAAP or IFRS.

(iv) *Priority of financial statements.*

(A) A financial statement that takes into account assets and liabilities of affiliates of the foreign corporation that are not owned in whole or part by the foreign corporation is not treated as an applicable financial statement for purposes of paragraphs (f)(1)(i) and (ii) of this section, and is not treated as an applicable financial statement for purposes of paragraph (f)(1)(iii) of this section unless it is the only financial statement described in paragraph (f)(1)(iii) of this section.

(B) A financial statement that is described in more than one clause listed in paragraphs (f)(1)(i) through (iii) of this section is treated for purposes of this paragraph (f)(1) as described solely in the highest priority clause. If a foreign corporation has more than one financial statement with equal priority under paragraphs (f)(1)(i) through (iii) of this section, a non-consolidated financial statement has priority over other financial statements.

(2) *Applicable insurance liabilities.* * * *

(i) * * *

(D) * * *

(*3*) Amounts of liabilities determined under paragraphs (f)(2)(i)(A) through (C) and (D)(*1*) and (*2*) are reduced by an amount equal to the assets reported on the corporation's financial statement as of the financial statement end date that represent amounts relating to those liabilities that may be recoverable from other parties through reinsurance. If a foreign corporation's financial statement is prepared on a consolidated basis, to the extent not reduced already under paragraphs (f)(2)(i)(A) through (C) and (D)(*1*) and (*2*), liabilities are reduced by an amount equal to the assets relating to those liabilities that may be recoverable through reinsurance from another entity included in the consolidated financial statement, regardless of whether the reinsurance transaction is eliminated in the preparation of the consolidated financial statement.

* * * * *

(6) *Financial statements*—(i) *In general.* The term *financial statement* means a statement prepared for a legal entity for a reporting period in accordance with the rules of a financial accounting or statutory accounting standard that includes a complete balance sheet, statement of income, a statement of cash flows (or equivalent statements under the applicable reporting standard), and related exhibits, schedules, forms, and footnotes that usually accompany the balance sheet, income statement and cash flow statement.

(ii) *Consolidated and non-consolidated financial statement.* The term *consolidated financial statement* means a financial statement of a consolidated group of entities that includes a parent and its subsidiaries presented as those of a single economic entity, prepared in accordance with GAAP, IFRS or another financial or statutory accounting standard. A *non-consolidated financial statement* means a financial statement that is not prepared on a consolidated basis and that accounts for investments in subsidiaries on a cost or equity basis.

(iii) *Audited financial statement.* The term *audited financial statement* means a financial statement that has been examined by an independent auditor that has provided an opinion that the financial statement presents fairly in all material respects the financial position of the audited company (and its subsidiaries and controlled entities, if relevant) and the results of their operations and cash flows in accordance with GAAP or IFRS, or an equivalent opinion under GAAP, IFRS or another financial accounting or statutory accounting standard.

* * * * *

(g) *Applicability date*—(1) *General applicability date.* Except as provided in paragraph (g)(2) of this section, this section applies to taxable years of shareholders beginning on or after January 14, 2021.

(2) *Exception.* Paragraphs (e)(4), (e)(5), (f)(1), (f)(2)(i)(D)(*3*), and (f)(6) of this section apply to taxable years of United States persons that are shareholders in foreign corporations beginning on or after [the date these regulations are filed as final regulations in the **Federal Register**].

(3) *Early application*—(i) A shareholder may choose to apply the rules of this section (other than paragraphs (f)(1), (f)(2)(i)(D)(*3*), and (f)(6) of this section) for any open taxable year beginning after December 31, 2017 and before the applicability dates described in paragraphs (g)(1) and (2) of this section, provided that, with respect to a tested foreign corporation, it consistently applies those rules and the rules described in § 1.1297–6(f)(3) for such year and all subsequent years.

(ii) A shareholder may choose to apply paragraphs (f)(1), (f)(2)(i)(D)(*3*), and (f)(6) of this section for any open taxable year beginning after December 31, 2017 and before [the date these regulations are filed as final regulations in the **Federal Register**], provided that, with respect to a tested foreign corporation, it consistently applies the rules of this section, § 1.1297–5, and § 1.1297–6 for such year and all subsequent years.

■ **Par. 9.** Section 1.1297–5 is revised to read as follows:

§ 1.1297–5 Active conduct of an insurance business.

(a) *Scope.* This section provides rules pertaining to the exception from passive income under section 1297(b)(2)(B) for income derived in the active conduct of an insurance business. Paragraph (b) of this section sets forth the options for a qualifying insurance company (QIC) to qualify as engaged in the active conduct of an insurance business and describes circumstances under which a QIC will not be engaged in the active conduct of an insurance business. Paragraph (c) of this section describes the factual requirements that are sufficient to show that a QIC is engaged in the active conduct of an insurance business for purposes of section 1297(b)(2)(B). Paragraph (d) of this section describes an alternative active conduct percentage test, pursuant to which a QIC may be deemed to be engaged in the active conduct of an insurance business for purposes of section 1297(b)(2)(B). Paragraph (e) of this section describes the circumstances under which officers and employees of certain entities related to a QIC may be treated as if they were employees of the QIC. Paragraph (f) of this section provides definitions applicable to this section. Paragraph (g) of this section provides the applicability date of this section.

(b) *Active conduct of an insurance business*—(1) *In general.* A QIC is engaged in the active conduct of an insurance business only if it satisfies—

(i) the factual requirements test in paragraph (c) of this section; or

(ii) the active conduct percentage test in paragraph (d) of this section.

(2) *Exceptions.* Notwithstanding paragraph (b)(1) of this section, a QIC is not engaged in the active conduct of an insurance business if either of the following circumstances apply—

(i) It has no employees or only a nominal number of employees and relies exclusively or almost exclusively upon independent contractors (disregarding for this purpose any related entity that has entered into a contract designating its status as an independent contractor with respect to the QIC) to perform its core functions;

(ii) It is a vehicle that has the effect of securitizing or collateralizing insurance risks underwritten by other insurance or reinsurance companies or is an insurance linked securities fund that invests in securitization vehicles, and its stock (or a financial instrument, note, or security that is treated as equity for U.S. tax purposes) is designed to provide an investment return that is tied to the occurrence of a fixed or pre-determined portfolio of insured risks, events, or indices related to insured risks.

(c) *Factual Requirements Test*—(1) *In general.* A QIC satisfies the factual requirements test of paragraph (b)(1)(i) of this section if all the following are met—

(i) The officers and employees of the QIC carry out substantial managerial and operational activities on a regular and continuous basis with respect to its core functions as described in paragraph (c)(2) of this section; and

(ii) The officers and employees of the QIC perform virtually all of the active decision-making functions relevant to underwriting functions as described in paragraph (c)(3) of this section.

(2) *Substantial managerial and operational activities with respect to core functions*—(i) *Substantial managerial and operational activities.* Substantial managerial and operational activities with respect to a QIC's core functions requires all of the following—

(A) Establishing the strategic, overall parameters with respect to each core function;

(B) Establishing, or reviewing and approving, detailed plans to implement the strategic, overall parameters for each of the QIC's core functions;

(C) Managing, controlling and supervising the execution of the detailed plans to carry out each of the QIC's core functions;

(D) Establishing criteria for the hiring of employees or independent contractors to execute the detailed plans to carry out each of the QIC's core functions, and if independent contractors are hired, prescribing the goals and objectives of the engagement, the scope of work, evaluation criteria for contractor eligibility and for submissions by prospective contractors, and criteria and budget for the work to be performed;

(E) Reviewing the conduct of the work performed by employees or independent contractors to ensure that it meets the goals, standards, criteria, timeline and budget specified by the QIC, and taking appropriate action if it does not; and

(F) Conducting each of the requirements above by officers or senior employees of the QIC, which officers or employees are experienced in the conduct of those activities and devote all or virtually all of their work to those activities and similar activities for related entities.

(ii) *Regular and continuous basis.* Carrying out managerial and operational activities on a regular and continuous basis requires that the parameters and plans described in paragraphs (c)(2)(i)(A) and (B) of this section are regularly reviewed and updated and that the activities described in paragraphs (c)(2)(i)(C) and (E) of this section are carried out on a daily or other frequent basis as part of the ordinary course of the QIC's operations.

(3) *Performance of virtually all of the active decision-making functions relevant to a QIC's underwriting activities*—(i) *Active decision-making functions.* Active decision-making functions are the underwriting activities that are most important to decisions of the QIC relating to the assumption of specific insurance risks.

(ii) *Performance requirements.* Performance of virtually all of the active decision-making functions relating to underwriting activities requires all of the following—

(A) Carrying out virtually all of the activities related to a QIC's decision to assume an insurance risk, as set forth in the definition of underwriting activities, by employees and not by independent contractors; and

(B) Evaluating, analyzing, and conducting virtually all of the decision-making with respect to executing an insurance contract on a contract-by-contract basis, including determining whether the contract meets the QIC's criteria with respect to the risks to be

undertaken and pricing and is otherwise sound and appropriate.

(iii) *Exclusions.* The following activities are not active decision-making functions relevant to a QIC's core functions—

(A) Development of underwriting policies or parameters that are changed infrequently without further ongoing, active involvement in the day-to-day decision-making related to these functions; and

(B) Clerical or ministerial functions with respect to underwriting that do not involve the exercise of discretion or business judgment.

(4) *Number of officers and employees.* The number of officers and employees actively engaged in each core function is a relevant factor in determining whether the factual requirements in paragraph (c)(1) of this section have been satisfied.

(d) *Active conduct percentage test.* A QIC satisfies the active conduct percentage test of paragraph (b)(1)(ii) and will be deemed to be engaged in an active insurance business for the applicable reporting period only if it satisfies the percentage requirement in paragraph (d)(1) of this section and, to the extent core functions are outsourced, the oversight requirement in paragraph (d)(2) of this section.

(1) *Percentage test.* For the applicable reporting period covered by the applicable financial statement, total costs incurred by the QIC with respect to the QIC's officers and employees for services rendered with respect to its core functions (other than investment activities) equals or exceeds 50 percent of total costs incurred by the QIC with respect to the QIC's officers and employees and any other person or entities for services rendered with respect to its core functions (other than investment activities).

(2) *Outsourcing.* To the extent the QIC outsources any part of its core functions to unrelated entities, officers and employees of the QIC with experience and relevant expertise must select and supervise the person that performs the outsourced functions, establish objectives for performance of the outsourced functions, and prescribe rigorous guidelines relating to the outsourced functions which are routinely evaluated and updated.

(e) *Related officers and employees.* For purposes of this section, a QIC's officers and employees are considered to include the officers and employees of a related entity if the requirements of this paragraph (e) are satisfied. In determining whether an activity is carried out by employees, the activities of persons that are independent contractors and that are not related entities are disregarded. An entity may be a related entity regardless of whether it has entered into a contract designating its status as an independent contractor with respect to the QIC. An entity is treated as a related entity only if the requirements of this paragraph (e) are satisfied.

(1) *Modified qualified affiliate requirement.* The entity is a qualified affiliate of the QIC within the meaning of § 1.1297–2(e)(2) (determined by treating the QIC as the tested foreign corporation) except that, for purposes of this section, section 1504(a)(2)(A) (with ''more than 50 percent'' substituted for ''at least 80 percent'') also applies for purposes of determining qualified affiliate status.

(2) *Oversight and supervision requirement.* The QIC exercises regular oversight and supervision over the services performed by the related entity's officers and employees for the QIC.

(3) *Compensation requirement.* The QIC either—

(i) Pays directly all the compensation costs of the related entity's officers and employees attributable to core functions performed by those officers and employees on behalf of the QIC;

(ii) Reimburses the related entity for the portion of its expenses, including compensation costs and related expenses (determined in accordance with section 482 and taking into account all expenses that would be included in the total services costs under § 1.482–9(j) and § 1.482–9(k)(2)) for the performance by its officers and employees of core functions on behalf of the QIC; or

(iii) Otherwise pays arm's length compensation in accordance with section 482 on a fee-related basis to the related entity for services related to core functions.

(f) *Definitions.* The following definitions apply solely for purposes of this section.

(1) *Applicable reporting period.* The term *applicable reporting period* has the meaning set forth in § 1.1297–4(f)(4).

(2) *Compensation costs.* The term *compensation costs* means all amounts incurred by the QIC during the applicable reporting period with respect to an officer and employee (including, for example, wages, salaries, deferred compensation, employee benefits, and employer payroll taxes).

(3) *Contract and claims management activities.* The term *contract and claims management activities* means performing the following activities with respect to an insurance or annuity contract: Monitoring a contract (or group of contracts) over its life cycle (that is, maintaining the information on contractual developments, insured risk and occurrences, and maintaining accounts on premiums, claims reserves and commissions); performing loss and claim reporting (establishing and maintaining loss reporting systems, developing reliable claims statistics, defining and adjusting claims provisions and introducing measures to protect and reduce claims in future); and all the activities related to a policyholder's claim, including processing the claims report, examining coverage, handling the claim (working out the level of the claim, clarifying causes, claims reduction measures, legal analysis) and seeking recovery of funds due to the QIC.

(4) *Core functions.* The term *core functions* means the QIC 's underwriting, investment, contract and claims management and sales activities; however, contract and claims management activities will not be considered to be a core function of a reinsurance company with respect to indemnity reinsurance contracts to the extent that the ceding company has agreed to retain this core function under a reinsurance contract.

(5) *Investment activities.* The term *investment activities* means investment in equity and debt instruments and related hedging transactions and other assets of a kind typically held for investment, for the purpose of producing income to meet obligations under the insurance, annuity or reinsurance contracts.

(6) *Qualifying insurance corporation or QIC.* The term *qualifying insurance corporation* or *QIC* has the meaning described in § 1.1297–4(b).

(7) *Sales activities.* The term *sales activities* means sales, marketing and customer relations with respect to insurance or reinsurance policies.

(8) *Total costs.* With respect to the QIC's own officers and employees (and without regard to related officers and employees described in paragraph (e) of this section), the term *total costs* means the compensation costs of those officers and employees and related expenses (determined in accordance with section 482 and taking into account all expenses that would be included in the total services costs under § 1.482–9(j) and § 1.482–9(k)(2)) for services performed related to core functions. With respect to services performed by related officers and employees and unrelated persons or entities, the term *total costs* means the amount paid or accrued to the related or unrelated persons or entities for the services related to core functions. For purposes of this section, total costs,

however, do not include any ceding commissions paid or accrued with respect to reinsurance contracts or commissions or fees paid or accrued to brokers or sales agents to procure reinsurance contracts.

(9) *Underwriting activities.* The term *underwriting activities* means the performance of activities related to a QIC's decision to assume an insurance risk (for example, the decision to enter into an insurance or reinsurance contract, setting underwriting policy, risk classification and selection, designing or tailoring insurance or reinsurance products to meet market or customer requirements, performing actuarial analysis with respect to insurance products, and performing analysis for purposes of setting premium rates or calculating reserves, and risk retention).

(10) *Virtually all.* The term *virtually all* means all, other than a *de minimis* portion, measured on any reasonable basis.

(g) *Applicability date.* This section applies to taxable years of shareholders beginning on or after [the date these regulations are filed as final regulations in the **Federal Register**]. A shareholder may choose to apply the rules of this section for any open taxable year beginning after December 31, 2017 and before [the date these regulations are filed as final regulations in the **Federal Register**], provided that, with respect to a tested foreign corporation, it consistently applies the rules of this section, § 1.1297–4, and § 1.1297–6 for such year and all subsequent years.

■ **Par. 10.** Section 1.1297–6 is amended by adding a sentence to the end of paragraph (b)(2), adding a sentence to the end of paragraph (c)(2), and revising paragraphs (e)(2), (e)(3), and (f), to read as follows:

§ 1.1297–6 Exception from the definition of passive income for active insurance income.

* * * * *

(b) *Exclusion from passive income of active insurance income.* * * *

(2) * * * See paragraph (e)(2)(i) of this section for additional rules regarding the amount of income of a qualifying domestic insurance corporation that is treated as non-passive.

* * * * *

(c) *Exclusion of assets for purposes of the passive asset test under section 1297(a)(2).* * * *

(2) * * * See paragraph (e)(2)(ii) of this section for additional rules regarding the amount of assets of a qualifying domestic insurance corporation that are treated as non-passive.

* * * * *

(e) *Qualifying domestic insurance corporation.* * * *

(2) *Qualifying domestic insurance corporation non-passive asset and income limitations.* For purposes of section 1297 and § 1.1297–1—

(i) *Qualifying domestic insurance corporation's non-passive assets.* The amount of passive assets of a qualifying domestic insurance corporation that may be treated as non-passive is equal to the lesser of the passive assets of the corporation (determined without application of paragraph (c)(2) of this section) or the corporation's non-passive asset limitation (as defined in paragraph (e)(2)(iii) of this section).

(ii) *Qualifying domestic insurance corporation's non-passive income.* The amount of passive income of a qualifying domestic insurance corporation that may be treated as non-passive is equal to the lesser of the passive income of the corporation (determined without application of paragraph (b)(2) of this section) or the corporation's passive income multiplied by the proportion that its non-passive asset limitation (as defined in paragraph (e)(2)(iii) of this section) bears to its total passive assets (determined without application of paragraph (c)(2) of this section).

(iii) *Non-passive asset limitation.* For purposes of paragraph (e) of this section, the non-passive asset limitation equals the corporation's total insurance liabilities multiplied by the applicable percentage. The applicable percentage is—

(A) 400 percent of total insurance liabilities, for a company taxable under Part II of Subchapter L; and

(B) 200 percent of total insurance liabilities, for a company taxable under Part I of Subchapter L.

(iv) *Total insurance liabilities.* For purposes of paragraph (e) of this section—

(A) *Companies taxable under Part I of Subchapter L.* In the case of a company taxable under part I of Subchapter L, the term *total insurance liabilities* means the sum of the total reserves (as defined in section 816(c)) plus (to the extent not included in total reserves) the items referred to in paragraphs (3), (4), (5), and (6) of section 807(c).

(B) *Companies taxable under Part II of Subchapter L.* In the case of a company taxable under part II of Subchapter L, the term *total insurance liabilities* means the sum of unearned premiums (determined under § 1.832–4(a)(8)) and unpaid losses.

(3) *Example.* The following example illustrates the application of this section.

(i) *Facts.* X, a qualifying domestic insurance corporation within the meaning of paragraph (e)(1) of this section, is a nonlife insurance company taxable under part II of Subchapter L. X has passive assets of $1000x, total insurance liabilities of $200x, and passive income of $100x.

(ii) *Result*—(A) *Non-passive asset limitation.* The applicable percentage for nonlife insurance companies is 400%. Pursuant to paragraph (e)(2)(iii) of this section, X has a non-passive asset limitation of $800x, which is equal to its total insurance liabilities of $200x multiplied by 400%. Under paragraph (e)(2)(i) of this section, $800x of X's passive assets (equal to the lesser of the non-passive asset limitation ($800x) or passive assets ($1000x)) are treated as non-passive, and $200x remains passive.

(B) *Non-passive income limitation.* X has a non-passive asset limitation of $800x. The proportion of its non-passive asset limitation ($800x) to its total passive assets ($1000x) is 80%. Pursuant to paragraph (e)(2)(ii) of this section, X has $80x of passive income treated as non-passive (equal to the lesser of passive income ($100x) or 80% times $100x) and $20x remains passive.

(f) *Applicability date*—(1) *General applicability date.* Except as provided in paragraph (f)(2) of this section, this section applies to taxable years of shareholders beginning on or after January 14, 2021.

(2) *Exception.* Paragraphs (e)(2) and (e)(3) of this section apply to taxable years of shareholders beginning on or after [the date these regulations are filed as final regulations in the **Federal Register**].

(3) *Early application.* A shareholder may choose to apply the rules of this section (other than paragraphs (e)(2) and (e)(3) of this section) for any open taxable year beginning after December 31, 2017 and before January 14, 2021, provided that, with respect to a tested foreign corporation, it consistently applies those rules and the rules described in § 1.1297–4(g)(3)(i) for such year and all subsequent years.

■ **Par. 11.** Section 1.1298–0 is amended by adding entries for § 1.1298–4(e)(2)(i) and (ii); § 1.1298–4(e)(2)(ii)(A), (B), (C), and (D); § 1.1298–4(e)(3); § 1.1298–4(e)(3)(i), (ii), (iii), and (iv); § 1.1298–4(e)(3)(i)(A) and (B); § 1.1298–4(e)(3)(ii)(A) and (B); § 1.1298–4(e)(3)(iii)(A) and (B); and § 1.1298–4(e)(3)(iv)(A) and (B) to read as follows:

§ 1.1298–0 Table of contents.

§ 1.1298–4 Rules for certain foreign corporations owning stock in 25-percent-owned domestic corporations.

* * * * *

(e) * * *

(2) Safe harbor.

(i) Active business within Unites States.

(ii) Businesses undergoing change and new businesses.

(A) In general.

(B) Testing date.

(C) Transition period.

(D) Inapplicability.

(3) Examples.

(i) Example 1.

(A) Facts.

(B) Results.

(ii) Example 2.

(A) Facts.

(B) Results.

(iii) Example 3.

(A) Facts.

(B) Results.

(iv) Example 4.

(A) Facts.

(B) Results.

* * * * *

■ **Par. 12.** Section 1.1298–4 is amended by:

■ 1. Revising paragraphs (e)(2) and (3).

■ 2. Revising the first sentence and adding two sentences to the end of paragraph (f).

The additions and revisions read as follows:

§ 1.1298–4 Rules for certain foreign corporations owning stock in 25-percent-owned domestic corporations.

* * * * *

(e) * * *

(2) *Safe harbor.* Paragraph (e)(1) of this section will not apply if paragraph (e)(2)(i) or (e)(2)(ii) of this section applies.

(i) *Active business within United States.* The value of the assets of the second-tier domestic corporation used or held for use in an active trade or business within the U.S. is more than 80 percent of the fair market value of the gross assets of such corporation. For purposes of this paragraph (e)(2)—

(A) The value of the assets of the second-tier domestic corporation takes into account its pro-rata share of the value of the assets of its domestic subsidiary qualified affiliates and does not take into account the stock of such affiliates;

(B) The term *domestic subsidiary qualified affiliate* means each member of the affiliated group (as defined in section 1504(a) applied by substituting ''more than 50 percent'' for ''at least 80 percent'' each place it appears), treating the second-tier domestic corporation as the common parent of such affiliated group; and

(C) For purposes of this paragraph (e)(2), the determination of the existence of an active trade or business and whether assets are used in an active trade or business is made under § 1.367(a)–2(d)(2), (3), and (5) except that officers and employees of related entities as provided in § 1.367(a)–2(d)(3) include only the officers and employees of related domestic entities within the meaning of section 267(b) or 707(b)(1).

(ii) *Businesses undergoing change and new businesses*—(A) *In general.* The second-tier domestic corporation engages in an active U.S. trade or business that satisfies paragraph (e)(2)(i) of this section by the end of the transition period following the testing date.

(B) *Testing date.* For purposes of this paragraph (e)(2)(ii), the term ''testing date'' means the last day of the month in which either—

(*1*) The second-tier domestic corporation is created or organized or is acquired, directly or indirectly, by the tested foreign corporation; or

(*2*) A second-tier domestic corporation that previously satisfied (e)(2)(i) of this paragraph (e) disposes of, to a person that is not related within the meaning of section 267(b) or 707(b)(1), substantially all of the assets used or held for use in its active U.S. trade or business.

(C) *Transition period.* For purposes of this paragraph (e)(2)(ii), the term ''transition period'' means thirty-six months after the testing date as defined in paragraph (e)(2)(ii)(B)(*1*) or (*2*) of this section.

(D) *Inapplicability.* This paragraph (e)(2)(ii) does not apply for any taxable year (including previous taxable years) of the tested foreign corporation if the second-tier domestic corporation does not engage in an active U.S. trade or business that satisfies paragraph (e)(2)(i) of this section by the end of the transition period following a testing date.

(3) *Examples.* The following examples illustrate the rules of this paragraph (e). For purposes of these examples, TFC is a foreign corporation that is not a controlled foreign corporation (within the meaning of section 957(a)) and that is subject to the section 531 tax, USS1 and USS2 are domestic corporations for TFC's entire taxable year, TFC owns 100% of the single class of stock of USS1, and USS1 owns 100% of the single class of stock of USS2.

(i) *Example 1*—(A) *Facts.* USS2 operates an active trade or business within the United States within the meaning of § 1.367(a)–2(d)(2), (3), and (5). Throughout TFC's Year 1, the value of USS2's assets is $100x, and the value of USS2's assets that are used or held for use in its active trade or business within the United States is $20x. USS2 was not created, organized, or acquired within the preceding thirty-six months and has not disposed of an active trade or business within the United States within the preceding thirty-six months.

(B) *Results.* Paragraph (e)(2)(i) of this section does not apply in Year 1 even though USS2 is engaged in an active trade or business within the United States because only 20% ($20x/$100x) of its assets are used or held for use in an active U.S. trade or business within the meaning of § 1.367(a)–2(d)(2), (3), and (5), an amount that is not more than 80% of the fair market value of the total gross assets of USS2. Accordingly, the general rule in paragraph (e)(1) of this section will apply if there is a principal purpose to hold passive assets through USS2, the second-tier domestic corporation, to avoid classification of TFC, the tested foreign corporation, as a PFIC.

(ii) *Example 2*—(A) *Facts.* The facts are the same as in as in paragraph (e)(4)(i)(A) of this section (the facts in *Example 1*), except that USS2 also has an investment in USS3, a wholly owned domestic subsidiary of USS2. Throughout TFC's taxable Year 1, the value of USS3's assets is $400x and USS3 uses 100% of its assets in an active trade or business within the United States within the meaning of § 1.367(a)–2(d)(2), (3), and (5).

(B) *Results.* Because USS3 is a domestic subsidiary qualified affiliate of USS2, USS2's pro-rata share of the assets of USS3 is taken into account to determine whether USS2 satisfies paragraph (e)(2)(i) of this section. Accordingly, USS2 takes into account $400x (its pro-rata share) of USS3's assets in addition to the $100x of its own assets and, thus, is treated for purposes of paragraph (e)(2)(i) of this section as owning $500x of assets, with 84% ($420x/$500x) of such assets being used or held for use in an active trade or business within the United States within the meaning of § 1.367(a)–2(d)(2), (3), and (5). Therefore, paragraph (e)(2)(i) of this section applies in Year 1 and the general rule in paragraph (e)(1) of this section does not apply.

(iii) *Example 3*—(A) *Facts.* Throughout Year 1, USS2 uses 100% of its assets in an active trade or business within the United States within the meaning of § 1.367(a)–2(d)(2), (3), and (5), and thus satisfied paragraph (e)(2)(i) of this section in Year 1. On the first day of Year 2, USS2 disposes of all of those assets for cash. On the seventh day of Year 5 (before the end of the first month

in Year 5), USS2 invests the cash in assets that it immediately begins to use in an active trade or business in the United States.

(B) *Results.* Because USS2, the second-tier domestic corporation, engages in an active U.S. trade or business that satisfies paragraph (e)(2)(i) of this section by the end of thirty-six months after the last day of the month in which it disposed of its entire active U.S. trade or business that previously satisfied paragraph (e)(2)(i) of this section, paragraph (e)(2)(ii) of this section applies in Year 2, Year 3, and Year 4, and the general rule in paragraph (e)(1) of this section does not apply.

(iv) *Example 4*—(A) *Facts.* The facts are the same as in paragraph (e)(4)(iii)(A) of this section (the facts in *Example 3*), except that at the end of the first month of Year 5, USS2 is still in negotiations to purchase assets to be used in an active trade or business in the United States within the meaning of § 1.367(a)–2(d)(2), (3), and (5), and USS2 does not complete the purchase of such assets until the third month of Year 5.

(B) *Results.* The safe harbor in paragraph (e)(2)(ii) of this section does not apply for Year 2, Year 3, or Year 4, because USS2, the second-tier domestic corporation, did not engage in an active U.S. trade or business that satisfied paragraph (e)(2)(i) of this section by the end of the thirty-six month transition period after the end of the month in which it sold its prior active trade or business. Accordingly, the general rule in paragraph (e)(1) of this section will apply if there is a principal purpose to hold passive assets through USS2, the second-tier domestic corporation, to avoid classification of TFC, the tested foreign corporation, as a PFIC.

(f) *Applicability date.* Except as otherwise provided, the rules of this section apply to taxable years of shareholders beginning on or after January 14, 2021 * * * Paragraphs (e)(2) and (3) of this section apply to taxable years of shareholders beginning on or after [DATE OF FILING OF FINAL RULE IN THE **FEDERAL REGISTER**]. A shareholder may choose to apply the paragraphs in the preceding sentence for any open taxable year beginning before [DATE OF FILING OF FINAL RULE IN THE **FEDERAL REGISTER**] without regard to whether the rules of this section are applied consistently, provided that once applied, each rule must be applied for each subsequent taxable year beginning before [DATE OF FILING OF FINAL RULE IN THE **Federal Register**].

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2020–27003 Filed 1–14–21; 8:45 am]

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Part VII

Department of the Interior

Office of Natural Resources Revenue

30 CFR Parts 1206 and 1241

ONRR 2020 Valuation Reform and Civil Penalty Rule; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

30 CFR Parts 1206 and 1241

[Docket No. ONRR–2020–0001; DS63644000 DRT000000.CH7000 212D1113RT]

RIN 1012–AA27

ONRR 2020 Valuation Reform and Civil Penalty Rule

AGENCY: Department of the Interior, Office of the Secretary, Office of Natural Resources Revenue.

ACTION: Final rule.

SUMMARY: The Office of Natural Resources Revenue (''ONRR'') is amending certain regulations on how it values oil and gas produced from Federal leases for royalty purposes, values coal produced from Federal and Indian leases for royalty purposes, and assesses civil penalties for violations of certain statutes, regulations, leases, and orders associated with mineral leases. In addition, it is making some minor, non-substantive corrections to its regulations.

DATES: *Effective date:* This rule is effective February 16, 2021.

Compliance date: With respect to the amendments to 30 CFR part 1206 only, compliance is required for production that occurs on or after May 1, 2021. Compliance with the amendments to 30 CFR part 1241 is required on the effective date.

FOR FURTHER INFORMATION CONTACT: For questions on procedural issues, contact Dane Templin, Regulations Supervisor, at (303) 231–3149 or *Dane.Templin@onrr.gov.* For questions on technical issues related to royalty valuation, contact Amy Lunt, Supervisor Royalty Valuation Team A, at (303) 231–3746 or *Amy.Lunt@onrr.gov,* or Peter Christnacht, Supervisor Royalty Valuation Team B, at (303) 231–3651 or *Peter.Christnacht@onrr.gov.* For questions on technical issues related to civil penalties, contact Michael Marchetti, Program Manager Office of Enforcement, at (303) 231–3125 or *Michael.Marchetti@onrr.gov.*

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TABLE OF ABBREVIATIONS AND COMMONLY USED ACRONYMS IN THIS RULE

Abbreviation	What it means
2016 Valuation Rule	ONRR's Consolidated Federal Oil and Gas and Federal and Indian Coal Valuation Reform Rule, 81 FR 43338 (July 1, 2016).
2016 Civil Penalty Rule	ONRR's Amendments to Civil Penalty Regulations, 81 FR 50306 (August 1, 2016).
2017 Postponement Notice	ONRR's Notice of Postponement, 82 FR 11823 (February 27, 2017) (sought to stay implementation of the 2016 Valuation Rule).
2017 Repeal Rule	ONRR's Repeal of the 2016 Valuation Rule, 82 FR 36934 (August 7, 2017).
2020 Proposed Rule	ONRR's 2020 proposed rule titled: ONRR 2020 Valuation Reform and Civil Penalty Rule, 85 FR 62054 (October 1, 2020).
ALJ	Administrative Law Judge.
APA	Administrative Procedure Act of 1946, as amended.
API	American Petroleum Institute.
APD	Application for a Permit to Drill.
BLM	Bureau of Land Management.
BLS	Bureau of Labor Statistics.
BOEM	Bureau of Ocean Energy Management.
BSEE	Bureau of Safety and Environmental Enforcement.
Department	U.S. Department of the Interior.
Deepwater Policy	MMS's May 20, 1999, memorandum titled ''Guidance for Determining Transportation Allowances for Production from Leases in Water Depths Greater Than 200 Meters''.
E.O.	Executive Order.
FCCP	Failure to Correct Civil Penalty.
FERC	Federal Energy Regulatory Commission.
FLPMA	Federal Land Policy and Management Act of 1976.
FOGRMA	Federal Oil and Gas Royalty Management Act of 1982.
FY	Fiscal Year.
GOM	Gulf of Mexico.
IBLA	Interior Board of Land Appeals.
ILCP	Immediate Liability Civil Penalty.

TABLE OF ABBREVIATIONS AND COMMONLY USED ACRONYMS IN THIS RULE—Continued

Abbreviation	What it means
MLA	Mineral Leasing Act of 1920.
MMS	Minerals Management Service.
NEPA	National Environmental Policy Act of 1970.
NGL	Natural Gas Liquids.
OCS	Outer Continental Shelf.
OCSLA	Outer Continental Shelf Lands Act of 1953.
ONRR	Office of Natural Resources Revenue.
Secretary	Secretary of the U.S. Department of the Interior.
S.O.	Secretarial Order.

I. Introduction

This final rule amends ONRR's regulations under 30 CFR Chapter XII, Parts 1206 (product valuation) and 1241 (penalties). In 30 CFR part 1206, this final rule amends certain definitions (Subpart A) and provisions used to value Federal oil (Subpart C), Federal gas (Subpart D), Federal coal (Subpart F), and Indian coal (Subpart J). In 30 CFR part 1241, this final rule amends ONRR's regulations on the practices it uses to assess civil penalties (Subparts A and C).

This rule is effective 30 days after its publication in the **Federal Register**. However, ONRR recognizes that lessees typically report and pay royalties based on monthly production, sales, and costs. In addition, compliance with the requirements of the Rule will require system modifications by ONRR to accept reports and for industry reporters in order to submit reports. These system modifications will take some time to program. For those reasons, a separate compliance date is provided under the **DATES** caption to establish that—for the amendments to 30 CFR part 1206 only—lessees must conform to the amended requirements under this final rule beginning with production that occurs on and after May 1, 2021.

As stated under the **DATES** caption, the amendments to 30 CFR part 1241 shall become effective on and compliance is required by February 16, 2021.

ONRR explained in the 2020 Proposed Rule that, with regard to 30 CFR part 1206, several of ONRR's proposed amendments would extend, revise, or remove regulations that ONRR had adopted through the 2016 Valuation Rule. *See* 85 FR 62054–62062. ONRR also explained the factors it was considering in its decision making, including: (1) Executive Orders (E.O.s) and Secretarial Orders (S.O.s) issued after the 2016 Valuation Rule's effective date; (2) specific to coal cooperatives and coal valuation based on electricity sales, ONRR's consideration of the parties' briefs filed in litigation challenging the 2016 Valuation Rule and the court's decision in that litigation to stay implementation of the rule's Federal and Indian coal provisions; and (3) ONRR's continued work to consider and implement regulatory changes that simplify or better explain ONRR's processes, and to provide early clarity regarding royalties owed. *See* 85 FR 62054–62057.

For 30 CFR part 1241, ONRR explained in the 2020 Proposed Rule that, in addition to some of the reasons listed above, ONRR was considering changes to its civil penalty practices to conform with a (subsequently-vacated) Federal District Court's decision on an industry challenge to ONRR's 2016 Civil Penalty Rule and to conform the civil penalty regulations to certain IBLA decisions. *See* 85 FR 62055 and 62056.

ONRR finds that those reasons, additional reasons raised in public comments, and additional information (identified by ONRR or provided to ONRR by its sister agencies) warrant the amendments adopted in this final rule on the following topics:

1. Allowing a lessee producing Federal oil and gas from the OCS under leases in water depths of 200 meters or greater to take a deduction for certain gathering costs as part of its transportation allowance.
2. Allowing a lessee to apply to ONRR for approval to claim an extraordinary processing allowance for Federal gas in situations where the gas stream, plant design, and/or unit costs were extraordinary, unusual, or unconventional relative to standard industry conditions and practice.
3. Removing the definition of ''misconduct'' from 30 CFR part 1206 as it applies to Federal oil and gas, and Federal and Indian coal.
4. Removing the default provision and references thereto from the regulations applying to Federal oil and gas, and Federal and Indian coal.
5. Removing the requirement that a lessee have contracts signed by all parties in order for those contracts to be recognized valid and binding with respect to the valuation of Federal oil and gas, and Federal and Indian coal.
6. Removing the requirement for a lessee to cite legal precedent when seeking a valuation determination for Federal oil and gas or a valuation decision for Federal or Indian coal.
7. Expanding the option to use index-based valuation to arm's-length Federal gas sales, which, under the 2016 Valuation Rule, was only available for non-arm's-length Federal gas sales.
8. For unprocessed and residue gas valued using the index-based valuation method, changing from the high index price to the average index price.
9. Changing the transportation deductions allowed under an index-based valuation method to reflect more recent transportation cost data reported to ONRR.
10. Amending other regulation language to make non-substantive corrections so as to make the regulations more clear and workable.
11. Amending ONRR's Federal and Indian coal valuation regulations to remove the requirement to value certain coal based on the sale of electricity.
12. Amending ONRR's Federal and Indian coal valuation regulations to remove the definition of ''coal cooperative'' and the method to value sales between members of a ''coal cooperative.''
13. Amending ONRR's civil penalty regulations to clarify that ONRR will consider the unpaid, underpaid, or late payment amounts in the severity analysis for payment violations only.
14. Amending ONRR's civil penalty regulations to clarify that ONRR may consider aggravating and mitigating circumstances when calculating the amount of a civil penalty.
15. Amending ONRR's civil penalty regulations to remove an ALJ's ability to vacate the benefit of a stay of an accrual of penalties if the ALJ later determines that a violator's defense to a notice of noncompliance was frivolous.

This rule does not adopt three amendments that ONRR proposed in the 2020 Proposed Rule. This rule does not:

1. Remove or otherwise amend the regulatory cap on transportation allowances for Federal oil and gas.

2. Remove or otherwise amend the regulatory cap on processing allowances for Federal gas.

3. Allow a lessee producing oil or gas on the OCS in waters shallower than 200 meters to file an application seeking ONRR's permission to include certain gathering costs in its transportation allowance.

A. ONRR's Rulemaking Authority

ONRR's royalty program is ''a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'' *Amoco Prod. Co.* v. *Watson,* 410 F.3d 722, 729 (D.C. Cir. 2005) (internal quotations and citation omitted). FOGRMA grants the Secretary authority to ''prescribe such rules and regulations as he deems reasonably necessary to carry out this chapter.'' *See* 30 U.S.C. 1751(a); *see also, e.g.,* 30 U.S.C. 1719. Re-evaluating the best means of balancing these statutory priorities within the bounds of the specific commands of the statute, as called for in the Executive and Secretarial Orders, is well within the scope of authority that Congress granted to the Secretary under FOGRMA and which was delegated by the Secretary to ONRR.

B. Rulemaking Objectives

The E.O.s explained below do not prescribe an outcome, rather, they note policy positions that are well within the specific authorities outlined in the relevant statutes, namely the MLA and the OCSLA. Specifically, 43 U.S.C. 1332(3) states that: ''It is hereby declared to be the policy of the United States that . . . the [OCS] is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs. . . .'' Moreover, the MLA, at 30 U.S.C. 201, states that ''[t]he Secretary of the Interior is authorized to divide any lands subject to this chapter which have been classified for coal leasing into leasing tracts of such size as he finds appropriate and in the public interest and which will permit the mining of all coal which can be economically extracted in such tract and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands for leasing and shall award leases thereon by competitive bidding.'' With respect to oil and gas, the MLA, at 30 U.S.C. 226, states that ''[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary'' and provides that ''[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary.''

While neither of these statutes define or employ the term ''fair return,'' both the OCSLA and the MLA make use of the term ''fair market value.'' OCSLA, at 43 U.S.C. 1331(o), defines ''fair market value'' as ''the value of any mineral (1) computed at a unit price equivalent to the average unit price at which such mineral was sold pursuant to a lease during the period for which any royalty or net profit share is accrued or reserved to the United States pursuant to such lease, or (2) if there were no such sales, or if the Secretary finds that there were an insufficient number of such sales to equitably determine such value, computed at the average unit price at which such mineral was sold pursuant to other leases in the same region of the [OCS] during such period, or (3) if there were no sales of such mineral from such region during such period, or if the Secretary finds that there are an insufficient number of such sales to equitably determine such value, at an appropriate price determined by the Secretary[.]'' FOGRMA built upon the royalty provisions of the MLA and the OCSLA by stating that the Secretary shall: ''establish a comprehensive inspection, collection and fiscal and production accounting and, auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed and to collect and account for such amounts in a timely manner.'' 30 U.S.C. 1711(a).

Both of the statutes provide for minimum royalty rates when leasing areas for energy and mineral development and offer some direction on royalty collection. The mineral leasing authorities granted to the Secretary by Congress provide broad authorities to ''prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the leasing statutes]'' including the collection of all revenues associated with such activities (bonus bids, royalties, rentals and other fees). *See* 25 U.S.C. 396, 396d (tribal lands); 30 U.S.C. 189 (public lands); 30 U.S.C. 1751 (FOGRMA); 43 U.S.C. 1334(a) (OCS lands).

In addition to these policy goals, ONRR's objectives include implementing court decisions and analyses, making changes that reduce regulatory burdens while maintaining royalty value and ONRR's ability to provide oversight, and making regulations more simple, clear, and workable. Further, ONRR explains additional reasons to adopt or not adopt the specific proposed amendments in the amendment discussion sections that follow.

The 2020 Proposed Rule, at 85 FR 62054 and 62056–62057, explained that ONRR's objective for this rulemaking included furtherance of the policy goals described in:

1. E.O. 13783, ''Promoting Energy Independence and Economic Growth.''

In E.O. 13783, the President emphasized that ''[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.'' The President further directed executive departments and agencies to immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. Pursuant to E.O. 13783, agency heads are required to review all existing regulations that potentially burden the development or use of domestically produced energy resources, ''with particular attention to oil, natural gas, coal, and nuclear energy resources.'' E.O. 13783 further explained that ''burden'' means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

2. E.O. 13795, ''Implementing an America-First Offshore Energy Strategy.''

Through E.O. 13795, the President stated his policy goal of emphasizing ''the energy needs of American families and businesses first'' and to ''continue implementing a plan that ensures energy security and economic vitality for decades to come.'' E.O. 13795 stated that ''[i]ncreased domestic energy production on Federal lands and waters strengthens the Nation's security and

reduces reliance on imported energy'' and ''help[s] reinvigorate American manufacturing and job growth.'' Accordingly, E.O. 13795 stated that ''[i]t shall be the policy of the United States to encourage energy exploration and production, including on the [OCS], in order to maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people. . . .''

3. E.O. 13892, ''Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication.''

Through E.O. 13892, the President stated his policy goal of emphasizing that ''[a]gencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication.'' E.O. 13892 stated that ''the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. . . .'' With emphasis on fairness and transparency, E.O. 13892 also reinforced that ''regulated parties must know in advance the rules by which the Federal Government will judge their actions,'' and required that agencies provide ''prior public notice'' of any legal standards the agency will be applying.

4. S.O.s 3306, 3350, and 3360.

Three Secretarial Orders are also relevant to this rulemaking. S.O. 3306, Organizational Changes Under the Assistant Secretary—Policy, Management and Budget, signed on September 30, 2010, created ONRR and reorganized this office under the Assistant Secretary for Policy, Management and Budget to: ''discharge the duties of the Secretary for management of revenues from Federal and Indian onshore and offshore mineral and energy resource leases . . . to assure full and timely collection, distribution, and disbursement of bonuses, rentals, royalties, and other revenues and coordination of related Departmental policy.''

Through S.O. 3350, America-First Offshore Energy Strategy, the Secretary of the Interior (''Secretary'') took specific steps to implement E.O. 13795. Significant to the proposed rule, the Secretary specifically stated that S.O. 3350 is designed to implement the President's directives as set forth in E.O. 13795 to ''ensure that responsible OCS exploration and development is promoted and not unnecessarily delayed or inhibited.'' The Order directed BOEM and BSEE to take specific actions, but also more generally expressed a desire for active coordination of energy policy in order to enhance opportunities for energy exploration, leasing, and development on the OCS. S.O. 3360 is likewise directed at continuing to implement E.O. 13783 and the directive to the Department to review existing regulations that ''potentially burden the development or utilization of domestically produced energy resources.''

These statutes, Executive Orders and Secretarial Orders make clear that it is in the national interest to promote domestic energy development for a variety of reasons, including stimulating the economy, job creation, and national security. They also emphasize the importance of reducing regulatory burdens so that energy producers, and particularly oil, natural gas, and coal producers, are incentivized to produce more energy. Through this rulemaking, ONRR furthers these policy objectives by several means, including providing mechanisms that simplify reporting and compliance, and promoting domestic energy production.

C. Executive Discretion is a Permissible Initiative for Rulemaking

As described in greater detail in the discussion of each amendment that follows, this rule is, in part, founded upon new factual findings that, in some instances, contradict those upon which the 2016 Valuation Rule was based. In some instances, the operative facts have changed since 2016. In other instances, ONRR has reconsidered the weighing of different policy priorities and values as they apply to the relevant facts. *See generally F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514 (2009); *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012); *Dana Corp.* v. *ICC,* 703 F.2d 1297, 1305 (D.C. Cir. 1983). With respect to the latter category and as explained further herein, ONRR is implementing this rule, in part, because policy directives issued after July 1, 2016, give different weight to the factual findings, and also set other policy-based priorities. Agency action representing a policy change ''is not subject to a more searching review.'' *F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514 (2009).

Indeed, ''regulatory agencies do not establish rules of conduct to last forever.'' *Am. Trucking Assoc., Inc.* v. *Atchison, T. & S.F.R. Co.,* 387 U.S. 397, 416 (1967). An agency must be given ample latitude to ''adapt their rules and policies to the demands of changing circumstances.'' *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968). A revised rulemaking based on ''a reevaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion.'' *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009)). Further, ''[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.'' *Id.* at 1043 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). An ''agency is entitled to have second thoughts, and to sustain action which it considers in the public interest upon whatever basis more mature reflection suggests.'' *Dana Corp.* v. *ICC,* 703 F.2d 1297, 1305 (D.C. Cir. 1983). An agency is entitled to give more weight to socioeconomic concerns than it may have under a different administration. *Am. Trucking Associations* v. *Atchison, T. & S.F. Ry. Co.,* 387 U.S. 397, 416, 87 S. Ct. 1608, 1618 (1967); *see also, Fox,* 556 U.S. at 515–516, 129 S. Ct. at 1811.

D. ONRR's Relevant Prior Rulemakings and Associated Litigation

1. Federal Oil and Gas, and Federal and Indian Coal

i. The 2016 Valuation Rule and Industry Lawsuit

On July 1, 2016, ONRR published the 2016 Valuation Rule, which extensively updated the royalty valuation framework for Federal oil and gas and Federal and Indian coal. The effective date of the 2016 Valuation Rule was January 1, 2017.

ii. The 2017 Postponement Notice

On February 27, 2017, ONRR published the 2017 Postponement Notice, which attempted to postpone the effective date of the 2016 Valuation Rule. In response, the States of California and New Mexico filed suit in the United States District Court for the Northern District of California to challenge the 2017 Postponement Notice. *See Becerra* v. *U.S. Dep't. of the Interior,* 276 F. Supp. 3d 953 (N.D. Cal. 2017).

iii. The 2017 Repeal Rule

On August 7, 2017, ONRR published the 2017 Repeal Rule, which attempted to repeal the 2016 Valuation Rule in its entirety. On October 7, 2017, the States

of California and New Mexico filed a second suit in the United States District Court for the Northern District of California to challenge the 2017 Repeal Rule. On March 29, 2019, the District Court issued a decision that vacated the 2017 Repeal Rule. *Becerra* v. *U.S. Dep't of the Interior,* 381 F. Supp. 3d 1153 (N.D. Cal. 2019). The decision reinstated the 2016 Valuation Rule, including the rule's original effective date of January 1, 2017. *Id.* at 1179. *See also Becerra* v. *U.S. Dep't of the Interior,* Case No. C 17–5948 SBA, Order at page 3 (July 30, 2020).

ONRR included mention of the District Court's findings in the 2020 Proposed Rule (85 FR 62054, 62055–62056), and discusses those findings further below.

Several months after the 2016 Valuation Rule was reinstated, industry filed litigation in the United States District Court for the District of Wyoming, challenging the 2016 Valuation Rule. *See Cloud Peak Energy, Inc.* v. *U.S. Dep't of the Interior,* Case No. 19–CV–120–SWS (D. Wyo.). On October 8, 2019, the Wyoming District Court entered an Order granting in part and denying in part industry's request for a preliminary injunction with respect to the 2016 Valuation Rule. The Order stayed all portions of the 2016 Valuation Rule applicable to Federal and Indian coal. *Cloud Peak,* 415 F. Supp. 3d 1034, 1053 (D. Wyo. 2019). Thus, Federal and Indian coal lessees continue to report and pay royalties under the 1989 Federal and Indian Coal Valuation Regulations (54 FR 1492) while the *Cloud Peak* case is being litigated.

2. Civil Penalties

ONRR previously amended portions of its civil penalty regulations, at 30 CFR part 1241, on August 1, 2016 (81 FR 50306) in order to clarify the civil penalty regulations and increase transparency about how ONRR assesses civil penalties. API challenged the 2016 Civil Penalty Rule in the United States District Court for the District of Wyoming. The District Court upheld the 2016 Civil Penalty Rule, except as to one issue. *See API* v. *U.S. Dep't. of the Interior,* 366 F. Supp. 3d 1292, 1309–10 (D. Wyo. 2018). The exception was 30 CFR 1241.11(b)(5), which provides that a petitioner may forfeit the benefit of a stay of the accrual of civil penalties if an ALJ determines that the petitioner's defense to a previously issued civil penalty is frivolous. The District Court held that the provision was an abuse of discretion and facially not in accordance with the law. *See API,* 366 F. Supp. 3d at 1310.

API appealed to the United States Court of Appeals for the Tenth Circuit, which vacated the District Court's decision, finding API lacked standing to pursue its facial challenge to the 2016 Civil Penalty Rule. *See API* v. *U.S. Dep't of the Interior,* 823 Fed. Appx. 583 (10th Cir. 2020). Upon remand, the District Court dismissed API's claim for lack of jurisdiction. *API,* Case No. 17–cv–83–NDF, D. Wyo., Order dated Sept. 29, 2020.

E. Public Comment Overview

1. Public Comment Period

On August 7, 2020, the Department issued a press release to notify the public of the 2020 Proposed Rule and, on the same day, ONRR published the text of the 2020 Proposed Rule on its website for the public to view in advance of the 2020 Proposed Rule's publication in the **Federal Register**.

On October 1, 2020, ONRR published the 2020 Proposed Rule in the **Federal Register**. The 2020 Proposed Rule provided a 60-day comment period that closed on Monday, November 30, 2020. *See* 85 FR 62054. ONRR received comments from numerous industry members, trade associations, public interest groups, members of Congress, members of the public, and state and local entities. ONRR received a total of 40,456 pages of comments, of which 38,150 pages were a similar form comment. If the 38,150 pages of form comments are treated as a single comment, ONRR received 2,307 unique pages of comment materials.

2. Specific Comments Requested by ONRR in the 2020 Proposed Rule

In section F of the 2020 Proposed Rule, ONRR requested comments on specific topics (85 FR 62070–62071). This rule addresses those comments in the applicable amendment discussions herein.

3. General Comments

Public Comment: One commenter claimed that ONRR's 2020 Proposed Rule is arbitrary and capricious. ONRR's claim that the 2020 Proposed Rule will increase natural resource production is arbitrary and capricious because it is unsupported in the rulemaking record, the commenter said. The commenter stated that ONRR failed to provide any analysis or record to demonstrate that production increases will occur. According to the commenter, ONRR also contradicted itself by stating that the 2020 Proposed Rule would not materially alter natural resource exploration, production, or transportation.

ONRR Response: In the 2020 Proposed Rule, ONRR provided its rationale for proposing the amendments. ONRR acknowledged instances where it believed additional information could improve its analyses. Consequently, ONRR posed a list of specific, targeted questions in the 2020 Proposed Rule to solicit additional information from public commenters for ONRR's consideration. ONRR reviewed and considered all substantive comments it received, and, where appropriate, revised its analysis in this final rule based on the information provided by the public comments.

The commenter is correct that the 2020 Proposed Rule does not quantify an increase in domestic energy production—neither does this final rule. This rule is not premised on increasing the production of oil, gas, or coal by some measured amount. Instead, this rule, in part, is meant to incentivize both the conservation of natural resources (by extending the life of current operations) and domestic energy production over foreign energy production. The Department typically conducts economic analyses regarding changes in leasing fiscal terms or increased/decreased regulatory burdens. The margin of error for estimating this rule's negligible or marginal impact on actual production is beyond the capability of the Department's existing models, and the Department does not know of other economic models that are sufficiently sensitive to accurately measure these changes. The Department's models are designed to analyze newly available geologic information, changes in prices and fiscal changes to future lease terms. The model results provide estimates of the downstream impact on public lands leasing and production, and it would not be appropriate for ONRR to use these results to estimate to estimate any production changes due to the provisions of this rulemaking because these provisions impact leases currently in production.

ONRR disagrees with the commenter that ONRR contradicted itself in the 2020 Proposed Rule. ONRR believes the commenter misunderstood the separate activities of (1) ONRR's explanation of the rule's objectives and estimating its royalty and administrative impacts, and (2) ONRR's application of certain criteria to determine whether it must make an additional statement or analysis to comply with NEPA requirements.

Public Comment: A commenter also claimed that if production does increase as a result of the rule, then ONRR's failure to address the environmental

costs associated with such production increase is arbitrary and capricious. According to the commenter, increased production will result in negative environmental externalities, which ONRR must consider under Federal land management statutes and the APA. The commenter specifically cites to FLPMA, MLA, and OCSLA as authorities that require ONRR to consider environmental impacts when promulgating regulations involving energy production on Federal lands. As the commenter pointed out, the APA also requires agencies to ''examine the relevant data and articulate a satisfactory explanation for its action.'' *Motor Vehicle Assn.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

Another commenter raised additional environmental concerns with ONRR's 2020 Proposed Rule. This commenter requested that ONRR consider environmental impacts alongside the effects on the oil and gas industry as a result of this rule. The commenter stated that ONRR is supposed to consider and consult with more stakeholders when engaging in the rulemaking process. The commenter explained that the list of stakeholders should include government agencies, environmentalists, private companies, actors in the fossil fuel industries that operate on Federal and Indian land, and people who consume oil and gas. The commenter stated that this type of stakeholder engagement would make ONRR's rulemakings more comprehensive.

ONRR Response: The environmental impacts of energy and mineral development are analyzed at other stages in the development process, including the land use planning stage, the lease sale stage, and the project-specific development stage when more specific details of the potential environmental impacts and use on the leased area by a proposed project would be readily available. Further environmental review of these projects in the context of this rulemaking is thus duplicative and unnecessary. Generally, an agency's promulgation of regulations must be based within the agency's specific legal mandate and cannot extend beyond the intended reach of the agency's statutory and delegated authority. Similarly, an agency's primary rulemaking objective and goal must align with the stated purpose of the Acts governing the agency's rulemaking. Congress gave the Secretary authority to promulgate regulations concerning ''a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas *royalties, interest, fines, penalties, fees, deposits, and other payments owed,* and to collect and account for such amounts in a timely manner.'' 30 U.S.C. 1701(a) (emphasis added). *See also* 30 U.S.C. 1701(b)(2) (''It is the purpose of this chapter . . . to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases on Federal lands, Indian lands, and the [OCS]. . . .''). A similar broad grant of authority to promulgate regulations is provided to the Secretary under the MLA at 30 U.S.C. 189 and OCSLA at 43 U.S.C. 1334. ONRR is amending its royalty valuation and civil penalty regulations, and has considered all relevant information within this context in accordance with the Department's statutory mandate, as set forth under the MLA, OCSLA, and FOGRMA.

Regarding the commenter's reference to FLPMA, that Act governs leasing activities primarily carried out by other Department bureaus and offices. For energy leasing, exploration, and development activities to be conducted on Federal or Indian land, these Department bureaus and offices evaluate the environmental impacts by conducting NEPA analyses. Thus, environmental impacts associated with newly proposed projects or operations are evaluated during the leasing and permitting stages by the appropriate bureau or office. If a project or operation is significantly modified or expanded beyond the initial approvals and corresponding NEPA analysis, the responsible agency will reevaluate any additional environmental impacts and conduct the appropriate NEPA analysis. This rule does not lessen the obligation borne by other Department bureaus and offices to perform NEPA analyses at all appropriate stages in the leasing and lease administration process.

In response to the commenter's statement pertaining to stakeholder involvement, ONRR solicited input from all interested persons and stakeholders, including environmental organizations, as part of this rulemaking. Through the publication of the 2020 Proposed Rule in the **Federal Register** on October 1, 2020, ONRR provided ''interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments'' as required under the APA. 5 U.S.C. 553(c). The 2020 Proposed Rule provided all interested persons with a 60-day public comment period to submit information for ONRR's consideration.

Public Comment: Another public commenter stated that ONRR likely will be required to once again change its regulations as a result of a change in Administrations. The commenter cites to statements suggesting that a future Administration would modify or reverse the E.O.s currently relied upon by ONRR for this rulemaking.

ONRR Response: The commenter cited general environmental policy objectives of a new Administration, which are not in place at the time of this rulemaking, and failed to identify any specific conflicts between any such policies and the proposed amendments. ONRR bases its policies on statutory dictates and its current priorities, rather than speculation about what a future administration might do. ONRR, in part, based the 2020 Proposed Rule on E.O.s and S.O.s in effect at the time of its publication, and on the policies underlying those directives. Those same E.O.s and S.O.s are still in effect for ONRR to consider in this final rule. Moreover, the underlying policies are valid, and deserve weight, aside from the particulars of the E.O.s and S.O.s. Please refer to Sec. I.A. for a general overview of this rule's objectives and the amendment discussion sections for additional explanations specific to each amendment.

II. Amendment Discussion—Part 1206 Product Valuation

A. Index-Based Valuation Method To Value Federal Gas

General Comments

Public Comment: ONRR requested and received comments on the index-based valuation method amendments. Specifically, ONRR asked for alternatives to requiring a lessee to evaluate all pricing points where a lessee's gas may flow. Several commenters from or representing the regulated community suggested that ONRR use the pricing point where a lessee's gas actually flows, rather than evaluate all possible pricing points. These commenters suggested this would lessen the burden on a lessee to research all possible index points and create greater certainty that a lessee did not overlook any possible index points.

ONRR Response: As ONRR monitors reporting and payments under the index-based valuation methods adopted in the 2016 Valuation Rule and in this final rule, and systematically examines actual transaction data, ONRR will continue to look for alternatives to evaluating all accessible index pricing points, including alternatives that require tracing production to determine the actual index pricing point. However,

at this time, ONRR does not have the data to support the suggested change. Accordingly, ONRR is not making the change in this final rule.

Public Comment: ONRR received several comments requesting ONRR update the transportation and fractionation (''T&F''), and processing adjustments, published at *https://www.ONRR.gov,* for the NGL index-based valuation method. These commenters stated that the values are outdated and do not reflect current markets or FERC published rates. The commenters also expressed concerns that the NGL index-based method does not allow for deductions for pre-plant transportation and the transportation deductions for unprocessed and residue gas should apply to NGLs.

ONRR Response: ONRR did not propose amendments to the adjustments to the NGL index-based valuation method. While these comments are beyond the scope of this rulemaking, ONRR regulations state the T&F adjustments will be periodically updated (§ 1206.142(d)(2)(ii)), as outlined in the preamble to the 2016 Valuation Rule. ONRR will continue to periodically review and update these adjustments, as necessary. However, at this time, ONRR is not amending the proposed unprocessed and residue gas transportation deductions to apply to NGLs.

Public Comments: A commenter requested that ONRR develop a valuation method for areas that do not have access to index-pricing points, specifically for gas produced in Alaska.

ONRR Response: Currently, ONRR is not incorporating a specific valuation method for areas that do not have access to index-pricing points. A lessee cannot elect to use an index-based method in these areas, and the lessee must continue using the first arm's-length sale to value Federal gas.

Public Comments: Some commenters requested that ONRR modify the index-based valuation method, and some commenters specifically submitted comments for consideration during future rulemakings. These comments include: (1) ONRR should consider extending the election period to value Federal gas, under the index-based valuation method, from two years to a minimum of three years; (2) ONRR should require or mandate a lessee value Federal gas using the index-based valuation method; (3) ONRR should develop an index-based method to value gas at the wellhead; and (4) ONRR should allow a lessee to propose an alternative valuation method under certain situations that force a lessee to value gas under the index-based valuation method (*e.g.* gas sold under a keepwhole contract with no arm's-length gross proceeds sales from the same lease, flared gas).

ONRR Response: In this final rule, ONRR will not adopt these suggested changes as these changes are outside of the scope of this rulemaking. Additionally, ONRR will not act to implement suggestions for an extended election period or mandatory use of index-based valuation methods. At this time, both ONRR and lessees are best served in implementation of new valuation methods by shorter commitments and optional use.

1. Expansion of the Federal Gas Index Pricing Valuation Method Under a Non-Arm's-Length Contract to Federal Gas Sold Under Arm's-Length Contracts (§§ 1206.141(c) and 1206.142(d))

The 2016 Valuation Rule amended 30 CFR part 1206 to allow a lessee two valuation methods to value its non-arm's-length Federal gas sales. The first valuation method was to value Federal gas based on the first arm's-length sale occurring after a non-arm's-length sale or transfer of the gas to the lessee's affiliate. The second valuation method was to elect to use an index-based valuation method. This index-based valuation method aligns with a provision from the 2000 Federal Oil Valuation Rule, ''Establishing Oil Value for Royalty Due on Federal Leases'' (65 FR 14022, March 15, 2000), that allowed a lessee to elect to value Federal oil using index prices when it sells or transfers oil to an affiliate that, in turn, then sells the oil at arm's-length. The 2020 Proposed Rule would extend optional use of the index-based valuation method to arm's-length sales of Federal gas.

Comments on the Proposed Amendment

Public Comment: Several commenters supported the expansion of the index-based valuation method for Federal gas sold under an arm's-length contract. Commenters agreed that having the option to elect an index-based method lessens the burden and provides early certainty for all payors. Commenters noted that a lessee is more likely to use the index-based method if it is applicable to all its Federal gas sales and that this valuation method will truly lessen the administrative burden by allowing a lessee to use one approach to value gas sold under multiple contracts. The commenters reiterated that extending the index-based method to all Federal gas sales will further eliminate the burden to unbundle and comply with marketable condition regulations. One commenter stated that the index-based valuation method should be mandatory instead of being a method that gas producers can select for non-arm's-length sales for two-year periods.

ONRR Response: Many commenters were in favor of the proposed changes published in the 2020 Proposed Rule. In this final rulemaking, ONRR is adopting the amendment as proposed in the 2020 Proposed Rule to allow a lessee with an arm's-length sale to elect to value its gas production under the index-based valuation method. Regarding the commenter's statement that the index-based valuation method should be mandatory, ONRR is not choosing to make it mandatory at this time for all sales, but will collect data based on optional use to inform possible future rulemaking.

Public Comment: Some commenters opposed the extension of the index-based method, and stated that ONRR has not provided enough data to modify the position it took in the 2016 Valuation Rule, including that arm's-length sales are the best indicator of value.

ONRR Response: ONRR maintains that arm's-length sales are generally the best indicator of value. Index prices are derived from arm's-length sales reported to index pricing publications. The index-based valuation method simplifies the current valuation method and, in addition, provides transparency and early certainty to a lessee. The index-based method provides early certainty because the elements of the index-based formula are all known at the time royalty reports are first due, which is the end of the month following the month of production, and not subject to subsequent adjustment. In contrast, when royalty value is based on actual sales prices, transportation costs, and, for gas, processing costs, adjustments to those prices and costs in subsequent months change royalty values and require re-reporting. Also, the sales prices, transportation costs, and processing costs may be disputed through an ONRR audit or other ONRR compliance activity.

The index-based method, in contrast, uses transparent, certain prices published prior to the royalty due date, and a fixed percentage of those published prices as an ''allowance'' to cover the costs of transportation. ONRR recognizes that ONRR and all Federal lessees can benefit from the certainty and transparency that the index-based valuation method provides. Additionally, complex valuation situations are not limited to non-arm's-length dispositions. In arm's-length transactions, many third-party pipeline

and service providers now charge lessees ''bundled'' fees that include costs to place production into marketable condition. Both ONRR and lessees with arm's-length sales, transportation, and/or processing contracts have found allocating the costs between allowed and disallowed costs is necessary for valuation based on gross proceeds, but administratively costly and time consuming. These are not required with index-based royalty reporting and payment cost allocations.

Public Comment: A commenter suggested that ONRR require a lessee to pay on whichever value is higher between gross proceeds and the index-based valuation method to eliminate the temptation to manipulate index prices.

ONRR Response: Requiring a lessee each and every month to value gas by both gross proceeds and the index-based valuation method forces a lessee to use two valuation methods and increases the burden of either method individually. This would not achieve the mutual goal of a simple or certain valuation method for ONRR or a lessee. While there have been instances of traders attempting to manipulate index prices in recent years, these have been infrequent and involve limited volumes. ONRR believes that index prices are an acceptable method to value royalties for the following reasons: (1) The FERC must approve pricing publications used as the source of index prices for Federal gas royalty reporting and payments; (2) index publishers have protections to prevent and discourage price manipulation; (3) ONRR maintains discretion to disallow the use of an index point; and (4) index prices already influence royalty valuation, as they are used as the sales price or as part of a sales price formula in many arm's-length sales contracts. Further, as discussed in the preamble to the 2020 Proposed Rule, even when a lessee elects to use the index-based valuation method to report and pay royalties, ONRR retains the right and ability to from time to time examine, review, analyze, and audit the lessee's actual transaction data—including sales, transportation, processing, and contracts for services required to place production in marketable condition. By periodically examining actual transaction data, ONRR will be well positioned to ascertain the continuing validity of both the index prices and ONRR's continued use of an index-based valuation method. If ONRR finds an index price unreliable, ONRR will have the opportunity to stop using that index price. And if ONRR finds that its index-based valuation method needs adjustment, ONRR will have the opportunity to change the method through future rulemaking.

ONRR appreciates the comments supporting, seeking modification to, and opposing the proposed amendments to §§ 1206.141(c) and 1206.142(d). After careful consideration, and for the reasons explained in the 2020 Proposed Rule and this final rule, ONRR is adopting the proposed changes to §§ 1206.141(c) and 1206.142(d) as part of this final rule.

2. Published Average Bidweek Price (§§ 1206.141(c)(1)(i) and (ii); and 1206.142(d)(1)(i) and (ii))

For unprocessed gas and residue gas, the 2016 Valuation Rule's index-based valuation method requires use of the highest monthly bidweek price for the index pricing points that a lessee's gas can flow to, whether or not there is a constraint for that production month, less a specified deduction. The 2020 Proposed Rule proposed to amend the 2016 Valuation Rule to use the highest of the monthly bidweek *average* prices for the index pricing points that a lessee's gas can flow to, whether or not there is a constraint for that production month, instead of the highest of the monthly bidweek *high* prices. *See* 85 FR 62058.

When ONRR uses the term in the 2020 Proposed Rule, ''published average bidweek price,'' or ''bidweek average'' for short, it refers to what many publications call the ''index'' or ''average'' price. For example, the Platts Inside FERC's Gas Market Report labels this price as the ''index,'' while the Natural Gas Intelligence's (''NGI'') Bidweek Survey labels this price as the ''average.''

An index-based valuation method using bidweek *average* prices still results in a royalty value comparable to the fair market value a lessee could receive under the typical arm's-length contract, and ONRR anticipates this method will be used by more lessees, because it better reflects the average price the average lessee receives, rather than the high price only one lessee receives. Greater use of the index-based valuation method will ease both the lessee's administrative burden and ONRR's.

Lastly, using the bidweek average price for unprocessed gas and residue gas aligns with the use of average prices used in the NGL index-based valuation method (§ 1206.142(d)(2)(i)) and the Federal oil regulations (§ 1206.102). Using average prices for all the index-based valuation methods provides consistency and transparency, increases accuracy, and avoids confusion and potential errors.

Comments on the Proposed Amendment

Public Comment: ONRR received several comments that support using the bidweek average price rather than the bidweek high price in the index-based valuation method. Commenters stated that the bidweek average price more closely reflects the price a lessee could obtain and is closer to the value of gross proceeds. Commenters stated the bidweek average price results in a more reasonable value for royalty purposes and that a lessee is more likely to elect the index-based valuation method. Another commenter stated that bidweek average prices are more certain and reliable because they represent many transactions at the same pricing point. On the contrary, the highest bidweek price may only represent a single transaction, which may or may not reflect normal market dynamics.

ONRR Response: The bidweek high price is the highest price reported for any transaction that qualifies for reporting, which may or may not reflect usual market dynamics. The bidweek average price is just that—an average price from many arm's-length transactions at the same pricing point. For the reasons discussed above, ONRR is adopting the use of the bidweek average price in this final rule.

Public Comment: A commenter supported using the bidweek average prices since a lessee could more easily access the bidweek average price based on its own contract pricing but would have to pay a third-party publication to access the high bidweek prices.

ONRR Response: If a lessee chooses to use contract prices that reference an index price, rather than a price found in a subscription or publication, it is up to the lessee to verify that the contract price is accurate, and that it reflects all possible index pricing-points. ONRR will rely on ONRR's subscriptions to verify pricing in any compliance activity. ONRR is not aware of any difference in subscription costs between publications identifying the bidweek average and the bidweek high prices.

Public Comment: Several commenters stated that ONRR should require the highest of the bidweek high prices, because it better protects the interests of the taxpayers and States. Additionally, commenters opposed adopting any amendment that would decrease royalties paid to ONRR.

ONRR Response: ONRR disagrees that using the bidweek high price better protects the lessor's interest than using the bidweek average price. While the bidweek average price is lower than the bidweek high price, the bidweek average more closely reflects the gross

proceeds that a lessee would typically receive in an arm's-length transaction, and therefore is more likely to actually be used by lessees. ONRR maintains that other protections are still in place, such as requiring the lessee to choose this option for a minimum of two years and requiring the lessee to use the highest bidweek average price to which the gas could flow when multiple pricing points are involved.

Furthermore, in the context of the overall rulemaking, it is possible that the index-based valuation method (if actually used) may increase royalties paid under this method. As outlined in the Procedural Matters section, overall royalty values under the 2020 Valuation Rule's index-based valuation method are around $0.04/MMBtu higher than the prices reported to ONRR for arm's-length sales, even with the use of average rather than high bidweek prices.

ONRR appreciates the comments supporting, seeking the modification to, and opposing the proposed amendments to §§ 1206.141(c)(1)(i) and (ii) and 1206.142(d)(1)(i) and (ii). After careful consideration, and for the reasons stated in the 2020 Proposed Rule and this final rule, this final rule adopts the proposed amendment in full.

3. Transportation Deductions (§§ 1206.141(c)(1)(iv) and 1206.142(d)(1)(iv))

The 2016 Valuation Rule amended ONRR's regulations to allow a lessee that elects to use the index-based valuation method to include an adjustment for transportation based on the location of its lease (*e.g.,* OCS, GOM, or all other areas). The rule further constrained the transportation adjustment to a specified range measured in cents per MMbtu. The 2016 Valuation Rule adjustments and minimum-to-maximum ranges were as follows:

Location	Transportation adjustment (%)	Minimum rate (cents per MMbtu)	Maximum rate (cents per MMbtu)
OCS, GOM	5	$0.10	$0.30
All Other Areas	10	0.10	0.30

ONRR based the transportation adjustment and minimum-to-maximum constraint on its analysis of transportation allowances reported to ONRR for production months in calendar years 2007 to 2010 (proposed 2016 Valuation Rule, 80 FR 618, January 6, 2015).

In the 2020 Proposed Rule, ONRR performed the same analysis for production months in calendar years 2014 through 2018. Based on this analysis of more recent time periods, ONRR proposed to revise the allowed transportation adjustments and minimum-to-maximum constraints as follows:

Location	Transportation adjustment (%)	Minimum rate (cents per MMbtu)	Maximum rate (cents per MMbtu)
OCS, GOM	10	$0.10	$0.40
All Other Areas	15	0.10	0.50

The 2020 Proposed Rule explained that these values more closely reflect the actual costs a lessee will incur to transport gas to an index-pricing point. *See* 85 FR 62058. ONRR will continue to monitor reported transportation allowances to ensure that the adjustments under its regulations for the index-based valuation method continue to be representative of the actual costs that lessees report to ONRR.

Comments on the Proposed Amendment

Public Comment: ONRR received comments supporting the proposal to update the transportation adjustment values in order to more accurately reflect the current markets and rates charged for arm's-length transportation.

ONRR Response: ONRR agrees with these comments that the transportation adjustment amounts should more closely reflect the average cost a lessee incurs to transport gas to an index pricing point. ONRR will continue to monitor transportation allowances reported by lessees, including those who have not elected to report under the index price valuation method but under gross proceeds, and will periodically review, examine, analyze, or audit actual transportation transactions and the costs of placing gas into marketable condition to ensure that the adjustments under these regulations remains representative of the costs a lessee incurs on average.

Public Comment: Commenters stated that ONRR should not update the transportation adjustments for the index-based valuation method. These commenters opposed any amendment that will result in lower royalties paid to the Federal Government and disbursed to State and local governments.

ONRR Response: While ONRR understands these concerns, ONRR's analysis of data supports modifying the adjustments to more closely reflect the average costs a lessee incurs to transport gas to an index pricing point. ONRR will continue to monitor transportation adjustments, and will periodically review, examine, analyze, or audit actual transportation contracts and the costs of placing gas into marketable condition to ensure that the adjustments remain reflective of the average cost lessees incur.

Public Comment: An industry commenter stated that because the transportation adjustments were calculated using data from calendar years 2014 through 2018, they are already outdated. Most transportation contracts have moved to fixed-fee rates since that time and with lower commodity prices, transportation can exceed the updated adjustments. The commenter suggested ONRR find alternatives to a set percentage or evaluate transportation adjustments more frequently.

ONRR Response: ONRR will monitor and review the transportation adjustments. If ONRR finds that the transportation adjustments cease to reflect typical costs, ONRR can take action to update the transportation adjustment to ensure that its index-based valuation method captures a reasonable value for royalty purposes.

Public Comment: A commenter expressed concern that ONRR failed to document and explain its calculations of the revised index-based

transportation adjustments. The commenter expressed a need for greater transparency to ensure that ONRR is accountable to the public for its decisions.

ONRR Response: ONRR identified the weighted per unit transportation rate and imputed the transportation percentage from the data reported on the form ONRR–2014 for the months in the noted calendar years for properties reporting a transportation allowance. Using this method, ONRR identified a maximum, minimum, and average range for both OCS and all other properties. ONRR used these values to establish the updated transportation deductions in the 2020 Proposed Rule.

ONRR appreciates the comments supporting, seeking the modification to, and opposing the proposed amendments to §§ 1206.141(c)(1)(iv) and 1206.142(d)(1)(iv). After careful consideration, and for the reasons set out in the 2020 Proposed Rule and this final rule, this final rule will adopt the proposed amendment in full.

4. Zero Value (§§ 1206.141(f) and 1206.142(g))

In the 2020 Proposed Rule, ONRR proposed to add language to the unprocessed (§ 1206.141(f)) and processed (§ 1206.142(g)) gas regulations clarifying ONRR's long-standing policy that the value of any product cannot be reported as less than zero. Consistent with language included in lease documents, including a lessee's duty to market gas at no cost to the Federal Government, lessees have never been permitted to report negative royalty values. Adding this to the regulatory language promotes consistent and clear regulations.

When ONRR published the 2020 Proposed Rule, its systems were unable to accept a reporting line with a $0.00 royalty value. In instances where the royalty value would correctly be $0.00, ONRR instructed reporters to code the reporting line using Transaction Code 20 and report a royalty value less allowances of $0.01. The 2020 Proposed Rule's proposed regulatory text reflected this constraint by including language that, for example, prevented a lessee from reducing ''the royalty value of any production *to zero.*'' Emphasis added.

ONRR now has the system capability to accept a report with a $0.00 royalty value, and no longer has a need to include a workaround for that constraint in this final rule. Thus, in the example above, this final rule will modify the proposed amendment to §§ 1206.141(f) and 1206.142(g) to state that ''Under no circumstances may your gas be valued for royalty purposes *at less than zero.*'' Emphasis added.

Comments on the Proposed Amendment

Public Comment: A commenter requested ONRR clarify this provision. The commenter stated that payors received guidance from ONRR stating, ''for those situations where your value for royalty purposes, plus any disallowed costs or additional consideration under your sales contract, is less than or equal to $0.00, ONRR's regulations and your Federal lease require you to report and value any Federal gas production removed or sold from your lease, even if the value is zero or less than zero.'' The guidance further instructed reporters to report those zero royalty values, where the proposed rule does not allow a zero-royalty value. The inconsistency in guidance and the proposed rule changes create confusion and uncertainty, the commenter said.

ONRR Response: ONRR acknowledges that its guidance and the proposed amendment may be inconsistent. However, the purpose of the amendment is to resolve any confusion that may have arisen under ONRR's prior regulations and guidance. If there is an inconsistency between the amendments adopted in this final rule and any prior guidance, this final rule will control. ONRR recognizes that, in the absence of the clarifying language in this final rule, a lessee might seek to report a royalty value of zero in instances where gross proceeds or index prices are at or below zero, after adding back any disallowed costs or additional considerations. However, this final rule clarifies that products cannot be valued, for royalty purposes, less than zero, but can be valued at zero. This regulatory change is consistent with language included in most lease documents, including a lessee's duty to market gas at no cost to the Federal Government. Lessees have never had the ability to report negative royalty values.

ONRR appreciates the comments supporting, seeking the modification to, and opposing the proposed amendments to §§ 1206.141(f) and 1206.142(g). After careful consideration, and for the reasons stated in the 2020 Proposed Rule and this final rule, this final rule adopts the proposed amendment with the modification described above to clarify that a lessee can report a $0.00 royalty value. This modification between the 2020 Proposed Rule and this final rule impacts a limited number of instances to change the reported royalty value from $0.01 to $0.00. As such, ONRR finds there will be no material change to the royalties it collects, and it does not further distinguish the modification in this rule's economic analysis.

5. Providing Sales Records (§§ 1206.141(g) and 1206.142(h))

The 2020 Proposed Rule proposed to add new regulation language to reinforce ONRR's statutory authority under 30 U.S.C. 1713(a), which expressly requires ''a lessee, operator, or other person directly involved in developing, producing, transporting, purchasing, or selling oil or gas . . . through the point of first sale or the point of royalty computation, whichever is later, establish and maintain any records, . . . and provide any information'' required by rule to ONRR when it is ''conducting an audit or investigation.'' ONRR proposed the addition of regulatory language to clarify that it may continue to request and receive a lessee's and its affiliate's sales and expense records, even when a lessee pays royalties under an index-based valuation method.

The ability to continue to evaluate sale and expense records will ensure the index-based valuation method remains a fair market value for Federal oil and gas lessees' production. ONRR has the authority to request this information when conducting an audit or investigation, and the new regulatory text will preserve the ability to obtain a lessee's records in order to evaluate whether the index-based valuation method remains a fair value for royalty purposes.

Comments on the Proposed Amendment

Public Comment: Several commenters acknowledge ONRR already has the authority to collect records from a lessee during the normal course of audit and compliance activity. However, the commenters expressed concern that frequent and persistent requests for data will create an unnecessary burden. The commenters referenced the preamble language in the 2020 Proposed Rule and ONRR's suggestion that the index-based method should create simplicity and early certainty when reporting royalties. Commenters expressed concern that ONRR will continue to request and audit these records and eliminate any of the simplicity that the index-based method affords.

ONRR Response: ONRR does not believe that adding this language to regulatory text will create an unnecessary burden on a lessee that elects to use the index-based method. Further, any burden to a lessee is outweighed by the certainty of knowing that ONRR will have access to information needed to periodically evaluate the reliability of individual

index prices. Finally, if ONRR requires a lessee to provide information under this section, and that information establishes that the index-based method is no longer representative of fair market value, any change to or repeal of the method would be done through rulemaking, and would only have prospective application.

ONRR appreciates the comments supporting, seeking the modification to, or opposing the proposed amendments to §§ 1206.141(g) and 1206.142(h). After careful consideration, and for the reasons explained in the 2020 Proposed Rule and this final rule, ONRR is adopting the proposed changes to §§ 1206.141(g) and 1206.142(h) as part of this final rule.

B. Transportation Allowance for Certain Offshore Federal Oil and Gas Gathering Costs

In the 2020 Proposed Rule, ONRR explained the origins of its current ''gathering'' definition and how ONRR and MMS have considered over the years whether to allow the cost of certain offshore gathering activities to be included in a lessee's transportation allowance. *See* 85 FR 62054. Central to this amendment's discussion are the Deepwater Policy (*https://www.onrr.gov/Laws_R_D/pubcomm/PDFDocs/990520.pdf*) and the 2016 Valuation Rule, which rescinded the Deepwater Policy. *See* 81 FR 43338.

Because of the unique nature of the OCS, particularly in the deepwater OCS, the 2020 Proposed Rule proposed to amend ONRR's regulations to permit the same deductions previously taken under the Deepwater Policy. Under the Deepwater Policy, a lessee could claim certain gathering costs in its transportation allowance if certain criteria were met, including:

- A part of the lease must lie in waters deeper than 200 meters.
- The transportation allowance must otherwise be determined in accordance with ONRR's regulations.
- The costs must be allocated between the royalty bearing and non-royalty bearing substances (for example, water or production subject to a zero royalty rate).
- The leases and units must be treated similarly.
- Movement prior to a central accumulation point is still disallowed from a transportation allowance. A central accumulation point, for purposes of the Deepwater Policy, may be a single well, a subsea manifold, the last well in a group of wells connected in series, or a platform extending above the water's surface.
- The movement must be to a facility not located on a lease adjacent to the lease on which the production originated. An adjacent lease is defined as a lease with at least one point of contact with the producing lease or unit.

The 2020 Proposed Rule proposed to permit a lessee to request, and ONRR to approve, an application of the deepwater gathering-as-transportation principles in shallow waters under certain circumstances.

The 2020 Proposed Rule also proposed to remove certain language that the 2016 Valuation Rule added to ONRR regulations. Specifically, through the 2020 Proposed Rule, ONRR removed (1) the language under §§ 1206.110(a)(2)(ii) and 1206.152(a)(2)(ii), which provided ''[f]or [production from] the OCS, the movement of [production] from the wellhead to the first platform is not transportation,'' and (2) the portion of the ''gathering'' definition at § 1206.20, which stated that ''any movement of bulk production from the wellhead to a platform offshore.''

While the 2020 Proposed Rule's preamble fully explained ONRR's intent behind its proposal to adopt regulatory text that is consistent with the former Deepwater Policy, the proposed regulatory text failed to include all of the Deepwater Policy's requirements. Specifically, the proposed regulatory text was not consistent across the oil and gas sections and did not include the adjacency limitation or the requirement for a lessee to identify a central accumulation point at or near the subsea wellheads (explained in the 6th and 5th bulleted points respectively, *supra.*).

Comments on the Proposed Amendment

Public Comment: Industry commenters endorsed ONRR's attempt to adopt regulations consistent with the Deepwater Policy. These commenters argued that the Deepwater Policy supported innovative technology development that minimized surface facilities, reduced environmental risks, and increased ultimate recovery. They also argued that adopting regulations consistent with the Deepwater Policy would return a longstanding ONRR practice that lessees relied on to inform their business decisions.

ONRR Response: Based on public comments such as these, adoption of regulations consistent with the Deepwater Policy may reduce a lessee's total royalty burden, resulting in a lower total cost to operate on the OCS, and thereby potentially encouraging continued production and conservation of resource. Additionally, consistent and transparent regulations reduce uncertainty for investors, which provides a competitive advantage for development of domestic production. Recent Executive and Secretarial Orders call on Federal agencies to appropriately promote and unburden domestic energy production, especially OCS resources. *See* E.O. 13783, ''Promoting Energy Independence and Economic Growth,'' E.O. 13795, ''Implementing an America-First Offshore Energy Strategy,'' and S.O. 3350, which promotes the America-First Offshore Energy Strategy.

Public Comment: One industry commenter, while supportive of the Deepwater Policy, argued that adoption of regulations consistent with the Deepwater Policy is moot. This commenter suggested that ONRR intends to disallow deductions for any movement of production that is not fully in marketable condition, and cited *DCOR, LLC,* ONRR–17–0074–OCS (FE), 2019 WL 6127405 (Aug. 26, 2019) (''*DCOR*'').

ONRR Response: The fact pattern and analysis in *DCOR* are distinguishable from the amendments in this rule to allow a lessee to claim certain OCS gathering costs. For example, no part of the leases in *DCOR* were located in water depths deeper than 200 meters. These amendments provide a specific exception to the general principle that a lessee may not include gathering costs in its transportation allowance.

Public Comment: Several commenters noted the inconsistency between the oil and gas sections of the proposed rule. The oil section at § 1206.110 included the following language: ''For oil produced on the OCS in waters deeper than 200 meters, the movement of oil from the wellhead to the first platform is transportation for which a transportation allowance may be claimed'' and ''On a case-by-case basis, you may apply to ONRR to have your actual, reasonable and necessary costs of the movement of oil produced on the OCS in waters shallower than 200 meters from the wellhead to the first platform to be treated as transportation for which a transportation allowance may be claimed.'' *See* 85 FR 62080. The gas section of the proposed rule, however, included no such language. *See* 85 FR 62084.

ONRR Response: In the final rule, ONRR is correcting for the omissions in its proposed regulation text at § 1206.110 to clearly adopt regulations consistent with the Deepwater Policy, except for the provision that would have allowed a lessee to apply for treatment of shallow water gathering as deductible transportation. ONRR is inserting parallel language in the gas regulations at § 1206.152.

Public Comment: One commenter suggested that the language at § 1206.110(a)(1)(i) should end with ''including'' instead of ''except.''

ONRR Response: In the final rule, ONRR restructured the regulation text. The movement of bulk production from or near subsea wellheads to the first platform is gathering. However, this regulatory amendment provides an exception to the general application of the gathering and transportation regulations, allowing subsea gathering costs to be included in a transportation allowance when the regulatory requirements are met.

Public Comment: One commenter requested that, when a lessee submits a request to apply the deepwater gathering-as-transportation principles to a lease in shallow waters, the regulation include a time limit for ONRR to respond and require ONRR to provide an explanation if the request is denied.

ONRR Response: This final rule does not allow a lessee to apply for treatment of shallow water gathering as deductible transportation. A lessee may not submit, nor may ONRR approve, such a request under this final rule. Accordingly, there is no need for ONRR to adopt a time limit for its action on a shallow water request. However, ONRR intends to continue studying any need for, and the economic impact of, a shallow water gathering allowance, and may propose a future rulemaking on this subject.

Public Comment: Public interest groups opposed the effort, arguing the policy permitted, in the form of a transportation allowance, is an improper deduction under ONRR's regulatory scheme. A commenter argued that ONRR does not have the authority to incentivize production and should not attempt to do so using a policy like this to minimize a lessee's royalty obligations. Another commenter stated that the oil and gas industry has received several royalty relief measures for offshore production and that the government should not be further helping industry at the taxpayers' expense.

ONRR Response: Although ONRR's primary focus is the collection, verification, and disbursement of natural resources revenues, it shares the Department's policy goals to promote the development of natural resources and to obtain for the public a reasonable financial return on assets that belong to the public. *See* S.O. 3350 and S.O. 3360. ONRR has the statutory authority to promulgate regulations and to carry out the stated purposes of the Acts as explained further in the introduction of this final rule. The mineral leasing authorities granted to the Secretary by Congress provide broad authorities to ''prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the leasing statutes]'', including the collection of all revenues associated with such activities, including the OCS. 30 U.S.C. 189 (MLA); 30 U.S.C. 1751 (FOGRMA); 43 U.S.C. 1334(a) (OCSLA).

Public Comment: The States of California and New Mexico opposed this change, arguing it will cause companies to improperly deduct costs that should be considered gathering and is inconsistent with the definition of gathering clarified in conjunction with the rescission of the Deepwater Policy in the 2016 Valuation Rule. These States asserted the 2016 Valuation Rule allowed for a more consistent and reliable application of the regulations.

ONRR Response: Historically, the regulatory framework for gathering and transportation did not recognize the unique technology and development model, higher risk and substantial cost of developing and producing oil and gas in unique environments, like the deepwater OCS. However, by practice from 1999 until the 2016 Valuation Rule, these types of developments were allowed as part of a lessee's transportation deduction.

The commenters are correct that subsea movement of bulk production before the royalty measurement point would be defined, under the 2016 Valuation Rule and this final rule, as gathering. However, in this final rule, pursuant to the Secretary's authority to create rules and definitions for royalty collection purposes and to provide for the expeditious and orderly development of the OCS, ONRR is creating a new regulatory exception to the rules for gathering and transportation in order to provide a deduction for a lessee that carries the higher risk and cost of production in the deepwater OCS.

This change from the 2016 Valuation Rule is being made at this time because the GOM is currently viewed as a mature hydrocarbon province; most of the acreage available for leasing has received multiple seismic surveys, has been offered for lease a number of times, or is under lease. Many of the remaining reserves are located in smaller fields that do not warrant stand-alone development and are unlikely to be developed, unless using subsea completions with tiebacks to existing platforms. The risks and costs of subsea tiebacks are significant, especially when developing a resource within a high pressure and high temperature reservoir, and many of the remaining undiscovered technically recoverable resources in the GOM are within this type of reservoir. The actual discovery, development, and production of oil and natural gas results not from the inventory and data compiled by the government, but from efforts by a diverse set of companies working to identify oil and gas prospects that warrant investment. When examining alternative investment opportunities, companies will consider not only the oil and gas potential of an area, but also the expected costs of development, as compared to alternative investments. The expected profitability of specific projects will be affected by a company's determinations of geologic and economic risk.

Public Comment: A few public interest groups and States noted that in the 2016 Valuation Rule, ONRR explained the Deepwater Policy had served its purpose and is no longer necessary. These commenters argued that ONRR has not sufficiently explained the reason for adopting regulations consistent with the Deepwater Policy.

ONRR Response: When the Deepwater Policy was written in 1999, the Department's intent was to acknowledge that: ''new technologies involved in deepwater development were not specifically contemplated'' in the regulations at that time. *See* 63 FR 56217. In the 2016 Valuation Rule, based on the significant deepwater development that had occurred since 1999, and consistently high commodity prices during the years the 2016 Valuation Rule was in development, the Department determined that the Deepwater Policy had served its purpose and was no longer needed. More recently, however, commodity prices have once again significantly changed. Rather than make policy decisions based on commodity prices that are nearly impossible to predict, the Department has reassessed the statutory direction provided clearly in the OCSLA which states that: ''the [OCS] is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs,'' (*see* 43 U.S.C. 1332), and has assessed concrete data provided by BOEM and BSEE on permitting activity as well as geologic prospects on the OCS. Consequently, the decision to adopt regulations consistent with the Deepwater Policy has been made for several reasons.

First, from 2010–2014, the average NYMEX oil price was approximately $92/bbl and the average natural gas price was approximately $3.85/MMBTU, while over the last five years (July 2015 to June 2020), the average NYMEX oil price was approximately $51/bbl and the average natural gas price was approximately $2.67/MMBTU.

In addition to the decreases in commodity prices, APDs in the GOM have declined, from an average of 173 in FY 2016 through FY 2019 to 140 in FY 2020. During the same time period, onshore APDs have significantly increased, from an average of 3,548 in FY 2016 through FY 2019 to 6,234 in FY 2020.

Also, when ONRR's 2016 Valuation Rule was promulgated, BOEM had published its 2011 National Assessment of Undiscovered Oil and Gas Resources of the U.S. Outer Continental Shelf. BOEM's 2016 version of the same assessment—which was not available when the 2016 Valuation Rule was promulgated—showed declines in the GOM's economically recoverable oil resources and significant declines in the economically recoverable natural gas resources. Information from BOEM shows the remaining economically and technically recoverable oil and gas resources are all significantly lower than the 2016 estimates. The estimated number of large GOM oil pools has been reduced and the estimated remaining natural gas resources has been further scaled back.

Regarding other input on this topic, in the 2020 Proposed Rule, ONRR sought comments on how its regulations could be revised to address deductions for other remote areas, like Alaska's North Slope. ONRR thanks several commenters for their helpful responses. ONRR did not include provisions specific to remote areas in this final rule but will continue examining the issue.

In this final rule, ONRR retains the provision allowing lessees to deduct certain offshore deepwater gathering costs in its transportation allowance when certain criteria are met. Certain production environments, like the deepwater OCS, require unique technology and carry more risk and costs than onshore environments, resulting in a deepwater OCS development model that is drastically different from onshore counterparts. Additionally, the GOM is currently viewed as a maturing hydrocarbon province; most of the acreage available for leasing has received multiple seismic surveys and has been leased. Many of the remaining reserves are located in smaller fields that do not warrant stand-alone development and will be developed, if at all, using subsea completions with tiebacks to existing platforms. However, the risks and costs of subsea tiebacks are significant, especially when developing a resource within a high pressure and high temperature reservoir. Many of the remaining undiscovered technically recoverable resources in the GOM are within this type of reservoir. *See https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Energy-Economics/Fair-Market-Value/2018-GOM-International-Comparison.pdf.*

The regulations adopting language consistent with the deepwater policy recognize the benefits that offshore production offers the American public in meeting U.S. demand for oil and gas when compared to onshore U.S. production by allowing for a smaller surface footprint with increased well productivity and longer lifespans. *See https://www.nap.edu/read/25439/chapter/4#14.* Additionally, deepwater economic limits are expected to be greater than shallow water economic limits because deepwater structures are larger, more complex, further from shore, and almost all structures are manned. This further emphasizes the impact that granting an allowance for deepwater gathering costs, when applied over the life of a facility, offers by increasing net revenue to shift the break-even cost curve and extend the life of the reservoir. *See* Mark J. Kaiser, in Decommissioning Forecasting and Operating Cost Estimation, 2019.

Offshore oil and gas production is of strategic national importance, as it has accounted for between 15–20 percent of domestic oil production over the past decade and generates billions of dollars in revenue for the U.S. Treasury, various conservation initiatives, and revenue sharing for four Gulf states. Crude oil produced from the OCS is generally of heavier quality and refined in the Gulf Coast for use throughout the country to meet U.S. national energy needs.

ONRR and its predecessor, MMS, recognized the increased risk, cost, and national importance of producing in the deepwater OCS, but historically did not provide a regulatory mechanism for a lessee to deduct appropriate expenses. In 1999, MMS adopted the Deepwater Policy, which granted deductions for the higher costs of moving production in the deepwater OCS while also creating some confusion about the authority of the policy (provided through Departmental memorandum) and its relationship to MMS' valuation regulations. This final rule resolves that confusion by clearly articulating the elements of the Deepwater Policy in the regulatory text.

ONRR's current regulations prohibit a lessee from including gathering costs in its transportation allowance for all Federal oil and gas production. *See* §§ 1206.110(a) and 1206.152(a). The regulations define gathering as ''the movement of lease production to a central accumulation or treatment point on the lease, unit, or communitized area, or to a central accumulation or treatment point off of the lease, unit, or communitized area that BLM or BSEE approves for onshore and offshore leases, respectively, including any movement of bulk production from the wellhead to a platform offshore.'' *See* 30 CFR 1206.20. Gathering does not end and transportation does not begin before a lessee moves production to the point where it is measured for royalty purposes. *See* 30 CFR 1206.20 and 1206.171; 53 FR 1184 at 1190–1191 (January 15, 1988); *DCOR,* ONRR–17–0074–OCS (FE), 2019 WL 6127405. In adopting regulations consistent with the Deepwater Policy, ONRR is amending § 1206.110(a) and § 1206.152(a) to permit a lessee to include, in its transportation allowance, costs incurred in moving offshore production upstream of the royalty measurement point when certain requirements are satisfied. Solely for purposes of this amendment, ONRR is defining central accumulation point to include a single well, a subsea manifold, the last well in a group of wells connected in a series, or a platform extending above the surface of the water, even when prior to the royalty measurement point, and only to the extent all other regulation requirements are met. *See, infra.,* §§ 1206.110(a)(2)(ii) and 1206.152(a)(2)(ii). In all other situations, the central accumulation point remains at or downstream of the royalty measurement point.

The 2020 Proposed Rule included a provision allowing a lessee to request, and ONRR to approve, an application of the deepwater gathering-as-transportation principles in water depths of 200 meters and shallower. ONRR is not adopting the specific provision relating to shallow water gathering in the final rule. While there was such a provision in ONRR's Deepwater Policy in effect from 1999 through 2016, no lessee ever requested an allowance for its shallow water gathering. The fact lessees did not request such relief shows the provision did not effectively incentivize shallow water production, nor did it provide ONRR with a foundation for estimating the economic impact of a shallow water gathering allowance. While ONRR

invited public comment on a possible shallow water gathering allowance in the 2020 Proposed Rule, the public comments received also did not provide sufficient information to justify or quantify the impact of such an allowance. ONRR intends to further examine the matter and, if determined to be appropriate, may make shallow water gathering the subject of a future rulemaking.

In this final rule, ONRR removed the proposed language at § 1206.110. In its place, ONRR is adding regulatory text that is largely consistent with the Deepwater Policy except for the shallow water provision. This language is included in the final rule under both §§ 1206.110(a) and 1206.152(a), and references thereto in the definition of ''gathering'' under § 1206.20.

C. Allowance Limits for Federal Oil and Gas

The MLA requires a lessee to pay royalties at a minimum of 12.5 percent in amount or value of production removed or sold from the leased lands. 30 U.S.C. 226(b)(1)(A). OCSLA requires a royalty of not less than 12.5 percent in amount or value of production saved, removed, or sold from the leases. 43 U.S.C. 1337(a)(1)(A). Although the MLA and OCSLA do not define the term ''value,'' it is well-established that the Secretary has the authority and considerable discretion to establish the value for royalty purposes of production from Federal oil and gas leases. *United States* v. *Ohio Oil Co.,* 163 F.2d 633 (10th Cir. 1947); *Cont'l Oil Co.* v. *United States,* 184 F.2d 804 (9th Cir. 1950); *Marathon Oil Co.* v. *United States,* 604 F. Supp. 1375 (D. Alaska 1985); *Amoco Prod. Co.,* 29 IBLA 234 (1977).

The regulations at 30 CFR part 1206 govern value and, under these regulations, the Secretary allows deductions for transportation and processing. *See, e.g.,* 30 CFR 1206.110, 1206.152, and 1206.159. Secretarial discretion, augmented by case law, supports the Federal lessor sharing in the increased value to the royalty share and costs of the royalty share when a lessee transports production to a market off the lease or processes natural gas into gas plant products.

From the late 1980s to December 30, 2016, ONRR regulations permitted a lessee to request that ONRR allow it to exceed the regulatory limits for transportation allowances (50 percent limit for Federal oil and Federal gas) or processing allowances (66⅔ percent limit for Federal gas) (''request to exceed''). Under a different process, a lessee could provide data and documentation to support its request to claim an extraordinary processing allowance (''request to claim''). The 2016 Valuation Rule converted the prior regulatory limits from a soft cap (that is, one that could be exceeded upon application to and approval by ONRR) to a hard cap (one that could not be exceeded) and terminated all currently-existing approvals. At that time, a significant number of companies had received approvals to exceed the transportation and processing allowance limits and ONRR had approved two applications for extraordinary processing allowances.

In the 2020 Proposed Rule, ONRR proposed to remove the hard caps on transportation and processing costs and revert to soft caps, and also to allow a lessee to once again request an extraordinary processing allowance. As before the 2016 Valuation Rule, the lessee would submit to ONRR a request to exceed form (form ONRR–4393) and ONRR would review and approve the request before the lessee could properly report allowances in excess of soft regulatory limits. Similarly, a lessee requesting ONRR approval for an extraordinary processing allowance would submit documentation supporting its claim for ONRR to review and either approve or deny.

Based on comments ONRR received on the 2020 Proposed Rule and the economic analysis in this final rule, ONRR finds that this final rule should retain the hard caps on transportation and processing allowances but reinstate the provision allowing a lessee to request approval for an extraordinary processing allowance. ONRR's economic analysis shows that the financial impact to the Federal lessor, states, and industry arising from the retention of the hard caps is less than $500,000 per year. This represents a significant change from ONRR's economic analysis in the 2020 Proposed Rule, and the benefit to lessees and financial impact to states is considerably less than ONRR originally estimated. In broad terms, the updated royalty impact associated with changing the hard caps to soft caps is insufficient to support making the change when considered in combination with public comments on this issue and, to a lesser extent, the potential increased administrative burden on ONRR and lessees. Section VII, entitled ''Procedural Matters,'' of this final rule describes a breakdown of the royalty impacts associated with gas transportation, oil transportation, and gas processing. ONRR addresses public comments on the 2020 Proposed Rule in the Public Comments section of this final rule below.

Finally, with respect to reinstating the language allowing a lessee to request an extraordinary processing allowance, ONRR reviewed comments from industry and the State of Wyoming where the facilities that were the subject of the two prior approvals for extraordinary processing allowances were located. Both were supportive of the proposed change. For the reasons outlined in the extraordinary processing allowance section below, this final rule reinstates a lessee's ability to request approval for an extraordinary processing allowance.

Several commenters provided comments on portions of the 2016 Valuation Rule that were beyond the scope of the 2020 Proposed Rule. The comments ranged in support of continuing to value arm's-length percent-of-proceeds contracts as processed gas, to supporting the requirement that transportation and processing pricing factors be reported as allowances, instead of being netted from the gross sales price or value. Other comments related to the 2016 Valuation Rule included objection to the removal of a provision that allowed a lessee to use FERC or state-approved tariffs to calculate transportation rates in non-arm's-length transportation allowances, the removal of line fill costs in the calculation of arm's-length transportation allowances, and the removal of transportation factors in the price of the product. Several commenters recommended that ONRR restore the 1.3 multiplier to the BBB bond rate used to calculate non-arm's-length transportation costs. These commenters also suggested that, in light of Standard and Poor's decision to no longer provide its BBB bond rate free to industry, ONRR select a different rate and publish the rate on *ONRR.gov* to alleviate confusion and inconsistency when calculating non-arm's-length transportation allowances. Lastly, ONRR received comments asserting that valuing sales of arm's-length unprocessed gas as processed gas, such as in the case of percent-of-index and percent-of-proceeds contracts, is arbitrary. ONRR appreciates the comments but does not address the comments in the sections below because the comments are outside the scope of this rulemaking.

1. Transportation Allowance Limits for Federal Oil and Gas (§§ 1206.110(d)(1) and (2) and 1206.152(e)(1) and (2))

In the 2016 Valuation Rule, ONRR eliminated the regulations that allowed it to approve oil (§ 1206.110) and gas (§ 1206.152) transportation allowances

in excess of 50 percent of the value of a lessee's production.

In the 2020 Proposed Rule, ONRR proposed to revert to the historical practice of treating the 50 percent cap as a soft cap on oil and gas transportation costs. As discussed in the background above, ONRR retains the hard caps from the 2016 Valuation Rule in this final rule.

Comments on the Proposed Amendment

Public Comment: Several commenters supported ONRR's authority to approve transportation allowances in excess of the 50 percent allowance cap. These commenters stated that the option to request approval to exceed the 50 percent cap is necessary because it allows a lessee to deduct its actual, reasonable, and necessary transportation costs, even if those costs exceed 50 percent, which is especially important in a low commodity price environment.

ONRR Response: ONRR agrees that the oil and gas markets changed between the adoption of the 2016 Valuation Rule and the 2020 Proposed Rule. ONRR understands that market volatility and the global pandemic have adversely affected the oil and gas industry. However, it may be counterproductive to make regulatory changes based on market volatility because frequent regulatory changes may decrease early certainty to lessees and make Federal leases less attractive to current and potential lessees. Retaining the hard caps on allowances supports a fair return to the public on their non-renewable natural resources.

Public Comment: A commenter suggested that ONRR approve exceptions to the 50 percent limit prospectively for a two-year or three-year period to reduce the administrative burden associated with applying for and approving or denying these requests. Another commenter stated that ONRR could offset the administrative burden associated with reviewing and approving requests to exceed the transportation allowance limits by approving allowances for more than a single year at a time.

ONRR Response: ONRR appreciates comments and suggestions related to reducing administrative burden. ONRR is retaining the hard caps in this final rule, which eliminates any associated increase in administrative burdens.

Public Comment: A commenter suggested that ONRR modify the allowance to include a 120-day time limit for ONRR to respond to a request and that ONRR provide a detailed explanation if ONRR denies a request. The commenter argues these actions provide certainty to the lessee regarding their allowance calculations.

ONRR Response: ONRR appreciates these suggestions. However, since ONRR is retaining the hard caps rather than removing them in this final rule, there will not be any application to which a 120-day mandate could apply, nor will there be a need to provide a detailed explanation for a denial.

Public Comment: A commenter recommended that ONRR reinstate any approval to exceed the 50 percent transportation allowance limits for oil and gas that was in place prior to the reinstatement of the 2016 Valuation Rule.

ONRR Response: The 2016 Valuation Rule terminated all approvals to exceed the transportation allowance limits prior to its January 1, 2017, effective date. ONRR has no authority to grant future applications retroactively, and is retaining the hard caps in this final rule.

Public Comment: A commenter asserted that ONRR should eliminate transportation allowances entirely because they amount to an uncapped subsidy of the oil, gas, and coal industries.

ONRR Response: Transportation allowances are a well-established standard supported by case law and precedent. *See, e.g.* 30 CFR 1206.110 and 1206.152 and *United States* v. *Gen. Petroleum Corp. of California,* 73 F. Supp. 225, 262 (S.D. Cal. 1946). This final rule retains the hard caps on transportation and processing allowances.

Public Comment: A commenter asserted that ONRR should eliminate allowances entirely because providing a lessee the option to deduct transportation or processing allowances in excess of the caps disincentivizes lessees to reduce their costs. Another commenter asserted that allowing lessees to request to exceed the limits does not incentivize the lessee to lower operational costs and negatively impacts royalty payments, which in some instances support local schools.

ONRR Response: Transportation and processing allowances are intended to benefit both a lessee and the Federal lessor because of typically higher market values found off the lease, or from recovering NGLs. Courts have upheld the use of allowances to calculate the value of Federal oil and gas production for royalty purposes. *See United States* v. *Gen. Petroleum Corp. of California,* 73 F. Supp. 225, 262 (S.D. Cal. 1946) (stating ''It has been held that if there is no open market in the place where an article ordinarily would be sold, the market value of such article in the nearest open market less cost of transportation to such open market becomes the market value of the article in question.''), *aff'd sub nom. Cont'l Oil Co.* v. *United States,* 184 F.2d 802 (9th Cir. 1950).

Also, a lessee already has an incentive to minimize its transportation and processing costs. Typically, the Federal Government's royalty share of production is 12½ or 16⅔ percent. The lessee retains the remaining 87½ or 83⅓ percent respectively, and has every incentive to minimize the transportation and processing costs borne by its sizable share. The Federal Government benefits from the lessee's incentive to be cost-conscious on its greater share. ONRR does not expect limiting the transportation and processing allowances on a smaller share of production to change lessee behavior in incurring transportation and processing expenses borne by the lessee's greater share. In this final rule, ONRR retains the hard caps on allowances, consistent with the commenter's request. ONRR acknowledges that market conditions and the global pandemic have negatively impacted many budgets, including for schools.

Public Comment: A commenter asserted that ONRR did not provide justification for incentivizing production in low-quality reservoirs, which the commenter suggested may cause harmful environmental externalities. A second commenter suggested ONRR did not address any environmental consequences associated with reinstating the requests to exceed the transportation limit. Another commenter asserted that ONRR did not fully perform its due diligence to ensure consistency with multiple use management laws.

ONRR Response: Allowing a lessee to request to exceed the hard caps may not provide sufficient economic incentive for that lessee to continue producing or seek additional production from Federal lands. The Federal Government's royalty share of production is typically 12½ or 16⅔ percent; the lessee's share of production is typically the remaining 87½ or 83⅓ percent. Small changes in the calculation of the value of the Federal Government's 12½ or 16⅔ percent share become even smaller when spread over the value of the lessee's 87½ or 83⅓ percent share, making it difficult for the Federal Government to effectively incentivize industry action. While allowing a lessee to request to exceed the hard caps could provide some economic incentive to the lessee, such action would also increase the lessee's administrative cost burden. See Section V for ONRR's economic analysis. ONRR has determined that, on

balance, removing the hard caps is not warranted, and is retaining the hard caps in its regulations.

ONRR addresses public comments about environmental considerations in the introduction to this rule. As to the comment regarding consistency with multiple use management laws, the commenter failed to specify which multiple use management laws ONRR failed to consider. While ONRR cannot respond directly to this comment, it has addressed the specific acts raised by other commenters in the introduction.

Oil: ONRR retained the current language in § 1206.110(d)(1) and (2), which limits transportation allowances to 50 percent of the value of oil transported. Despite the current market volatility, ONRR believes that it is in the public interest to retain the hard cap.

Gas: ONRR retained the current language in § 1206.152(e)(1) and (2), which limits transportation allowances to 50 percent of the value of unprocessed gas, residue gas, or gas plant products transported. Despite the current market volatility, ONRR believes that it is in the public interest to retain the hard cap.

2. Processing Allowance Limits for Federal Gas (§ 1206.159(c)(2) and (3))

In the 2016 Valuation Rule, ONRR eliminated the regulation allowing it to approve gas processing allowances in excess of 66⅔ percent of the value of a lessee's gas production.

In the 2020 Proposed Rule, ONRR proposed to revert to historical practices by treating the regulatory limit as a ''soft cap'' on gas processing costs (66⅔ percent regulatory limit). As discussed in the background above, ONRR retains the hard caps from the 2016 Valuation Rule in this final rule.

Comments on the Proposed Amendment

Public Comment: Several commenters supported the 2020 Proposed Rule's provision for ONRR to approve requests to exceed the 66⅔ percent limit on processing allowances. The commenters stated that the right to request approval to exceed the 66⅔ percent cap needs to be reinstated because its removal denied lessees the ability to deduct all of their actual, reasonable, and necessary processing costs when those costs exceed 66⅔ percent. The commenters asserted that this is especially true when the physical make-up of the gas necessitates complex plant designs which result in higher processing costs. Last, a commenter took issue with ONRR terminating any approval that it previously issued for a lessee to exceed the 66⅔ percent limitation.

ONRR Response: Although the oil and gas market clearly changed between the drafting of the 2016 Valuation Rule and the 2020 Proposed Rule, and ONRR understands that the oil and gas industry, like many industries, has been adversely affected by market volatility and the global pandemic, ONRR's regulations are designed to continue to function during uncommon or unavoidable circumstances affecting costs and value. ONRR believes retaining the hard caps on allowances supports a fair return to the public on non-renewable natural resources.

Public Comment: A commenter suggested ONRR reduce administrative costs arising from processing the requests to exceed by approving the exception for periods of two or more years for lessees with contracts that have been reviewed and which are consistently over the limits.

ONRR Response: ONRR appreciates the suggestion. Because ONRR is retaining the hard caps in this final rule, there are no associated administrative costs.

Public Comment: A commenter suggested that ONRR modify the allowance to include a 120-day mandate for ONRR to respond to a request and that ONRR provide a detailed explanation if ONRR denies a request.

ONRR Response: ONRR appreciates the suggestions and responded to a parallel suggestion in the discussion of transportation costs, above. That response is applicable here, as well.

Public Comment: A commenter stated they oppose ONRR's approval to exceed the 66⅔ percent cap on processing allowances and allowances in general. Another commenter stated that allowing a lessee to request to exceed the 66⅔ percent limitation on processing allowances is a savings for industry at the expense of taxpayers due to a reduction in royalty payments.

ONRR Response: The comments regarding the 66⅔ percent processing allowance mirror the comments that ONRR received for the 50 percent limitation on transportation allowances for oil. Please refer to ONRR's responses regarding the 50 percent transportation cap.

ONRR retained the current language in § 1206.159(c)(2) and (3), which limits processing allowances to 66⅔ percent of the value of the gas plant products recovered. Despite the current volatile market conditions, ONRR believes that it is in the public interest to retain the hard cap on processing allowances.

3. Extraordinary Processing Allowances for Federal Gas (§ 1206.159(c)(4))

The 2016 Valuation Rule removed the provision that was in place between March 1, 1988 (53 FR 1230, January 15, 1988), and December 31, 2016 (81 FR 43338, July 1, 2016), under § 1206.158(d)(2), which allowed a lessee to request an extraordinary processing allowance. Under the prior § 1206.158(d)(2), on application to and with ONRR's approval, a lessee could deduct its actual and reasonable processing costs up to 99 percent of the value of the gas plant products extracted and up to 50 percent of the value of the residue gas. *See* 81 FR 43353, July 1, 2016. For ONRR's approval, a lessee's application must have demonstrated that the gas stream, plant design, and/or unit costs were extraordinary, unusual, or unconventional relative to standard industry conditions and practice. *See e.g. Amoco Prod. Co.* v. *Baca,* 300 F. Supp. 2d 1, 13–14 (D.D.C. 2003); *see also Exxon Corp.,* 118 IBLA 221, n. 7 (1991). In justifying the elimination of extraordinary processing allowances, ONRR stated in the 2016 Valuation Rule that ''the markets and the technology have changed sufficiently such that this provision and these approvals are no longer necessary.'' *See* 81 FR 43353 (July 1, 2016).

The 2016 Valuation Rule terminated the two existing ONRR-approved extraordinary processing allowance claims for lessees processing gas at two facilities in Wyoming. In response to the 2020 Proposed Rule, the Governor of Wyoming and the members of Wyoming's Congressional delegation submitted comments stating that this allowance is essential for two major gas-processing facilities in Wyoming. The commenter further explained that this process is challenging and expensive. According to the commenter, these gas processing operations provide an important source of valuable gasses, including helium, which is relied upon by consumers in Wyoming and the rest of the country. The commenters representing Wyoming argued that extraordinary processing allowances are warranted because certain Wyoming gas processing facilities face a serious competitive disadvantage without them, which may cause those plants to be prematurely retired.

Upon receipt of those comments, ONRR reexamined the facts and the assertion in the 2016 Valuation Rule that there were technological advances that rendered the extraordinary processing allowances unnecessary. While gas markets have indisputably

changed since MMS added the extraordinary processing allowance provision to the regulations (53 FR 1230, January 15, 1988), and gas processing technologies have improved overall, the technology necessary to process these two gas streams, characterized by high concentrations of nitrogen, carbon dioxide, hydrogen sulfide, methane, and almost no recoverable NGLs, *see Exxon Corp.,* 118 IBLA 221, n. 7 (1991), remains substantially the same. *See, e.g.,* Eow, J.S. (2002), Recovery of sulfur from sour acid gas: A review of the technology. Environ. Prog., 21: 143–162, *https://doi.org/10.1002/ep.670210312;* Reviews in Chemical Engineering, Volume 29, Issue 6, Pages 449–470, eISSN 2191–0235, ISSN 0167–8299, DOI: *https://doi.org/10.1515/revce-2013-0017.* Therefore, reinstating the provision that allowed a lessee to request approval to take an extraordinary processing allowance is appropriate, as the technology to process these unique gas streams has not changed, despite technological advances in processing relevant to many other areas and types of gas streams.

Further, as was noted by the Governor of Wyoming and Wyoming's Congressional delegation, one of these unique gas streams contains recoverable quantities of helium, an element that is vital to the Nation's security and economic prosperity. *See* Final List of Critical Minerals 2018, *https://www.usgs.gov/news/interior-releases-2018-s-final-list-35-minerals-deemed-critical-us-national-security-and,* published May 18, 2018 (83 FR 23295). Helium production is governed by the Helium Stewardship Act of 2013, Public Law 113–40, codified at 50 U.S.C. 167–167q, and is administered by the BLM. *See https://www.blm.gov/programs/energy-and-minerals/helium.* Accordingly, the U.S. has important economic and national security interests in ensuring the continuation of a reliable supply of helium, including that recovered from unique gas streams requiring costly equipment to remove carbon dioxide and hydrogen sulfide before helium can be extracted. *See, e.g., https://www.nap.edu/read/9860/chapter/7#41.* In instances where a lessee might not otherwise choose to produce a gas resource containing helium, allowing a lessee to apply for an extraordinary processing allowance approval for the natural gas portion of their production stream, may lower natural gas production costs and incentivize new or continued production of helium. However, the extraordinary processing allowance does not apply to helium and to obtain a reduction in helium rates, the helium extractor would need to request this separately with the BLM Amarillo Federal Leased Lands Team.

In light of the foregoing, and after careful consideration of the public comments discussed in more detail below, this final rule reverts to ONRR's long-standing historical practice and reinstates the provision that was in place between March 1, 1988 (53 FR 1230, January 15, 1988), and December 31, 2016 (81 FR 43338, July 1, 2016), under 30 CFR 1206.158(d)(2)(i) to the updated § 1206.159(c)(4). Adoption of this amendment will allow a lessee to apply to ONRR for approval to claim an extraordinary processing allowance.

Comments on the Proposed Amendment

Public Comment: Several commenters stated that ONRR should restore the option for lessees to request approval for extraordinary processing allowances. The commenters argued that ONRR's prior limited approvals were for gas streams with unique gas compositions that were processed at gas plants with complex plant designs and extremely high unit costs. The commenters stated that the lessees with those approvals made investment decisions based on the approvals. Without the ability to deduct additional, extraordinary processing costs against the value of the residue gas recovered, the economic viability of lease operations was questionable. These commenters further asserted that ONRR was incorrect in the 2016 Valuation Rule when it stated that technological advancements since the 1990s meant that these approvals were no longer necessary.

ONRR Response: Reinstating this provision may remove the potential disincentive for a lessee to develop Federal lands disadvantaged by gas streams requiring complex and costly facilities, which, like the composition of the gas streams, are unique, extraordinary, or unconventional. Receiving an approval under this provision may also provide a lessee an incentive to continue producing through uncommon or unavoidable circumstances affecting costs and value. As already discussed, ONRR concedes that, despite other technological advances relevant to processing, the technology necessary to process unique gas streams such as that used at the two Wyoming facilities discussed above has not changed appreciably since the prior approvals were given in the 1990s.

Public Comment: Several commenters requested that ONRR reinstate the extraordinary processing allowance approvals terminated by the 2016 Valuation Rule.

ONRR Response: The 2016 Valuation Rule terminated the prior approvals that ONRR granted before January 1, 2017. 81 FR 43338 (July 1, 2016). This final rule will add language allowing a lessee to again request an approval. However, ONRR will apply this final rule prospectively, beginning with its effective date. ONRR cannot reinstate the two extraordinary processing allowance approvals that the 2016 Valuation Rule terminated, nor can ONRR grant such allowances for the period between January 1, 2017, and the effective date of this final rule. Rather, each of the lessees will need to reapply to ONRR for approval. And, as before the 2016 Valuation Rule, ONRR may only approve a lessee's request after reviewing the lessee's documentation for adequacy, reasonableness, and accuracy. ONRR anticipates that it will again receive few requests and will rarely grant approval under this provision, as was the case when the language was in place between March 1, 1988, and December 31, 2016.

Public Comment: A commenter stated that ONRR should not restore the ability for a lessee to request an extraordinary processing allowance approval because the 2016 Valuation Rule ensured a fair return to the public.

ONRR Response: ONRR is committed to ensuring a fair return to the American public for oil and gas produced from Federal lands. Allowing a lessee to deduct actual, reasonable, extraordinary post-production processing costs is part of ensuring a fair return. Prior to the 2016 Valuation Rule, just two approvals for extraordinary processing allowances were in effect. Both were for leases in Wyoming. The State of Wyoming receives about half of the royalties reported and paid for Federal leases in Wyoming, and shares in any reduction in those royalties, including reductions occasioned by an extraordinary processing allowance. Nonetheless, the comments submitted by the Governor of Wyoming and Wyoming's Congressional delegation urge ONRR to adopt regulations restoring a lessee's ability to apply for extraordinary processing allowances, and state that the positive overall economic impact to Wyoming of continuing operation of the Federal leases that historically benefitted from extraordinary processing allowances outweighs any reduction in royalties Wyoming receives. Further, in more than 30 years, ONRR has received fewer than 10 requests to approve extraordinary processing allowances (and approved only two), which

indicates that such requests are very rare.

Public Comment: One commenter stated that, if there is a potential danger to local communities if extraction of high sulfur gas streams goes wrong, the company should pay the taxpayers a fair share (and no less) for the resources.

ONRR Response: As discussed above, allowing a lessee to deduct actual, reasonable post-production processing costs is part of ensuring a fair return for the right to produce Federal resources. And ''if extraction of high sulfur gas streams goes wrong,'' other laws potentially hold the responsible party liable for personal, property, and environmental damage. ONRR's regulations governing the method of calculating the amount of a lessee's royalty payment were never intended to compensate for accidental personal, property, or environmental damages should someone or something suffer injury or damage as a result of a failure associated with the processing of a natural resource. ONRR further addressed public comments regarding environmental concerns in the General Comments section in this rule's introduction.

ONRR appreciates the comments supporting, seeking the modification to, or opposing the proposed amendment to allow a lessee to apply to ONRR for approval to claim an extraordinary processing allowance. After careful consideration, and for the reasons explained in the introduction above, this final rule will adopt the proposed amendment to § 1206.159(c)(4). In the 2020 Proposed Rule, this paragraph was designated as § 1206.159(c)(4). To account for other changes to § 1206.159, paragraph (c)(4) is redesignated as § 1206.159(c)(5) in this final rule.

D. The Default Provision for Federal Oil, Gas, and Coal and Indian Coal

The 2016 Valuation Rule introduced a provision on how ONRR will exercise the Secretary's authority to establish royalty value when typical valuation methods are unavailable, unreliable, or unworkable. This provision, which appears in several places in the 2016 Valuation Rule, is generally referred to as ''the default provision.'' ONRR's intent in 2016 was to increase clarity, consistency, and predictability on when and how ONRR would exercise the Secretary's discretion to determine royalty value when other royalty valuation methods fail.

The 2020 Proposed Rule sought to amend 30 CFR part 1206 to eliminate the default provision from four sections and a number of references thereto. The amendment, if adopted, would effectively revert ONRR's practices to those in place prior to publication of the 2016 Valuation Rule. ONRR premised the proposed change on E.O.s 13783 and 13795 and the policies reflected in those directives, and on ONRR's consideration of continuing concerns from regulated entities with respect to how ONRR would apply the default provision, as most recently expressed by industry members in the Petitioners' Joint Opening Brief (ECF No. 89), filed December 4, 2020, in *API* v. *U.S. Dept. of the Interior, et al,* Case No. 19–cv–120–S, U.S. District Court for the District of Wyoming.

In the 2016 Valuation Rule and 2020 Proposed Rule, ONRR determined that inserting and subsequently removing the default provision will not affect royalty values because neither the default provision nor its absence changes ONRR's goal, which is to determine the value of the produced commodity for royalty purposes based on the best or a reasonable measure of market value. Further, removing the default provision does not affect ONRR's ability to establish a royalty value in those infrequent instances where a typical valuation method is unavailable, unreliable, or unworkable because the Secretary's discretion to establish a royalty value does not derive from ONRR's regulations. *See, e.g.,* 17 U.S.C. 1751 and BOEM OCS lease form, section 6(b)(''The value of production for purposes of computing royalty shall be the reasonable value of the production as determined by the Lessor.'').

In this final rule, ONRR amends 30 CFR part 1206 to eliminate the default provision found in §§ 1206.105, 1206.144, 1206.254, and 1206.454, and a number of references thereto, effectively returning ONRR's practices to those that were in place for decades prior to the adoption of the 2016 Valuation Rule.

Comments on the Proposed Amendments

Public Comment: Several commenters supported the default provision's elimination because the commenters opine that the default provision introduces ambiguity as to who within ONRR has the authority to invoke the default provision. There was also concern that the default provision would be applied inconsistently. Further, commenters expressed concerns about the lack of criteria for determining ''reasonable'' sales prices and transportation costs, which could theoretically result in a lessee not being allowed to value royalties based upon arm's-length sales contracts or deduct all reasonable, actual transportation, and processing costs. These commenters assert that the default provision is overly broad and open-ended, allowing ONRR to determine the value of production or the amount of allowance in instances where a lessee cannot provide documentation requested by ONRR the lessee asserts it has no legal or practical ability to obtain. These commenters support regulations with more certainty in valuation, because they lead to less risk, efficiency in reporting and audits, and improved planning for ONRR and lessees.

ONRR Response: Prior to the adoption of the 2016 Valuation Rule, ONRR successfully performed compliance activities and, when appropriate, exercised Secretarial discretion, to establish royalty values, even in the absence of an express default provision. Considering the recent direction given by E.O.s 13783 and 13795, which promote domestic energy production and reduce regulatory burden, together with the confusion around when and how the default provision would be applied, ONRR has reevaluated whether the default provision is necessary. ONRR intended the provision to be used in situations where determination of value was unclear, and not to determine the value of production in cases where reasonable, actual transportation and processing costs are well supported. ONRR agrees that the default provision is unnecessary. Further, the default provision invites litigation over what are the ''lowest reasonable measures of market price,'' ''highest reasonable measure of transportation costs,'' ''highest reasonable measure of processing costs,'' and ''highest reasonable measure of washing allowances.'' *See, e.g.,* 30 CFR 1206.104(c)(2), 1206.110(f)(2), 1206.143(c)(2), 1206.153(g)(2), 1206.159(e)(2), 1206.253(c)(2) 1206.260(g)(2), 1206.267(d)(2). Also, arguably, the default provision allows a lessee in certain circumstances to report and pay royalties based on sales prices up to ten percent less than the lowest reasonable measure of market price; transportation costs up to ten percent higher than the highest reasonable measure of transportation costs; processing costs up to ten percent higher than the highest reasonable measure of processing costs; and washing allowances up to ten percent higher than the highest reasonable measure of washing allowances. *See, e.g.,* 30 CFR 1206.104(c)(2), 1206.110(f)(2), 1206.143(c)(2), 1206.153(g)(2), 1206.159(e)(2), 1206.253(c)(2), 1206.260(g)(2),

1206.267(d)(2). The default provision does not best protect the United States against inadequate royalty payments and is being removed from ONRR regulations by this final rule.

Public Comment: Some commenters expressed concern over reporting errors causing ONRR to ''penalize'' a lessee and impose an entirely different (and presumable higher) valuation for royalty purposes through the application of the default provision without first allowing the lessee to correct its reporting to conform to the applicable regulations.

ONRR Response: Where royalty value cannot be determined under the regulations, such as instances of breach of a lessee's duty to market, ONRR will use statutory authority to determine Federal oil and gas royalty value in accordance with the lease terms, statutes, and regulations in the same manner as ONRR did prior to adoption of the 2016 Valuation Rule.

Public Comment: Many commenters expressed concerns over the ten percent variance, arguing that it does not take into account arm's-length sales and transportation contracts, particularly where the lack of fully-developed transportation and processing infrastructure could vary by more than 10 percent from ''reasonable measures.'' The commenters also stated that the ten percent test is too broadly written and could be triggered by transactions that have the same economic effect but are structured differently.

ONRR Response: ONRR is to capture a reasonable measure of fair market value for production. *See, e.g.,* 43 U.S.C. 1344(a)(4). Fair market value is influenced by sales prices, transportation costs, processing costs, and the costs of placing production in marketable condition. The ten percent variance is problematic, but for reasons other than expressed in these public comments. The ten percent variance is from the lowest *reasonable* sales price and the highest *reasonable* transportation and processing costs. For this reason, the default provision is in conflict with ONRR's mandate to capture full, reasonable fair market value, not up to ten percent less.

Public Comment: Several commenters suggested that, if ONRR elects to retain the default provision, it should be narrowly tailored to address the most blatant of reporting discrepancies, and defined in such a way that a lessee is not left to guess if and when ONRR will decide to insert itself into regular business transactions and what the results of such intervention might be. One commenter further asserted that ONRR should indicate when its judgment will or will not be substituted, how such discretion would or would not be wielded, and what factors would or would not be used. The commenters added that ONRR should also clarify how the provision would establish pricing for misconduct, breach of duty to market, or instances where ONRR cannot verify value.

ONRR Response: ONRR appreciates the suggestions to tailor and further define when and how it would use the default provision. However, ONRR believes that the default provision has created uncertainty and unintended consequences in the valuation of production, as discussed above. Therefore, this final rule eliminates the default provision.

Public Comment: One commenter stated that ONRR should give proper notice to a payor so that additional information or justification as to the valuation could be provided first. The commenter further asserted that the default provision should not be triggered by simple or inadvertent reporting errors, nor by some arbitrary percentage below the lowest ''reasonable'' measure of value in arm's-length situations, or above the highest ''reasonable'' measure of transportation or processing cost as under the 2016 Valuation Rule.

ONRR Response: In this final rule, ONRR eliminates the default provision contained in the 2016 Valuation Rule because the default provision created uncertainty and a regulatory burden, as well as unintended consequences adverse to the lessor. The final rule reverts to historical practices under which MMS and ONRR successfully performed compliance activities. Where appropriate, ONRR will exercise Secretarial discretion to establish royalty values in the absence of the default provision. ONRR believes that it unintentionally increased uncertainty due to lessees' perception that ONRR might apply the default provision in place of accurate lessee reporting, thereby creating a regulatory burden for lessees.

Public Comment: One commenter suggested that a lessee should be allowed to fix a mis-reported value to conform to ONRR's regulations rather than the agency unilaterally setting its preferred value.

ONRR Response: In the future, ONRR may request more information and/or specific proposals regarding ways to address reporting errors. Lessees are currently required to correct any reporting errors within 30 days of the date the lessee learns of the error. *See* 30 CFR 1210.30.

Public Comment: A commenter suggested that because several phrases relating to the default provision were not addressed by the 2020 Proposed Rule that ONRR may still exercise seemingly unfettered discretion to review a lessee's royalty valuation that is based on *bona fide* arm's-length contract. This commenter requested that ONRR issue a separate rulemaking to target the remaining default provisions to meet the intent of the 2020 Proposed Rule.

ONRR Response: ONRR appreciates the suggestions to address the other phrases that were not the subject of the 2020 Proposed Rule. However, it is outside of the scope of this rulemaking.

Public Comment: One commenter stated that ONRR did not provide a reasoned explanation for removing the default provision, and thus creates uncertainty surrounding the valuation of oil, gas, and coal. The commenter went on to say that removal of this provision will reintroduce uncertainty by leaving a lessee unsure when ONRR will exercise the Secretary's discretion. The commenter also stated that ONRR fails to recognize the lessee's right to appeal any order issued by or on behalf of the Secretary regarding royalty valuation, even though those appeals create an important check on the Secretary's power. Further, this commenter argued that ONRR did not consider alternatives and chose to repeal the default provision without providing justification other than broad executive policies. Accordingly, the commenter concluded that removing the default provision is arbitrary and capricious.

ONRR Response: ONRR disagrees with the suggestion that the default provision is necessary or that its removal will cause uncertainty. ONRR used its delegated Secretarial discretion, lease terms, statutes, and regulations to determine Federal oil and gas royalties prior to adoption of the 2016 Valuation Rule, and will continue to do so after the default provision's removal from ONRR regulations. The default provision created uncertainty and unintended consequences as discussed above, and the regulations did not best define the situations when ONRR should apply a default provision.

Public Comment: Another commenter stated that the default provision should be retained because its removal would undermine ONRR's ability to ensure proper royalty collection.

ONRR Response: ONRR disagrees that the default provision is necessary or that its removal will adversely affect its ability to ensure proper royalty collection. In fact, as discussed above, the default provision may have restricted ONRR's ability to use

Secretarial discretion when a lessee reports royalties significantly lower than the lowest reasonable value.

ONRR appreciates the commenters supporting, seeking the modification to, and opposing the proposed amendment to §§ 1206.101, 1206.102, 1206.104, 1206.105, 1206.110, 1206.141, 1206.142, 1206.143, 1206.144, 1206.152, 1206.160, 1206.252, 1206.253, 1206.254, 1206.256, 1206.260, 1206.267, 1206.451, 1206.452, 1206.453, 1206.454, 1206.460, 1206.461, 1206.467, and 1206.468. For the reasons explained in the 2020 Proposed Rule and this final rule, this final rule will adopt the proposed amendments to §§ 1206.101, 1206.102, 1206.104, 1206.105, 1206.110, 1206.141, 1206.142, 1206.143, 1206.144, 1206.152, 1206.160, 1206.252, 1206.253, 1206.254, 1206.256, 1206.260, 1206.267, 1206.451, 1206.452, 1206.453, 1206.454, 1206.460, 1206.461, 1206.467, and 1206.468 in full.

E. ''Misconduct'' Definition for Federal Oil, Gas, and Coal and Indian Coal

In the 2016 Valuation Rule, ONRR added a definition of the term ''misconduct'' under § 1206.20 to mean: ''any failure to perform a duty owed to the United States under a statute, regulation, or lease, or unlawful or improper behavior, regardless of the mental state of the lessee or any individual employed by or associated with the lessee.'' In the preamble to the 2016 Valuation Rule, ONRR explained that it added the misconduct definition in conjunction with the adoption of the ''default'' provision. ''This new definition will apply to—and in conjunction with the—default provision. Misconduct, in this subpart, is different than—and in addition to—any violations subject to civil penalties under . . . FOGRMA . . . . Behavior that constitutes misconduct under part 1206 does not need to be willful, knowing, voluntary, or intentional. This is a valuation mechanism, not an enforcement tool.''

ONRR is eliminating the default provision from its regulations in this final rule. Accordingly, the definition of ''misconduct'' added to ONRR regulations in conjunction with and for the operation of the default provision is also being eliminated.

Comments on the Proposed Amendment

Public Comment: Some commenters stated that the 2016 Valuation Rule generated uncertainty for royalty reporters by creating a broad definition of ''misconduct.'' The commenters argued this definition could be misapplied, leading to the imposition of civil penalties under the 2016 Civil Penalty Rule. The commenters explained that they interpreted the 2016 Valuation Rule's definition of ''misconduct'' to allow ONRR to penalize a lessee under the ''default provision'' for reporting an incorrect product code, sales type, or other non-value-based field on a royalty report (form ONRR–2014), without an opportunity to correct the error. Additionally, penalizing a lessee for non-value-based errors is not reasonable, the commenters said, because there are many fields on form ONRR–2014 that do not affect ONRR's ability to ensure that it has collected every dollar due. Thus, these commenters support the 2020 Proposed Valuation Rule's elimination of the definition of ''misconduct.''

One commenter stated that the definition of misconduct was expansive enough to capture even inadvertent paperwork errors. Furthermore, the commenter stated that the 2016 definition of misconduct duplicates existing regulations to the extent that a lessee is required to correct reporting errors under § 1206.30.

ONRR Response: The definition of ''misconduct'' in 30 CFR 1206.20 is no longer needed because the default provision is being eliminated by this final rule.

Public Comment: Some commenters suggested that ONRR amend the definition of ''misconduct'' in § 1206.20 by including the words ''intentional'' or ''knowing or willful'' before ''misconduct'' where it appears in 30 CFR part 1206. Alternatively, the commenters suggested, ONRR could insert a provision such as ''ONRR will not allege misconduct absent some intent by the lessee to lower its royalty payments to the government beyond what is reasonable'' to ensure that, for example, the failure of the lessee to conform to formal or informal agency guidance does not establish misconduct, while good faith efforts to comply constitutes mitigating circumstances and should not result in the issuance of a penalty. Another commenter said that intentional conduct aimed at reducing royalties owed should be an aggravating factor, while innocent reporting mistakes, a favorable compliance record, and adherence to ONRR guidance should be mitigating factors.

ONRR Response: ONRR defined ''misconduct'' in the 2016 Valuation Rule to clarify when ONRR would exercise the Secretary's discretion to determine value of production under the default provision. Because the default provision is being eliminated by this final rule, the related definition of ''misconduct'' is also being eliminated, and thus, it is unnecessary to amend, in any manner, the definition of misconduct.

Public Comment: One commenter stated that ONRR did not provide a reasoned or substantive explanation for proposing in the 2020 Proposed Rule to remove the misconduct definition. The commenter asserted that ONRR's proposal unnecessarily reintroduces uncertainty to the application of the valuation regulations. Additionally, the commenter opined that ONRR directly contradicted its earlier position on an issue without properly justifying its decision. This commenter suggested that before removing the definition, ONRR must first provide a reasoned explanation for the change. Accordingly, the commenter stated that removing the definition for the term ''misconduct'' is arbitrary and capricious.

ONRR Response: This final rule provides ONRR's reasoned explanation to remove the definition of ''misconduct.'' In summary, this rule removes the definition because: (1) ONRR originally added the definition in conjunction with, and for the operation of, the default provision that this rule also removes; (2) in light of this rule's objectives, ONRR gives greater weight to comments that the definition increased uncertainty and undue burdens in the regulated community; and (3) ONRR maintains and has not eroded its ability to ensure and compel accurate reporting including, for example, the requirement under § 1210.30 for a lessee to ''submit accurate, complete, and timely information,'' regardless of whether those errors were caused by misconduct.

ONRR appreciates the comments supporting, seeking the modification to, and opposing the proposed amendment. After careful consideration, and for the reasons explained above, ONRR is adopting the proposed amendment to remove the definition of ''misconduct'' in § 1206.20 as part of this final rule.

F. Contract Signature Requirement for Federal Oil, Gas, and Coal and Indian Coal

The 2016 Valuation Rule required a lessee or a lessee's ''affiliate [to] make all contracts, contract revisions, or amendments in writing, and all parties to the contract must sign the contract, contract revisions, or amendments'' for all valuation methods, including gross proceeds and index-based options, to verify the correctness of royalty reports and payments. *See* §§ 1206.104(g)(1); 1206.143(g)(1); 1206.253(g)(1); and 1206.453(g)(1) (2016 Valuation Rule). If a written contract was not signed by all parties to the contract, the 2016 Valuation Rule directs that ONRR use

the default provision to determine royalty value.

In the 2020 Proposed Rule, ONRR seeks to eliminate the requirement that a lessee create and maintain contracts signed by all parties where the lessee would not do so in the normal course of business, except as required by 30 CFR 1207.5, which states that a lessee must place in written form and retain any oral sales arrangement negotiated by the lessee. The proposed amendment also seeks to create greater consistency with ONRR's definition of contract, which includes oral contracts and written contracts that are not signed by all parties. *See* 30 CFR 1206.20.

Even with the amendments adopted in this final rule, ONRR will still be able to evaluate a lessee's course of performance under all contracts, oral and written, signed and unsigned, consistent with ONRR's historical agency practice. ONRR has long been able to request copies of a lessee's sales contracts and all agreements, other contracts, and other documents relevant to the valuation of production, including any written or electronic evidence of transportation contracts, processing contracts, and contracts for services to place production in marketable condition. *See* 30 CFR 1207.5 (''Copies of all sales contracts . . . and copies of all agreements, other contracts, or other documents which are relevant to the valuation of production are to be maintained by the lessee and made available upon request . . . to . . . ONRR . . . .''). Given this broad, long-standing authority to request all lessee's records that bear on royalty value, in the 2020 Proposed Rule ONRR sought public comment on whether the new requirements imposed by the 2016 Valuation Rule should be retained.

ONRR recognizes that contracts may be valid and enforceable, as a matter of law, despite the absence of writing or signatures. *See* the definition of ''contract'' in 30 CFR 1206.20. In this final rule, ONRR seeks to resolve the ambiguity that exists between its definition of contract—which recognizes the validity of oral agreements and of written agreements that have not been signed by all parties—and the 2016 Valuation Rule's imposition of a requirement for every contract to be in writing and signed by all parties, despite a lessee's normal business practices to the contrary. ONRR has determined that the 2016 Valuation Rule's new requirement does not align with contract law, that industry operates without signed documents as a matter of course without issue, and that ONRR can use other methods to determine the terms of an oral contract or a written contract that is not signed by all parties.

Comments on the Proposed Amendment

Public Comment: Several industry commenters supported removal of the contract signature requirement, stating that real world practices do not always require written contracts and that there is no need for signatures to affirm a contractual agreement. Additionally, commenters noted that the 2016 Valuation Rule inadvertently contradicted the definition of ''contract'' in the regulation itself, which, at § 1206.20, defines ''contract'' as ''any oral or written agreement . . . that is enforceable by law,'' and which does not require the contract to be signed by the parties. Commenters also noted that eliminating the written contract requirement would not diminish a lessee's obligation to justify its Federal or Indian oil or gas valuation to ONRR, and that the mere absence of a written contract is not a valid reason for ONRR to interject itself and reestablish royalty value by using the default provision.

ONRR Response: ONRR agrees that the 2016 Valuation Rule overlooked the fact that oral agreements and unsigned written agreements may be binding and legally enforceable, eliminating the need for the agency to implement new requirements. Additionally, the 2016 Valuation Rule's requirement of contract signatures is inconsistent with the definition of contract found in 30 CFR 1206.20. This amendment will more readily synchronize ONRR's regulations with the long-standing definition of ''contract'' that is found in § 1206.20, which acknowledges that a contract may be oral or in writing and does not have to be signed. ONRR also acknowledges that oral contracts are legally enforceable, making the signature requirement unworkable and potentially burdensome upon lessees by creating a heightened requirement that may not be part of standard business practice. ONRR also agrees that eliminating the signed contract requirement does not diminish the lessee's obligation to prove its contract terms and justify its valuation methods to the agency. Long-standing ONRR regulations allow ONRR to request a lessee provide all documents relevant to the valuation of production during the course of its compliance and audit efforts. ONRR believes this provides it with an appropriate mechanism by which to verify appropriate valuation.

Public Comment: One industry commenter stated that many current agreements among producers and other parties active in the market exist electronically or via email exchanges, renew automatically, or include terms that require something not in written form. Further, the commenter indicated that the signed written contract requirement in 2016 Valuation Rule is stricter than what is required to establish a contract under general commercial law. The commenter provided an example, stating that a course of dealing could not be used to satisfy ONRR's signed contract requirement, but could be sufficient to establish a binding arrangement in a court of law, in the event of a contract dispute. This commenter also believes that ONRR has decades of experience evaluating contracts prior to the 2016 Valuation Rule, and this broad authority and experience should be adequate to carry the agency forward.

ONRR Response: ONRR agrees that the 2016 Valuation Rule overlooked the fact that many agreements renew automatically and include terms that require acknowledgement in some manner other than a written agreement signed by all parties. This amendment will eliminate inconsistency between this stated industry practice and ONRR's regulatory requirements that rely on accurate recordkeeping and how those records are to be maintained by lessees over time. ONRR also recognizes the 2016 Valuation Rule created a more stringent standard than what most lessees are subject to as part of their normal commercial transactions, and by adopting the amendment proposed in the 2020 Valuation Rule, ONRR hopes to more readily align with standard commercial practices. ONRR also agrees that prior agency practice and expertise can inform its audit and compliance activities, and that eliminating the signed contract provision will not negatively impact these efforts. These longstanding agency practices include ONRR requests to lessees for documents bearing on the valuation of production, including any written sales, transportation, or processing agreements, any documentation of an oral sales agreement, and any documentation that reflects the existence of, or pertaining to, an oral or written sales, transportation, or processing agreement, or agreement for services to place production into marketable condition.

Public Comment: One industry commenter stated that ONRR's assertion that the contract signature requirement is defective is a premature conclusion for the agency to make. The commenter asserted that ONRR should amend the definition so that it is consistent throughout all product valuation regulations instead of repealing the written contract requirement altogether.

Alternatively, the commenter stated that ONRR should broaden the definition of contract to require that all contracts be in writing. The commenter also expressed concern that ONRR is simply returning to an old regimen that, by ONRR's own admission in the preamble to the 2016 Valuation Rule, is outdated and flawed.

ONRR Response: The fact that oral and unsigned, written agreements may be legally binding and enforceable between the parties impacted ONRR's decision to revisit this requirement in the 2020 Proposed Rule. ONRR is adopting the proposed amendment for the reasons stated in this final rule.

Public Comment: Several public-interest commenters stated that this proposed amendment directly contradicts the reason ONRR provided in the 2016 Valuation Rule for the inclusion of contract signatures. These commenters also believe that ONRR has not properly justified this amendment, and that verification activities would suffer without written contracts.

ONRR Response: In terms of ONRR's verification activities, ONRR believes that its compliance and audit processes will not be negatively impacted by eliminating the 2016 Valuation Rule's requirement for written contracts signed by all parties. ONRR has several methods by which it can confirm transaction-based information from a lessee without relying solely on written contracts signed by all parties. This includes ONRR's ongoing ability to request a full array of documents—both signed and unsigned, hard-copy and electronic—along with its continuing use of Generally Accepted Government Auditing Standards (''GAGAS'' or ''*Yellow Book* Standards'') to review and audit transactions based on information received from a lessee. In using these different investigatory methods, ONRR ensures compliance and verification activities that meet or exceed its regulatory mandate. ONRR is adopting the proposed amendment for the reasons stated in this final rule.

ONRR is eliminating the requirement that a lessee create and maintain contracts signed by all parties when the lessee would not otherwise do so in the normal course of business. Affected sections are §§ 1206.104(g)(1), 1206.143(g)(1), 1206.253(g)(1), and 1206.453(g)(1).

G. Citation to Legal Precedent as Part of a Valuation Determination Request

The 2016 Valuation Rule introduced a requirement that a lessee provide, along with the lessee's valuation request, any citations to legal precedent, including adverse precedent, that it believes are persuasive as part of its analysis of the issues. These requirements are set forth in §§ 1206.108(a)(5), 1206.148(a)(5), 1206.258(a)(5), and 1206.458(a)(5).

In the 2020 Proposed Rule, ONRR proposes to eliminate this requirement. More specifically, the 2020 Proposed Rule proposed to remove the phrase ''including citations to all relevant precedents (including adverse precedents)'' from §§ 1206.108(a)(5), 1206.148(a)(5), 1206.258(a)(5), and 1206.458(a)(5).

ONRR is familiar with, and commonly a party to, matters that generate precedent for Federal oil and gas, Federal coal, and Indian coal royalty valuation issues. Although citations might expedite the processing time for a lessee's request for a valuation determination, it is not necessary to require a lessee to provide citations to precedent. Further, ONRR believes that it would be unproductive to attempt to enforce or litigate such a requirement, especially because a failure to include a citation to precedent may not, on its own, provide a sufficient reason to deny an otherwise valid request for a valuation determination. Lessees may always cite precedent when they wish to do so in submitting a valuation request, but it is not necessary to require lessees to do this.

Comments on the Proposed Amendment

Public Comment: One industry commenter found the requirement to provide legal citations to be problematic because the requirement creates an undue burden on lessees which discourages lessees from seeking formal guidance from ONRR. The commenter explained that requiring legal citations amounts to providing a legal brief to ONRR in support of a lessee's request for a valuation determination, which is unduly burdensome and out of reach for many smaller operators with no legal support staff.

ONRR Response: ONRR agrees with this commenter and believes that the requirement to provide legal citations creates an unnecessary burden on lessees. ONRR recognizes that many lessees do not employ in-house legal counsel or have outside legal counsel on retainer who could assist with this degree of detailed legal research. Because of the significant legal costs and operational challenges that result from this requirement of the 2016 Valuation Rule, ONRR agrees that eliminating this provision removes a significant challenge for lessees who seek more formal guidance.

Public Comment: One industry commenter noted that the IBLA oftentimes issues valuation determinations via Orders, which are unpublished and difficult to find using traditional electronic search tools. This creates an issue for lessees because ONRR may be the only entity privy to this information. Further, the commenter stated that it is ONRR's responsibility to ensure that the agency administers its regulations in a consistent manner, not industry's.

ONRR Response: ONRR recognizes this limitation and agrees that the best way to eliminate the issue is to remove the requirement to cite to legal precedent. The IBLA's issuance of unpublished Orders and directives that cannot be accessed by the general public creates an unanticipated burden on lessees that this proposed amendment seeks to rectify. Further, ONRR conducts its own extensive legal research when evaluating the issues in a lessee's request for a valuation determination. Because ONRR already engages in this level of legal analysis, it is unnecessary for a lessee to duplicate efforts that the agency is already conducting as a matter of course.

Public Comment: Several industry commenters were concerned that ONRR will require excessive data and legal analysis in order for a lessee to receive valuation guidance or a determination.

ONRR Response: Although citations might expedite the processing time for a lessee's request, ONRR does not believe that it is necessary to require a lessee to provide citations to legal precedent or regulatory authority. This is particularly true for novel issues for which there may be no legal reference to cite. Therefore, ONRR is removing this requirement.

Public Comment: One industry commenter expressed concern that the lack of sufficient legal citation would give ONRR a reason to deny a request for a valuation determination.

ONRR Response: A lessee always has the option to cite to legal precedent in requesting a valuation determination. Even with the amendment adopted in this final rule, lessees may choose to include legal precedent to support or substantiate its arguments; but such citations are by no means a requisite step in the valuation determination or valuation guidance process.

Public Comment: One industry commenter stated that many mid-sized and smaller independent ''Mom and Pop'' oil and gas oil companies do not have access to in-house counsel or general counsel to help them research case law and legal citations in support of their valuation determination.

ONRR Response: ONRR addressed a substantially similar comment, above,

and refers the commenter to the responses in the preceding section.

Public Comment: A public-interest commenter stated that the burden should remain on the lessee to provide ONRR with citation to legal precedent that bolster or support the lessee's request for a valuation determination.

ONRR Response: Although citations and reference to legal authority might expedite the processing time for a lessee's request, ONRR does not believe that it is necessary to require lessees to provide citations for this purpose. Further, ONRR believes that maintaining this requirement may disincentivize lessees from seeking a valuation determination or valuation guidance. ONRR's position is that all requests for guidance and valuation determinations are welcome, and ONRR should not create a system that discourages lessees from contacting ONRR for support or assistance.

Public Comment: A commenter indicated that citation to case law and other legal precedent may be a good barometer for ONRR to use to decide whether the lessee's request has sufficient merit, especially since a valuation determination may remain in effect for decades or longer.

ONRR Response: ONRR disagrees with this commenter. Although legal citations may provide support for a valuation determination, ONRR must still undertake comprehensive factual and legal research, and a lessee's citation to precedent will not relieve ONRR of the obligation to do so for every valuation determination. Maintaining the regulation that requires citation to legal precedent could inadvertently prevent companies from seeking a valuation determination. ONRR does not want to place unnecessary burdens on lessees and holds that the amendment eliminating the requirement to cite to legal precedent should be adopted.

For the reasons discussed in the 2020 Proposed Rule and this final rule, ONRR is removing the requirements under §§ 1206.108(a)(5), 1206.148(a)(5), 1206.258(a)(5), and 1206.458(a)(5) for a lessee to include citations to legal precedent when requesting a valuation determination.

H. Coal Valued for Royalty Purposes Based on an Electricity Sale

The 2016 Valuation Rule addressed the valuation of coal at 30 CFR 1206.252 (Federal coal) and 30 CFR 1206.452 (Indian coal). In general and consistent with ONRR's view that the best indicator of value is the gross proceeds a lessee receives under an arm's-length contract, these sections, with certain exceptions discussed below, value coal based on the gross proceeds accruing under the first arm's-length contract, less certain allowances.

In a situation where a lessee or its affiliate produces and then uses coal in a power plant owned by the lessee or its affiliate to generate electricity that is sold by the lessee or its affiliate to a variety of customers, no coal sales contract may exist and no arm's-length sale of the coal would have taken place prior to the sale of the electricity. In a situation where the electricity is sold under an arm's-length contract, §§ 1206.252(b) and 1206.452(b) of the 2016 Valuation Rule directs a lessee to value the coal based on the gross proceeds received for the electricity sale less certain allowances. If the electricity is sold under a non-arm's-length contract, these sections require the lessee to propose to ONRR a method to value the coal. ONRR may accept the lessee's proposed method or determine that the lessee needs to adjust its royalty reporting and payment because ONRR's determination resulted in a different value. Further, §§ 1206.252(c)(2) and 1206.452(c)(2) extend these valuation requirements to a lessee who sells coal to another member of a coal cooperative for use in the generation and sale of electricity.

As previously discussed, the United States District Court for the District of Wyoming entered a preliminary injunction which enjoined the implementation of the portions of the 2016 Valuation Rule applicable to Federal and Indian coal. The District Court stated that electricity sales may not be the best or a true indicator of the value of the coal produced from Federal or Indian properties. *See Cloud Peak,* 415 F. Supp. 3d at 1052–53. Specifically, the District Court stated, *inter alia,* that ''an electricity utility's power supply portfolio typically includes a range of options, from nuclear to coal to natural gas to hydro, wind, and solar.'' *Id.* at 1051 (citation omitted). ''Thus, the sales price of the electricity is comprised of much more than just the cost of coal, and that's ignoring the rabbit hole that is electricity sales regulation by both the federal and state governments.'' *Id.*

After careful consideration, of the pleadings filed and arguments raised in the United States District Court for the District of Wyoming relating to the coal cooperative definition and the electricity netback method, and the District Court's rationale underlying the preliminary injunction, together with the public comments discussed below, ONRR concludes that valuing coal on the first arm's-length sale of electricity is unworkable and inadvisable. Many resources contribute to the generation of the electricity. Calculations to determine netback rely on the availability of information on the amount and type of fuels used to generate a kilowatt hour of electricity, detailed data on the capital costs of the plant to include the direct costs of all plant, materials, equipment and buildings, fixed and variable operating costs influenced by the age, efficiency, and limitations of all plant equipment and including voluntarily-supplied labor costs attributable to keeping the plant in operation, as well as consideration of market dynamics such as system load factors and peak-shaving capacity. ONRR lacks authority to compel a power plant to provide these data sources, and, even with the data, it is overly burdensome, exceedingly complex, and too difficult to accurately and meaningfully develop models to simulate individual power plant operations effectively to isolate the contribution of a single non-arm's-length coal source to the value of the electricity, let alone assume that it is an accurate proxy for the value of coal determined based on arm's-length sales. ONRR is removing this unworkable and unduly burdensome requirement from its valuation regulations.

Thus, in the 2020 Proposed Rule, ONRR proposed to amend §§ 1206.252(b) and 1206.452(b) to remove coal valuation based on arm's-length electricity sales. *See* 85 FR 62055 and 62061. With removal, a lessee will be required to propose a method to value all coal that it or its affiliate uses for the generation and sale of electricity, regardless of whether the electricity is sold under in an arm's-length or a non-arm's-length contract.

Comments on the Proposed Amendment

Public Comment: Some industry commenters supported the removal of provisions that required the valuation of certain coal based on the sale of electricity. The commenters pointed out that it would be impossible to derive a meaningful value for coal from the value of electricity. One commenter argued that ONRR was not upholding its responsibility to obtain a fair market value for Federal coal since it did not provide a method to value coal never sold at arm's-length. Further, these commenters focused on the reduced complexity of valuation computations and reduced administrative burdens that would be recognized by removing this provision.

ONRR Response: ONRR agrees that valuing coal based on the sales price of electricity would result in an overly

burdensome series of calculations resulting in a value that would be open to challenge and would be overly burdensome for ONRR to perform compliance activities and verify accurate reporting and payments. Even if ONRR completed such compliance activities and issued an order to the lessee, these audits would likely result in the issuance of orders that would be contested by the lessee and, potentially, modified or overturned by the IBLA or a reviewing court after protracted litigation. ONRR agrees that there is no universal solution or method that can be applied to value all coal used to produce electricity. ONRR further agrees that it is reasonable and proper for the lessee to identify, in the first instance, the situation-specific circumstances that could impact the appropriate method to values royalties. Fortunately, these situations are not common, resulting in only a handful or fewer cases that ONRR will need to review and approve. Even after several decades of experience, ONRR has not found a better solution for instances when coal is converted to another commodity without sales. The valuation solutions in these cases must take into account the lessees' rights under the lease agreements, the MLA, and court-established precedents in order to establish a reasonable method to value this coal. ONRR will work to arrive at a just valuation method for lessees and the lessor where these no-sale situations exist under § 1206.252(b).

Public Comment: Other commenters opposing this change argued that generated electricity is a more accurate indicator of coal's value than any method allowed under § 1206.252. Additionally, some of these commenters advocated that coal should be valued further downstream including, in some cases, the *last* arm's-length electricity sale.

ONRR Response: As stated above, valuing coal based on the first arm's-length sale of electricity is not a more accurate indicator of the value of coal in the limited circumstances affected by this rule change. Instead, it is a long-standing principle that royalty valuation of production from Federal and Indian leases typically occurs at or near the lease. In addition, ONRR has never looked beyond the first arm's-length sale to the last arm's-length sale. Most coal produced from Federal leases is sold at arm's-length at or near the mine loadout, where mined coal is loaded for shipment to the buyer. Where a lessee moves its production away from the lease prior to this first sale (where ownership of the coal passes from producer to buyer), an allowance for transportation may be deducted from the royalty value. If the lessee sells or transfers the coal to an affiliate, the point of sale is where the first arm's-length sale of the coal by the affiliate occurs. In cases where no coal sale occurs prior to the generation of electricity, the lessee is required to submit a proposed valuation method to ONRR. In turn, ONRR will review and either approve the lessee's method or ONRR will construct a reasonable value using the best information available under § 1206.252(b).

Public Comment: Several industry commenters argued that ONRR is acting arbitrarily and capriciously when it allows lessees the opportunity to propose their own valuation method.

ONRR Response: Over time, ONRR has found that the information that lessees provide when requesting a valuation determination has been sufficient to establish a value for coal that results in a fair royalty value. The proposed amendments will ensure that coal used by the lessee or its affiliate in a power plant for the generation and sale of electricity is fairly valued by requiring (1) the lessee to propose to ONRR a method that provides a proxy for what would be the first arm's-length sale of the coal and (2) to adjust its royalty reporting and payment if ONRR determines that the proposed method does not fairly reflect the coal's value.

Public Comment: Two commenters offered suggestions as to how to value non-arm's-length coal sales. The commenters suggested that ONRR go back to the coal valuation regulations in effect prior to the 2016 Valuation Rule, which used a series of benchmarks to value coal sold in non-arm's-length transactions. They also suggested that the first benchmark be changed so that a lessee could use their own arm's-length sales contracts to establish a range to compare their non-arm's-length sales contracts when determining the appropriateness of the non-arm's-length sales price. The commenters also suggested that ONRR use a published index price to establish a value for coal sold non-arm's-length.

ONRR Response: Typically, the best indicator of value is the gross proceeds received under an arm's-length contract between independent entities who are not affiliates and who have opposing economic interests regarding that contract. Also, typically the best indicator of value under a non-arm's-length sale is the gross proceeds accruing to the lessee or its affiliate under the first arm's-length sale, less applicable allowances.

ONRR is not currently aware of any published index prices for coal that covers a wide array of coal production, which indices are both transparent and widely traded to yield a reasonable value that would represent the true market value of coal.

Public Comment: One commenter also suggested that ONRR should consider adopting an objectively-determinable backstop similar to the major-portion concept applicable to valuing oil and gas produced from Indian leases. Under the major portion process, lessees initially pay royalty based on their application of the valuation regulations (including using benchmarks for certain non-arm's-length transactions). After ONRR collects all the sales data in particular areas from lessees' royalty reports, ONRR calculates and publishes a major-portion price. Any lessee that initially paid royalty on a value less than the major-portion price must re-report and pay any differential.

ONRR Response: The proposal to construct a major portion comparison for coal is not something ONRR is prepared to address in this rulemaking. ONRR may consider this idea in future rulemaking efforts. ONRR applies major-portion pricing based on Secretarial discretion. Currently, ONRR only applies major portion to certain Indian oil and gas leases.

Public Comment: One commenter suggested that ONRR should not establish a floor price for coal. The commenter argued that lessees should be able to sell their coal at below-market prices in order to continue operations. They also argued that it is inconsistent and unreasonable for ONRR to chase the actual arm's-length sale price of coal while also suggesting that a floor value be established when it is to ONRR's benefit.

ONRR Response: To be clear, ONRR does not set prices for commodities. Rather, ONRR ensures royalties are reported and paid based on values typically best reflected in the price received by the lessee in an arm's-length sale of the same or similar commodity. ONRR's regulations require a lessee to market coal for the mutual benefit of the lessee and the lessor. The regulations further provide that the best indicator of value is typically the gross proceeds received under an arm's-length contract between independent entities that are not affiliates and have opposing economic interests. Any uplift in gross proceeds, an increase in the contract sales price, an affiliate of the lessee realizes in an arm's-length sale of the same or a similar commodity after buying coal non-arm's-length from the lessee should be royalty bearing. Sales below market prices ''in order to continue operations'' do not reflect the value of the resource but rather

operating conditions experienced by the lessee.

Public Comment: One commenter stated that the economic impact of removing the electricity netback method from the rule for Federal and Indian coal would be impossible to measure. The commenter also stated that using the first arm's-length sale of coal to value coal sold non-arm's-length for Indian leases should have no economic impact.

ONRR Response: ONRR has estimated, in past rulemakings, that the implementation and now removal of the electricity netback method will have no impact on royalties. As discussed below, ONRR believes, but has not estimated, that removing the electricity netback method will reduce administrative burden for both the lessee and ONRR.

ONRR appreciates comments supporting, seeking modification to, and opposing the proposed amendment. Based on the reasons given in the 2020 Proposed Rule (*see* 85 FR 62061) where ONRR stated that the valuation method was burdensome and controversial, the pleadings filed and arguments raised in the United States District Court for the District of Wyoming, the District Court's rationale for the preliminary injunction, and the public comments received, ONRR is adopting the amendment as proposed.

I. ''Coal Cooperative'' Definition

The 2016 Valuation Rule amended ONRR's regulations to add a definition of ''coal cooperative,'' at 30 CFR 1206.20, to mean ''an entity organized to provide coal or coal-related services to the entity's members (who may or may not also be owners of the entity), partners, and others. The entity may operate as a coal lessee, operator, payor, logistics provider, or electricity generator, or any of their affiliates, and may be organized to be non-profit or for-profit.'' *See* also 81 FR 43369.

The 2016 Valuation Rule also added §§ 1206.252(c)(1) (Federal coal) and 1206.452(c)(1) (Indian coal). Those sections require a lessee to value coal under §§ 1206.252(a) and 1206.452(a), respectively, if the lessee sells the coal to another member of a coal cooperative and that member, in turn, sells the coal under an arm's-length contract. Sections 1206.252(a) and 1206.452(a) provide that the value of coal is the gross proceeds accruing to the lessee or its affiliate under the first arm's-length contract, less allowances.

The 2016 Valuation Rule also added §§ 1206.252(c)(2) and 1206.452(c)(2), which address the valuation of coal in the situation where a lessee sells coal to another member of a coal cooperative that uses the coal to generate and sell electricity. The 2016 Valuation Rule also explained that, principally, coal cooperatives are formed because of some degree of mutual economic or other business interest. *See* 81 FR 43338, 43354. Thus, transactions between members of a coal cooperative lack the typical opposing economic interests necessary to create an arm's-length sale.

In the 2020 Proposed Rule, ONRR proposed to amend 30 CFR part 1206 to remove the ''coal cooperative'' definition under § 1206.20 and the requirements of §§ 1206.252(c)(1)–(2) and 1206.452(c)(1)–(2). *See* 85 FR 62061. By these proposed amendments, ONRR attempts to relieve concerns with the meaning and effect of the coal cooperative amendments while maintaining the royalty value of coal.

Comments on the Proposed Amendment

Public Comment: Numerous industry commenters agreed that ONRR should remove the coal cooperative definition because its inclusion in ONRR's regulations fails to reflect those entities' corporate structure, would harm small producers, and unduly complicates coal's royalty valuation.

ONRR Response: For the reasons discussed above in the preamble and the 2020 Proposed Rule (*see* 85 FR 62061), ONRR agrees that the definition of coal cooperatives is overly broad and ambiguous, and would create too much confusion to be effective or enforceable. ONRR also agrees that the definition is unnecessary because ONRR's long-standing definitions of ''affiliate'' and ''non-arm's length'' are sufficient to protect the lessor's interest. Under those existing definitions, any transfer of coal between entities lacking opposing economic interest is a non-arm's-length sale. In such cases, the lessee must look to either the first arm's-length sale of the coal by its affiliate, or the lessee must come to ONRR and request a valuation determination. *See* 81 FR 43369.

Public Comment: Some commenters oppose the amendment to remove the ''coal cooperative'' definition as well as its recognition that certain sales are not arm's-length transactions. These commenters expressed a concern that cooperative members could use their affiliated status to sell coal to each other at less than market prices, which improperly lowers royalty payments. Some commenters alleged that ONRR failed to provide a reasoned explanation as to why the removal of the ''coal cooperative'' definition was necessary and also stated that ONRR incorrectly asserted the Wyoming District Court ''offered strong criticism'' of its definition. These commenters concluded that ONRR's proposed action is arbitrary and capricious.

ONRR Response: ONRR's regulations require coal to be valued, when possible, on the value realized under the first arm's-length sale. Removing the ''coal cooperative'' definition does not alter that principle or change other methods available to evaluate a coal transaction's nature. The overly broad definition of ''coal cooperatives'' draws, within its coverage, entities that are not affiliated and which have opposing economic interests when it comes to buying and selling coal. Thus, the definition results in the treatment of some transactions as if they were non-arm's-length when they are, in fact, more appropriately viewed as arm's-length transactions under traditional principles because ONRR's regulations identify what conditions constitute sales between affiliates, and treats those circumstances as non-arm's-length sales. And sales between entities that lack opposing economic interests are also treated as non-arm's-length sales. As demonstrated in its recent filing in the United States District Court for the District of Wyoming, ONRR concurs with the ruling set forth in the District Court's preliminary injunction that suggested that, upon final briefing, the provisions of the 2016 Valuation Rule that require some coal cooperatives to value coal based on the sales price of electricity and the definition of coal cooperative are arbitrary and capricious. Removing the cited provisions fosters the most appropriate treatment of transactions as either arm's-length or non-arm's-length.

ONRR appreciates comments supporting, seeking modification to, and opposing the proposed amendment. After careful consideration of the reasons given in the 2020 Proposed Rule (*see* 85 FR 62061) that the definition was confusing and unnecessary, the pleadings filed and arguments raised in the United States District Court for the District of Wyoming, the District Court's rationale for the preliminary injunction, and the public comments, ONRR is adopting the amendment to remove the ''coal cooperative'' definition from § 1206.20 and the valuation requirements for coal sold to coal cooperatives at §§ 1206.252(c)(1) and (2) and 1206.452(c)(1) and (2).

III. Amendment Discussion—Part 1241 Penalties

The first objective of the civil penalty provision of this rule is to increase the transparency and fairness of ONRR's current civil penalty practices for the

benefit of regulated parties and interested members of the public. On October 9, 2019, the President issued E.O. 13892, ''Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,'' which emphasized the importance of transparency in agency civil penalty practices. Specifically, E.O. 13892 directed Federal agencies to ''act transparently and fairly with respect to all affected parties . . . when engaged in civil administrative enforcement or adjudication.'' Further, E.O. 13892 highlights the need, where feasible, to ''foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct.''

The second objective of the civil penalty provision of this rule is to address the analysis of the 2016 Civil Penalty Rule within a now vacated Federal District Court's decision.

In the 2020 Proposed Rule, ONRR discussed three potential amendments to its civil penalty regulations, set forth at 30 CFR part 1241. First, for transparency, ONRR proposed to amend § 1241.70(b) to explain that—for payment violations only—ONRR would consider the monetary impact of the violator's conduct when assessing a civil penalty. In Section F of the 2020 Proposed Rule, ONRR specifically elicited comments on how the proposed amendment to § 1241.70(b) would impact lessees that receive a civil penalty. ONRR received no comments opposing but received several comments supporting this amendment. The supporting comments generally agreed that penalties should be proportionate to the unpaid, underpaid, or late paid royalty obligation. ONRR received no comment describing the specific impact this amendment might have on a lessee. As this amendment merely clarifies ONRR's current practice, ONRR did not anticipate a commenter would identify an impact.

Second, for transparency, ONRR proposed an amendment to § 1241.70 to add § 1241.70(d) to clarify that ONRR may consider aggravating and mitigating circumstances in determining the appropriate penalty. In the 2020 Proposed Rule, ONRR specifically requested comments on how this proposed § 1241.70(d) would impact lessees subject to an ONRR-issued civil penalty and what facts or situations ONRR should treat as aggravating and mitigating circumstances. ONRR received comments generally supporting this amendment and no comments in opposition. The supporting comments generally agreed that ONRR should be more transparent in how it treats mitigating and aggravating circumstances. There was no comment describing any specific impact this amendment would have on a lessee. As this amendment merely clarifies ONRR's current practice, it did not anticipate any impacts. However, ONRR did receive comments suggesting alternative aggravating and mitigating circumstances, which are addressed below in Section III.B.

Third, for fairness, ONRR proposed to amend § 1241.11(b)(5) to return to its historical practice of guaranteeing an appellant the benefit of a stay of the accrual of a civil penalty during an appeal if granted by the Department's ALJ. ONRR specifically sought comments on how eliminating § 1241.11(b)(5) would affect lessees to whom a civil penalty was issued. ONRR received comments generally supporting this amendment and no comments in opposition. The comments in support generally agreed that ONRR should eliminate this provision from its regulations. There was no comment describing any specific impact this amendment would cause on a lessee, other than a general concern that the provision, if not removed, would deter penalized parties from asserting their due process rights.

General Comments

ONRR did not receive comments either supporting, opposing, or seeking to modify the proposed amendments to §§ 1241.11(b)(5) and 1241.70(b), or to the proposed addition of § 1241.70(d). Some commenters sought numerous other civil penalty policy changes, including increasing the number and size of civil penalties or modifying other portions of ONRR's civil penalty regulations were beyond the scope of the 2020 Proposed Rule. One commenter requested that ONRR pursue civil penalties for environmental crimes. Another commenter sought greater collaboration with State and Tribal Royalty Audit Committee members on FOGRMA compliance. This commenter also sought greater royalty accuracy in compliance activities—audits, compliance reviews, and data mining. Commenters sought an increase in civil penalties to pursue policy goals of decreasing emissions and reducing climate change. Other commenters requested that ONRR reconsider the definition of ''knowingly or willfully'' in § 1241.3(b). Commenters also sought to amend § 1241.60(c), which allows ONRR to consider ''any information'' including informal email communications, to evaluate whether violations were committed ''knowingly or willfully.'' One commenter requested ONRR adopt a regulation regarding the posting of civil penalties and enforcement actions on social media. ONRR appreciates these comments and may consider them in the future; however, these comments were beyond the scope of the 2020 Proposed Rule and unrelated to the proposed amendments to §§ 1241.11(b)(5), 1241.70(b), and the proposed addition of § 1241.70(d). Accordingly, ONRR is not implementing policies to enact the proposals in these out-of-scope comments in this final rule.

A. Civil Penalties for Payment Violations

The 2016 Civil Penalty Rule added § 1241.70(b) to clarify that, with respect to reporting violations or other violations arising from a failure to provide required data to ONRR, ONRR does not consider the monetary impact of the violation in the severity analysis performed as part of the determination of the amount of a penalty. The 2016 addition of § 1247.70(b) was meant to distinguish between how ONRR treats non-payment violations from payment violations, the latter of which include a failure to pay royalties, rent, interest, fees, or other demands or obligations. It was ONRR's intent in the 2016 Civil Penalty Rule to clarify that ONRR considers the monetary impact in its severity analysis only when a company's conduct involves a payment violation. This is in addition to ONRR's consideration—in all violation types—of the company's history of noncompliance and business size. Specifically, § 1241.70(b), as added in 2016, states that ONRR ''will not consider the royalty consequence of the underlying violation when determining the amount of the civil penalty for a violation under § 1241.50 or § 1241.60(b)(1)(ii) or (b)(2).'' The clarification was necessary because most violations arising under § 1241.50 (curable violations) are reporting violations and require correction regardless of amount of money that may be owed because of the reporting violation. Because of the need to correct violations regardless of the monetary amount, reporting violations are similar to failure to permit audit violations under § 1241.60(b)(1)(ii) and knowing or willful submission or maintenance violations under § 1241.60(b)(2).

In the 2020 Proposed Rule, ONRR attempted to further clarify how it treats payment versus non-payment violations with the proposed amendment of § 1241.70(b), stating that ONRR will consider the unpaid, underpaid, or late payment amount in the severity analysis for payment violations only.

In the 2020 Proposed Rule, ONRR explained that adopting the proposed amendment to § 1241.70(b) is consistent with E.O. 13892 which, among the general goals of transparency and fairness in agency civil penalty practices, requires agencies to avoid ''unfair surprise'' and apply ''standards of conduct that have been publicly stated.'' *See* E.O. 13892, Section 4.

ONRR further stated that it would not consider the monetary amount for non-payment obligations. To provide more clarity, ONRR is expressly stating that it considers the monetary impact for all payment violations, which includes payment violations arising under § 1241.50. In contrast, the 2016 Civil Penalty Rule only indicated that ONRR could consider the royalty impact for the knowing or willful failure to pay royalty violations under § 1241.60(b)(1)(i), which was the only violation type left once ONRR excluded ''violation under § 1241.50 or § 1241.60(b)(1)(ii) or (b)(2).''

ONRR believes that the proposed amendment furthers the goal of clarifying its civil penalty practices in order to make those practices transparent. Specifically, the proposed amendment adds a sentence clarifying that ONRR will consider the monetary impact of a penalty only when a company's conduct involves a payment violation.

Comments on the Proposed Amendment

Public Comment: ONRR received comments supporting the proposed amendment to § 1241.70(b). These commenters generally agreed that ONRR should consider the monetary consequence of payment violations and supported the proposed change to § 1241.70(b). Commenters support the reasons ONRR outlined in the 2020 Proposed Rule and noted that the proposed amendment would ensure proportionality of the penalty when compared to the amount of the unpaid, underpaid, or late paid royalty obligation at issue. Generally, the commenters supported the amendment, arguing that penalties issued for payment violations should not be excessive in comparison to the monetary impact of the underlying payment violation. To be clear, as stated above, ONRR considers the unpaid, underpaid, or late-paid amount when it considers penalties for payment violations arising under § 1241.50 and for knowing or willful failure to pay royalty violations under § 1241.60(b)(1)(i).

ONRR Response: ONRR appreciates the comments supporting the proposed amendment to 30 CFR 1241.70(b). ONRR agrees that the 2020 Proposed Rule provides greater transparency in ONRR's civil penalty practice.

After careful consideration, including for the reasons explained above, ONRR is adopting the proposed amendment to § 1241.70(b) in full.

B. Consideration of Aggravating and Mitigating Circumstances When ONRR Assesses a Civil Penalty

Section 1241.70(a) identifies three factors that ONRR must consider in assessing the amount of a civil penalty. However, this section, as currently written, does not include language permitting ONRR to consider aggravating and mitigating circumstances. In the 2020 Proposed Rule, ONRR proposed to add new paragraph (d) to § 1241.70 stating that ONRR may adjust the penalty amount upward or downward in a failure to correct civil penalty (''FCCP'') or immediate liability civil penalty (''ILCP'') if ONRR finds aggravating or mitigating circumstances to exist.

Consistent with E.O. 13892's transparency and fairness directives, the proposed addition of § 1241.70(d) explains that ONRR may consider aggravating and mitigating circumstances when calculating the amount of a civil penalty. The amendment also aims to reduce or eliminate any undue surprise for companies in instances where ONRR deviates from the standard penalty assessment because of those circumstances. Additionally, the proposed addition of § 1241.70(d) accomplishes the implementation of the approach directed by E.O. 13924 and E.O. 13892.

Comments on the Proposed Amendment

Public Comment: ONRR received comments supporting the proposed amendment to add § 1241.70(d). The commenters generally supported greater transparency in ONRR's assessment of penalties. The commenters agreed that ONRR should consider aggravating or mitigating circumstances in certain cases and therefore support the addition of § 1241.70(d). Some commenters who supported this amendment did so because it establishes flexibility in ONRR's civil penalty calculations in order to arrive at penalty amounts that are proportionate to the underlying monetary violation.

Some commenters responded to ONRR's request for comment on circumstances that ONRR should consider to be aggravating and mitigating. Some commenters supported the inclusion of an aggravating circumstance to consider ''intentional misconduct to reduce royalties otherwise due.'' Some commenters suggested including additional mitigating factors, such as innocent reporting mistakes, lack of a history of prior violations of the same or more severe violations, and actions that adhere to guidance from ONRR. One commenter suggested that the proposed provision under § 1241.70(d)(iii), which considers good faith efforts to comply with formal or informal agency guidance, should constitute grounds for eliminating any civil penalty from being assessed. Lastly, another commenter suggested that the list of aggravating and mitigating circumstances is not exhaustive and may lend to ambiguity and agency burden in making case-by-case determinations.

ONRR Response: ONRR appreciates and agrees with the comments supporting the proposed amendment to § 1241.70(d). ONRR acknowledges that the list of circumstances in the proposed regulatory language is not all-inclusive. Although the list is not exhaustive, it provides further transparency and predictability with respect to existing practices. ONRR possesses both the authority and expertise to consider aggravating or mitigating circumstances outside of the list proposed under § 1241.70(d). These considerations do not create an undue or excessive burden to the agency, as one commenter suggested.

Some commenters recommended the inclusion of additional aggravating or mitigating circumstances. ONRR disagrees with the suggestion to include an aggravating circumstance of intentional misconduct to reduce royalties otherwise due, because that circumstance is considered in the standard penalty amount for non-curable violations described under 30 U.S.C. 1719(c) and (d) and 30 CFR 1241.60. ONRR also disagrees with the suggestion to include a mitigating circumstance of innocent reporting mistakes, because that circumstance is considered in the standard penalty amount of curable violations described under 30 U.S.C. 1719(a) and (b) and 30 CFR 1241.50. Consideration of innocent reporting mistakes as a mitigating circumstance would de-emphasize and undermine the importance of correcting the mistakes promptly as required by an ONRR notice of noncompliance (''NONC''). And receipt of an ONRR NONC is a condition precedent to ONRR's assessment of a penalty for a failure to correct an innocent reporting mistake. ONRR also disagrees with the suggestion to include a mitigating circumstance of a lack of a prior violation. ONRR's standard penalty

amounts already account for a lack of a history of noncompliance. Finally, ONRR is making no change in response to the suggestion to modify the language that no penalties are appropriate when a violator makes a good faith effort to comply with formal or informal agency guidance. Consistent with its exercise of prosecutorial discretion, ONRR retains the discretion to evaluate mitigating circumstances on a case-by-case basis and conclude that the presence of mitigating circumstances can justify resolving a matter without penalty. *See Heckler* v. *Chaney,* 470 U.S. 821 (1985). In exercising its prosecutorial discretion, ONRR will be guided by the principles reflected in E.O. 13924, ''Regulatory Relief to Support Economic Recovery,'' E.O. 13892, ''Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,'' E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' and S.O. 3385, ''Enforcement Priorities.'' Thus, ONRR already has the discretion to determine that no penalties are appropriate when sufficient mitigating circumstances are present, including a good faith effort to comply with formal or informal agency guidance. Because ONRR intended for the proposed amendment to provide transparency in how it calculates penalty amounts and did not intend to address when it would exercise its prosecutorial discretion, ONRR finds the language regarding guidance in the proposed provision under § 1241.70(d)(2)(iii) sufficient.

ONRR appreciates the comments supporting and seeking the modification to the proposed amendment to § 1241.70(d). After careful consideration, and for the reasons explained above, ONRR is adopting the proposed addition at § 1241.70(d) in full.

C. Forfeiture of a Stay of the Civil Penalty Accrual Under Limited Circumstances

ONRR's 2016 Civil Penalty Rule added § 1241.11(b)(5) to give an ALJ the ability to conclude that a petitioner had raised a frivolous defense and therefore should forfeit the benefit of a previously-granted stay of the accrual of the amount of the civil penalty. Specifically, the 2016 Civil Penalty Rule states that ''[n]otwithstanding paragraphs (b)(1), (2), (3), and (4) of this section, if the ALJ determines that your defense to a Notice is frivolous, and a civil penalty is owed, you will forfeit the benefit of the stay, and penalties will be calculated as if no stay had been granted.''

In the 2020 Proposed Rule, ONRR proposed to amend § 1241.11 by removing paragraph (b)(5). The proposed amendment followed the U.S. District Court for the District of Wyoming's decision to vacate § 1241.11(b)(5). *See API,* 366 F. Supp. 3d at 1309–1311. Although the Tenth Circuit subsequently vacated the District Court's decision on other grounds, ONRR finds the District Court's analysis relevant in its determination to remove paragraph (b)(5) and the mission of ONRR's overall civil penalty program.

The District Court found ''unpersuasive'' the argument that due process rights are implicated by § 1241.11(b)(5), but still found the provision ''an abuse of discretion and not in accordance with law.'' *API,* 366 F. Supp. 3d at 1310. Most problematic to the District Court was the fact that it provided ONRR with ''a second bite'' to argue a defense was frivolous after an optional chance to oppose the stay and ''the potential loss'' if a stay were nullified was significant. *Id.* This analysis is relevant because if a person obtains standing to challenge this provision in the future, ONRR expects it will be invalidated if challenged in the District of Wyoming.

The IBLA, Office of Hearings and Appeals Division's procedural requirements under 43 CFR 4.21(b) establish that ''the appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted.'' If the ALJ grants a stay, the accrual of additional penalty amounts would be paused until there is an ALJ decision in ONRR's favor, coupled with a determination that the violation is ongoing. *See* 30 CFR 1241.11(a) and (b). By adopting the amendment, ONRR returns to its pre-2016 Civil Penalty Rule practice whereby penalties would not accrue during the period of a stay, even if an ALJ subsequently finds a petitioner's defense to the penalty to be frivolous.

ONRR believes § 1241.11(b)(5) is duplicative because ONRR may still safeguard against a frivolous defense by opposing a petition for a stay under § 1241.11(b)(2)(i). As the District Court stated, ''If ONRR believes a stay is not warranted, including the argument that the defense is frivolous, ONRR has the right to, and should file a response to the stay petition rather than wait on an outcome at some undetermined later date and then assert frivolity.'' *API,* 366 F. Supp. 3d at 1310. ONRR concurs with the District Court that ONRR has the right to oppose a frivolous stay petition and that it should do so. Additionally, removing § 1241.11(b)(5) would be consistent with executive orders seeking to increase transparency and reduce undue surprise in penalty assessments. Further, by removing § 1241.11(b)(5), ONRR still retains a remedy against frivolous cases, while eliminating unnecessary regulations.

ONRR anticipates that it will be rare that a frivolous defense is both more persuasive than ONRR's response to a petition for stay and ultimately sufficient to convince the ALJ that the petitioner's defense to the penalty was frivolous. ONRR believes that removing § 1241.11(b)(5), in light of the District Court's analysis, remains consistent with the purpose of assessing civil penalties, which is to encourage compliance and discourage noncompliance, and also is consistent with E.O. 13892 and the policies reflected in that order.

Comments on the Proposed Amendment

Public Comment: Some commenters supported the removal of § 1241.11(b)(5). The commenters that supported the amendment fell into two general categories. First, commenters generally supported the reasons described in the 2020 Proposed Rule. Second, commenters supported the amendment because of due process concerns, including the possibility that § 1241.11(b)(5) may discourage a petitioner from exercising its due process rights. ONRR also received one comment suggesting that the 2020 Proposed Rule did not provide sufficient reasons for its repeal of an ALJ's ability to revoke a stay of accrual upon determination of a frivolous claim. The commenters did not advocate for rejecting or modifying the amended regulations as proposed. However, the commenter asserted that the Tenth Circuit's vacatur of the District Court of Wyoming's decision is an insufficient rationale to remove the provisions found in § 1241.11(b)(5).

ONRR Response: ONRR appreciates and agrees with the comments supporting the proposed amendment to § 1241.11(b)(5). ONRR also appreciates this opportunity to afford additional clarity and rationale in the proposed removal of this provision, which is to increase transparency, reduce undue surprise, remove an unnecessary regulation, and still have sufficient protection from frivolous defenses to civil penalties, as further discussed above.

ONRR appreciates the comments supporting the proposed amendment to § 1241.11(b)(5) and the comment indicating that additional rationale is needed to remove this provision. After careful consideration, and for the reasons and additional rationale

explained above, ONRR is adopting the proposed amendment to remove § 1241.11(b)(5).

IV. Non-Substantive Corrections

Through this final rule, ONRR is also making non-substantive corrections to the following sections: §§ 1206.108, 1206.148, 1206.252, 1206.258, 1206.261, 1206.268, 1206.452, 1206.458, 1206.460, 1206.461, 1206.467, and 1206.468. Corrections include:

1. ONRR reports to the Assistant Secretary for Policy, Management, and Budget. This final rule replaces instances of the words ''Assistant Secretary'' with ''Assistant Secretary for Policy, Management and Budget'' to clarify and specify the correct Assistant Secretary within the Department.

2. 30 CFR 1206.252 and 1206.452 are titled ''How do I calculate royalty value for coal that I or my affiliate sell(s) under an arm's-length or non-arm's-length contract?'' In addition to addressing the valuation of coal that is sold, these sections also address the valuation of coal that a lessee or its affiliate uses for the generation and sale of electricity. *See* §§ 1206.252(b) and 1206.452(b). This final rule eliminates any requirement that coal be based on the price received through electricity sales. Even after that amendment, both sections still address the valuation of coal that is used for the generation and sale of electricity, and thus not sold. Specifically, the sections require the lessee to propose a method to ONRR for the valuation of the coal and further require the lessee to use its proposed valuation method until ONRR makes a determination. *Id.* Since both sections also address situations when coal is not sold, ONRR is amending the title of §§ 1206.252 and 1206.452 as part of this final rule to read: ''How do I calculate royalty value for coal?'' This amendment conforms the title of the sections to the content thereof.

3. 30 CFR 1206.252(a) and 1206.452(a) provide that the value of coal generally is the ''gross proceeds accruing to you or your affiliate under the first arm's-length contract'' less certain allowances. Sections 1206.252(a)(1)–(2) and 1206.452(a)(1)–(2) state that this requirement to use gross proceeds to value the coal applies when a lessee sells the coal under an arm's-length contract or the lessee sells or transfers the coal to its ''affiliate or another person under a non-arm's-length contract, and that affiliate or person, or another affiliate of either of them, then sells the coal under an arm's-length contract.'' Since the first arm's-length sale of the coal may be by a person other than the lessee or its affiliate under §§ 1206.252(a)(1)–(2) and 1206.452(a)(1)–(2), ONRR is amending §§ 1206.252(a) and 1206.452(a) to reflect that the gross proceeds used to value the coal is the ''gross proceeds accruing to you, your affiliate, or another person under the first arm's-length contract'' less allowances.

4. The 2020 Proposed Rule also proposed amendments to change certain instances of ''may'' to ''must'' in §§ 1206.252(b)(2) and 1206.452(b)(2). The paragraphs apply when a lessee has proposed a valuation method to ONRR for consideration and instruct that the lessee ''may'' use the method it proposed until ONRR issues a determination. ONRR intended that the lessee would use its proposed method while its proposal was pending with ONRR. A change from ''may'' to ''must'' better reflects that intent. For the same reasons, ONRR is making the same change from ''may'' to ''must'' in §§ 1206.111(d)(2); 1206.141(e)(2)(ii); 1206.142(f)(2)(ii); 1206.153(d)(1); 1206.160(c)(1); 1206.261(c)(1); 1206.268(c)(1); 1206.461(c)(1); and 1206.468(c)(1) (reporting a washing allowance using a proposed method).

5. This final rule corrects the 2020 Proposed Rule's description of some leases as ''Federal'' when they should have been identified as ''Indian'' in §§ 1206.460 and 1206.467.

6. ONRR is correcting a cross-reference in § 1206.458(h) to properly refer to ''§ 1206.459'' rather than ''§ 1206.259,'' as was initially published in the 2020 Proposed Rule.

V. Economic Analysis

ONRR shares the Department's statutory mandate to conserve and encourage domestic production of natural resources and develop regulations to achieve these goals. BOEM and BLM have provided information and documentation to ONRR demonstrating that the dynamics of the domestic energy markets have changed since the 2016 Valuation Rule was published. In the years leading up to the 2016 Valuation Rule, domestic energy commodity prices were nearly double those leading up to this rule. Given this, GOM assets have lost value and leasing is less attractive than previously. BOEM information shows reserves in the GOM are declining and GOM bidding, active leases, rig counts, and wells spud have declined significantly since ONRR's Economic Analysis in the 2016 Valuation Rule.

In the 2020 Proposed Rule, ONRR summarized the estimated changes to royalties and regulatory costs that the proposed rule may have on potentially affected groups, including industry, the Federal Government, and State and local governments.

ONRR notes that changes to royalties are transfers that are distinguishable from regulatory costs (or cost savings). The estimated changes in royalties will change both the private cost to the lessee and the amount of revenue collected by the Federal Government and disbursed to State and local governments. The net impact of the amendments adopted by this final rule is an estimated $28.9 million annual decrease in royalty collections. This represents a decrease of less than one-half of one percent of the total Federal oil and gas royalties ONRR collected in 2018. The royalty impact, as evident in the total annual estimate reflected above, does impact the disbursements for the Treasury and for States that are stakeholders and recipients of ONRR's distributions.

ONRR also estimates that the Federal oil and gas industry will face increased annual administrative costs of $2.58 million under this final rule. As discussed below, this is the net impact of various cost increasing and cost saving measures.

ONRR estimates that this rule will have no economic impact on Federal and Indian coal. Please note that, unless otherwise indicated, numbers in the tables in this section are rounded to the nearest thousand, and that the totals may not match due to rounding.

General Comments on the Economic Analysis

Public Comment: Some commenters suggested that the economic analysis is incorrect because it compared the proposed amendments relative to ONRR's current regulations which include the 2016 Valuation Rule amendments, which commenters suggest should have never happened.

ONRR Response: ONRR's current regulations include the 2016 Valuation Rule's amendments. The appropriate baseline for this rule is the rules that are currently in effect. Any change that would be affected by the rule will be measured relative to that baseline.

1. Federal Oil and Gas Industry

This table shows the change in royalties by provision for the first year and each year thereafter:

SUMMARY OF CHANGES TO OIL & GAS ROYALTIES PAID

[Annual]

Rule provision	Net change in royalties paid by lessees
Index-Based Valuation Method Extended to Arm's-Length Gas Sales	$5,620,000
Index-Based Valuation Method Extended to Arm's-Length NGL Sales	21,141,000
High to Midpoint Index Price for Non-Arm's-Length Gas Sales	(4,488,000)
Transportation Deduction Non-Arm's-Length Index-Based Valuation Method	(7,121,000)
Extraordinary Processing Allowances	(11,131,000)
Allowances for Certain OCS Deepwater Gathering Costs	(32,900,000)
Total	(28,879,000)

ONRR estimated the administrative cost savings from optional use of the index-based valuation method for arm's-length gas and NGL sales and administrative costs from the calculation of allowances for certain OCS deepwater gathering. These administrative costs to industry totaled approximately $2.58 million annually.

SUMMARY OF ANNUAL ADMINISTRATIVE IMPACTS TO INDUSTRY

Rule provision	Cost (cost savings)
Administrative Cost Savings for Index-Based Valuation Method for Gas & NGLs	(1,354,000)
Administrative Cost for Allowances for Certain OCS Deepwater Gathering	3,931,000
Total	2,577,000

ONRR also estimated industry will incur a one-time administrative cost savings of $4.5 million from the simplification of reporting processing and transportation allowances associated with the optional use of the index-based valuation method. These costs are only calculated by a lessee once to break out allowed from disallowed costs in reported processing and transportation allowances. Unless there is a significant change in processing and transportation costs, this ratio of allowed to disallowed costs should not change from year to year.

ONE-TIME ADMINISTRATIVE IMPACTS TO INDUSTRY

Rule provision	Cost savings
Administrative Cost-Savings in Lieu of Unbundling Related to Index-Based Valuation Method for Gas & NGLs	$4,520,000

To perform this economic analysis on all the provisions adopted in this final rule, ONRR reviewed royalty data for Federal oil, condensate, residue gas, unprocessed gas, fuel gas, gas lost—flared or vented, carbon dioxide, sulfur, coalbed methane, and natural gas products (product codes 03, 04, 15, 16, 17, 19, 39, 07, 01, 02, 61, 62, 63, 64, and 65) from the five calendar years, 2014–2018. ONRR believes the majority of the reporting used in this analysis was made in compliance with the regulations in place prior to the 2016 Valuation Rule. ONRR used five calendar years of royalty data because this longer time period helped reduce volatility caused by fluctuations in commodity pricing and volume swings. ONRR used this data without adjusting for previous rulemakings because at the time of this analysis, a significant number of lessees and operators had not yet complied with the 2016 Valuation Rule's provisions due to its implementation delays, including the 2017 Repeal Rule, the subsequent 2019 Vacatur, and ONRR's two dear reporter letters providing industry with additional time to come into compliance with the 2016 Valuation Rule following its reinstatement. ONRR adjusted the historical data in this analysis to calendar year 2018 dollars using the Consumer Price Index (all items in U.S. city average, all urban consumers) published by the BLS. ONRR found that some companies aggregate their natural gas volumes from multiple leases into pools and sell that gas under multiple contracts. Lessees report those sales and dispositions using the ''POOL'' sales type code. Only a small portion of these gas sales are non-arm's-length. ONRR used estimates of 10 percent of the POOL volumes in the economic analysis of non-arm's-length sales and 90 percent of the POOL volumes in the economic analysis of arm's-length sales.

Change in Royalty 1: Using Index-Based Valuation Method To Value Arm's-Length Federal Unprocessed Gas, Residue Gas, Fuel Gas, and Coalbed Methane

To estimate the royalty impact of the option to pay royalties using the index-based valuation method, ONRR reviewed the reported royalty data for all Federal gas sales except for non-arm's-length (discussed below), future valuation agreements, and percentage of proceeds (''POP'') sales. ONRR also adjusted the POOL sales down to 90 percent (as described above), which were spread across 10 major geographic areas with active index prices. The 10 areas account for over 95 percent of all Federal gas produced. ONRR assumes the remaining five percent of Federal gas lessees will not elect the index-

based method because areas outside of major producing basins may have infrastructure limitations or limited access to index pricing. The 10 geographic areas are:

Offshore Gulf of Mexico	Big Horn Basin	Green River Basin	Permian Basin	Piceance Basin
Powder River Basin	San Juan Basin	Uinta Basin	Williston Basin	Wind River Basin.

To calculate the estimated impact, ONRR:

(1) Identified the monthly bidweek price index, published by *Platts Inside FERC,* applicable to each area—Northwest Pipeline Rockies for Green River, Piceance and Uinta basins; El Paso San Juan for San Juan basin; Colorado Interstate Gas for Big Horn, Powder River, Williston, and Wind River basins; El Paso Permian for Permian basin; and Henry Hub for the GOM. ONRR determined the price index applicability based on proximity to the producing area and the frequency by which ONRR's audit and compliance staff verify these index prices in sales contracts.

(2) Subtracted the transportation deduction as modified by this rule (detailed in the transportation section below) from the midpoint index price identified in step (1).

(3) Multiplied the royalty volume by the index price identified per region, less the transportation deduction calculated in step (2).

(4) Totaled the reported royalties less allowances reported on the monthly royalty report (form ONRR–2014) and the estimated royalties based on the index-based valuation method calculated in step (3).

(5) Calculated the annual average of reported royalties and estimated index-based royalties calculated in step (4) by dividing by five (number of years of reported data in the analysis).

(6) Subtracted the difference between the totals calculated in step (5).

ONRR anticipates that some lessees will choose to value their royalties on natural gas sales reported to ONRR using this index-based valuation method, saving administrative costs (described in detail below in Cost Savings 1 and Cost Savings 2), while other lessees will continue to calculate and deduct the actual costs they incur. As discussed above in response to a comment, ONRR cannot precisely estimate how many lessees will elect to use the index-based valuation method since many factors, that are currently unquantifiable, will drive a lessee's decision. For the purposes of this analysis and for consistency with previous similar analyses, ONRR assumed that half of lessees would choose the index-based valuation method to value sales and dispositions eligible for the election. ONRR's assumption that half of lessees will choose this method is an attempt to simplify the countless number of factors such as, unpredictable natural gas price changes, simpler accounting methods for lessees, company-specific break-even analysis in producing regions, and unbundling administrative calculations. ONRR also isolated the GOM from the onshore basins listed above because it accounts for approximately 30 percent of the total Federal gas sales used in this analysis, as well as having different complexities, when compared to onshore areas.

ONRR estimates that the index-based valuation method will increase annual royalty payments on arm's-length unprocessed gas, residue gas, fuel gas, and coalbed methane by approximately $5.6 million. This estimate represents an average increase of approximately one percent, or $0.04 per MMBtu, based on an annualized royalty volume of 296,440,024 MMBtu. ONRR chose not to include POP sales in the above method because the sales are reported inclusive of the NGL value and net of transportation and processing costs. To capture the change in value associated with POP contracts, ONRR applied the $0.04 per MMBtu calculated above to the annualized royalty volume for arm's-length percent of proceeds (''APOP'') sales of 158,772,452 MMBtu. ONRR recognizes that it is not accounting for the value of APOP NGLs, however ONRR does not have a reasonable method to break out those components from the available data.

ANNUAL NET CHANGE IN ROYALTIES PAID USING INDEX-BASED METHOD FOR ARM'S-LENGTH GAS SALES

	Gulf of Mexico	Onshore basins	Total
Annualized Reported Royalties	$235,065,000	$541,124,000	$776,189,000
Royalties Estimated using Index-Based Valuation Method	$250,183,000	$536,564,000	$786,747,000
Difference	$15,118,000	($4,560,000)	$10,558,000
Change per MMBtu	$0.18	($0.02)	$0.04
% Change	6%	(1%)	1%
Annualized POP Royalties using Index-Based Valuation Method			$682,000
Annual Net Change in Royalties Paid using Index-Based Valuation Method			$11,240,000
50% of Lessees Choose Index-Based Valuation Method			$5,620,000

Comments on the Analysis of this Amendment

Public Comment: A commenter stated that ONRR's assumption that half of lessees will choose to use the index-based valuation method is unreasonable and incorrectly overstates the estimated change in royalties.

ONRR Response: ONRR acknowledges the uncertainty associated with predicting the number of lessees who may elect to use the index-based valuation methods as the commenter suggests. One major factor a lessee must look at when deciding whether to elect the index-based valuation method for two consecutive years is a prediction of future natural gas pricing. It is difficult

to accurately predict natural gas prices two years into the future at the precise levels required when so many market dynamics are at play. Current domestic natural gas prices have changed compared to recent years and fluctuate up and down regularly. Because of these unknowns and for consistency with previous similar analysis, including the 2016 Valuation Rule, ONRR will continue to use the assumption that half of lessees will adopt this method to provide a baseline of understanding for the impacts of the provision.

Public Comment: ONRR received a comment that claimed in the 2016 Valuation Rule's Preamble, valuing gas transactions based on the first arm's-length sale would result in administrative cost savings of $247,000 for industry. The commenter claims ONRR ignored these 2016 Valuation Rule calculations in the proposed rule when claiming that extending the index-based valuation method to all transactions reduces administrative burden.

ONRR Response: ONRR believes the commenter misunderstood the 2016 Valuation Rule analyses. In both the 2016 Valuation Rule and the 2020 Proposed Rule, using the index-based valuation method creates an administrative cost savings for lessees compared to using the first arm's-length sale made by an affiliate of the lessee.

Change in Royalties 2: Using the Index-Based Valuation Method To Value Arm's-Length Sales of Federal NGLs

Similar to the changes to Federal unprocessed gas, residue gas, pipeline fuel, and coalbed methane, a lessee will have the option to pay royalties on Federal NGLs using an index-based value less a processing allowance defined by regulation and be allowed an adjustment for transportation costs and fractionation costs, which account for the prices realized at the various NGL hubs. ONRR used the same 2014–2018 calendar years for all NGL sales except for non-arm's-length and future valuation agreements. ONRR also adjusted the POOL sales down to 90 percent (as described above). These sales were spread across the same 10 major geographic areas with active index prices for this analysis. To calculate the estimated royalty impact of the index-based valuation method on Federal NGLs, ONRR:

(1) Identified the *Platts Oilgram Price Report Price Average Supplement (Platts Conway) or OPIS LP Gas Spot Prices Monthly (OPIS Mont Belvieu)* for published monthly midpoint NGL prices per component applicable to each area—Platts Conway for Williston and Wind River basins; and OPIS Mont Belvieu non-TET for the Gulf of Mexico, Big Horn, Green River, Permian, Piceance, Powder River, San Juan, and Uinta basins. In ONRR's audit experience, OPIS' prices are used to value NGLs in contracts more frequently at Mont Belvieu, and Platts' prices are used more frequently at Conway.

(2) Calculated an NGL basket price (a weighted average price to group the individual NGL components to a weighted price), which were compared to the imputed price from the monthly royalty report. The baskets illustrate the difference in the gas composition between Conway, Kansas and Mont Belvieu, Texas. The NGL basket hydrocarbon allocations are:

Platts Conway Basket		OPIS Mont Belvieu Basket	
Ethane-propane (EP mix)	40%	Ethane	42%
Propane	28%	Non-TET Propane	28%
Isobutane	10%	Non-TET Isobutane	6%
Normal Butane	7%	Normal Butane	11%
Natural Gasoline	15%	Natural Gasoline	13%

(3) Subtracted the current processing deductions, as well as fractionation costs and transportation costs referenced in the current regulations and published online at *https://www.onrr.gov,* as shown in the table below from the NGL basket price calculated in step (2):

NGL DEDUCTION

[$/gal]

	Gulf of Mexico	New Mexico	Other areas
Processing	$0.10	$0.15	$0.15
Transportation and Fractionation	0.05	0.07	0.12
Total *($/gal)*	0.15	0.22	0.27

(4) Multiplied the royalty volume by the index price identified for each region, less the NGL deduction calculated in step (3).

(5) Totaled the royalty value less allowances reported on the monthly royalty report, and the estimated royalties based off the index-based valuation method calculated in step (4).

(6) Calculated the annual average of reported royalties and estimated index-based royalties calculated in step (5) by dividing by five (number of years in this analysis).

(7) Subtracted the difference between the totals calculated in step (6).

Because ONRR assumed that half of lessees would choose this option for eligible dispositions, ONRR reduced the total estimate by 50 percent in the following table. ONRR estimates that this change will increase annual royalty payments by approximately $21.1 million. This estimate represents an average increase of approximately 17 percent or $0.0894 per gallon, based on an annualized royalty volume of 475,257,250 gallons [($42,281,000/475,257,250 gal) = $0.0894/gal].

ANNUAL NET CHANGE IN ROYALTIES PAID USING INDEX-BASED VALUATION METHOD FOR ARM'S-LENGTH NGL SALES

	Gulf of Mexico	New Mexico	Other areas	Total
Annualized Reported Royalties	$74,438,000	$67,637,000	$70,072,000	$212,147,000
Royalties Estimated using Index-Based Valuation Method	$77,068,000	$66,397,000	$110,962,000	$254,428,000
Annual Net change in Royalties Paid using Index-Based Valuation Method for NGLs	$2,630,000	($1,240,000)	$40,891,000	$42,281,000
Change per Gallon	$0.0174	($0.0081)	$0.2439	$0.0894
% Change	3%	(2%)	37%	17%
50% of Lessees Choose the Index-Based Valuation Method				$21,141,000

Change in Royalties 3: Using the Average Index Price Versus the Highest Published Index Price To Value Non-Arm's-Length Federal Unprocessed Gas, Residue Gas, Coalbed Methane, and NGLs

As noted above, the index-based valuation method will change from using the *highest* published price for a specific index-pricing point to using the *average* published bidweek price for the index-pricing point. To estimate the royalty impact of this change from the highest published index price to the average published bidweek price for the index-based valuation method, ONRR used reported royalty data using non-arm's-length (''NARM'') sales and 10 percent of the POOL sales type codes based on the assumption above in the same 10 major geographic areas with active index-pricing points, also listed above.

To calculate the estimated impact, ONRR:

(1) Identified the *Platts Inside FERC* published monthly midpoint and high prices for the index applicable to each area— Northwest Pipeline Rockies for Green River, Piceance and Uinta basins; El Paso San Juan for San Juan basin; Colorado Interstate Gas for Big Horn, Powder River, Williston, and Wind River basins; El Paso Permian for Permian basin; and Henry Hub for the Gulf of Mexico.

(2) Multiplied the royalty volume by the published index prices identified for each region.

(3) Totaled the estimated royalties using the published index prices calculated in step (2).

(4) Calculated the annual average index-based royalties for both the high and volume-weighted-average prices calculated in step (3) by dividing by five (number of years in this analysis).

(5) Subtracted the difference between the totals calculated in step (4).

As explained in response to a comment above, ONRR assumes that half of lessees would choose this method, and ONRR therefore reduced the total estimate by 50 percent in the following table. ONRR estimates that the result of this change is a decrease in annual royalty payments of approximately $4.5 million. This estimate represents an average decrease of approximately three percent or ten cents ($0.10) per MMBtu, based on an annualized royalty volume of 93,301,478 MMBtu (for NARM and 10 percent POOL reported sales type codes).

ANNUAL CHANGE IN ROYALTIES PAID DUE TO HIGH TO MIDPOINT MODIFICATION FOR NON-ARM'S-LENGTH SALES OF NATURAL GAS USING INDEX-BASED VALUATION METHOD

	Gulf of Mexico	Onshore basins	Total
Royalties Estimated Using High Index Price	$107,736,000	$198,170,000	$305,907,000
Royalties Estimated Using Published Average Bidweek Price	107,448,000	189,483,000	296,931,000
Annual Change in Royalties Paid due to High to Midpoint Change	(288,000)	(8,687,000)	(8,975,000)
Change per MMBtu	(0.01)	(0.14)	(0.10)
% Change	0%	(5%)	(3%)
50% of Lessees Choose the Index-Based Method			(4,488,000)

Change in Royalties 4: Modifying the Index-Based Valuation Method Transportation Deduction Used To Value Non-Arm's-Length Federal Unprocessed Gas, Residue Gas, Coalbed Methane, and NGLs

This rulemaking updates the transportation deductions applicable to the non-arm's-length index-based valuation method to reflect changes in industry's transportation contracts terms and more recent allowance data reported to ONRR. To estimate the royalty impact of the modification to the transportation deduction, ONRR used reported royalty data using NARM and 10 percent of the POOL sales type codes from the same 10 major geographic areas with active index-pricing points listed above.

To calculate the estimated impact, ONRR:

(1) Identified appropriate areas using *Platts Inside FERC* index prices (*see* list above).

(2) Calculated the transportation deduction as published in the current regulations and the deduction outlined in the table below for each area identified in step (1).

TRANSPORTATION DEDUCTION OF INDEX-BASED VALUATION METHOD FOR NON-ARM'S-LENGTH GAS

[$/MMBtu]

Element	2016 valuation rule	2020 valuation reform and civil penalty rule
Gulf of Mexico %	5%	10%
Gulf of Mexico Low Limit	$0.10	$0.10
Gulf of Mexico High Limit	$0.30	$0.40
Other Areas %	10%	15%
Other Areas Low Limit	$0.10	$0.10
Other Areas High Limit	$0.30	$0.50

(3) Multiplied the royalty volume by the applicable transportation deduction identified for each area calculated in step (2).

(4) Totaled the estimated royalty impact based off both transportation deductions calculated in step (3).

(5) Calculated the annual average royalty impact for both methods calculated in step (4) by dividing by five (number of years in this analysis).

(6) Subtracted the difference between the totals calculated in step (5).

Because ONRR estimates that half of lessees will choose this option, ONRR reduced the total estimate by 50 percent. Please note that the figures in the table below represent the difference between the current transportation adjustment percentage found in the 2016 Valuation Rule and the percentage under the index-based valuation method in the 2020 Proposed Rule. ONRR estimates the change will result in a decrease in annual royalty payments of approximately $7.1 million. This estimate represents an average decrease in royalties paid of approximately 65 percent or 15 cents per MMBtu, based on an annualized royalty volume of 93,301,478 MMBtu (for NARM and 10 percent POOL reported sales type codes).

ANNUAL CHANGE IN ROYALTIES DUE TO TRANSPORTATION DEDUCTION MODIFICATION FOR NON-ARM'S-LENGTH SALES OF NATURAL GAS

	Gulf of Mexico	Other areas	Total
Current Regulations Transport Deduction	$5,387,000	$16,375,000	$21,762,000
Estimate using new Transport Deduction	10,346,000	25,659,000	36,005,000
Difference	4,959,000	9,284,000	14,243,000
Change per MMBtu	0.15	0.15	0.15
50% of Lessees Choose the Index-Based Valuation Method			7,121,000
Annual Change in Royalties Due to Transportation Deduction Modification			(7,121,000)

Clarifying the description of the $0.04/MMBtu and $0.09/MMBtu: In the 2020 Proposed Rule, ONRR noted the estimated changes in royalties under the proposed index-based valuation method. Specifically, the preamble of the 2020 Proposed Rule (85 FR 62054, at 62058) provided, ''As we outline in the Procedural Matters section, overall royalty values under the 2016 Valuation Rule's index-based valuation method are still around $0.04/MMBtu higher than the prices reported to ONRR for arm's-length sales. In the 2020 Proposed Rule, the average bidweek price would result in around $0.09 less per MMBtu.'' This section was unclear, and should have provided, ''As outlined in the Procedural Matters section, overall royalty values under the *2020* Valuation Rule's index-based valuation method are around $0.04/MMBtu higher than the prices reported to ONRR for arm's-length sales. *For non-arm's-length dispositions valued under the proposed rule's index-based valuation method,* using the average bidweek price *instead of the bidweek high price* would result in around $0.09 less per MMBtu'' (emphasis added). This clarification does not affect the economic analyses conducted in the 2020 Proposed Rule and this final rule.

No Change in Royalties 1: Transportation Allowances in Excess of 50 Percent of the Royalty Value Prior to Allowances for Federal Gas

In certain scenarios, a lessee may incur costs to transport Federal gas at a cost that exceeds the regulatory limit of 50 percent of the gas's royalty value prior to allowances. This rule does not provide a lessee the ability to submit a request to ONRR to exceed the 50 percent limit. The annual number of requests to exceed allowance limits submitted by lessees to ONRR has decreased since the similar analysis was performed for the 2016 Valuation Rule. To estimate the change in royalties associated with the proposed amendment, ONRR first identified all gas transportation allowances reported on the monthly royalty reports exceeding the 50 percent limit for calendar years 2014–2018. Next, ONRR calculated the transportation allowance claimed for each royalty line compared to what the transportation allowance would have been at the 50 percent limit. ONRR then calculated annual totals and averaged them over 5 years. The result in the proposed rule was an estimated annual decrease in royalties paid by industry of approximately $279,000 per year. ONRR is not adopting this regulation change. There is no change in estimated royalties.

No Change in Royalties 2: Transportation Allowances in Excess of 50 Percent of the Royalty Value Prior to Allowances for Federal Oil

Similar to the section above, a lessee may incur costs to transport Federal oil that exceed the regulatory limit of 50 percent of the oil's royalty value prior

to allowances. This rule does not provide a lessee the ability to request to exceed that limit. The annual number of requests to exceed allowance limits submitted by lessees to ONRR has decreased since the similar analysis was performed for the 2016 Valuation Rule. To estimate the change in royalties associated with the proposed amendment, ONRR first identified all oil transportation allowances reported on the monthly royalty report that exceeded the 50 percent limit for calendar years 2014–2018. As above, ONRR calculated the transportation allowance claimed for each royalty line compared to what the transportation allowance would have been at the 50 percent limit. ONRR then calculated annual totals and averaged them over five years. The result in the proposed rule was an annual estimated decrease in royalties paid by industry of approximately $11,000 per year. ONRR is not adopting this regulation change. There is no change in estimated royalties.

No Change in Royalties 3: Processing Allowances in Excess of 66⅔ Percent of the Royalty Value of Federal NGLs Prior to Allowances

Similar to the transportation allowance amendments, a lessee may incur costs required to process gas that exceed the regulatory limit of 66⅔ percent of the royalty value of the NGLs prior to allowances. This rule does not provide a lessee the ability to request to exceed that limit. The annual number of requests to exceed allowance limits submitted by lessees to ONRR has decreased since a similar analysis was performed for the 2016 Valuation Rule. To estimate the change in royalties associated with the proposed amendment, ONRR completed two separate calculations.

First ONRR identified all NGL processing allowances reported on the monthly royalty report that exceeded the 66⅔ percent limit for calendar years 2014–2018. Next, ONRR calculated the processing allowance claimed for each royalty line compared to what the processing allowance would have been at the 66⅔ percent limit. ONRR then calculated annual totals and averaged them over five years. The result in the proposed rule was an annual estimated decrease in royalties paid by industry of approximately $135,000 per year.

ONRR then calculated the estimated impact for processing allowances exceeding the 66⅔ percent limit for POP contract sales. ONRR assumed the lessee retains 85 percent of the value of the residue and NGLs and the processor retains 15 percent. ONRR then assumed that 60 percent of the processor's portion was allocable to transportation and the remaining 40 percent was processing. The total estimated processing allowance attributable to POP sales was $62,390,000. The estimated processing allowance limit attributable to POP sales was $137,316,000. ONRR found the potential processing allowances did not exceed the 66⅔ percent limit and there would be no additional change in royalties from POP contract sales. ONRR is not adopting this regulation change. There is no change in estimated royalties.

Comments on the Analysis of This Amendment

Public Comment: One commenter identified to ONRR that its assumption to use a 70/30 split to represent POP contracts when estimating processing allowances in excess of 66⅔ percent limit contradicted other ONRR materials and examples used in trainings and on the ONRR website.

ONRR Response: ONRR reviewed several reference documents and further researched the appropriate split for these POP contracts and ONRR agrees with the commenter. ONRR acknowledges that its previous analysis did not adequately account for POP contracts and breaking out transportation and allowances from the fee in ONRR's assumptions. ONRR revised its POP contract analysis of this impact in this provision. After using the 85/15 POP contract split, as well as applying the 60/40 split for the processor's portion being allocable to processing versus transportation, the estimated allowances no longer exceed the 66⅔ percent threshold and the estimated royalty impact is eliminated. This change is reflected below.

Change in Royalties 5: Extraordinary Gas Processing Cost Allowances for Federal Gas

This rule allows a lessee to request an extraordinary processing cost allowance. Using the approvals ONRR granted prior to the 2016 Valuation Rule, ONRR identified the 127 leases claiming an extraordinary processing allowance for residue gas, sulfur, and CO_2 for calendar years 2014–2018. The total processing costs are reported across all three products for these unique situations. For these leases, ONRR retrieved all form ONRR–2014 royalty lines with a processing allowance reported by lessees. For CO_2 and sulfur produced from these leases, ONRR then calculated the annual average processing allowances which exceeded the 66⅔ percent limit and found that only two years in the analysis showed that the total allowances exceeded the 66⅔ percent limit. Under these unique approved exceptions, the processing allowances are also reported against residue gas. To account for this, ONRR added the average annual processing allowances taken for those same leases for residue gas. Based on these calculations, ONRR estimates this change will result in a decrease in annual royalty payments of approximately $11.1 million.

ESTIMATED ANNUAL CHANGE IN ROYALTIES PAID

Annual Average Sulfur allowances in excess of 66⅔%	($348,000)
Annual Average Residue Gas Allowance	(10,783,000)
Estimated Impact on Royalties	(11,131,000)

Change in Royalties 6: Transportation Allowances for Certain OCS Gathering for Federal Oil and Gas

The Deepwater Policy was in effect from 1999 until January 1, 2017. Under the Deepwater Policy, ONRR allowed a lessee to treat certain expenses for subsea gathering as transportation expenses and to deduct a portion of those costs from its royalty payments. The 2016 Valuation Rule rescinded the Deepwater Policy. To analyze the impact to industry of this regulation amendment, ONRR used data from the BSEE's Technical Information Management System database to identify 113 current subsea pipeline segments, and potentially 169 eligible leases, which may qualify for an allowance under the Deepwater Policy. ONRR assumed that all segments were similar (in other words, no adjustments were made to account for the size, length, or type of pipeline) and considered only the pipeline segments that were in active status and supporting leases in producing status. To determine the range (shown in the tables at the end of this section as low, mid, and high estimates) of changes to

royalties, ONRR estimates a 15 percent error rate in the identification of the 113 eligible pipeline segments. This resulted in a range of 96 to 130 eligible pipeline segments. ONRR's audit data is available for 13 subsea gathering segments serving 15 leases covering time periods from 1999 through 2010. ONRR used the data to determine an average initial capital investment in the pipeline segments. ONRR used the initial capital investment total to calculate depreciation and a return on undepreciated capital investment (also known as the return on investment or ''ROI'') for eligible pipeline segments and calculated depreciation using a 20-year straight-line depreciation schedule.

ONRR calculated return on investment using the average BBB Bond rate (the BBB Bond rating is a credit rating used by the Standard & Poor's credit agency to signify a certain risk level of long-term bonds and other investments) for January 2018. ONRR based the calculations for depreciation and ROI on the first year a pipeline was in service. From the same audit information, ONRR calculated an average annual operating and maintenance (''O&M'') cost. ONRR increased the O&M cost by 12 percent to account for overhead expenses. ONRR then decreased the total annual O&M cost per pipeline segment by nine percent because, on average, nine percent of wellhead production volume is water which much be excluded from any calculation of a permissible deduction. ONRR chose these two percentages based on knowledge and information gathered during audits in the GOM. Finally, ONRR used an average royalty rate of 14 percent, which is the volume-weighted-average royalty rate for the non-Section 6 (*See* 43 U.S.C. 1335(a)(9)) leases in the Gulf of Mexico. Based on these calculations, the average annual allowance per pipeline segment during the period when ONRR's audit data was collected was approximately $233,000. ONRR used this value to calculate a per lease cost based on the number of eligible leases during the same period. ONRR then applied this value to the current number of eligible leases. This represents the estimated amount per lease that ONRR would allow a lessee to take as a transportation allowance based on the Deepwater Policy. To calculate a range for the total cost, ONRR multiplied the average annual allowance by the low (96), mid (113), and high (130) number of eligible segments. The low, mid, and high annual allowance estimates are $35 million, $41.1 million, and $47.3 million, respectively.

Of the eligible leases, 68 of 169, or about 40 percent, will qualify for a deduction under the proposed amendment. But due to varying lease terms, multiple royalty relief programs, price thresholds, volume thresholds, and other factors, ONRR estimated that half of the 68, or 34, leases eligible for royalty relief (20 percent of 169) have received royalty relief. ONRR chose to estimate half of lessees for consistency with previous rulemaking analyses and to provide a basis for understanding of this change. ONRR decreased the low, mid, and high annual cost-to-industry estimates by 20 percent. The table below shows this section's estimated royalty impact.

ANNUAL ESTIMATED COST SAVINGS TO ALLOW DEEPWATER GATHERING

	Low	Mid	High
Royalty Impact	$28,000,000	$32,900,000	$37,900,000

The 2020 Proposed Rule proposed to allow a lessee to request, and ONRR to approve, applications for gathering-as-transportation principles in water depths of 200 meters and shallower, if there is a subsea completion and the other requirements of the regulations are met. This provision was a part of the Deepwater Policy from its inception in 1999 until expressly revoked by the 2016 Valuation Rule. Neither MMS nor ONRR received any application to apply the Deepwater Policy to leases producing from OCS shallow waters. ONRR is not adopting this regulation change. There is no change in estimated royalties associated with gathering in depths 200 meters or shallower.

Comments on the Analysis of This Amendment

Public Comment: ONRR received a comment identifying what the commenter believed was an error in the calculation of the change in royalties related to transportation allowances for Deepwater gathering.

ONRR Response: ONRR appreciates this comment and investigated potential errors in the formulas and data used for the calculation. ONRR revised the analysis for deepwater gathering. During the review of the proposed rule, ONRR found that calculation steps were not explained fully and identified that ONRR's per segment value was overstated by nine percent attributable to the water content. ONRR also identified a miscalculation in the 2020 Proposed Rule that did not accurately incorporate a reduction to account for the 20 percent of leases that were eligible and receiving royalty relief. ONRR revised the explanation of the formula and the calculations accordingly and it is reflected in the section below.

Cost 1: Transportation Allowances for Certain OCS Gathering Costs for Offshore Federal Oil and Gas

This rule, by allowing transportation allowances for deepwater gathering systems, will result in an administrative cost to industry because it requires qualified lessees to monitor their costs and perform calculations. The cost to perform these calculations is significant because industry often hires outside consultants to calculate their subsea transportation allowances. ONRR estimates that each lessee with leases eligible for transportation allowances for deepwater gathering systems will allocate one full-time employee annually to perform the calculation. ONRR used data from the BLS to estimate the hourly cost for industry accountants in a metropolitan area [$42.33 mean hourly wage] with a multiplier of 1.4 for industry benefits to equal approximately $59.26 per hour [$42.33 × 1.4 = $59.26]. Using this fully-burdened labor cost per hour, ONRR estimates that the annual administrative cost to industry would be approximately $3.9 million.

ANNUAL ADMINISTRATIVE COST TO INDUSTRY TO CALCULATE DEEPWATER TRANSPORTATION

	Annual burden hours per company	Industry labor cost/ hour	Companies reporting eligible leases	Estimated cost to industry
Allowance for Certain OCS Deepwater Gathering Costs	2,080	$59.26	32	$3,931,000

No Administrative Cost 1: Request To Exceed Regulatory Allowance Limitation for Transportation and Processing

In the proposed rule ONRR recognized the opportunity for a lessee to request to exceed the regulatory allowance limitation would result in an administrative cost to industry because qualified lessees will spend labor hours filling out the necessary form (form ONRR–4393). ONRR previously completed an Information Collection Request that included review of this ONRR form and identified the number of annual requests ONRR received and the estimated burden hours attributed to those requests each year. Using this information, ONRR calculated the cost to be: [$42.33 × 1.4 (including employee benefits) = $59.26 calculated mean hourly wage] × [19 average annual requests] × [57.68 labor hours to complete and submit form ONRR–4393]. In the proposed rule, ONRR estimated annual administrative costs to industry of approximately $65,000 but those costs will not be realized as ONRR is not adopting this regulation change.

ANNUAL ADMINISTRATIVE COST TO INDUSTRY TO SUBMIT REQUESTS TO EXCEED ALLOWANCE LIMITS

	Annual burden hours per company	Industry labor cost/ hour	Annual number of requests to exceed	Estimated cost to industry
Requests to Exceed Allowances	58	$59.26	19	$65,000

Cost Savings 1: Administrative Cost Savings From Using Index-Based Valuation Method To Value Federal Unprocessed Gas, Residue Gas, Fuel Gas, Coalbed Methane, and NGLs

ONRR expects that industry will realize administrative-cost savings if lessees choose to use the index-based valuation method to value sales of Federal unprocessed gas, residue gas, fuel gas, coalbed methane, and NGLs. A lessee will have price certainty when calculating its royalties—saving time it currently spends on verifying gross proceeds. ONRR estimates that half of lessees will use the index-based valuation method. Further, ONRR estimates that it will shorten the time burden per line reported by 50 percent (to 1.5 minutes per electronic line submission and 3.5 minutes per manual line submission). As with Cost 1, ONRR used tables from the BLS to estimate the fully-burdened hourly cost for an industry accountant in a metropolitan area working in oil and gas extraction. The industry labor cost factor for accountants would be approximately $59.26 per hour = [$42.33 (mean hourly wage) × 1.4 (including employee benefits)]. Using a labor cost factor of $59.26 per hour, ONRR estimates the annual administrative cost savings to industry will be approximately $1.4 million.

ANNUAL ADMINISTRATIVE COST SAVINGS FOR INDUSTRY

	Time burden per line reported	Estimated lines reported using index-based valuation method (50%)	Annual burden hours
Electronic Reporting (99%)	1.5 min	892,620	22,315
Manual Reporting (1%)	3.5 min	9,016	526
Industry Labor Cost/hour			$59.26
Total Benefit to Industry			$1,354,000

Cost Savings 2: Administrative Cost Savings Using Index-Based Valuation Method To Value Residue Gas and NGLs Simplifying Processing and Transportation Cost Calculations

ONRR expects industry will realize an additional one-time administrative-cost savings if they choose to use the index-based valuation method to value sales of Federal residue gas and NGLs, as this method eliminates the need to unbundle and calculate specific cost allocations related to processing and transportation. These cost allocations, referred to as ''unbundling,'' are segregated portions of a transportation or processing expense or fee attributable to placing production in marketable condition. Industry would unbundle their applicable plants and transportation systems one time in the absence of this rule and then use those unbundled cost allocations for subsequent royalty calculations. Industry is responsible for calculating these costs, however ONRR has published and calculated a limited number of unbundling cost allocations.

In ONRR's experience, it takes approximately 100 hours per gas plant. ONRR calculated the average number of gas plants reported per payor is 3.4, across a total of 448 payors reporting residue gas and NGLs, between 2014–2018. Using the BLS labor cost per hour of $59.26 (described above) and adjusting the assumption to half of lessees choosing the index-based valuation method, ONRR believes this results in a one-time cost savings to industry of $4.5 million dollars.

Change 1: Eliminate Reference To Default Provision Requirements for Federal Oil and Gas

ONRR proposed to remove the default provision from its regulations. In instances of misconduct, breach of a lessee's duty to market, or other situations where royalty value cannot be determined under the rules, ONRR will use statutory authority to determine Federal oil and gas royalty value under lease terms, FOGRMA, and other authorizing legislation in the same manner—as ONRR would have prior to adoption of the 2016 Valuation Rule. ONRR does not believe there is any overall royalty impact from removing the default provision.

State and Local Governments

ONRR estimates that States and certain local governments would receive an overall decrease in royalty share (which, in part, was a reason for California's and New Mexico's challenges to the 2017 Repeal Rule) based on the category the leases falls under, including offshore OCSLA section 8(g) leases (*See* 43 U.S.C. 1337(g)), Gulf of Mexico Energy Security Act leases (''GOMESA'') ((43 U.S.C. 1337(g))), and onshore Federal lands. ONRR disburses royalties based on where the oil, gas, or coal was produced.

Except for Federal Alaskan production (where Alaska receives 90 percent of the distribution), Section 8(g) leases in the OCS, and qualified leases under GOMESA in the OCS (more information on distribution percentages at *https://revenuedata.doi.gov/how-it-works/gomesa/*), the following distribution table generally applies:

ONRR Disbursements by Area

	Onshore (%)	Offshore (%)
Federal	51	95.2
State	49	4.8

Please visit *https://revenuedata.doi.gov/explore/#federal-disbursements* to find more information on ONRR's disbursements to any specific State or local government.

The next table in this section summarizes the State and local government royalty decreases.

Indian Lessors

The provisions affecting royalties in this rule only apply to Federal oil and gas leases and are not expected to affect Indian lessors.

Federal Government

The impact of this rule to the Federal Government will be a net decrease in royalty collections. ONRR estimates the net yearly impact on the Federal Government (detailed in the next table of this section) would be a loss of $22,728,000 in royalties and the net effect to the Federal Government and the States would be a loss of $28,879,000 in combined royalties.

Summary of Royalty Impacts and Costs to Industry, State and Local Governments, Indian Lessors, and the Federal Government

In the table below, ONRR presents the net change in royalties by this rulemaking provision. Changes to royalties are neither costs nor benefits, but transfers. The estimated changes in royalties assessed will change both the costs incurred by an operator/lessee and the amount of revenue collected by the Federal Government and the States.

Annual Economic Impacts for Industry, the Federal Government, and States

Rule provision	Net change in royalties	Federal portion	State portion
Index-Based Valuation Method Extended to Arm's-Length Gas Sales	$5,620,000	$3,562,000	$2,058,000
Index-Based Valuation Method Extended to Arm's-Length NGL Sales	21,141,000	14,248,000	6,893,000
High to Midpoint Index Price for Non-Arm's-Length Gas Sales	(4,488,000)	(2,844,000)	(1,644,000)
Transportation Deduction Non-Arm's-Length Index-Based Valuation Method	(7,121,000)	(4,513,000)	(2,608,000)
Extraordinary Processing Allowance	(11,131,000)	(7,054,000)	(4,077,000)
Allowance for Certain OCS Gathering Costs	(32,900,000)	(26,127,000)	(6,773,000)
Total	(28,879,000)	(22,728,000)	(6,151,000)

Note: Totals may not add due to rounding.

Federal and Indian Coal

ONRR estimates that there will be no economic impact in terms of royalties to ONRR, Tribes, individual Indian mineral owners, States, or industry from the changes to coal valuation in this rule. The changes outlined in this rule should result in coal values for royalty purposes similar to those reported and paid to ONRR under the regulations in effect since 1989. Further, as of this writing, lessees have not submitted coal reporting under the 2016 Valuation Rule, so ONRR lacks data showing any changes resulting from implementation of the provisions of the 2016 Valuation Rule.

Change 2: Eliminating the Use of Arm's-Length Electricity Sales To Value Non-Arm's-Length Dispositions of Federal Coal

Comments on the Analysis of This Amendment

Public Comment: ONRR received comments on this amendment expressing concerns about a potential

loophole where companies may be able to pay royalties on prices below fair market value.

ONRR Response: ONRR appreciates the comment on this amendment but the commenter does not provide ONRR with enough information or evidence to calculate an economic impact of the loophole mentioned.

In the 2016 Valuation Rule, ONRR estimated no impacts to industry for this provision. Further, because lessees have not submitted reporting under the 2016 Valuation Rule, ONRR lacks data showing any changes that may have been attributable to this provision.

Change 3: Using the First Arm's-Length Sale To Value Non-Arm's-Length Sales of Indian Coal

ONRR did not estimate any impacts to industry for the proposed change from this provision. Currently, lessees of Indian coal sell their entire production at arm's-length, so this proposed change would have no royalty impact on lessees or lessors of Indian coal.

Change 4: Eliminating the Sales of Electricity To Value Non-Arm's-Length Sales of Indian Coal

ONRR did not estimate any impacts to industry for the proposed change for this provision. Currently, lessees of Indian coal sell their entire production at arm's-length so this proposed change would have no royalty impact on lessees or lessors of Indian coal.

Change 5: Using First Arm's-Length Sale To Value Sales of Indian Coal Between Parties That Lack Opposing Economic Interests

At the present time, all producers of Indian coal sell the produced coal under arm's-length transactions. Accordingly, ONRR does not anticipate any impact to royalty collections from the proposed change.

Change 6: Elimination of the Default Provision To Value Federal Oil, Gas, and Coal and Indian Coal

ONRR estimates that the royalty impact would be insignificant because the default provision established a reasonable value of production using market-based transaction data, which has always been, and continues to be, the basis for ONRR's royalty valuation rules.

VI. Severability Statement

If any provision, or portion of a provision, of this rule is found, by a court or tribunal of competent jurisdiction, to be invalid under the law, it shall be regarded as stricken while the remainder of this rule shall continue to be in full effect.

VII. Procedural Matters

A. Regulatory Planning and Review (E.O. 12866 and 13563)

E.O. 12866 provides that the Office of Information and Regulatory Affairs (''OIRA'') of the Office of Management and Budget (''OMB'') will review all significant rulemakings. OIRA has determined that this final rule is significant. Because the primary effect is on royalty payments, ONRR expects this final rule will largely result in transfers, which are described in the table below. ONRR also anticipates that this rule will result in $2.58 million in annual administrative costs and $4.52 million in one-time administrative cost savings.

SUMMARY OF PROPOSED CHANGES TO OIL & GAS ROYALTIES PAID

[Annual]

Rule provision	Net change in royalties paid by lessees
Index-Based Valuation Method Extended to Arm's-Length Gas Sales	$5,620,000
Index-Based Valuation Method Extended to Arm's-Length NGL Sales	21,141,000
High to Midpoint Index Price for Non-Arm's-Length Gas Sales	(4,488,000)
Transportation Deduction Non-Arm's-Length Index-Based Valuation Method	(7,121,000)
Extraordinary Processing Allowances	(11,131,000)
Allowance for Certain OCS Gathering Costs	(32,900,000)
Total	(28,879,000)

SUMMARY OF ANNUAL ADMINISTRATIVE IMPACTS TO INDUSTRY

Rule provision	Cost (Cost savings)
Administrative Cost Savings for Index-Based Valuation Method for Arm's-Length Gas & NGL Sales	($1,354,000)
Administrative Cost for Allowances for Certain OCS Gathering	3,931,000
Total	2,577,000

ONE-TIME ADMINISTRATIVE IMPACTS TO INDUSTRY

Rule provision	(Cost savings)
Administrative Cost-savings in lieu of Unbundling related to Index-Based Valuation Method for ARMS Gas & NGLs	($4,520,000)

NET PRESENT VALUE OF ADMINISTRATIVE IMPACTS TO INDUSTRY

Time horizon	3% Discount rate	7% Discount rate
Administrative Costs over 10 years	$18,100,000	$14,800,000
Administrative Costs over 20 years	35,000,000	24,700,000

To estimate the present value of potential future administrative cost to industry, ONRR looked at two different potential time periods to represent various production lives of oil and gas leases. ONRR applied three percent and seven percent discount rates as described in OMB Circular A–4, using a base year of 2021 and reported in 2020 dollars. As described above, ONRR estimates a cost savings to industry in the first year this regulation is in effect and administrative costs each year thereafter.

E.O. 13563 reaffirms the principles of E.O. 12866, while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and

freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. ONRR developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires Federal agencies to prepare a regulatory flexibility analysis for rules that are subject to the notice-and-comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553), if the rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 601–612.

For the changes to 30 CFR part 1206, this rule would affect lessees of Federal oil and gas leases. For the changes to 30 CFR part 1241, this rule could affect violators of obligations under Federal and Indian mineral leases. Federal and Indian mineral lessees are, generally, companies classified under the North American Industry Classification System (''NAICS''), as follows:

- Code 211111, which includes companies that extract crude petroleum and natural gas;
- Code 212111, which includes companies that extract surface coal; and
- Code 212112, which includes companies that extract underground coal.

Under NAICS code classifications, a small company is one with fewer than 500 employees. ONNR updated its count since the 2020 Proposed Rule to estimate that approximately 1,208 different companies submit royalty reports from Federal oil and gas leases and other Federal mineral leases to ONRR each month. Of these, approximately 106 companies are not considered small businesses because they exceed the employee count threshold established for small businesses. ONRR estimated that the remaining 1,102 companies affected by this rule are small businesses. Accordingly, ONRR has not changed its initial determination from the 2020 Proposed Rule that this rule will have an impact on a substantial number of small entities, but the economic impact on those small entities will not be significant.

As stated in the Summary of Royalty Impacts and Costs Table, shown above, this rule would benefit industry through a reduction in royalties of approximately $28.9 million per year. Small businesses account for about 8 percent of the royalties. Applying that percentage to industry costs, ONRR estimated that the changes in the final rule would result in a private cost savings to small business lessees of approximately $2.3 million per year, or $2,087 per small business, on average. The extent of an economic impact, if any, would vary between companies due to, for example, differences in the volume of production that the small business produces and sells each year. Furthermore, this rule does not require any business to incur new costs. Instead, this rule provides businesses with more flexibility as each entity, including small businesses, are able to determine whether it is economically advantageous to incur increases in administrative costs to reduce the royalties paid, based on an entity's individual circumstances. ONRR believes that the economic impact to small businesses, if any, will be minimal. Accordingly, this rule will not result in a significant economic impact on those small businesses.

In accordance with 5 U.S.C. 605, ONRR hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. Thus, ONRR did not prepare a Regulatory Flexibility Act Analysis nor is a Small Entity Compliance Guide required.

C. Small Business Regulatory Enforcement Fairness Act

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more. ONRR estimates that the cumulative effect on all of industry will be a reduction in private cost of nearly $26.32 million per year, which is the sum of $28.9 million in decreased royalty payments and $2.58 million in additional costs due to increased administrative burdens. The net change in royalty payments is a transfer rather than a cost or cost savings. The Summary of Royalty Impacts and Costs Table, as shown above, demonstrates that the cumulative economic impact on industry, State and local governments, and the Federal Government will be well below the $100 million threshold that the Federal Government uses to define a rule as having a significant impact on the economy.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Please see the data tables in the Regulatory Planning and Review (E.O.s 12866 and 13563) section above.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. This rule is, in part, meant to incentivize domestic energy production. ONRR has estimated no significant adverse impacts to small business.

D. Unfunded Mandates Reform Act

The final rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, or Tribal governments, or the private sector. Therefore, ONRR is not required to provide a statement containing the information that the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) requires because this rule is not an unfunded mandate.

E. Takings (E.O. 12630)

Under the criteria in section 2 of E.O. 12630, the final rule does not have any significant takings implications. This rule does not impose conditions or limitations on the use of any private property. This rule applies to the valuation of Federal oil and gas and Federal and Indian coal only. The final rule only makes minor technical changes to ONRR's civil penalty regulations that have no expected economic impact. The final rule does not require a takings implication assessment.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, the final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. The management of Federal oil and gas is the responsibility of the Secretary, and ONRR distributes all of the royalties that it collects under Federal oil and gas leases as directed by the relevant disbursement statutes. This rule does not impose administrative costs on States or local governments. This rule also does not substantially and directly affect the relationship between the Federal and State governments. Because this rule does not alter that relationship, it does not require a Federalism summary impact statement.

G. Civil Justice Reform (E.O. 12988)

The final rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of Section 3(a), which requires that ONRR review all regulations to eliminate errors and ambiguity and write them to minimize litigation.

(b) Meets the criteria of Section 3(b)(2), which requires that all regulations be written in clear language using clear legal standards.

H. Consultation With Indian Tribal Governments (E.O. 13175)

The Department strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. ONRR evaluated this final rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined that it has no substantial direct effects on Federally-recognized Indian tribes. Thus, consultation under the Department's tribal consultation policy is not required.

ONRR reached this conclusion, in part, based on the consultations it conducted before the adoption of the 2016 Valuation Rule. At that time, ONRR held six tribal consultations with the three tribes (Navajo Nation, Crow Nation, and Hopi Tribe) for which ONRR collected and disbursed Indian coal royalties. Upon the conclusion of each consultation, ONRR and the tribal partners determined that the 2016 Valuation Rule would have no substantial impact on any of the potentially impacted tribes. With the exception of the Kayenta Mine located in Navajo Nation, which ceased production in 2019, the circumstances relevant to the Indian coal leases have not changed since the prior consultations occurred. As with the 2016 Valuation Rule, ONRR's review of the royalty impact to tribes from this rulemaking concludes that there is no substantial impact to the three tribes. Further, this rule estimates no impact to the royalty value of Indian coal.

I. Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

Certain collections of information require OMB's approval under the Paperwork Reduction Act. This final rule does not require any new information collections subject to OMB's approval. Thus, ONRR has not submitted any new information collection requests to OMB related to this rule.

The final rule leaves intact the information collection requirements that OMB has already approved under OMB Control Numbers 1012–0004, 1012–0005, and 1012–0010.

J. National Environmental Policy Act

This final rule does not constitute a major Federal action significantly affecting the quality of the human environment. ONRR is not required to provide a detailed statement under the National Environmental Policy Act of 1969 (''NEPA'') because this rule qualifies for a categorical exclusion under 43 CFR 46.210(c) and (i) and the Department's Departmental Manual, part 516, section 15.4.D: ''(c) Routine financial transactions including such things as . . . audits, fees, bonds, and royalties . . . [and] (i) [p]olicies, directives, regulations, and guidelines . . . [t]hat are of an administrative, financial, legal, technical, or procedural nature.'' ONRR also determined that this rule does not involved in any of the extraordinary circumstances listed in 43 CFR 46.215 that require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This final rule is not a significant energy action under the definition in E.O. 13211. It is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Moreover, the Administrator of OIRA has not otherwise designated this action as a significant energy action. A Statement of Energy Effects pursuant to E.O. 13211, therefore, is not required.

L. Clarity of This Regulation

E.O.s 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and the Presidential Memorandum of June 1, 1998, require ONRR to write all rules in plain language. This means that the rules ONRR publishes must use:

(a) Logical organization.

(b) Active voice to address readers directly.

(c) Clear language rather than jargon.

(d) Short sections and sentences.

(e) Lists and tables wherever possible.

If you believe that ONRR has not met these requirements, send your comments to *Dane.Templin@onrr.gov.* To better help ONRR understand your comments, please make your comments as specific as possible. For example, you should tell ONRR the numbers of the sections or paragraphs that you think were written unclearly, the sections or sentences that you think are too long, and the sections for which you believe lists or tables would be useful.

M. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.,* OIRA has determined that this rulemaking is not a major rulemaking, as defined by 5 U.S.C. 804(2), because this rulemaking has not resulted in, and is unlikely to result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects

30 CFR Part 1206

Coal, Continental shelf, Geothermal energy, Government contracts, Indians-lands, Mineral royalties, Oil and gas exploration, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 1241

Administrative practice and procedure, Coal, Geothermal energy, Indians-lands, Mineral royalties, Natural gas, Oil and gas exploration, Penalties, Public lands-mineral resources.

Kimbra G. Davis,

Director for Office of Natural Resources Revenue.

Authority and Issuance

For the reasons discussed in the preamble, the Office of Natural Resources Revenue is amending 30 CFR parts 1206 and 1241 as set forth below:

PART 1206—PRODUCT VALUATION

■ 1. The authority citation for part 1206 continues to read as follows:

Authority: 5 U.S.C. 301 *et seq.,* 25 U.S.C. 396 *et seq.,* 396a *et seq.,* 2101 *et seq.;* 30 U.S.C. 181 *et seq.,* 351 *et seq.,* 1001 *et seq.,* 1701 *et seq.;* 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.,* 1331 *et seq.,* and 1801 *et seq.*

Subpart A—General Provisions and Definitions

■ 2. Amend § 1206.20 by:

■ a. Removing the definition of ''coal cooperative'';

■ b. Revising the definition of ''gathering''; and

■ c. Removing the definition of ''misconduct''.

The revision reads as follows:

§ 1206.20 What definitions apply to this part?

* * * * *

Gathering means the movement of lease production to a central accumulation or treatment point on the lease, unit, or communitized area, or to a central accumulation or treatment point off of the lease, unit, or communitized area that BLM or BSEE approves for onshore and offshore leases, respectively. Excluded from this definition is the movement of bulk production from a wellhead to an offshore platform which may, for valuation purposes, be considered a function for which a Transportation Allowance is properly taken pursuant to §§ 1206.110(a)(1) and 1206.152(a)(1).

* * * * *

Subpart C—Federal Oil

■ 3. Amend § 1206.101 by:

■ a. Revising paragraphs (a) introductory text, (c)(1) introductory text, and (c)(1)(i); and

■ b. Adding paragraph (d).

The revisions and addition read as follows:

§ 1206.101 How do I calculate royalty value for oil I or my affiliate sell(s) under an arm's-length contract?

(a) The value of oil under this section for royalty purposes is the gross proceeds accruing to you or your affiliate under the arm's-length contract less applicable allowances determined under § 1206.111 or 1206.112. This value does not apply if you exercise an option to use a different value provided in paragraph (c)(1) or (c)(2)(i) of this section, or if one of the exceptions in paragraph (d) of this section applies. You must use this paragraph (a) to value oil when:

* * * * *

(c)(1) If you enter into an arm's-length exchange agreement, or multiple sequential arm's-length exchange agreements, and following the exchange(s) that you or your affiliate sell(s) the oil received in the exchange(s) under an arm's-length contract, then you may use either paragraph (a) of this section or § 1206.102 to value your production for royalty purposes. If you fail to make the election required under this paragraph, you may not make a retroactive election.

(i) If you use paragraph (a) of this section, your gross proceeds are the gross proceeds under your or your affiliate's arm's-length sales contract after the exchange(s) occur(s). You must adjust your gross proceeds for any location or quality differential, or other adjustments, that you received or paid under the arm's-length exchange agreement(s). If ONRR determines that any arm's-length exchange agreement does not reflect reasonable location or quality differentials, ONRR may require you to value the oil under § 1206.102. You may not otherwise use the price or differential specified in an arm's-length exchange agreement to value your production.

* * * * *

(d) This paragraph contains exceptions to the valuation rule in paragraph (a) of this section. Apply these exceptions on an individual contract basis.

(1) In conducting reviews and audits, if ONRR determines that any arm's-length sales contract does not reflect the total consideration actually transferred either directly or indirectly from the buyer to the seller, ONRR may require that you value the oil sold under that contract either under § 1206.102 or at the total consideration received.

(2) You must value the oil under § 1206.102 if ONRR determines that the value under paragraph (a) of this section does not reflect the reasonable value of the production due to either:

(i) Misconduct by or between the parties to the arm's-length contract; or

(ii) Breach of your duty to market the oil for the mutual benefit of yourself and the lessor.

■ 4. Amend § 1206.102 by revising the introductory text and paragraphs (d) and (e) to read as follows:

§ 1206.102 How do I value oil not sold under an arm's-length contract?

This section explains how to value oil that you may not value under § 1206.101 or that you elect under § 1206.101(c)(1) to value under this section. First, determine if paragraph (a), (b), or (c) of this section applies to production from your lease, or if you may apply paragraph (d) or (e) with ONRR's approval.

* * * * *

(d) *Unreasonable value.* If ONRR determines that the NYMEX price or ANS spot price does not represent a reasonable royalty value in any particular case, ONRR may establish a reasonable royalty value based on other relevant matters.

(e) *Production delivered to your refinery and the NYMEX price or ANS spot price is an unreasonable value.* (1) Instead of valuing your production under paragraph (a), (b), or (c) of this section, you may apply to ONRR to establish a value representing the market at the refinery if:

(i) You transport your oil directly to your or your affiliate's refinery, or exchange your oil for oil delivered to your or your affiliate's refinery; and

(ii) You must value your oil under this section at the NYMEX price or ANS spot price; and

(iii) You believe that use of the NYMEX price or ANS spot price results in an unreasonable royalty value.

(2) You must provide adequate documentation and evidence demonstrating the market value at the refinery. That evidence may include, but is not limited to:

(i) Costs of acquiring other crude oil at or for the refinery;

(ii) How adjustments for quality, location, and transportation were factored into the price paid for other oil;

(iii) Volumes acquired for and refined at the refinery; and

(iv) Any other appropriate evidence or documentation that ONRR requires.

(3) If ONRR establishes a value representing market value at the refinery, you may not take an allowance against that value under § 1206.113(b) unless it is included in ONRR's approval.

■ 5. Amend § 1206.104 by revising paragraphs (a)(1), (b), (c) introductory text, (c)(2), (g)(1), and (2) to read as follows:

§ 1206.104 How will ONRR determine if my royalty payments are correct?

(a)(1) ONRR may monitor, review, and audit the royalties that you report, and, if ONRR determines that your reported value is inconsistent with the requirements of this subpart, ONRR may establish a reasonable royalty value based on other relevant matters.

* * * * *

(b) ONRR may examine whether your or your affiliate's contract reflects the total consideration transferred for Federal oil, either directly or indirectly, from the buyer to you or your affiliate. If ONRR determines that additional consideration beyond that reflected in the contract was transferred, or that any portion of the consideration was not included in gross proceeds reported, ONRR may establish a reasonable royalty value based on other relevant matters.

(c) ONRR may establish a reasonable royalty value based on other relevant matters if ONRR determines that the gross proceeds accruing to you or your affiliate under a contract do not reflect reasonable consideration because:

* * * * *

(2) You have breached your duty to market the oil for the mutual benefit of yourself and the lessor; or

* * * * *

(g)(1) You or your affiliate must make all contracts, contract revisions, or amendments in writing.

(2) If you or your affiliate fail(s) to comply with paragraph (g)(1) of this section, ONRR may establish a reasonable royalty value based on other relevant matters.

* * * * *

§ 1206.105 [Removed and Reserved]

■ 6. Remove and reserve § 1206.105.

■ 7. Amend § 1206.108 by:

■ a. Revising paragraphs (a) introductory text and (a)(5); and

■ b. Removing the words ''Assistant Secretary'' in paragraphs (c)(2), (c)(3), (d)(1), (e), (f), and (g) and adding in their place the words ''Assistant Secretary for Policy, Management and Budget''.

The revisions read as follows:

§ 1206.108 How do I request a valuation determination?

(a) You may request a valuation determination from ONRR regarding any oil produced. Your request must comply with all of the following:

* * * * *

(5) Provide your analysis of the issue(s);

* * * * *

■ 8. Amend § 1206.110 by revising paragraphs (a), (f) introductory text and (f)(2) to read as follows:

§ 1206.110 What general transportation allowance requirements apply to me?

(a)(1) ONRR will allow a deduction for the reasonable, actual costs to transport oil from the lease to the point off of the lease under § 1206.110, 1206.111, or 1206.112, as applicable. You may not deduct transportation costs that you incur to move a particular volume of production to reduce royalties that you owe on production for which you did not incur those costs. This paragraph applies when:

(i) You value oil under § 1206.101 based on a sale at a point off of the lease, unit, or communitized area from which the oil is produced; or

(ii) You do not value your oil under § 1206.102(a)(3) or (b)(3).

(2) You may not include any gathering costs in your transportation allowance under § 1206.110, 1206.111, or 1206.112, as applicable, except those reasonable, actual gathering costs you incur for oil produced from a lease or unit on the OCS, any part of which lies in waters deeper than 200 meters, that meet all of the following criteria:

(i) The gathering costs are for oil for which you are entitled to take a transportation allowance under paragraph (a)(1) of this section;

(ii) The gathering costs are for movement of oil beyond a central accumulation point. For purposes of paragraph (a)(2) of this section, a central accumulation point may be a single well, a subsea manifold, the last well in a group of wells connected in a series, or a platform extending above the surface of the water;

(iii) The gathering costs are for movement of oil to a facility that is not located on a lease or unit adjacent to the lease or unit on which the production originates. For purposes of paragraph (a)(2) of this section, an adjacent lease or unit is any lease or unit with at least one point of contact with the producing lease or unit. Typically, for a single OCS lease, there are 8 adjacent leases; and

(iv) The gathering costs are only those allocable to the royalty-bearing oil. Gathering costs properly allocable to non-royalty bearing substances, or any royalty-bearing substance other than oil, may not be included in your transportation allowance under this section.

* * * * *

(f) ONRR may direct you to modify your transportation allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length transportation contract does not reflect the reasonable cost of the transportation because you breached your duty to market the oil for the mutual benefit of yourself and the lessor by transporting your oil at a cost that is unreasonably high; or

* * * * *

■ 9. Amend § 1206.111 by:

■ a. Removing paragraph (d)(1)

■ b. Redesignating paragraph (d) introductory text as (d)(1);

■ c. Revising newly redesignated paragraph (d)(1); and

■ d. Removing the word ''may'' in paragraph (d)(2) and adding in its place the word ''must''.

The revision reads as follows:

§ 1206.111 How do I determine a transportation allowance if I have an arm's length transportation contract?

* * * * *

(d)(1) If you have no written contract for the arm's-length transportation of oil, you must propose to ONRR a method to determine the allowance using the procedures in § 1206.108(a).

* * * * *

■ 10. Amend § 1206.117 by revising paragraph (a) to read as follows:

§ 1206.117 What interest and penalties apply if I improperly report a transportation allowance?

(a) If you deduct a transportation allowance on form ONRR–2014 that exceeds 50 percent of the value of the oil transported without obtaining ONRR's prior approval under § 1206.110(d)(2), you must pay additional royalties due, plus late payment interest calculated under §§ 1218.54 and 1218.102 of this chapter, on the excess allowance amount taken from the date when that amount is taken to the date when you file an exception request that ONRR approves. If you do not file an exception request, or if ONRR does not approve your request, you must pay late payment interest on the excess allowance amount taken from the date that amount is taken until the date you pay the additional royalties owed.

* * * * *

Subpart D—Federal Gas

■ 11. Amend § 1206.141 by:

■ a. Revising paragraphs (a)(2), (b) introductory text, (b)(2), (b)(3), (c) introductory text, (c)(1)(i), (c)(1)(ii), (c)(1)(iv), (c)(1)(vi), and (e)(2) introductory text;

■ b. Removing the word ''may'' in paragraph (e)(2)(ii) and adding in its place the word ''must''; and

■ c. Adding paragraphs (f) and (g).

The revisions and additions read as follows:

§ 1206.141 How do I calculate royalty value for unprocessed gas that I or my affiliate sell(s) under an arm's-length or non-arm's length contract?

(a) * * *

(2) Any gas that you are not required to value under § 1206.142; or

* * * * *

(b) The value of gas under this section for royalty purposes is the gross proceeds accruing to you or your affiliate under the first arm's-length contract less a transportation allowance determined under § 1206.152. This value does not apply if you exercise the option in paragraph (c) of this section. Unless you elect to value your gas under paragraph (c) of this section, you must use this paragraph (b) to value gas when:

* * * * *

(2) You sell or transfer unprocessed gas to your affiliate or another person under a non-arm's-length contract and that affiliate or person, or an affiliate of either of them, then sells the gas under an arm's-length contract;

(3) You, your affiliate, or another person sell(s) unprocessed gas produced from a lease under multiple arm's length

contracts, and that gas is valued under this paragraph. The value of the gas is the volume-weighted average of the values, established under this paragraph, for each contract for the sale of gas produced from that lease; or

* * * * *

(c) Alternatively, you may elect to value your unprocessed gas under this paragraph (c), which allows you to use an index-based valuation method to calculate royalty value. You may not change your election more often than once every two years.

(1)(i) If you can only transport gas to one index pricing point published in an ONRR-approved publication, available at *www.onrr.gov,* your value, for royalty purposes, is the published average bidweek price to which your gas may flow for that respective production month.

(ii) If you can transport gas to more than one index pricing point published in an ONRR-approved publication available at *www.onrr.gov,* your value, for royalty purposes, is the highest of the published average bidweek prices to which your gas may flow for that respective production month, whether or not there are constraints for that production month.

* * * * *

(iv) You may adjust the number calculated under paragraphs (c)(1)(i) and (ii) of this section by reducing the value by 10 percent, but not less than 10 cents per MMBtu nor more than 40 cents per MMBtu for sales from the OCS Gulf of Mexico and by 15 percent, but not less than 10 cents per MMBtu nor more than 50 cents per MMBtu, for sales from all other areas.

* * * * *

(vi) ONRR may exclude an individual index pricing point found in an ONRR-approved publication if ONRR determines that the index pricing point does not accurately reflect the values of production. ONRR will publish criteria for index pricing points available at *www.onrr.gov.*

* * * * *

(e) * * *

(2) There is not an index pricing point for the gas, then:

* * * * *

(f) Under no circumstances may your gas be valued for royalty purposes at less than zero.

(g) If you elect to value your gas under paragraph (c) of this section, ONRR reserves the right to collect actual transaction data in the future to assess the validity of the index-based valuation option.

■ 12. Amend § 1206.142 by:

■ a. Revising paragraphs (c) introductory text, (c)(2), (c)(3), (d)(1)(i), (d)(1)(ii), (d)(1)(iv), and (d)(1)(vi);

■ b. Removing the word ''methodology'' from paragraph (d)(2)(ii) and adding in its place the word ''method'';

■ c. Removing the word ''may'' in paragraph (d)(2)(iii) and adding in its place the word ''must'';

■ d. Revising paragraph (f)(2) introductory text;

■ e. Removing the word ''may'' in paragraph (f)(2)(ii) and adding in its place the word ''must''; and

■ f. Adding paragraphs (g) and (h).

The revisions and additions read as follows:

§ 1206.142 How do I calculate royalty value for processed gas that I or my affiliate sell(s) under an arm's-length or non-arm's length contract?

* * * * *

(c) The value of residue gas or any gas plant product under this section for royalty purposes is the gross proceeds accruing to you or your affiliate under the first arm's-length contract. This value does not apply if you exercise the option provided in paragraph (d) of this section. Unless you exercise the option provided in paragraph (d) of this section, you must use this paragraph (c) to value residue gas or any gas plant product when:

* * * * *

(2) You sell or transfer to your affiliate or another person under a non-arm's length contract, and that affiliate or person, or another affiliate of either of them, then sells the residue gas or any gas plant product under an arm's-length contract;

(3) You, your affiliate, or another person sell(s), under multiple arm's-length contracts, residue gas or any gas plant products recovered from gas produced from a lease that you value under this paragraph. In that case, because you sold non-arm's-length to your affiliate or another person, the value of the residue gas or any gas plant product is the volume-weighted average of the gross proceeds established under this paragraph for each arm's-length contract for the sale of residue gas or any gas plant products recovered from gas produced from that lease; or

* * * * *

(d) Alternatively, you may elect to value your residue gas and NGLs under this paragraph (d). You may not change your election more often than once every two years.

(1)(i) If you can only transport residue gas to one index pricing point published in an ONRR-approved publication available at *www.onrr.gov,* your value, for royalty purposes, is the published average bidweek price to which your gas may flow for that respective production month.

(ii) If you can transport residue gas to more than one index pricing point published in an ONRR-approved publication available at *www.onrr.gov,* your value, for royalty purposes, is the highest of the published average bidweek prices to which your gas may flow for that respective production month, whether or not there are constraints for that production month.

* * * * *

(iv) You may adjust the number calculated under paragraphs (d)(1)(i) and (ii) of this section by reducing the value by 10 percent, but not less than 10 cents per MMBtu nor more than 40 cents per MMBtu for sales from the OCS Gulf of Mexico and by 15 percent, but not less than 10 cents per MMBtu nor more than 50 cents per MMBtu for sales from all other areas.

* * * * *

(vi) ONRR may exclude an individual index pricing point found in an ONRR-approved publication if ONRR determines that the index pricing point does not accurately reflect the values of production. ONRR will publish criteria for index pricing points on *www.onrr.gov.*

* * * * *

(f) * * *

(2) There is not an index pricing point or commercial price bulletin for the gas, then:

* * * * *

(g) Under no circumstances may your gas be valued for royalty purposes at less than zero.

(h) If you elect to value your gas under paragraph (d) of this section, ONRR reserves the right to collect actual transaction data in the future to assess the validity of the index-based valuation option.

■ 13. Amend § 1206.143 by revising paragraphs (a)(1), (b), (c) introductory text, (c)(2), (g)(1), and (g)(2) to read as follows:

§ 1206.143 How will ONRR determine if my royalty payments are correct?

(a)(1) ONRR may monitor, review, and audit the royalties that you report. If ONRR determines that your reported value is inconsistent with the requirements of this subpart, ONRR will direct you to use a different measure of royalty value.

* * * * *

(b) ONRR may examine whether your or your affiliate's contract reflects the total consideration transferred for Federal gas, either directly or indirectly, from the buyer to you or your affiliate.

If ONRR determines that additional consideration beyond that reflected in the contract was transferred, or that any portion of the consideration was not included in gross proceeds reported, ONRR may establish a reasonable royalty value based on other relevant matters.

(c) ONRR may direct you to use a different measure of royalty value if ONRR determines that the gross proceeds accruing to you or your affiliate under a contract do not reflect reasonable consideration because:

* * * * *

(2) You have breached your duty to market the gas, residue gas, or gas plant products for the mutual benefit of yourself and the lessor; or

* * * * *

(g)(1) You or your affiliate must make all contracts, contract revisions, or amendments in writing.

(2) If you or your affiliate fail(s) to comply with paragraph (g)(1) of this section, ONRR may direct you to use a different measure of royalty value.

* * * * *

§ 1206.144 [Removed and Reserved]

■ 14. Remove and reserve § 1206.144.

■ 15. Amend § 1206.148 by:

■ a. Revising paragraphs (a) introductory text and (a)(5); and

■ b. Removing the words ''Assistant Secretary'' in paragraphs (c)(2), (c)(3), (d)(1), (e), and (f) and adding in their place the words ''Assistant Secretary for Policy, Management and Budget''.

The revisions read as follows:

§ 1206.148 How do I request a valuation determination?

(a) You may request a valuation determination from ONRR regarding any gas produced. Your request must comply with all of the following:

* * * * *

(5) Provide your analysis of the issue(s);

* * * * *

■ 16. Amend § 1206.152 by revising paragraph (a), (g) introductory text, and (g)(2) to read as follows:

§ 1206.152 What general transportation allowance requirements apply to me?

(a)(1) ONRR will allow a deduction for the reasonable, actual costs to transport residue gas, gas plant products, or unprocessed gas from the lease to the point off of the lease under § 1206.152, 1206.153, or 1206.154, as applicable. You may not deduct transportation costs that you incur when moving a particular volume of production to reduce royalties that you owe on production for which you did not incur those costs. This paragraph applies when you value unprocessed gas under § 1206.141(b) or residue gas and gas plant products under § 1206.142(b) based on a sale at a point off of the lease, unit, or communitized area from which the residue gas, gas plant products, or unprocessed gas is produced.

(2) You may not include any gathering costs in your transportation allowance under § 1206.152, 1206.153, or 1206.154, as applicable, except those reasonable, actual gathering costs you incur for residue gas, gas plant products, or unprocessed gas produced from a lease or unit on the OCS, any part of which lies in waters deeper than 200 meters, that meet all of the following criteria:

(i) The gathering costs are for residue gas, gas plant products, or unprocessed gas for which you are entitled to take a transportation allowance under paragraph (a)(1) of this section;

(ii) The gathering costs are for movement of residue gas, gas plant products, or unprocessed gas beyond a central accumulation point. For purposes of paragraph (a)(2) of this section, a central accumulation point may be a single well, a subsea manifold, the last well in a group of wells connected in a series, or a platform extending above the surface of the water;

(iii) The gathering costs are for movement of residue gas, gas plant products, or unprocessed gas to a facility that is not located on a lease or unit adjacent to the lease or unit on which the production originates. For purposes of paragraph (a)(2) of this section, an adjacent lease or unit is any lease or unit with at least one point of contact with the producing lease or unit. Typically, for a single OCS lease, there are 8 adjacent leases; and

(iv) The gathering costs are only those allocable to the royalty-bearing residue gas, gas plant products, or unprocessed gas. Gathering costs properly allocable to non-royalty bearing substances, or any royalty-bearing substance other than residue gas, gas plant products, or unprocessed gas, may not be included in a transportation allowance under this section.

* * * * *

(g) ONRR may direct you to modify your transportation allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length transportation contract does not reflect the reasonable cost of the transportation because you breached your duty to market the gas, residue gas, or gas plant products for the mutual benefit of yourself and the lessor; or

* * * * *

■ 17. Amend § 1206.153 by revising paragraph (d) to read as follows:

§ 1206.153 How do I determine a transportation allowance if I have an arm's-length transportation contract?

* * * * *

(d) If you have no written contract for the arm's-length transportation of gas, and neither you nor your affiliate perform your own transportation, you must propose to ONRR a method to determine the transportation allowance using the procedures in § 1206.148(a).

(1) You must use that method to determine your allowance until ONRR issues its determination.

(2) [Reserved]

■ 18. Amend § 1206.157 by revising paragraph (b) to read as follows:

§ 1206.157 What interest and penalties apply if I improperly report a transportation allowance?

* * * * *

(b) If you deduct a transportation allowance on form ONRR–2014 that exceeds 50 percent of the value of the gas, residue gas, or gas plant products transported without obtaining ONRR's prior approval under § 1206.152(e)(2), you must pay additional royalties due, plus late payment interest calculated under §§ 1218.54 and 1218.102 of this chapter, on the excess allowance amount taken from the date when that amount is taken to the date when you file an exception request that ONRR approves. If you do not file an exception request, or if ONRR does not approve your request, you must pay late payment interest on the excess allowance amount taken from the date that amount is taken until the date you pay the additional royalties owed.

* * * * *

■ 19. Amend § 1206.159 by:

■ a. Revising paragraph (c)(1);

■ b. Adding paragraph (c)(5);

■ c. Redesignating paragraphs (d)(2)(A) and (B) as (d)(2)(i) and (ii); and

■ d. Revising paragraphs (e) introductory text and (e)(2).

The revisions and additions read as follows:

§ 1206.159 What general processing allowances requirements apply to me?

* * * * *

(c)(1) You may not apply the processing allowance against the value of the residue gas, except as provided in paragraph (c)(5) of this section.

* * * * *

(5) If you incur extraordinary costs for processing gas, you may apply to ONRR for an allowance for those costs which must be in addition to any other processing allowance to which the lessee is entitled pursuant to this section. You must demonstrate that the costs are, by reference to standard industry conditions and practice, extraordinary, unusual, or unconventional. You are not required to receive ONRR approval to continue an extraordinary processing allowance. However, you must report the deduction to ONRR in a form and manner prescribed by ONRR in order to retain the ability to deduct the allowance.

* * * * *

(e) ONRR may direct you to modify your processing allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length processing contract does not reflect the reasonable cost of the processing because you breached your duty to market the gas, residue gas, or gas plant products for the mutual benefit of yourself and the lessor; or

* * * * *

■ 20. Amend § 1206.160 by:

■ Revising paragraphs (a)(1) and (c), to read as follows:

§ 1206.160 How do I determine a processing allowance if I have an arm's length processing contract?

(a)(1) If you or your affiliate incur processing costs under an arm's-length processing contract, you may claim a processing allowance for the reasonable, actual costs incurred, as more fully explained in paragraph (b) of this section, except as provided in § 1206.159(e) and subject to the limitation in § 1206.159(c)(2).

* * * * *

(c) If you have no written contract for the arm's-length processing of gas, and neither you nor your affiliate perform your own processing, you must propose to ONRR a method to determine the processing allowance using the procedures in § 1206.148(a).

(1) You must use that method to determine your allowance until ONRR issues a determination.

(2) [Reserved]

■ 21. Amend § 1206.164 by revising paragraph (b) to read as follows:

§ 1206.164 What interest and penalties apply if I improperly report a processing allowance?

* * * * *

(b) If you deduct a processing allowance on form ONRR–2014 that exceeds 66⅔ percent of the value of a gas plant product without obtaining ONRR's prior approval under § 1206.159(c)(3), you must pay additional royalties due, plus late payment interest calculated under §§ 1218.54 and 1218.102 of this chapter, on the excess allowance amount taken from the date when that amount is taken to the date when you file an exception request that ONRR approves. If you do not file an exception request, or if ONRR does not approve your request, you must pay late payment interest on the excess allowance amount taken from the date that amount is taken until the date you pay the additional royalties owed.

* * * * *

Subpart F—Federal Coal

■ 22. Amend § 1206.252 by revising paragraph (a) introductory text, (b) and removing and reserving paragraph (c) to read as follows:

§ 1206.252 How do I calculate royalty value for coal?

(a) The value of coal under this section for royalty purposes is the gross proceeds accruing to you or your affiliate under the first arm's-length contract, or another person, less an applicable transportation allowance determined under §§ 1206.260 through 1206.262 and washing allowance under §§ 1206.267 through 1206.269. You must use this paragraph (a) to value coal when:

* * * * *

(b) If you have no contract for the sale of coal subject to this section because you or your affiliate used the coal in a power plant that you or your affiliate own(s) for the generation and sale of electricity:

(1) You must propose to ONRR a method to determine the value using the procedures in § 1206.258(a).

(2) You must use that method to determine value, for royalty purposes, until ONRR issues a determination.

(3) After ONRR issues a determination, you must make the adjustments under § 1206.253(a)(2).

* * * * *

■ 23. Amend § 1206.253 by revising paragraphs (a)(1), (b), (c) introductory text, (c)(2), (g)(1) and (2) to read as follows:

§ 1206.253 How will ONRR determine if my royalty payments are correct?

(a)(1) ONRR may monitor, review, and audit the royalties that you report, and, if ONRR determines that your reported value is inconsistent with the requirements of this subpart, ONRR may establish a reasonable royalty value based on other relevant matters.

* * * * *

(b) ONRR may examine whether your or your affiliate's contract reflects the total consideration transferred for Federal coal, either directly or indirectly, from the buyer to you or your affiliate. If ONRR determines that additional consideration beyond that reflected in the contract was transferred, or that any portion of the consideration was not included in gross proceeds reported, ONRR may establish a reasonable royalty value based on other relevant matters.

(c) ONRR may establish a reasonable royalty value based on other relevant matters if ONRR determines that the gross proceeds accruing to you or your affiliate under a contract do not reflect reasonable consideration because:

* * * * *

(2) You breached your duty to market the coal for the mutual benefit of yourself and the lessor; or

* * * * *

(g)(1) You or your affiliate must make all contracts, contract revisions, or amendments in writing.

(2) If you or your affiliate fail(s) to comply with paragraph (g)(1) of this section, ONRR may establish a reasonable royalty value based on other relevant matters.

* * * * *

§ 1206.254 [Removed and Reserved]

■ 24. Remove and reserve § 1206.254.

■ 25. Amend § 1206.258 by:

■ a. Revising paragraphs (a) introductory text and (a)(5);

■ b. Removing the words ''Assistant Secretary'' in paragraphs (c)(2), (c)(3), (e), and (f) and adding in their place the words ''Assistant Secretary for Policy, Management and Budget'';

■ c. Revising paragraph (g); and

■ d. Adding paragraph (h).

The revisions and additions read as follows:

§ 1206.258 How do I request a valuation determination?

(a) You may request a valuation determination from ONRR regarding any coal produced. Your request must comply with all of the following:

* * * * *

(5) Provide your analysis of the issue(s);

* * * * *

(g) ONRR or the Assistant Secretary for Policy, Management and Budget generally will not retroactively modify or rescinds a valuation determination issued under paragraph (d) of this section, unless:

(1) There was a misstatement or omission of material facts; or

(2) The facts subsequently developed are materially different from the facts on which the guidance was based.

(h) ONRR may make requests and replies under this section available to the public, subject to the confidentiality requirements under § 1206.259.

■ 26. Amend § 1206.260 by revising paragraphs (g) introductory text and (g)(2) to read as follows:

§ 1206.260 What general transportation allowance requirements apply to me?

* * * * *

(g) ONRR may determine your transportation allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length transportation contract does not reflect the reasonable cost of the transportation because you breached your duty to market the coal for the mutual benefit of yourself and the lessor by transporting your coal at a cost that is unreasonably high; or

* * * * *

■ 27. Amend § 1206.261 by revising paragraph (c) to read as follows:

§ 1206.261 How do I determine a transportation allowance if I have an arm's-length transportation contract?

* * * * *

(c) If you have no written contract for the arm's-length transportation of coal, and neither you nor your affiliate perform your own transportation, you must propose to ONRR a method to determine the transportation allowance using the procedures in § 1206.258(a).

(1) You must use that method to determine your allowance until ONRR issues a determination.

(2) [Reserved]

■ 28. Amend § 1206.267 by revising paragraphs (d) introductory text and (d)(2) to read as follows:

§ 1206.267 What general washing allowance requirements apply to me?

* * * * *

(d) ONRR may direct you to modify your washing allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length washing contract does not reflect the reasonable cost of the washing because you breached your duty to market the coal for the mutual benefit of yourself and the lessor by washing your coal at a cost that is unreasonably high; or

* * * * *

■ 29. Amend § 1206.268 by revising paragraphs (b) and (c) to read as follows:

§ 1206.268 How do I determine washing allowances if I have an arm's-length washing contract or no written arm's-length contract?

* * * * *

(b) You must be able to demonstrate that your or your affiliate's washing contract is arm's-length.

(c) If you have no written contract for the arm's-length washing of coal, and neither you nor your affiliate perform your own washing, you must propose to ONRR a method to determine the washing allowance using the procedures in § 1206.258(a).

(1) You must use that method to determine your allowance until ONRR issues a determination.

(2) [Reserved]

Subpart J—Indian Coal

■ 30. Amend § 1206.452 by revising the section heading, paragraphs (a) introductory text and (b) and removing and reserving paragraph (c) to read as follows:

§ 1206.452 How do I calculate royalty value for coal?

(a) The value of coal under this section for royalty purposes is the gross proceeds accruing to you or your affiliate under the first arm's-length contract, or another person, less an applicable transportation allowance determined under §§ 1206.460 through 1206.462 and washing allowance under §§ 1206.467 through 1206.469. You must use this paragraph (a) to value coal when:

* * * * *

(b) If you have no contract for the sale of coal subject to this section because you or your affiliate used the coal in a power plant that you or your affiliate own(s) for the generation and sale of electricity:

(1) You must propose to ONRR a method to determine the value using the procedures in § 1206.458(a).

(2) You must use that method to determine value, for royalty purposes, until ONRR issues a determination.

(3) After ONRR issues a determination, you must make the adjustments under § 1206.453(a)(2).

* * * * *

■ 31. Amend § 1206.453 by revising paragraphs (a)(1), (b), (c) introductory text, (c)(2), (g)(1), and (2) to read as follows:

§ 1206.453 How will ONRR determine if my royalty payments are correct?

(a)(1) ONRR may monitor, review, and audit the royalties that you report, and, if ONRR determines that your reported value is inconsistent with the requirements of this subpart, ONRR may establish a reasonable royalty value based on other relevant matters.

* * * * *

(b) ONRR may examine whether your or your affiliate's contract reflects the total consideration transferred for Indian coal, either directly or indirectly, from the buyer to you or your affiliate. If ONRR determines that additional consideration beyond that reflected in the contract was transferred, or that any portion of the consideration was not included in gross proceeds reported, ONRR may establish a reasonable royalty value based on other relevant matters.

(c) ONRR may establish a reasonable royalty value based on other relevant matters if ONRR determines that the gross proceeds accruing to you or your affiliate under a contract do not reflect reasonable consideration because:

* * * * *

(2) You breached your duty to market the coal for the mutual benefit of yourself and the lessor; or

* * * * *

(g)(1) You or your affiliate must make all contracts, contract revisions, or amendments in writing.

(2) If you or your affiliate fail(s) to comply with paragraph (g)(1) of this section, ONRR may establish a reasonable royalty value based on other relevant matters.

* * * * *

§ 1206.454 [Removed and Reserved]

■ 32. Remove and reserve § 1206.454.

■ 33. Amend § 1206.458 by:

■ a. Revising paragraphs (a) introductory text and (a)(5);

■ b. Removing the words ''Assistant Secretary'' in paragraphs (c)(2), (c)(3), (d)(1), (e), and (f) and adding in their place the words ''Assistant Secretary for Policy, Management and Budget'';

■ c. Revising paragraph (g); and

■ d. Adding paragraph (h).

The revisions and additions read as follows:

§ 1206.458 How do I request a valuation determination?

(a) You may request a valuation determination from ONRR regarding any coal produced. Your request must comply with all of the following:

* * * * *

(5) Provide your analysis of the issue(s);

* * * * *

(g) ONRR or the Assistant Secretary for Policy, Management and Budget generally will not retroactively modify

or rescinds a valuation determination issued under paragraph (d) of this section, unless:

(1) There was a misstatement or omission of material facts; or

(2) The facts subsequently developed are materially different from the facts on which the guidance was based.

(h) ONRR may make requests and replies under this section available to the public, subject to the confidentiality requirements under § 1206.459.

■ 34. Amend § 1206.460 by:

■ a. Revising paragraph (a)(2);

■ b. Removing paragraph (a)(3);

■ c. Removing the words ''a Federal'' in paragraphs (b)(2) and (b)(3) and adding in their place the words ''an Indian'';

■ d. Removing the word ''Federal'' in paragraphs (e)(1) and (e)(2) and adding in its place the word ''Indian''; and

■ e. Revising paragraphs (g) introductory text and (g)(2).

The revisions read as follows:

§ 1206.460 What general transportation allowance requirements apply to me?

(a)(1) * * *

(2) You do not need ONRR's approval before reporting a transportation allowance for costs incurred.

* * * * *

(g) ONRR may determine your transportation allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length transportation contract does not reflect the reasonable cost of the transportation because you breached your duty to market the coal for the mutual benefit of yourself and the lessor by transporting your coal at a cost that is unreasonably high; or

* * * * *

■ 35. Amend § 1206.461 by revising paragraph (c) to read as follows:

§ 1206.461 How do I determine a transportation allowance if I have an arm's-length transportation contract?

* * * * *

(c) If you have no written contract for the arm's-length transportation of coal, then you must propose to ONRR a method to determine the allowance using the procedures in § 1206.458(a). You may use that method to determine your allowance until ONRR issues a determination.

(1) You must use that method to determine your allowance until ONRR issues a determination.

(2) [Reserved]

■ 36. Amend § 1206.467 by:

■ a. Revising paragraph (a)(2);

■ b. Removing the word ''Federal'' in paragraph (b)(2) and adding in its place the word ''Indian''; and

■ c. Revising paragraphs (d) introductory text and (d)(2).

The revisions read as follows:

§ 1206.467 What general washing allowance requirements app ly to me?

(a)(1) * * *

(2) You do not need ONRR's approval before reporting a washing allowance.

* * * * *

(d) ONRR may direct you to modify your washing allowance if:

* * * * *

(2) ONRR determines that the consideration that you or your affiliate paid under an arm's-length washing contract does not reflect the reasonable cost of the washing because you breached your duty to market the coal for the mutual benefit of yourself and the lessor by washing your coal at a cost that is unreasonably high; or

* * * * *

■ 37. Amend § 1206.468 by revising paragraph (c) to read as follows:

§ 1206.468 How do I determine washing allowances if I have an arm's-length washing contract or no written arm's-length contract?

* * * * *

(c) If you have no written contract for the arm's-length washing of coal, and neither you nor your affiliate perform your own washing, you must propose to ONRR a method to determine the washing allowance using the procedures in § 1206.458(a).

(1) You must use that method to determine your allowance until ONRR issues a determination.

(2) [Reserved]

* * * * *

PART 1241—PENALTIES

■ 38. The authority citation for part 1241 continues to read as follows:

Authority: 25 U.S.C. 396 *et seq.,* 396a *et seq.,* 2101 *et seq.;* 30 U.S.C. 181 *et seq.,* 351 *et seq.,* 1001 *et seq.,* 1701 *et seq.;* 43 U.S.C. 1301 *et seq.,* 1331 *et seq.,* 1801 *et seq.*

Subpart A—General Provisions

■ 39. Amend § 1241.11 by removing paragraph (b)(5).

Subpart C—Penalty Amount, Interest, and Collections

■ 40. Amend § 1241.70 by:

■ a. Revising paragraph (b); and

■ b. Adding paragraph (d).

The revision and addition read as follows:

§ 1241.70 How does ONRR decide the amount of the penalty to assess?

* * * * *

(b) For payment violations only, we will consider the unpaid, underpaid, or late payment amount in our analysis of the severity of the violation.

* * * * *

(d) After we provisionally determine the civil penalty amount using the criteria and matrices described in paragraphs (a), (b), and (c) of this section, we may adjust the penalty amount in the FCCP or ILCP upward or downward if we find aggravating or mitigating circumstances to exist.

(1) Aggravating circumstances may include, but are not limited to:

(i) Committing a violation because you determined that the cost of a potential penalty is less than the cost of compliance;

(ii) Committing a violation where you have no recent history of noncompliance of the same type, but you have a history of noncompliance of other violation types;

(iii) Committing a violation that is also a criminal act.

(2) Mitigating circumstances may include, but are not limited to:

(i) Operational impacts resulting from the unexpected illness or death of an employee, natural disasters, pandemics, acts of terrorism, civil unrest, or armed conflict;

(ii) Delays caused by government action or inaction, including as a result of a government shutdown and an extended ONRR-system downtime;

(iii) Good-faith efforts to comply with formal or informal agency guidance.

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Part VIII

Securities and Exchange Commission

17 CFR Parts 240 and 249b

Disclosure of Payments by Resource Extraction Issuers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34–90679; File No. S7–24–19]

RIN 3235–AM06

Disclosure of Payments by Resource Extraction Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting a rule under the Securities Exchange Act of 1934 (''Exchange Act'') and an amendment to Form SD to implement Section 13(q) of the Exchange Act. Section 13(q) directs the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to payments made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires these issuers to provide information about the type and total amount of payments made for each of their projects related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information about those payments in an interactive data format.

DATES:

Effective date: The final rule and form amendment are effective March 16, 2021.

Compliance date: See Section II.O. for further information on transitioning to the final rules.

FOR FURTHER INFORMATION CONTACT: Elliot Staffin, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission initially adopted 17 CFR 240.13q–1 and an amendment to Form SD on August 22, 2012. Those rules were vacated by the U.S. District Court for the District of Columbia on July 2, 2013. On June 27, 2016, the Commission adopted a revised version of 17 CFR 240.13q–1 and an amendment to Form SD. On February 14, 2017, the revised rules were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act. Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) of the Exchange Act remains in effect. As a result, we proposed 17 CFR 240.13q–1 and an amendment to Form SD under the Exchange Act [1] on December 18, 2019. We are now adopting 17 CFR 240.13q–1 (''Rule 13q–1'') and an amendment to Form SD [2] under the Exchange Act largely as proposed.

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I. Background

A. Section 13(q) of the Exchange Act

Section 13(q) was added to the Exchange Act in 2010 by Section 1504 of the Dodd-Frank Act.[3] Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and mining companies [4] to governments for the purpose of the commercial development of oil, natural gas, and minerals.[5]

Section 13(q) directs the Commission to issue final rules that require each resource extraction issuer to include in an annual report information relating to payments made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government for the purpose of the commercial

[1] 15 U.S.C. 78a *et seq.*

[2] 17 CFR 249b.400.

[3] Public Law 111–203 (July 21, 2010).

[4] The disclosure requirements mandated by Section 13(q) only apply to oil, natural gas and mining companies that are required to file reports under Section 13 or 15(d) of the Securities Exchange Act of 1934. *See* 15 U.S.C. 78m(q)(1)(D)(i).

[5] According to Senator Richard Lugar, who co-sponsored the amendment that was the basis for this statutory provision, a goal was to provide more information to the global commodity markets and ''help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues.'' *See* 156 Cong. Rec. S3816 (daily ed. May 17, 2010).

development of oil, natural gas, or minerals. The information must include: (i) The type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.[6]

Section 13(q) defines several key terms:

- ''Resource extraction issuer'' means an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals;[7]
- ''Commercial development of oil, natural gas, or minerals'' includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;[8]
- ''Foreign government'' means a foreign government, a department, agency or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;[9] and
- ''Payment'' means a payment that:
  - Is made to further the commercial development of oil, natural gas, or minerals;
  - Is not de minimis; and
  - Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (the ''EITI'')[10] (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[11]

Pursuant to Section 13(q), the rules must require a resource extraction issuer to submit the payment information included in an annual report in an interactive data format[12] using an interactive data standard established by the Commission.[13] Section 13(q) defines ''interactive data format'' to mean an electronic data format in which pieces of information are identified using an interactive data standard.[14] It also defines ''interactive data standard'' as a standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.[15] Section 13(q) also requires that the rules include electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the Federal Government:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[16]

Section 13(q) further authorizes the Commission to require additional electronic tags that it determines are necessary or appropriate in the public interest or for the protection of investors.[17] In addition, Section 13(q) requires, to the extent practicable, that the Commission make publicly available online a compilation of the information required to be submitted by resource extraction issuers under the rules.[18] The statute does not define the term compilation.

Section 13(q) further specifies that ''[t]o the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.''[19] Although the statutory definition of ''payment'' explicitly refers to the EITI, the provision in Section 13(q) about supporting the Federal Government's commitment to international transparency promotion efforts[20] does not mention the EITI.[21]

B. Prior Section 13(q) Rulemakings and Congress's Actions Under the Congressional Review Act

On August 22, 2012, the Commission adopted Rule 13q–1 and amendments to Form SD (the ''2012 Rules'').[22] The 2012 Rules were vacated by the U.S. District Court for the District of Columbia on July 2, 2013.[23] On June 27, 2016, the

[6] 15 U.S.C. 78m(q)(2)(A).

[7] 15 U.S.C. 78m(q)(1)(D). Given this definition of ''resource extraction issuer,'' the use of the Commission's disclosure rules to achieve the transparency goals of Section 13(q) is inherently limited because the statute only applies to Exchange Act reporting companies. In contrast, the resource extraction reporting regimes of the European Union and Canada include registered companies as well as private companies of a certain specified size that are domiciled in their jurisdictions. *See infra* at Section III.C.

[8] 15 U.S.C. 78m(q)(1)(A).

[9] 15 U.S.C. 78m(q)(1)(B).

[10] The EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations committed to establishing a global standard (the ''EITI Standard'') for the good governance of oil, gas, and mineral resources. The coalition was formed with industry participation and describes itself as being dedicated to fostering and improving transparency and accountability in resource-rich countries through the publication and verification of company payments and government revenues from oil, natural gas, and mining. *See* Implementing EITI for Impact—A Handbook for Policymakers and Stakeholders (2012) (''EITI Handbook''), at xii. After volunteering to become an EITI candidate, a country must implement a series of requirements set forth in the EITI Standard and complete an EITI validation process to become a compliant member.

[11] 15 U.S.C. 78m(q)(1)(C).

[12] 15 U.S.C. 78m(q)(2)(C).

[13] 15 U.S.C. 78m(q)(2)(D).

[14] 15 U.S.C. 78m(q)(1)(E).

[15] 15 U.S.C. 78m(q)(1)(F).

[16] 15 U.S.C. 78m(q)(2)(D)(ii).

[17] *Id.*

[18] 15 U.S.C. 78m(q)(3).

[19] 15 U.S.C. 78m(q)(2)(E). The rules we are adopting in this release are consistent with this requirement, as explained throughout this adopting release. Although the new rules differ from those of the European Union and Canada in certain respects (including the definition of ''project''), neither Section 13(q)(2)(E) nor any other provision of law requires the Commission to adopt identical or significantly similar rules to those adopted by other foreign governments. When the Commission did adopt rules that were significantly similar to those of the European Union and Canada, Congress disapproved those rules.

[20] In 2013, the European Parliament and Council of the European Union (''EU'') adopted two directives that include payment disclosure rules. The EU Accounting Directive and the EU Transparency Directive (the ''EU Directives'') established the baseline in each EU member state and European Economic Area (''EEA'') country for annual disclosure requirements for oil, gas, mining, and logging companies concerning the payments made to governments on a per country and per project basis. All EU member states have implemented both of the EU Directives. The UK adopted its ''Reports on Payments to Governments Regulations 2014'' to implement the EU Directives, which remains effective following the UK's withdrawal from the EU. Norway adopted regulations similar to the EU Directives in 2013. Canada adopted a federal resource extraction disclosure law, the Extractive Sector Transparency Measures Act (''ESTMA''), in 2015. For further information about these international transparency promotion efforts, *see* Section I.B. of Release No. 34–87783 (Dec. 18, 2019) [85 FR 2522 (Jan. 15, 2020)] (''2019 Rules Proposing Release'').

[21] *See* 15 U.S.C. 78m(q)(2)(E). Although the United States became an EITI candidate country in 2014, it withdrew as an EITI implementing country in 2017. *See* letter from Gregory Gould, Director of the Office of Natural Resources Revenue, U.S. Department of the Interior, to Fredrik Reinfeldt, Chair of the EITI (Nov. 2, 2017)) (noting ''the fact that the U.S. laws prevent us from meeting specific provisions of the EITI Standard''), which is available at *https://www.doi.gov/sites/doi.gov/files/uploads/eiti_withdraw.pdf.* The United States has, however, maintained its status as a supporting country of the EITI.

[22] *See* Release No. 34–67717 (Aug. 22, 2012) [77 FR 56365 (Sept. 12, 2012)] (the ''2012 Rules Adopting Release'') *available at http://www.sec.gov/rules/final/2012/34-67717.pdf. See also* Release No. 34–63549 (Dec. 15, 2010) [75 FR 80978 (Dec. 23, 2010)] (the ''2012 Rules Proposing Release'') *available at http://www.sec.gov/rules/proposed/2010/34-63549.pdf.*

[23] *See API* v. *SEC,* 953 F. Supp. 2d 5 (D.D.C. July 2, 2013). The District Court based its decision on

Continued

Commission adopted a revised version of Rule 13q–1 and amendments to Form SD (the ''2016 Rules'') that addressed the concerns raised in the prior litigation.[24]

On February 14, 2017, the 2016 Rules were disapproved by a joint resolution [25] of Congress pursuant to the Congressional Review Act (the ''CRA'').[26] Members of the House and the Senate who supported the joint resolution expressed a number of concerns with the 2016 Rules. The principal concerns focused on the potential adverse economic effects of the rules. Specifically, members expressed the view that the 2016 Rules would impose undue compliance costs on companies,[27] undermine job growth and burden the economy,[28] and impose competitive harm [29] to U.S. companies relative to foreign competition.

Some members who voted in favor of the disapproval nonetheless reiterated support for the rule's transparency and anti-corruption objectives. For instance, a group of senators who voted for the joint resolution expressed their ''strong support'' for anticorruption policies and stated that they were ''committed to efforts to encourage corporate transparency on these matters consistent with the international standards already adopted by European and other governments.'' [30] They also indicated, however, that they voted in favor of disapproving the 2016 Rules in part due to their concern that those rules would place ''American and other SEC-registered companies'' at a significant competitive disadvantage.[31]

Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) of the Exchange Act remains in effect. As a result, the Commission is statutorily obligated to issue a new rule.[32] Under the CRA, however, the Commission may not reissue the disapproved rule in ''substantially the same form'' or issue a new rule that is ''substantially the same'' as the disapproved rule.[33] The CRA does not define ''substantially the same form'' or ''substantially the same'' and courts have not provided guidance on this issue. We therefore look to the plain meaning of the term ''substantially,'' which is ''to a large degree'' [34] or ''to a great extent.'' [35] While providing general guidance for comparing a new final rule to the rule that Congress disapproved pursuant to the CRA, this construct does not provide guidance regarding the specific textual revisions or policy adjustments that the Commission should make to the disapproved rule. We also recognize that, in the context of a mandatory rulemaking such as Section 13(q) requires, there generally is not one ''correct'' approach. As a result of the combination of these factors, we believe that determining the path forward falls to the agency assigned to undertake the mandatory rulemaking and that the agency should exercise its reasoned judgment in shaping new rules, evaluating a reasonable range of potential responses, including by considering the statutory provision that compels the rulemaking, the administrative record, and the CRA's requirements, among other things.

We received a number of comments on our approach to satisfying the statutory mandate in Section 13(q) in a manner that also adheres to the CRA's requirements.[36] Some commenters generally supported the Commission's approach regarding the CRA.[37] Several commenters, however, argued that the Commission interpreted the impact of the CRA resolution too broadly and gave too much emphasis to statements from members of Congress who supported the resolution.[38] Several commenters added that the economic concerns expressed during the CRA floor debates (particularly related to costs and competiveness) have been ameliorated by international developments, eliminating or at least reducing the need to change the substance of the final rules to address those consequences.[39] According to these commenters, the Commission (1) incorrectly concluded that the CRA resolution restricted its discretion when issuing new rules under Section 13(q) and (2) improperly relied on the CRA resolution to justify proposing rules that do not provide the level of disclosure needed to achieve the objectives of Section 13(q).[40]

two findings: First, that the Commission misread Section 13(q) to compel the public disclosure of the issuers' reports; and second, the Commission's explanation for not granting an exemption for when disclosure is prohibited by foreign governments was arbitrary and capricious. See 953 F. Supp. 2d at 17–19 and 21–23.

[24] *See* Release No. 34–78167 (June 27, 2016) [81 FR 49359 (July 27, 2016)] *available at https://www.sec.gov/rules/final/2016/34-78167.pdf* (the ''2016 Rules Adopting Release''). *See also* Release No. 34–76620 (Dec. 11, 2015) [80 FR 80057 (Dec. 23, 2015)] *available at https://www.sec.gov/rules/proposed/2015/34-76620.pdf* (the ''2016 Rules Proposing Release'').

[25] *See* H.R.J. Res. 41, 115th Cong. (2017) (enacted).

[26] 5 U.S.C. 801 *et seq.*

[27] *See, e.g.,* 163 Cong. Rec. H.848 (February 1, 2017) (Statement of Rep. Hensarling) (''The SEC has estimated that ongoing compliance costs for his rule could reach as high as $591 million annually. . . Furthermore, this rule still goes far beyond the statute passed by Congress and mandates public specialized disclosures that cost more and more, and is more burdensome than the law requires.'').

[28] *See id.* (Statement of Rep. Hensarling) (''That is $591 million every year that could better be used to hire thousands more Americans in an industry where the average pay is 50 percent higher than the U.S. average. Literally we could be talking about 10,000 jobs on the line for this ill-advised rule.'').

[29] *See id.* (Statement of Rep. Hensarling) (''The economic opportunities of . . . millions of Americans . . . are not helped by top-down, politically driven regulations that give many foreign companies an advantage over American public companies. That is exactly what this Securities and Exchange Commission regulation that we are talking about today does. It forces American public companies to disclose [expensive] proprietary information that can actually be obtained by their foreign competitors, including state-owned companies in China and Russia. This is just one regulation out of thousands and thousands that are burdening our companies, our job creators, and are costing our households by one estimate, over $14,000 a year. . .''); *see also* 163 Cong. Rec. H.851 (February 1, 2017) (Statement of Rep. Wagner) (''This particular SEC regulation . . . regarding resource extraction disclosures will make it more expensive for our public companies that are involved with energy production to be competitive overseas with foreign state-owned companies.'').

[30] *See* letter from Senator Bob Corker, Senator Susan Collins, Senator Marco Rubio, Senator Johnny Isakson, Senator Lindsey Graham, Senator Todd Young (Feb. 2, 2017) (''Sen. Corker *et al.*''), *available at https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml.*

[31] *See id.*

[32] A number of members who supported the joint resolution noted that the Commission would be obligated to issue a new rule fulfilling the statutory mandate. *See, e.g.,* 163 Cong. Rec. H.848, 849 (February 1, 2017) (Statement of Rep. Hensarling) (''Let's also remember that this joint resolution does not repeal section 1504 of Dodd-Frank. I wish it did, but it doesn't. . . It simply tells the SEC to go back to the drawing board, comply with the Dodd-Frank Act, and come up with a better rule . . .''); 163 Cong. Rec. S.635 (Feb. 2, 2017) (Statement of Sen. Crapo) (''What this resolution does is to cause the current SEC rule to not take effect. As it was characterized yesterday on the House floor and will be characterized further today on the Senate floor, what the SEC will need to do is to go back to the drawing board and come up with a better rule that complies with the law of the land.'').

[33] *See* 5 U.S.C. 801(b)(2). (''A rule that does not take effect (or does not continue) . . . may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.'').

[34] *See* Cambridge Dictionary (Cambridge University Press) (2020).

[35] *See* Oxford English Dictionary (Oxford University Press) (2020).

[36] *See, e.g.,* letters from Center for Progressive Reform (Mar. 16, 2020); Cary Coglianese (Mar. 16, 2020); Oxfam America and Earthrights International (Mar. 23, 2020); and PWYP–US (Mar. 16, 2020).

[37] *See, e.g.,* letter from National Association of Manufacturers (Mar. 16, 2020) (NAM) (stating that the proposed rule represents a tailored implementation of the statute and includes numerous important reforms from the 2016 proposal that faced disapproval from Congress).

[38] *See, e.g.,* letters from Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); and Sierra Club (March 14, 2020).

[39] *See id.*

[40] *See, e.g.,* letters from Center for Progressive Reform; Cary Coglianese; Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

The CRA resolution does not modify the Section 13(q) mandate that the Commission issue rules regarding the disclosure of resource extraction payments. It does, however, as set forth above, restrict somewhat our discretion regarding the form that those rules may take.[41] Thus, we believe our task is to exercise our discretion to craft and issue a new rule that reasonably achieves the objectives of Section 13(q) within the narrower range of available approaches imposed by the CRA.

Some commenters expressed the view that we could readopt the 2016 Rules with only minor modifications and still satisfy the CRA.[42] According to these commenters, it would be sufficient for the Commission to readopt most of the 2016 Rules while primarily modifying the rationales for or the economic analysis set forth in the prior rulemaking.[43] This approach, in our view, is inconsistent with the plain language of the CRA, which instructs that the ''new rule'' itself may not be substantially the same. Based on the plain language of the CRA, the Commission in our view is required to do more than substantially revise the rationales (including the economic analysis) in the adopting release accompanying the disapproved rule.[44] Rather, we believe that a better understanding of the CRA is that it requires us to make sufficient changes to the substantive operation of (including the requirements imposed by) the rule itself to meet the CRA mandate. Based on that general understanding, we believe that an appropriate and reasonable way to assess the CRA's not ''substantially the same'' requirement in the context of a disclosure-oriented provision such as Section 13(q) is primarily by comparing the extent to which the disclosures under the disapproved rule would differ from the disclosures under the new rule.[45]

Commenters also argued that readopting a new rule that included essentially the same (or similar) core discretionary components of the 2016 rulemaking would satisfy the CRA provided that the Commission made adjustments to a significant number of the ancillary or secondary components of the rule.[46] In the context of the Section 13(q) disclosure provision, however, we are not persuaded that ancillary or secondary adjustments would satisfy the CRA requirement that the new rule cannot be substantially the same as the disapproved rule. Various changes to the ancillary or secondary components of the 2016 Rules, alone and in combination, generally would yield a very similar disclosure model and thus result in payment disclosures substantially the same as those required by the 2016 Rules.

Rather, we believe that, in the context of Section 13(q), producing a rule that is not ''substantially the same'' as the disapproved rule is reasonably achieved by changing at least one of the two central discretionary determinations at the heart of the Section 13(q) disclosure system that the Commission made when it issued the 2016 Rules. Based on the administrative record and our understanding of Section 13(q), we believe that the two central determinations over which the Commission has discretionary authority are (1) publication of issuers' payment disclosures versus anonymization and (2) the relative granularity of the definition of ''project.'' Modifying the other discretionary determinations available in this particular rulemaking, in our view, likely would fail to produce a rule that is not substantially the same as the disapproved rule given the level of similarity that would remain between the disclosures under the new rule and those that would have resulted under the disapproved rule. Moreover, given our obligations under the CRA and based on our review of the administrative record, we believe that the final rules reasonably satisfy the statutory requirements of Section 13(q).

As discussed below, we believe that, of these two core discretionary determinations, the change that more effectively achieves Section 13(q)'s goal of increasing transparency with respect to extractive payments by resource extraction issuers while adhering to the requirements of the CRA, is to modify the project definition so that it requires less granularity in the payment disclosures than in the disapproved rule. In choosing to make this change, we are mindful of Section 13(q)'s goal, which could be significantly limited by anonymization. For reasons discussed in more detail below, we believe the final rules we are adopting appropriately comply with the CRA's not ''substantially the same'' rule requirement, and do so in a manner that reasonably achieves the objectives of Section 13(q) within the CRA's constraints.

Finally, we believe that the form and manner of the revision to the project definition is not just a reasonable change within our discretion to implement Section 13(q), but also one that alone is sufficient to comply with the CRA's requirements that the disapproved rule not be reissued in ''substantially the same form'' and a new rule may not be ''substantially the same'' as the disapproved rule. Accordingly, while we are making

[41] For example, by the plain terms of the CRA, it seems apparent that the Commission, at a minimum, could not simply readopt the disapproved rule.

[42] The CRA disapproval process is not a routine or perfunctory process. To disapprove a rule under the CRA, the support of a majority of both houses of Congress and the assent of the President is required, which taken together reflects a significant undertaking on the part of two elected branches of the Federal government. Based on the foregoing alone, it seems doubtful that the appropriate response to a CRA disapproval should be mere minor modifications.

[43] *See, e.g.,* letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[44] Revising the economic analysis from the 2016 adopting release would not in our view satisfy the CRA. The economic analysis was not part of the substantive rule because it neither imposed any legally enforceable obligations, nor provided any rights or benefits. Further, the economic analysis did not otherwise purport to offer the Commission's interpretation of any statutory provision or agency rule, nor did it set forth any general statements of agency policy, or establish any rules of agency organization, procedure, or practice. Rather, the economic analysis in the adopting release served to memorialize the Commission's understanding and consideration of the economic implications of the 2016 Rules. Moreover, even if in theory changing the economic analysis to include revised cost estimates might be sufficient in some cases to satisfy the CRA, we nonetheless disagree that a change in the economic analysis would be sufficient in this particular case. The argument put forward by some commenters is that the projected costs and competitive burdens included in the 2016 Rules Adopting Release were too high. *See id.* The costs and competitive burdens were, however, only one component of the considerations on which the Commission based the 2016 Rules. As the 2016 Rules Adopting Release explained, the economic impact of the 2016 Rules was relevant, but not determinative. *See* 2016 Rules Adopting Release at Sections II.B and C. Thus, merely revising the economic analysis and retaining the myriad other reasons that led the Commission to adopt the granular public disclosure model, and largely reissuing the same rule, would not, in our view, satisfy the CRA requirement. Any such rule, including the underlying analysis, would continue to be in substantially the same form as the disapproved rule.

[45] We recognize, as discussed in Section III.A below, that economic and other considerations relevant to Section 13(q) have continued to evolve since the 2016 Rules were adopted. Specifically, data and other information concerning the subsequent experiences of resource extraction issuers operating under foreign disclosure regimes that are similar to the disapproved 2016 Rules indicate that the potential compliance costs and competitive harm associated with the disclosures may be less than the Commission had projected at the time that it issued the 2016 Rules. Even if these external facts could be considered to have significantly mitigated such concerns, they do not eliminate the CRA mandate that *the new rule* cannot be substantially the same as the disapproved rule. In formulating the final rules, however, we have considered the developments in international payment reporting regimes, including the extent to which they might provide additional insights regarding the potential costs and competitive effects of project-level disclosures.

[46] *See, e.g.,* letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

various other changes to more ancillary or secondary matters that could further support our efforts to comply with the CRA's requirements, these changes are motivated by policy considerations and the administrative record.[47]

C. Summary of the Final Rules

We are adopting rules to implement Section 13(q) largely as proposed, with some modifications in response to comments received. As we previously explained, given the requirements of Section 13(q), certain elements of the final rules remain unchanged from the 2016 Rules.[48] In light of the changes that we have made, as discussed below, the fact that certain elements remain the same does not change our belief that the final rules are not substantially the same as the 2016 Rules and therefore are in compliance with the CRA's restriction on subsequent rulemaking.

In this regard, the final rules include several changes from the 2016 Rules. Most notably, the final rules will revise the definition of the term ''project,'' a term that was not statutorily defined, to require disclosure at the national and major subnational political jurisdiction, as opposed to the contract-level disclosure as required by the disapproved rule. Because the definition of ''project'' plays a central role in Section 13(q)'s disclosure regime, we believe that changing this definition is sufficient for meeting the CRA's mandate that the new rule not be substantially the same as the disapproved rule.[49] Some commenters have suggested that changing other aspects of the 2016 Rules, such as the definition of ''control,'' would equally fulfill the CRA mandate.[50] As discussed above, however, we believe that these suggested changes, some of which we are adopting, constitute relatively minor modifications that, by themselves, would not effect a substantial difference from the disapproved rule.

In addition to changing the project definition, the final rules will:

- Add two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure;[51]
- Add an exemption for smaller reporting companies and emerging growth companies;[52]
- Revise the definition of ''control'' to exclude entities or operations in which an issuer has a proportionate interest;[53]
- Limit the liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission;[54]
- Add relief for issuers that have recently completed their U.S. initial public offerings;[55] and
- Extend the deadline for furnishing the payment disclosures.[56]

We believe the final rules are reasonably designed to achieve the transparency goals of Section 13(q). For example, the final rules will require the public disclosure of the payment information, including the identity of the issuer.[57] We considered the alternative approach suggested by some commenters that would enable issuers to submit the payment information non-publicly, which would then be published in an anonymized compilation by the Commission.[58] Although this approach would constitute a significant difference from the 2016 Rules and would be within our discretionary authority, we determined not to adopt this approach because we believe doing so could limit the transparency and related objectives of Section 13(q).[59]

In contrast, although the changed project definition would diminish the granularity of disclosure compared to a contract-based definition, we believe that the final rules, taken as a whole, will achieve the transparency and related goals of Section 13(q) by providing significant and useful payment information regarding resource extraction payment flows from reporting companies to foreign governments. Transparency-enhancing changes from the proposed rules include our adoption of the $100,000 threshold in the definition of a ''not de minimis'' payment[60] and the requirement to disclose the amount of payments by payment type for, and identify, each subnational government payee.[61]

The following chart summarizes the primary changes in the proposed and final rules compared to the 2016 Rules:

Issue	2016 Rules (disapproved)	Proposed rules	Final rules
Definition of ''project''	• Defined as operational activities governed by a single contract, license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government.	• Defined using three factors: (1) Type of resource; (2) type of operation;and (3) major subnational jurisdiction.	• Same as proposed.

[47] Nevertheless, even if a modified definition of project alone were insufficient to comply with the CRA, given these other changes, we believe that the final rules, when considered as a whole, comply with the CRA's restriction on subsequent rulemaking. To be clear, however, we did not make these other changes in response to the CRA, but rather on independent policy grounds.

[48] *See* 2019 Rules Proposing Release at Section I.C.3. For example, we proposed, and are adopting, the same delayed reporting provision for exploratory activities, the same transitional relief for recently acquired companies, and a similar alternative reporting mechanism, all of which were adopted in 2016. *See infra* Sections II.D. and N. We also are adopting, as proposed, the same definitions as adopted in 2016 for ''resource extraction issuer,'' ''commercial development of oil, natural gas, or minerals,'' ''payment,'' and ''foreign government.'' *See infra* Sections II.G–J. As further discussed below, most commenters who addressed those definitions in the 2016 rulemaking generally supported them, and most submitting comments on the 2019 Rules Proposing Release either supported the definitions or chose not to address them.

[49] *See infra* Section II.A.

[50] *See, e.g.,* letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[51] *See infra* Section II.D.1.–2.

[52] *See infra* Section II.D.3.

[53] *See infra* Section II.E.

[54] *See infra* Section II.F.

[55] *See infra* Section II.D.6.

[56] *See infra* Section II.L.2.

[57] *See infra* Section II.B. Other aspects of the final rules that are reasonably likely to achieve the transparency goals of Section 13(q) include adding infrastructure payments, social or community payments, and certain dividend payments to the statutorily required payment types. *See infra* Section II.J.

[58] *See, e.g.,* letter from API (Mar. 16, 2020).

[59] *See infra* Section II.B.

[60] *See infra* Section II.C.

[61] *See infra* Section II.G.

Issue	2016 Rules (disapproved)	Proposed rules	Final rules
Aggregation of payments	• No aggregation of payments beyond contract level, except that payments related to operational activities governed by multiple legal agreements could be aggregated together as long as the multiple agreements were operationally and geographically related.	• Aggregation of the same type of payments permitted at major subnational jurisdiction level, which must be identified;	• Aggregation at major subnational jurisdiction level (same as proposed). • Aggregation of the same type of payments permitted at levels below major subnational level, which may be described generically (*e.g.,* as county or municipality). • Issuer may aggregate payments by payment type, but must disclose aggregated amount for each subnational government payee and identify each subnational government payee.
Exemptions from compliance based on conflicts with foreign laws or contract terms.	• No exemptions for conflicts with foreign laws or contract terms. • Case-by-case exemptive process established.	• Conditional exemptions for foreign law conflicts and pre-existing (pre-effectiveness) contract terms that prohibit disclosure.	• Same as proposed.
Exemption for smaller reporting companies or emerging growth companies.	• No exemption for smaller reporting companies or emerging growth companies.	• Exemption for smaller reporting companies and emerging growth companies.	• Same as proposed, but limit exemption to companies not subject to an alternative reporting regime, which has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q).
Definition of ''control''	• Based on established financial reporting principles: Issuer has control over an entity when it is required under GAAP or IFRS to consolidate or proportionately consolidate the financial results of that entity.	• Similar to approach under 2016 Rules, except that an issuer is not required to disclose payments made by entities that it only proportionately consolidates.	• Same as proposed.
Filed vs. furnished—application of Exchange Act Section 18 liability.	• Reports required to be filed; • Potential Section 18 liability.	• Reports are furnished; • No Section 18 liability.	• Same as proposed.
Relief for Initial Public Offerings (IPOs).	• No relief for IPOs.	• Transitional relief for IPOs; • Issuer would not have to comply with the Section 13(q) rules until the first fiscal year following the fiscal year in which it completed its initial public offering.	• Same as proposed.
Deadline for furnishing payment disclosures.	• For all issuers, no later than 150 days after the end of the issuer's most recent fiscal year.	• For issuers with fiscal years ending on or before June 30, no later than March 31 in the following calendar year; • For issuers with fiscal years ending after June 30, no later than March 31 in the second calendar year following their most recent fiscal year.	• 2 year transition period during which no Form SD due. • Following transition period, Form SD due no later than 270 days after the end of the issuer's fiscal year.

II. Final Rules Under Section 13(q)

We received over 70 letters on the 2019 Proposed Rules from a range of commenters that included companies; trade associations; not-for-profit, non-governmental organizations (''NGOs''); members of Congress; and investors.[62] When developing these final rules, we have considered these comments while keeping in mind the transparency and related objectives of Section 13(q), the disapproval of the 2016 Rules under the CRA, and the CRA requirement not to adopt a new rule that is ''substantially the same'' as the disapproved rule.

In this section, we first discuss the final rule provisions that, based on the large number of comments that addressed them, involve issues that we believe are the most critical in this rulemaking. Those issues include the definition of ''project'' and the related issue concerning the aggregation of payments, the definition of a ''not de minimis'' payment, whether to include exemptions (and the nature of any exemptions), whether the Section 13(q) disclosures must be public and include the identity of the issuer, the definitions of ''subsidiary'' and ''control,'' and the treatment of the Section 13(q) disclosures for purposes of liability under the Exchange Act and Securities Act.[63] While, as discussed below, we believe that the revised definition of project is both necessary and sufficient to satisfy the CRA, we note that several of the other provisions also represent changes from the 2016 rules. Thus, even if the revised project definition were not

[62] These comment letters are available at *https://www.sec.gov/comments/s7-24-19/s72419.htm.*

[63] *See infra* Sections II.A. through II.F.

sufficient, this change when considered with the other changes we are making should satisfy the CRA's mandate.

We then discuss final rule provisions that received fewer comments but are nonetheless important to the statutory scheme. These include the definition of ''resource extraction issuer,''[64] the definition of ''payment,''[65] and the interactive data format requirement for the Section 13(q) disclosure.[66]

Before we discuss the specific components of the new rules, we acknowledge that some commenters suggested that in the Proposing Release the Commission unduly relied on various floor statements made by members of Congress during the CRA votes to disapprove the 2016 Rules. The floor statements in question dealt with the potential high cost and competitive harm that could flow from the 2016 Rules. Commenters have identified a number of reasons why they believe these congressional floor statements are not relevant to the current rulemaking, including: (1) These floor statements are not necessarily consistent with the views of most members of Congress and are not legally binding in any case; (2) the floor statements themselves give no clear indication of how the Commission should modify the rules; and (3) the concerns expressed in these floor statements about costs and competitive effects may be based on estimates and economic analyses in the 2016 Rules Adopting Release that have been called into question by actual cost data and information regarding the potential anti-competitive effects derived from resource extraction issuers' experiences with the disclosure regimes in Europe and Canada.[67]

When the Commission adopted the 2016 Rules, it reasonably relied on the data available to it in the administrative record and that data may have informed the views subsequently expressed by members of Congress regarding the projected potentially high costs and significant risk of competitive harm as a result of the implementation of Section 13(q). Since that time, however, additional data and other information that has become available regarding resource extraction companies' experiences with the European and Canadian disclosure regimes indicate that the cost and anti-competitive effects of payment disclosure, while still relevant considerations,[68] may well be lower than the Commission projected in 2016.[69]

Thus, in formulating the final rules (and in contrast to our approach in the proposing release), we have not based our discretionary determinations for the final rules on previously expressed concerns, including from various members of Congress, about the economic effects of the 2016 Rules (although we do acknowledge various points where those concerns may align with our discretionary determinations). Instead, we have been informed by the comments received on the Proposing Release and our own evaluation of the potential economic and other effects of the final rules. Having considered the totality of the record before us, and for the reasons set forth below, we believe the final rules represent an appropriate and faithful implementation of the Section 13(q) disclosure provision while, at the same time, complying with the CRA and reflecting a reasoned exercise of our discretionary authority to make sound policy choices based on the administrative record.

A. Definition of ''Project''

Consistent with Section 13(q), the final rules will require a resource extraction issuer to disclose payments made to governments relating to the commercial development of oil, natural gas, or minerals by type and total amount per project. We are adopting, as proposed, the definition of ''project'' using the following three criteria: (1) The type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place.[70] This definition (''Modified Project Definition'') differs from the definition included in the 2016 Rules, which defined ''project'' as the operational activities governed by a single contract, license, lease, concession, or similar agreement, which form the basis for payment liabilities with a government (''Contract-Level Project Definition'').[71]

1. Comments and Considerations Regarding the Modified Project Definition

Several commenters supported adoption of the proposed Modified Project Definition.[72] For example, one commenter stated that it represented the best method for reducing regulatory costs and unnecessary exposure of issuers' competitively sensitive data while promoting transparency.[73] Another commenter indicated that the proposed project definition would address the concerns some market participants have raised about overly descriptive disclosures revealing competitively sensitive information,[74] and, by allowing for increased aggregation of payments, would also reduce the cost burden of the Section 13(q) disclosure requirement.[75] A third commenter stated that the proposed project definition would achieve an appropriate balance that promotes transparency from extraction payments while reducing the regulatory burden anticipated to result from the 2016 Rules.[76]

Other commenters opposed the Modified Project Definition for several reasons,[77] including the following:

- Some indicated that the Modified Project Definition would fail to produce the transparency necessary to enable citizens to detect corruption and demand accountability from their host governments as Congress intended.[78]

[64] *See infra* Section II.H.

[65] *See infra* Section II.J.

[66] *See infra* Section II.M.

[67] *See* letter from Oxfam America and Earthrights International (stating that other regulators have conducted reviews of implementation of alternative reporting regimes and found that no material competitive or compliance impacts have thus far been documented); *see also* European Commission, *Review of country-by-country reporting requirements for extractive and logging industries* (Final report) (2018).

[68] *See generally* Exchange Act Sections 3(f) and 23(a)(2).

[69] *See* Section III.D.11 below.

[70] This definition is similar to the definition of ''project'' previously suggested by one industry commenter. *See* letters from the API (Nov. 7, 2013) and (Feb. 16, 2016). The term ''project'' as used in this release will only apply to disclosure provided pursuant to Rule 13q–1 and not, for example, the disclosure required by Article 4–10 of Regulation S–X (17 CFR 210.4–10) or subpart 1200 or 1300 of Regulation S–K (17 CFR 229.1200 or 229.1300).

[71] *See* 2016 Rules Adopting Release at Section II.E.3.

[72] *See* letters from API (Mar. 16, 2020); Chamber of Commerce (Mar. 16, 2020) (Chamber); NAM; Petrobras (Mar. 16, 2020); and Shareholder Advocacy Forum (Mar. 16, 2020) (SAF).

[73] *See* letter from API (Mar. 16, 2020). When recommending that the Commission adopt the non-public submission and anonymized compilation approach, however, this commenter stated that reverse engineering was possible even under the Modified Project Definition. *See id.* We address this comment in Section II.B.1. *infra.*

[74] *See* letter from NAM.

[75] *See id.*

[76] *See* letter from SAF.

[77] *See, e.g.,* letter from Sens. Benjamin L. Cardin, Sherrod Brown, Richard J. Durbin, Edward J. Markey, Jeffrey A. Merkley, Sheldon Whitehouse, Patrick Leahy, Elizabeth Warren, Christopher A. Coons, and Jeanne Shaheen (Mar. 11, 2020) (Sens. Cardin *et al.*); letter from Oxfam in Kenya (Mar. 16, 2020); letter from PolicyAlert! (Feb. 27, 2020); letter from PWYP–US (Mar. 16, 2020); and letter from Sens. Benjamin L. Cardin and Richard J. Durbin (Dec. 11, 2020) (Sens. Cardin and Durbin).

[78] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020); *see also* letters from Sens. Cardin *et al;* and Sens. Cardin and Durbin. Several other commenters emphasized the need for disaggregated payment disclosure as an anti-corruption tool in various countries. *See, e.g.,* letter from EG Justice (Mar. 11, 2020) (describing the corruption in Equatorial Guinea); letter from the Carter Center (Mar. 16,

• Some pointed to a study that showed that a large amount of payment data would be lost under the Modified Project Definition if the proposed ''not de minimis'' thresholds were adopted.[79]

• Some believed that because the Modified Project Definition would allow issuers to report payments in the aggregate, at the country and major subnational level, without requiring disclosure of the contract or license that gave rise to the payments, it would limit the utility of the reported payment data for citizens in resource-rich countries with revenue-sharing laws.[80]

• Some opposed the Modified Project Definition because in their opinion it is an arbitrary construction that does not reflect standard industry practice.[81]

• Some stated that the Modified Project Definition deviates from what has become the international norm for a project definition in payments-to-governments reporting, namely, a project definition based on a single contract, license, lease, or concession.[82]

• Some argued that the Modified Project Definition does not satisfy the plain language of Section 13(q).[83]

• Finally, some indicated that investors need contract-based data to assess a resource extraction issuer's future cash flows and other indices of risk.[84]

As discussed below, we believe that the Modified Project Definition that we are adopting will achieve Section 13(q)'s statutory mandate by increasing transparency regarding resource extraction payments while also ensuring that the final rules comply with the requirements of the CRA.[85] A key threshold issue, however, is the application of the CRA in the context of Section 13(q). As discussed above, we believe that there are only two discretionary aspects of the Section 13(q) rules where we can make a change that will likely achieve compliance with the CRA mandate against issuing a rule that is substantially the same as the disapproved rule: The definition of project or changing from a public filing to an anonymized compilation.[86] Without a change to one of these two aspects, we believe it is unlikely that the final rules would satisfy the CRA mandate. Although changing from a public filing to an anonymized compilation would likely satisfy the CRA mandate, for the reasons we discuss in Section II.B.1. below, we believe it is a less effective option for achieving Section 13(q)'s mandated transparency goals.[87] Thus, in light of our decision to require public disclosure of payment information, and not change to an anonymized compilation, we believe that making a significant change to the definition of project is warranted in order for the disclosure regime under the final rules not to be substantially the same as that under the disapproved 2016 Rules.[88]

Although we believe that a significant change to the definition of project is warranted, we acknowledge that the CRA does not compel us to adopt any particular definition of project within the range of definitions that would lead to rules that are not ''substantially the same'' as the disapproved 2016 Rules. Thus, we have based our determination to adopt the Modified Project Definition on various policy considerations that are tied to Section 13(q) and its goals.[89]

As a starting point, we believe that the motivating purpose of the Section 13(q) mandated disclosure of resource extraction payments is to provide transparency around the source and recipients of these payments; specifically, to identify a country's share of the resource extraction revenue generated by each project of an issuer[90] and the governmental level and governmental entity within the country receiving the money from each project of an issuer (hereinafter ''Project-to-Government Payment Disclosure'').[91] Further, we believe that the principal goal of this Project-to-Government Payment Disclosure is to provide an informational tool that may help users

2020) (discussing the need for a contract-based definition of project to combat corruption in the Democratic Republic of the Congo); and letters from Daniel Kaufmann (May 1, 2020), One.org (Mar. 24, 2020), and Eric Postel (Mar. 19, 2020) (each generally discussing the importance of disaggregated, granular reporting as an anti-corruption tool).

[79] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International. We discuss these comments and the referenced study in greater detail in Section II.C.

[80] According to these commenters, the Modified Project Definition would particularly impact citizens residing in countries with revenue-sharing laws that require the national government to distribute a portion of the revenues received from extractive activities to subnational governments or local communities. *See* letter from PWYP–US (Mar. 16, 2020); *see also* letters from Sens. Cardin *et al.;* and Congr. Waters *et al. See also* letters from Friends of the Nation; Iraqi Transparency Alliance for Extractive Industries (Mar. 10, 2020) (''Iraqi Transparency Alliance''); Kenya Civil Society Platform Oil and Gas and PWYP-Kenya (Mar. 16, 2020) (''KCSPOG''); Oxfam in Kenya; PWYP-Burkina Faso (Apr. 22, 2020); PWYP-Indonesia (Mar. 16, 2020); and PWYP–US (Mar. 16, 2020).

[81] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020); *see also* letters from Elise J. Bean (Apr. 29, 2020); and Alan Detheridge (Mar. 15, 2020).

[82] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020); *see also* letters from Oxfam America and Earthrights International; and ONE Campaign (Mar. 16, 2016).

[83] *See, e.g.,* letter from Oxfam America and Earthrights International.

[84] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020); *see also* letter from Frederic Samama, Steve Waygood, Vicki Bakhshi, Helena Viñes Fiestas, John Wilson, Meryam Omi, Christopher P. Conkey, and Katarina Hammar (Mar. 16, 2020) (F. Samama *et al.*).

[85] The Modified Project Definition that we are adopting is an alternative that was available to the Commission in the reasonable exercise of its discretion when it sought to implement the Section 13(q) rules in 2012 and 2016. Although the Commission chose not to use this definition in its prior rulemakings, we view the Modified Project Definition as fully consistent with the structure and purpose of Section 13(q). To the extent that the Commission may have suggested otherwise in 2016, we believe that was incorrect for the reasons explained below.

[86] *See supra* Section I.B.

[87] We do not read Section 13(q) to preclude an anonymized compilation as a legal matter and as such believe that an anonymized compilation would be within our statutory discretion to adopt. Although an anonymized compilation would likely not allow users of the data to know the specific issuer to which any project-payment disclosures might relate, we do not read Section 13(q) to require such disclosure. Thus, for example, the definition of project that we are adopting could be coupled with an anonymized disclosure, with project payments disclosed in the compilation, but not in a manner that would clearly identify the issuer making the payments for the specific project. As discussed below, however, we do not believe that this would advance the transparency goals of Section 13(q) to the same extent as we believe our Modified Project Definition will.

[88] By adopting the Modified Project Definition, we are establishing the minimum level of disclosure that a resource extraction issuer must provide concerning its projects. We recognize that some resource extraction issuers have expressed a commitment to following the more granular model of reporting adopted by the EU countries, Norway, and Canada. *See, e.g.,* letters from BHP (Mar. 16, 2020); BP America, Inc. (Mar. 13, 2020); Eni (Mar. 25, 2020); Equinor ASA (Mar. 13, 2020); Kosmos Energy (Feb. 19, 2020); Ovintiv (Mar. 16, 2020); Rio Tinto (Mar. 16, 2020); and Total (Feb. 10, 2020). As discussed below, issuers may elect to furnish reports prepared under these foreign transparency regimes to satisfy their Section 13(q) reporting obligations pursuant to the alternative reporting provision we are adopting. In addition, there is nothing in the approach that we are taking that would preclude such issuers from providing additional disclosure concerning their projects, *e.g.,* by disclosing payments at a level below the major subnational government level, outside of the Form SD. For example, such issuers could provide the disclosure on their website, in annual or periodic reports, or in a Form 8–K or Form 6–K.

[89] We are not aware of, and commenters have not identified, any uniform or generally accepted definition of ''project.'' We have sought to provide a definition that both complies with the requirements imposed by the CRA and reasonably achieves the goals of Section 13(q), taking into account the views of resource extraction issuers who are making the disclosures and third parties who are seeking to use the information. We acknowledge that there may be alternatives to the Modified Project Definition that could potentially achieve the same objectives. The administrative record that has developed through the various rounds of rulemaking, however, reflects that the vast majority of commenters supported one of two competing definitions—*i.e.,* the contract-level definition that the Commission adopted in the disapproved 2016 Rules, and the Modified Project Definition we are adopting. Thus, given the administrative record before us, we considered the Modified Project Definition to be the principal alternative to the Contract Level Definition included in the 2016 Rules.

[90] *See* 15 U.S.C. 78m(q)(2)(A)(i).

[91] *See* 15 U.S.C. 78m(q)(2)(A)(ii).

of the information to hold various governments accountable for how those governments spend money received. This understanding is consistent with the text of Section 13(q) and the congressional concerns leading to its adoption.[92]

We believe that the Modified Project definition is reasonably tailored to achieve this goal, providing transparency to users of the information and doing so with a consistent and understandable frame of reference. Moreover, as we explain in Section II.B.1. below, we believe it is a better choice than the anonymized compilation for achieving this goal because it permits the users of the information to see, by identified issuers, the payments from specified activities in a defined area of the country to the various governmental authorities within the country.

Further, we anticipate the Modified Project Definition should provide resource extraction issuers with a practical and relatively straightforward definition of ''project'' that they can utilize in tracking and reporting payments wherever they may have ongoing operations around the globe. We also note that it appears that the Modified Project Definition may reduce the compliance burden of the Section 13(q) rules compared to the 2016 Rules. Specifically, the Modified Project Definition will allow an issuer to make the payment disclosure at a greater level of aggregation than under the Contract-Level Project Definition. As such, there should be fewer individual data points that have to be tracked, electronically tagged and reported, which may make it less burdensome to disclose the payment information on an ongoing basis. For similar reasons, the revised definition may also help limit any adverse competitive effects associated with project-based disclosures.

We acknowledged in the 2019 Rules Proposing Release that the Modified Project Definition, in contrast to the more granular Contract-Level Project Definition, might narrow the scope of the transparency benefits under Section 13(q). We stated that by providing transparency about the revenues generated from each contract, license, and concession, the Contract-Level Project Definition could serve to reduce further the potential for corruption in connection with the negotiation and implementation of a resource extraction contract as compared to the Modified Project Definition. As such, it could reduce instances of corruption that may occur *before* resource-extraction revenue is paid to the government.[93] As discussed below, however, we view this potential for incremental deterrence as a discretionary goal rather than the primary objective of Section 13(q).

Some commenters asserted that only a granular (*e.g.,* contract-level) definition of project will fully achieve the transparency and anti-corruption purposes that Congress sought to achieve with Section 13(q).[94] In advancing this argument, these commenters point to five considerations that the Commission identified in the 2016 Adopting Release to support the conclusion that a granular ''definition of project . . . is necessary and appropriate to achieve a level of transparency that will help advance the important anti-corruption and accountability objectives of Section 13(q).'' Specifically, these commenters noted, the 2016 Adopting Release stated that a granular definition would: (1) Help reduce instances where government officials are depriving subnational and local communities of revenue allocations to which they are entitled; (2) potentially permit ''comparisons of revenue flows among different projects'' to identify ''payment discrepancies that [may] reflect potential corruption and other financial discounts''; (3) help citizens and others ensure that firms are meeting their payment obligations; (4) help local communities and civil society groups possibly weigh the costs and benefits of a project; and (5) possibly deter companies from underpaying royalties or other monies owed.[95]

As a threshold matter, we observe that any effort to achieve the foregoing objectives would appear to depend on other factors beyond the scope of Section 13(q) and the Commission's rulemaking authority.[96] For example, item (1) assumes that there are statutory obligations for the national government to provide revenue allocations to other governmental levels within a country. In any event, as explained below, to the extent that a country has enacted a revenue-sharing law, we believe that the Modified Project Definition will provide significant information about payments to the national government that would help determine whether that government has met its statutory revenue-sharing obligations. Additionally, items (2) and (3) would appear to require *at a minimum* the disclosure of the underlying contracts, licenses, or leases to determine whether the payment obligations are similar among them; without that information, there would be no obvious way to make cross-project comparisons or ensure that resource extraction issuers are meeting their payment obligations. And with respect to items (4) and (5), without public awareness of the payment obligations (as well as the gross revenues earned annually by the project), it would appear doubtful that there could be any reasonably complete (or accurate) cost-benefit determination of the project or any form of oversight resulting in meaningful deterrence.

Based on the foregoing, as well as our consideration of the text of Section 13(q) and the history leading to its adoption in 2010, we do not find any persuasive support for the 2016 Adopting Release's conclusion that Section 13(q) requires payment disclosures that could advance the five purposes enumerated in that release. Thus, even assuming that the granular disclosure required by the 2016 Rules *might* facilitate in some fashion one or more of those goals, this result is not compelled, either directly or indirectly, by Section 13(q); and to the extent that the 2016 Adopting Release suggests otherwise, we disavow that determination.[97] Instead, those goals are

[92] *See* 15 U.S.C. 78m(q)(2)(A). As discussed below, we do not find persuasive support for any conclusion that Congress intended Section 13(q) to provide material information to investors. Although some commenters have asserted that granular disclosure through a contract-level project definition might provide certain investors with useful information, we believe that other disclosures already required by the Commission operate to provide the relevant information that is material to an investment decision. Accordingly, we decline in the exercise of our discretion to provide granular information that is not required by Section 13(q) and, in our view, generally is not material to or necessary for investors. In reaching this conclusion, we recognize that Section 13(q)(2)(D)(VII) affords us discretionary authority to require resource extraction issuers to submit additional payment-related data in an interactive data format including electronic tags beyond that data identified in the statute if the Commission determines that such data could benefit investors. We have determined not to use this authority, however, because as discussed above, we do not believe the data collected under Section 13(q) is material to investors, nor have we determined that electronically tagging additional data is necessary or appropriate in the public interest or for the benefit of investors.

[93] *See* 2019 Rules Proposing Release at Section II.F.1.

[94] *See, e.g.,* letters from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International.

[95] *See* 2016 Rules Adopting Release at Section II.E.3.

[96] This stands in contrast to what we believe is the primary congressional concern underlying Section 13(q), which (as we discuss below) can be fully addressed within available authority, and it is a factor in leading us to believe that these five potential collateral uses for the payment disclosures are neither statutorily compelled nor necessary to the transparency goals that Congress intended to advance.

[97] In this regard, we find it telling that Congress did not provide a definition of project or even direct

better understood as (at most) secondary or ancillary objectives that the agency in its discretion sought to further by requiring granular payment disclosure through the project definition. Consistent with that interpretation, we decline to exercise our discretion to follow the 2016 approach by utilizing a project definition that is focused on furthering these secondary objectives of the payment information.

We now turn to explain various aspects of the final rules. First, the final rules include changes from the proposal that we believe will help limit the potential loss of payment information compared to a contract-based definition. Specifically, the rules that we adopt in this release will include the reinstatement of the $100,000 threshold in the definition of a ''not de minimis'' payment [98] as well as a requirement to disclose the amounts paid to, and to identify, each subnational government payee.[99]

Second, issuers will be required to disclose payments at the major subnational government level. As such, users of this information would be able to see the payments made directly to a province or state, and could use this data to assess a province's or state's use of the funds received, such as whether the province is employing the funds to benefit its citizens.[100]

We also note that there is no single generally accepted definition of project in the mining industry and the definitions that exist are typically very broad and do not define project based on an individual contract level.[101] The definitions of project in the oil and gas industry (and related definitions in the Commission's oil and gas disclosure requirements) similarly do not focus on contractual arrangements that generate payment obligations but rather on whether operations will result in the development and production of reserves.[102] In light of this, we believe the Modified Project Definition, based on the resource (and how and where it is extracted, as well as the company's identity) is a reasonable approach.

Some commenters opposed the Modified Project Definition because it deviates from the contract-based definition of project adopted under the EU Directives, Canada's ESTMA, and, most recently, the EITI, which they describe as the international norm for a project definition in payments-to-governments reporting.[103] They maintain that the Modified Project Definition would (1) produce differences in the granularity of the payment disclosure reported under the Section 13(q) rules and that reported under the EU Directives, Canada's ESTMA, UK's and Norway's transparency regimes, and the voluntary reporting program of the EITI, and (2) result in issuers with multi-jurisdictional operations collecting and reporting two different sets of payment data to accommodate the different project definitions, thereby unnecessarily increasing compliance costs and potentially confusing users of the payment data.[104] Commenters therefore recommended adoption of a contract-based definition to maintain a level playing field among industry competitors [105] and to increase the comparability of the payment data.

One commenter stated that, instead of permitting the aggregation of contracts under the Modified Project Definition, the Commission should adopt the approach for aggregating contracts used in the foreign reporting regimes, which permits agreements with substantially similar terms that are both operationally and geographically integrated to be treated by the issuer as a single project. According to this commenter, the recommended approach would constitute a change from the 2016 Rules that better aligns with international practice.[106]

We acknowledge that adoption of the Modified Project Definition may in many instances produce differences in the granularity of the payment disclosure reported under the Section 13(q) rules and that reported under the EU Directives, Canada's ESTMA, UK's and Norway's transparency regimes, and the voluntary reporting program of the EITI. We are not statutorily required, however, to harmonize our disclosure obligations with other reporting regimes. We also believe that other aspects and considerations regarding the final rules should significantly diminish these concerns about differences with other payment reporting regimes.

For example, as proposed, we are adopting an alternative reporting provision that will allow issuers to meet the requirements of the Section 13(q) rules by providing disclosures that comply with a foreign jurisdiction's reporting regime if the Commission has determined that the foreign reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q).[107] Concurrent with adoption of these final rules, we are issuing an order recognizing that the resource extraction

us to define the term. Nor, when Section 13(q) was enacted, was there a definition of project under EITI or any foreign transparency regimes (as none then existed). The Commission chose to define the term project in the exercise of its discretionary authority. This indicates that the Commission could have declined to adopt a uniform definition of project, let alone a granular definition, and instead allowed resource extraction issuers the ability to define the contours of their projects on a case-by-case basis. Accordingly, we do not read Section 13(q) as necessarily requiring the Commission to adopt granular disclosure through a definition of the term project.

[98] *See infra* Section II.C.

[99] *See infra* Section II.G.

[100] Although not a goal of Section 13(q) (*see* the discussion above concerning the ultimate goal of the Project-to-Government Payment Disclosure of Section 13(q)), the final rules may provide information that would be useful for determining whether national governments in countries that have revenue-sharing laws have allocated funds to provinces or other subnational governments if and as required by law. For example, users of the information would be able to see all the reported payments made by resource extraction issuers from their projects that are paid to a particular national government in a particular year. They could then apply the relevant percentage under the country's revenue-sharing law to the aggregated amount of payments from all issuers to determine the portion of funds that should be allocated to a given province or other subnational government. Such persons could then use that data to hold the national government accountable for what they believe to be the lawful allocation of revenues required to be paid to a given subnational government from the extractive operations in that country. Similarly, the final rules will identify the specific government payees, which will help users of the information assess whether the payees allocated any funds to the specific communities where project activities are being conducted. The usefulness, however, of the Section 13(q) payment data for purposes of determining the lawful allocation from the national government to a subnational government will depend on the complexity of the particular revenue-sharing law. For allocations under complex revenue-sharing laws, which rely on factors other than a percentage-based formula, *see, e.g.,* letter from Iraqi Transparency Alliance, it is likely that neither a contract-based project definition nor the Modified Project Definition would be useful for this purpose.

[101] For example, the Canadian disclosure regime for companies with mining operations defines a mineral project as ''any exploration, development or production activity'' regarding ''base and precious metals, coal, and industrial minerals.'' *See* National Instrument (NI) 43–101, Part 1.1 (2016).

[102] *See, e.g.,* Society of Petroleum Engineers, *Petroleum Resources Management System,* Section 1.2 (June 2018) (stating that a project may, for example, ''constitute the development of a well, a single reservoir, or a small field; an incremental development in a producing field; or the integrated development of a field or several fields together with the associated processing facilities (*e.g.,* compression.''); *see also* 17 CFR 210.4–10(a)(8) (Rule 4–10(a)(8) of Regulation S–X), which defines a ''development project'' as ''the means by which petroleum resources are brought to the status of economically producible'' and provides as examples ''the development of a single reservoir or field, an incremental development in a producing field, or the integrated development of a group of several fields and associated facilities with a common ownership.''

[103] *See, e.g.,* letters from BHP; BP; Oxfam and Earthrights International; and PWYP–US (Mar. 16, 2020).

[104] *See* letters from BHP and PWYP–U.S. (Mar. 16, 2020).

[105] *See* letters from BP and Total (Feb. 10, 2020).

[106] *See* letter from Oxfam America and Earthrights International.

[107] *See infra* Section II.N. Issuers will have to meet certain conditions in order to avail themselves of the alternative reporting provision.

payment disclosure requirements of the European Union, United Kingdom, Norway,[108] and Canada satisfy the transparency objectives of the Section 13(q) rules. Consequently, a resource extraction issuer will be able to submit a report complying with the reporting requirements of either the EU Accounting Directive or the EU Transparency Directive, in each case as implemented in an EU or European Economic Area (EEA) member country, the UK Reports on Payments to Governments Regulations, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA, to satisfy its disclosure obligations under the Section 13(q) rules.

A resource extraction issuer that avails itself of the alternative reporting provision will only have one set of data to collect and report—that pertaining to the alternative reporting regime—and will largely not incur costs related to the need to collect and report two different sets of payment data in order to comply with our Section 13(q) rules.[109]

In addition, to the extent that some issuers only file under the Section 13(q) rules, we understand that the Modified Project Definition could produce differences in the granularity of the payment disclosure reported under the Section 13(q) rules and other regimes. While the extent of such differences will vary depending upon the particular issuer and the location of its resource extraction operations, given that the other reporting regimes permit some aggregation of payments for multiple agreements that are substantially interconnected operationally and geographically,[110] in some instances the differences in granularity could be small. In this regard, although one commenter recommended that we adopt the foreign reporting regimes' approach to the aggregation of payments for related contracts as a change to the 2016 Rules,[111] such an approach would not constitute a change from the 2016 Rules. The 2016 Rules included a largely similar provision that allowed agreements that are both operationally and geographically interconnected to be treated by the resource extraction issuer as a single project.[112]

Similarly, the deviation from the standards adopted in other regimes could result in a lower compliance burden for resource extraction issuers subject solely to the Section 13(q) rules. Unlike resource extraction issuers who are also subject to the EU Directives (or one of the other foreign reporting regimes), issuers subject solely to the Section 13(q) rules will only have to track and disclose payments at the more aggregated level required by the Modified Project Definition.[113] This differential in burden, however, is not due to our rules' selectively imposing substantively different requirements. Rather, it is due to the fact that some issuers are also obligated to comply with the EU Directives (or another foreign reporting regime).

Some commenters maintained that a contract-based definition of project is superior to the Modified Project Definition because the latter is an artificial construct that deviates from industry practice.[114] As a threshold matter, we reiterate that there is no single generally accepted definition of project in the mining industry. In addition, as we discuss below in Section III.D., there is no indication that issuers that are not already subject to a foreign reporting regime have systems in place to track payments at the contract level.[115] Thus, it is likely that these issuers will incur compliance costs to implement systems to track, verify, and record payments under either a contract-based project definition or the Modified Project Definition.[116]

Other commenters have argued that the Modified Project definition fails to satisfy the plain language of Section 13(q).[117] These commenters argued that the language in the statute calling for ''payments made for each project'' and the language calling for ''the type and total amount of such payments made to each government.'' when read together, indicate that Congress intended to require disaggregated reporting by project.[118] Congress, however, did not define the term ''project'' in Section 13(q), leaving the Commission discretion to adopt a definition that encompasses all payments as that term is defined by the Commission. Commenters did not explain how this plain language argument compels a particular definition of ''project,'' such as the contract-based definition.

Commenters also argued that the requirement in Section 13(q) to disclose ''royalties, license fees, production entitlements and bonuses'' suggests that Congress intended that the Commission adopt a contract-based definition because such items are typically levied according to the terms of specific contracts and licenses.'' Again, however, we do not view this language as compelling a particular ''project'' definition, as companies could aggregate or disaggregate these items according to the ''project'' definition adopted by the Commission.

Finally, some commenters opposed the Modified Project Definition because of their belief that a Contract-Level Project Definition is necessary to enable investors to assess the financial, political, and market risks regarding a particular issuer's projects.[119] As we explained in the 2019 Rules Proposing Release,[120] we do not believe that the purpose of the required disclosures is to provide material information to investors.[121] First, we believe that the Commission's existing rules should elicit all material risk-related disclosure. For example, issuers are required to disclose the most significant risks affecting an issuer or the securities being offered[122] as well as any known trends or uncertainties that have had or are reasonably likely to have a material impact on the registrant's liquidity, capital resources, or results of operations.[123] Moreover, we continue to believe that the direct incremental benefit to investors from the payment information may be limited because investors would typically require additional information to calculate cash flows and other indices of risk, which may be lacking.[124] Further, it is likely that the vast majority of the individual contract-level project payment

[108] Norway is a member of the EEA, not the EU. While the EU Directives apply to EEA members, Norway adopted its Regulations on Country-by-Country Reporting in 2013 prior to the adoption of the EU Directives. *See* FOR–2013–12–20–1682, which is available at *https://lovdata.no/dokument/SF/forskrift/2013-12-20-1682.*

[109] *See infra* Section III.D.5.

[110] *See, e.g.,* EU Accounting Directive, Art. 41(4). We discussed the non-U.S. payments-to-governments reporting regimes in some detail in the 2016 Rules Adopting Release at Section I.C.

[111] *See* letter from Oxfam America and Earthrights International.

[112] *See* 2016 Rules Adopting Release at Section II.E.

[113] *See* letter from Total (Feb. 10, 2020).

[114] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020).

[115] *See infra* Section III.D.1.

[116] One industry commenter expressly noted that using the Modified Project Definition would ''lower issuer compliance costs in collecting and furnishing the information.'' Letter from API (Mar. 16, 2020) at 6–7.

[117] See, *e.g.,* letter from Oxfam America and Earthrights International.

[118] *Id.*

[119] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020); and F. Samama *et al.*

[120] *See* 2019 Rules Proposing Release at Section II.F.1.

[121] *See, e.g.,* 163 Cong. Rec. H.850 (February 1, 2017) (Statement of Rep. Huizenga) (observing that the Congressional goals underlying Section 13(q) are outside of the SEC's ''core mission'' of ''protect[ing] investors,'' ''maintain[ing] fair, orderly and efficient markets,'' and ''facilitat[ing] capital formation'').

[122] *See* 17 CFR 229.503(c).

[123] *See* 17 CFR 229.303.

[124] *See infra* Section III.D.1.

amounts[125] would not be material to the financial condition of the issuers that are subject to the Section 13(q) reporting requirements.[126] As such, we do not believe that such information is likely to be material to an investment decision.[127]

After consideration of all of these issues, we continue to believe that adopting the Modified Project Definition is the appropriate choice to produce a rule that is not substantially the same,[128] yet one that continues to provide a level of transparency sufficient to meet Section 13(q)'s goals.

2. Discussion of the Modified Project Definition

In the following three subsections, we discuss the disclosure required by each of the three prongs of the Modified Project Definition in greater detail. Except for comments that either generally supported or opposed the Modified Project Definition, we received no comments directly addressing the specific prongs of the project definition. Accordingly, except as indicated, we are adopting the Modified Project Definition largely as proposed.[129]

a. Type of Resource

Under the Modified Project Definition, the first prong for determining the parameters of a project is the type of resource that is being commercially developed. A resource extraction issuer will be required to disclose whether the project relates to the commercial development of oil, natural gas, or a specified type of mineral. As we explained in the 2019 Rules Proposing Release, this prong will not require an issuer to describe the specific type or quality of oil or natural gas or distinguish between subcategories of the same mineral type.[130] For example, an issuer disclosing payments relating to an oil project will not be required to describe whether it is extracting light or heavy crude oil. Similarly, an issuer disclosing payments relating to a mining project will be required to disclose whether the mineral is gold, copper, coal, sand, gravel, or some other generic mineral class, but not whether it is, for example, bituminous coal or anthracite coal.[131]

We continue to believe that a requirement to provide greater detail regarding the type of resource that is the subject of extractive activities is not necessary for persons to determine whether those activities have given rise to government payments in which they may have an interest. The presence of the activities combined with the disclosure of the method of extraction (well, open pit, etc.) and the identification of the resource as oil, gas or, *e.g.,* gold, copper, or coal, will provide transparency to the users of the information to assess whether and to what extent there are payments being made for extraction activities in a particular area. We believe that requiring greater detail about the type of resource could reveal proprietary information that could cause competitive harm, a concern that members of Congress expressed when disapproving the 2016 Rules. Such an approach could make the final rules less likely to satisfy the CRA's restriction on reissuing the disapproved rule in substantially the same form or adopting a new rule that is substantially the same.

b. Method of Extraction

The second prong for determining the parameters of a project is the method of extraction. This prong will require a resource extraction issuer to identify whether the resource is being extracted through the use of a well, an open pit, or underground mining. Additional detail about the method of extraction will not be required. For example, a resource extraction issuer would not be required to disclose whether it is using horizontal or vertical drilling, hydraulic fracturing, or strip, sublevel stope, or block cave mining. Similar to the type of resource prong, we believe that such a level of specificity regarding the particular method of extraction would not provide any additional meaningful information to end users, and that the required disclosure about method of extraction will provide transparency to users of the information to assess whether and to what extent there are payments being made for extraction activities in a particular area. On the other hand, such disclosure could result in the disclosure of proprietary information, which could potentially result in competitive harm and thus make it less likely that the final rules satisfy the CRA requirements.

c. Major Subnational Political Jurisdiction

The third prong for determining the parameters of a project is the major subnational political jurisdiction where the commercial development of the resource is taking place. This prong will require an issuer to disclose only to the level of major subnational jurisdiction (*e.g.,* state, province, district, region, territory) in which the resource

[125] Based on publicly available data, the average payment for projects under the contract level definition was $29 million and 95% of the payments were at or below $61 million.

[126] In this regard, we note that most smaller reporting companies and emerging growth companies will be exempt from the Section 13(q) reporting requirements.

[127] This was acknowledged by the then Chairman of the Senate Banking Committee, Senator Christopher Dodd, one of the bill's co-sponsors. (The required payment information ''appears not to rise to the level of materiality for investors that currently governs the disclosure requirements of public companies under Federal securities laws.'') 156 Cong. Rec. 3801, 3818 (May 17, 2010). In further support of our view that Section 13(q) disclosures were not intended for investor use, we observe that Section 13(q) itself makes no reference to investor interests or protection (unlike many other provisions of the securities laws) and instead states that, to the extent practicable, any rules under Section 13(q) should support the ''commitment of the Federal Government to international transparency promotion efforts.'' Those efforts, which involve the EITI as well as European and Canadian law, are also generally not considered to be investor disclosure measures. While we acknowledge that the placement of Section 13(q) in the Exchange Act could be understood to support a contrary congressional intention here, we think that it is more likely that the placement of the resource extraction payment disclosures in the Exchange Act is primarily because the Commission has a deep history involving issuer disclosures and Congress sought to leverage that experience. In that regard, we note that Section 1504 of the Dodd-Frank Act, which amended the Exchange Act to add Section 13(q), was not incorporated into any of the Dodd-Frank's titles that principally deal with financial regulatory matters, but rather near the end of the Act in a title labeled ''Miscellaneous Provisions.''

[128] *See infra* Section II.B., for a discussion of why we do not believe that a non-public submission followed by an anonymized compilation is the appropriate choice for complying with the CRA and meeting the overarching disclosure objectives of Section 13(q).

[129] In Section II.P, the Commission explains its preference for how the final rule under Section 13(q) should be applied if the definition of ''project'' should be held invalid by a Federal court or otherwise deemed ineffective for any reason. If this should occur, it is the Commission's preference that the final rule should be enforced and resource extraction issuers should disclose resource extraction payments to the fullest extent practicable, including the per-project payment disclosures as required by Section 13(q)(2)(A(i). Further, issuers should determine based on their own business structure and other relevant considerations how to identify and describe their various projects until such time as the Commission completes any further rulemaking that seeks to define the term. In reaching this recommendation, we note that Section 13(q) does not define project nor does it compel the Commission to do so. Accordingly, we believe that it is appropriate to allow issuers to identify their projects in a reasonable manner just as they would be permitted to do by the statute in the absence of the Commission's exercise of discretion to adopt a definition. In specifying the preference above, the Commission is mindful that Congress enacted Section 13(q) over a decade ago and that to date no disclosures have been made under that provision. Finally, issuers are reminded that the anti-evasion provision in the final rule would continue to apply to their payment disclosures in these circumstances.

[130] *See* 2019 Rules Proposing Release at Section II.F.2.

[131] For clarity and consistency, we are adopting an instruction to Form SD, as proposed, that will require synthetic oil or gas obtained through the processing of coal to be classified as ''coal.'' *See* Instruction 5 to Item 2.01 of Form SD.

extraction activities are occurring. As discussed below, we are also adopting the proposed requirement that an issuer must provide an electronic tag for both the country and the major subnational political jurisdiction in which the extractive activities are occurring that is consistent with the International Organization for Standardization (''ISO'') code pertaining to countries and their major subdivisions.[132] We believe that the required use of ISO codes to identify major subnational jurisdictions will provide a standardized data format that may be more easily analyzed than the data produced under the Contract-Level Project Definition.

For example, a project for extractive activities in the city of Timika in the province of Papua, Indonesia would be identified as occurring in Papua, without identifying Timika, as Papua would be the major subnational political jurisdiction. Similarly, an issuer would identify the project for activities in the counties of Elko, Nevada and White Pine, Nevada, as occurring in Nevada because Nevada would be the major subnational political jurisdiction.

If the extractive activity is offshore, we proposed requiring an issuer to include in its project identification that its operations are offshore as well as the nearest major subnational political jurisdiction. One commenter stated that labeling projects in national waters according to the nearest major subnational political jurisdiction could create an incorrect impression that the identified subnational jurisdiction has a greater practical or legal relationship to the project than other subnational jurisdictions in the area, which may well not be the case. This could in turn create ''undesirable or wasteful political dynamics between states or provinces in the host country.'' [133] For offshore resource extraction, that commenter recommended identifying the project by the body of water in which the project is located (*e.g.,* Gulf of Mexico) instead of the nearest major subnational jurisdiction.[134]

We agree with this commenter that in certain circumstances labeling an offshore project by the nearest major subnational jurisdiction could be confusing, for example, a particular offshore project may be equidistant from multiple coastal states or provinces. Accordingly, we have revised the proposed third prong of the Modified Project Definition to provide that, for offshore projects, the identification of the major subnational political jurisdiction where the commercial development of the resource is taking place should include the body of water in which the project is located, using the smallest body of water applicable (*e.g.,* gulf, bay, sea), as well as the nearest major subnational jurisdiction. In addition, if the project is equidistant from two major subnational jurisdictions, the issuer may disclose both such jurisdictions.[135]

d. Special Situation

Under the final rules, commercial development activities using multiple resource types or extraction methods can be treated as a single project if such activities are located in the same major subnational political jurisdiction.[136] The issuer will be required to describe each type of resource that is being commercially developed and each method of extraction used for that project. For example, an open pit and underground zinc mining project in Erongo, Namibia would be described as ''ER/Zinc/Open Pit/Underground'' and a drilling project off the shore of Veracruz, Mexico that produced both oil and natural gas would be described as ''Offshore-Gulf of Mexico/Veracruz/Oil/Natural Gas/Well.''

We recognize that such an approach could result in broad aggregation of projects within a major subnational political jurisdiction, which could make it more difficult for end-users of the disclosure to identify the specific commercial development activities associated with the disclosed payments. Nevertheless, as we explained in the Proposing Release, we believe that this approach is appropriate because issuers often develop more than one type of resource at a particular location and use more than one method of extraction. Limiting the definition of project to only commercial development activities comprising the same type of resource, method of extraction, and major subnational political jurisdiction may result in artificial distinctions. For example, an issuer would be required to treat oil and natural gas extraction from the same well as separate projects, and similarly, open pit and underground mining in the same location as separate projects. Requiring that these types of related activities be treated as separate projects could also lead to confusion about how reportable payments should be allocated between such projects. Although we solicited comment on the proposed approach to development activities using multiple resource types or extraction methods, no commenters specifically objected or suggested alternative approaches.

In some situations, the site where a resource is being commercially developed could cross the borders between, and generate payment obligations in, multiple major subnational political jurisdictions. In such a case, the final rules will require the issuer to treat the activities in each major subnational political jurisdiction as separate projects, as proposed.[137] This approach reflects the fact that, although the cross-border extractive activities are related, the disaggregated payment information would be of interest to different users of the information.

B. Public Reporting

1. Public Disclosure of the Issuer's Payment Information, Including the Issuer's Name

Section 13(q) provides the Commission with the discretion to require public disclosure of payments by resource extraction issuers, including their names, or to permit nonpublic filings.[138] When proposing the 2019 Rules, the Commission expressed its belief that exercising its discretion to require public disclosure, including the issuer's name, might better accomplish the objectives of Section 13(q).[139] The Commission stated, however, in the 2019 Rules Proposing Release that it would also consider an alternative approach supported by some commenters on the 2016 Rules that would permit issuers to submit their Section 13(q) reports to the Commission non-publicly and have the Commission use those nonpublic submissions to produce an aggregated, anonymized compilation that would be made available to the public.[140] After reviewing the numerous comments received on the public reporting issue,

[132] *See infra* Section II.M. In a change from the proposed rules, in response to commenters' concerns that the proposed treatment of payments to subnational governments (below the level of major subnational political jurisdiction) was not sufficiently transparent, issuers will also be required to provide an electronic tag identifying each subnational government payee rather than referring to such payees generically (*i.e.,* as ''county'' or ''municipality''). *See infra* Section II.G.

[133] Letter from API (Mar. 16, 2020).

[134] *See id.*

[135] See Instruction (5)(iii) to Item 2.01 of Form SD.

[136] See Instruction (5)(iv) to Item 2.01 of Form SD.

[137] *See* Instruction (5)(iv) to Item 2.01 of Form SD.

[138] *See* API v. SEC, 953 F. Supp. 2d at 11 (finding that the Commission ''misread the statute to mandate public disclosure of the reports'' when adopting the 2012 Rules).

[139] *See* 2019 Rules Proposing Release at Section II.I.1; *see also* 2016 Rules Adopting Release at II.H.3.

[140] *See* 2019 Rules Proposing Release at Section II.I.1 (citing letters from API (Feb. 16, 2016) and (Jan. 28, 2011); BP (Feb. 16, 2016); Chevron (Feb. 16, 2016); and Royal Dutch Shell (Feb. 5, 2016)); *see also* 2016 Rules Proposing Release, Section II.G.2 and 2016 Adopting Release, n.345.

we are adopting the proposed requirement that resource extraction issuers provide the Section 13(q) disclosure publicly, including their names, through the searchable, online EDGAR system.[141]

Many commenters supported the proposed public submission of the Section 13(q) reports and expressly opposed the alternative, non-public submission and anonymized compilation approach.[142] Commenters indicated that public reporting of issuer-specific payment information is essential to carry out Section 13(q)'s transparency, accountability, and anti-corruption objectives.[143] Commenters stated that, to achieve these objectives, public reporting is necessary to hold both government actors and commercial actors accountable in resource-rich countries so as to achieve meaningful oversight of government revenue collection and management and deter corruption.[144] Commenters maintained that, in contrast, the non-public submission and anonymized compilation approach would not be conducive to building trust between issuers, governments, and local citizens, would not prevent mismanagement of funds obtained from resource payments, and would negate the transparency and anti-corruption benefits for citizens that Section 13(q) was intended to achieve.[145] Some commenters also noted that the non-public submission and anonymized compilation approach would nullify Section 13(q)'s benefits to investors by preventing them from obtaining issuer-specific payment data to help them assess risk in investing in resource extraction issuers.[146] Finally, commenters stated that adoption of the non-public submission and anonymized compilation approach would result in a decrease in comparability with the non-U.S. payments-to-governments reporting regimes, each of which requires public, issuer-specific reporting of payments.[147]

A few commenters supported the non-public submission and anonymized compilation approach.[148] One commenter stated that Congress's goal of enabling people to hold their governments accountable for the revenues generated from resource development would be achieved as long as citizens know the amount of money the government receives, and not the companies that make each individual payment.[149] This commenter further expressed its concern that public disclosure of issuer-specific extractive payments may result in harm by allowing competitors to reverse-engineer the value a particular issuer places on a specific resource area. Moreover, the commenter stated that the threat of reverse-engineering could occur even under the proposed Modified Project Definition by allowing a competitor to compare changes in reported payments for the same area year after year, which could provide competitive insights especially where a particular country effectively possesses a single major area of resource development.[150] For those reasons, this commenter believed that the non-public submission and anonymized compilation approach would best balance the goals of achieving the objectives of Section 13(q) and preventing unnecessary harm to resource extraction issuers.

We acknowledge the concerns raised about potential competitive harm, but do not believe that adoption of the non-public submission and anonymized compilation is necessary to avoid any such potential competitive harm. Rather, as discussed above, we believe that adopting the Modified Project Definition, under which issuers will not be required to disclose overly descriptive disclosures potentially revealing competitively sensitive information, is sufficient to address any such risks.

Moreover, we do not believe that adoption of the non-public submission and anonymized compilation would achieve the same level of transparency as our approach in the final rules. We acknowledge that the anonymized compilation would reveal the payments to foreign governments at all levels, including the specific agency and department within the government. As such, it would provide some level of transparency in foreign nations that currently do not disclose such information, or do not do so accurately. Importantly, however, the reduced transparency provided by an anonymized compilation would significantly limit the usefulness of the disclosure because all similar activities in the same subnational jurisdiction, regardless of issuer, would be indistinguishable. Thus, we believe that this would be much less effective in achieving Section 13(q)'s transparency goals as compared to our approach.

In this regard, we note that if Congress had simply been focused on the disclosure of revenues into foreign governments, it would have been sufficient to require only the disclosure of payments to foreign governments required by Section 13(q)(2)(A)(ii), which requires information about the payments to each government. Yet Congress also included Section 13(q)(2)(A)(i), which mandates that the Commission's rules must require the disclosure of the type and total amount of such payments made ''for each project of the resource extraction issuer.'' Thus, we believe that the Modified Project Definition, which provides for public disclosure of the issuer, is the more effective choice for satisfying the CRA mandate and achieving the transparency goals of Section 13(q).

We also do not believe that it is necessary to adopt the non-public submission and anonymized compilation approach to fulfill the CRA's mandate that the new rule not be substantially the same as the disapproved rule. Rather, as discussed above, we believe that adoption of the Modified Project Definition will largely accomplish this objective. We also believe that the other changes to the 2016 Rules that we are adopting will further distinguish the final rules from the disapproved rules and, in addition, help address concerns about the rules' burdens. In addition to the Modified Project Definition,[151] these changes include the rule-based exemptions for conflicts with foreign law and pre-existing contracts;[152] the exemptions for smaller reporting companies and emerging growth companies;[153] transitional relief for a resource extraction issuer that has completed its initial public offering in its last full fiscal year;[154] and an extended

[141] As we did in the 2012 and 2016 rulemakings, we are requiring that a resource extraction issuer provide the required Section 13(q) disclosures on Form SD (17 CFR 249b.400).

[142] *See, e.g.,* letters from Congr. Waters *et al;* Equinor; Oxfam and Earthrights International; Project On Government Oversight (Mar. 13, 2020) (POGO); PWYP–US; Sens. Cardin *et al.;* and Transparencia por Colombia (Mar. 19, 2020).

[143] *See, e.g.,* letters from Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); and Sens. Cardin *et al.*

[144] *See, e.g.,* letters from Oxfam American and Earthrights International; and PWYP–US (Mar. 16, 2020); *see also* letter from POGO.

[145] *See* letters from Equinor; Oxfam American and Earthrights International; and Congr. Waters *et al.*

[146] *See* letters from Congr. Waters *et al;* Oxfam American and Earthrights International; and PWYP–US (Mar. 16, 2020).

[147] *See, e.g.,* letters from Oxfam American and Earthrights International; and PWYP–US (Mar. 16, 2020).

[148] *See* letters from API (Mar. 16, 2020); Chamber; and NAM.

[149] *See* letter from API (Mar. 16, 2020).

[150] *See id.*

[151] *See supra* Section II.A.

[152] *See infra* Sections II.D.1. and 2.

[153] *See infra* Section II.D.3.

[154] *See infra* Section II.D.6

submission deadline.[155] Adoption of the proposed delayed reporting for exploratory activities, which we first adopted in 2016, should also help to mitigate the potential for competitive harm.[156]

Moreover, like the 2016 Rules, the final rules will include contractually required social and community payments among the required disclosures,[157] and issuers will be required to disclose those payments made to subnational governments while identifying each subnational government payee.[158] As such, the users of the information may be able to assess whether the local communities are in fact receiving the promised payments and whether those payments are being used by the governments for their intended purpose.[159]

Finally, although not a primary goal of Section 13(q), we note that adoption of the requirement for issuer-specific, public disclosure may nevertheless help to further Section 13(q)'s directive to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[160] As commenters noted, all other existing reporting regimes require public disclosure of the payment information, including the identity of the issuer.[161] Adoption of a similar requirement under Section 13(q) would be consistent with the statutory directive to support the commitment of the Federal Government to international transparency efforts by increasing the total number of companies that provide public, issuer-specific disclosure.

2. Public Compilation

Consistent with Section 13(q),[162] and as proposed, the final rules provide that, to the extent practicable, the staff will periodically make a compilation of the information that issuers are required to submit under Section 13(q) publicly available online.[163] The staff may determine the form, manner, and timing of the compilation,[164] except that no information included in the compilation may be anonymized, whether by redacting the names of the resource extraction issuers or otherwise. Since we are requiring the public disclosure of the payment information on Form SD, we do not believe it would be appropriate or useful to anonymize any of the information in the compilation.[165]

C. Definition of a ''Not De Minimis'' Payment

Section 13(q) defines ''payment'' in part to mean a payment that is made to further the commercial development of oil, natural gas, or minerals and that is not de minimis.[166] Section 13(q), however, does not define ''not de minimis.''[167] We proposed to define ''not de minimis'' to mean any payment made to each foreign government in a host country or the Federal Government that equals or exceeds $150,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments, subject to the condition that single payment (or a series of related payments) disclosure for a project is only required if the total payments for a project equal or exceed $750,000.[168] This proposed definition differed from the definition of ''not de minimis'' in the 2016 Rules, which defined a ''not de minimis'' payment in relevant part as one that equals or exceeds $100,000, whether made as a single payment or series of related payments.[169] We proposed this change in light of previously expressed concerns from commenters that the threshold was unreasonably low and costly to calculate[170] and the likely impact of the proposed revised definition of project, which would allow aggregation of payments at a higher level and likely increase the value of the individual types of payments.[171]

Several commenters supported the proposed definition of ''not de minimis'' as any payment that equals or exceeds $150,000 made in connection with a project that equals or exceeds $750,000 in total payments. For example, one commenter stated that the proposed definition would reduce compliance costs by allowing companies to forgo reporting on payments that are insignificant to the project and to their investors.[172] Another commenter stated that the proposed not de minimis thresholds would help preserve shareholder resources and enable long-term growth within the resource extraction industry.[173]

Numerous commenters opposed the proposed definition of a ''not de minimis'' payment.[174] Several commenters stated that the proposed definition would undermine Congressional intent underlying Section 13(q) by eliminating a significant amount of project and payment disclosures.[175] In support of this statement, some commenters referred to a study of 4,018 projects conducted by 731 companies that have published reports pursuant to the payments-to-governments laws of the EU, United Kingdom, Canada, and Norway.[176]

[155] *See infra* Section II.L.2.

[156] *See infra* Section II.D.4.

[157] *See infra* Section II.J.5.

[158] *See infra* Section II.G.

[159] Social or community payments are frequently made as accommodations by resource extraction issuers to local communities impacted by extractive activities. For example, when filing its Exchange Act annual report, a mining registrant is required to attach a technical report summary prepared by its mining expert (its ''qualified person''), which must include a description of ''accommodations the registrant commits or plans to provide to local individuals or groups in connection with its mine plans.'' *See* 17 CFR 229.601(b)(96)(iii)(B)(*17*)[Item 601(b)(96)(iii)(B)(*17*) of Regulation S–K.

[160] 15 U.S.C. 78m(q)(2)(E).

[161] *See supra* note 147. *See also* ESTMA Specifications, Section 2.4 (''Reporting Entities are required to publish their reports on the internet so they are available to the public''); and EU Accounting Directive Arts. 42(1) and 45(1) (requiring disclosure of payments to governments in a report made public on an annual basis and published pursuant to the laws of each member state). We are not aware of any existing transparency regimes that do not require public disclosure.

[162] *See* 15 U.S.C. 78m(q)(3).

[163] *See* 17 CFR 240.13q–1(e).

[164] *See* id. We do not anticipate that the staff would produce such a compilation more frequently than once a year.

[165] Except for comments that addressed the anonymized compilation approach, *see supra* Section II.B.1., we did not receive any comments that addressed the proposed compilation provision.

[166] *See* 15 U.S.C. 78m(q)(1)(C).

[167] Consistent with the 2012 and 2016 Rules, we continue to believe that it is appropriate to adopt a definition of ''not de minimis'' to provide clear guidance regarding when a resource extraction issuer must disclose a payment.

[168] *See* 2019 Rules Proposing Release at Section II.C.9.

[169] *See* 2016 Adopting Release, Section II.C.3.c. The 2012 Rules also defined a ''not de minimis'' payment using the $100,000 threshold. *See* 2012 Adopting Release, Section II.D.2.c.

[170] *See* 2019 Rules Proposing Release at Section II.C.9 (citing letter from Nouveau Inc. (Feb. 16, 2016) (stating that the $100,000 reporting threshold would be unreasonably low for companies working on massive scale projects and would require parties to engage in the costly collection, compilation, and standardization of potentially thousands of different data points).

[171] *See id.*

[172] *See* letter from NAM.

[173] *See* letter from SAF.

[174] *See* letters from Africa Center for Energy Policy (Mar. 16, 2020); Elise J. Bean; Better Markets (Mar. 16, 2020); Sens. Cardin *et al.*; the Carter Center; Derecho Ambiente y Recursos Naturales (Mar. 15, 2020) (DAR); Financial Accountability and Corporate Transparency Coalition (Mar. 18, 2020) (FACT Coalition); Shannon Gough (Mar. 16, 2020); KCSPOG; S. Kaimal, CEO of Natural Resource Governance Institute (Mar. 16, 2020) (S. Kaimal, CEO of NRGI); Daniel Kaufmann; *ONE.org;* Oxfam America and Earthrights International; Eric Postel; Public Citizen (Mar. 16, 2020); PWYP–US (Mar. 16, 2020); F. Samama *et al.,* Sierra Club (Mar. 14, 2020); Forum for Sustainable and Responsible Investment (Jun. 17, 2020) (SIF), Total (Feb. 10, 2020); and Congr. Waters *et al.*

[175] *See, e.g.,* letters from Elise J. Bean; Shannon Gough; *ONE.org;* Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[176] *See, e.g.,* letters from Elise J. Bean; Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020). The study was conducted by the Natural Resource Governance Institute and is

Utilizing the most recent payments-to-governments reports submitted by these companies, the study indicated that 49% of the reported projects, when using the Modified Project Definition, would fall below the $750,000 threshold and, therefore, go unreported. This study led commenters to assert that the proposed definition would severely undermine the utility of the rule in carrying out Section 13(q)'s pro-transparency mandate.[177]

One commenter opposing the proposed ''not de minimis'' payment definition stated that the proposed $750,000 threshold would operate as a de facto ''materiality'' requirement for the definition of project, which the commenter argued has no support in the statutory language.[178] Several commenters contended that both the $750,000 and $150,000 thresholds appear to be arbitrary and unsupported by anything in the record.[179] Some commenters also stated that the proposed definition is inconsistent with the payment threshold adopted in over 30 countries under the laws of the other payments-to-governments reporting regimes, each of which approximates $100,000.[180] Other commenters maintained that the proposed ''not de minimis'' payment definition would lessen the comparability of the payment data for users interested in analyzing the data on a global basis [181] and could result in a competitive disadvantage to companies operating and reporting in the other non-U.S. jurisdictions.[182] Finally, some commenters believed that the proposed ''not de minimis'' payment definition could encourage corruption, or at least be inconsistent with the anti-corruption objective of Section 13(q), by facilitating the manipulation of payments to below one or both thresholds and thereby keeping them non-reportable.[183] For the above reasons, many commenters requested that, consistent with the 2016 Rules, we define ''not de minimis'' as a payment that equals or exceeds $100,000, whether made as a single payment or series of related payments.[184]

We believe that these commenters have raised a number of valid concerns, the most significant of which is that the proposed definition could result in a high percentage of projects going unreported, thereby unduly reducing transparency. We also believe that adopting the $100,000 threshold will mitigate against the potential loss of information that may arise as a result of our adoption of the Modified Project Definition, which, as we have discussed, we believe is the most appropriate way to comply with the CRA.

Under the adopted definition, a ''not de minimis'' payment means any payment, whether made as a single payment or a series of related payments, that equals or exceeds $100,000, or its equivalent in the resource extraction issuer's reporting currency.[185] We are adopting the remainder of the proposed definition, which provides that, in the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required. We did not receive any comments on this part of the definition, which is similar to the definition adopted under the 2016 Rules.

We are also adopting the proposed instruction that allows an issuer to choose several methods to calculate currency conversions for payments not made in U.S. dollars or the issuer's reporting currency. That instruction also provides that the same methods are available to issuers when calculating whether a payment not made in U.S. dollars meets or exceeds the ''not de minimis'' threshold.[186] We did not receive any comments on this instruction. We continue to believe that providing alternative methods for calculating currency conversions would help limit compliance costs under Section 13(q). As under the 2016 Rules, an issuer would be required to use a consistent method for its payment currency conversions, including when determining if a payment is not de minimis, and would be required to disclose which method it used.[187]

D. Exemptions From Compliance

The 2013 District Court opinion found that the Commission has the authority to grant exemptions with respect to Section 13(q).[188] We proposed three new exemptions from reporting under Section 13(q),[189] as follows:

- If the Section 13(q) disclosure is prohibited by foreign law;
- If the required disclosure would violate one or more pre-existing contract terms; and
- If the resource extraction issuer is a smaller reporting company [190] or an emerging growth company.[191]

We also proposed delayed reporting for exploratory activities and transitional relief for recently acquired companies, both of which were included in the 2016 Rules.[192] In addition, we proposed similar transitional relief for a resource extraction issuer that has recently conducted its initial public offering.[193] Finally, we proposed to retain the 2016 Rules' provision allowing an issuer to file an application for exemptive relief on a case-by-case basis.[194]

When proposing the exemptions for situations involving conflicts with foreign laws or pre-existing contract terms, we noted that several industry commenters had specifically recommended these two exemptions in connection with prior rulemakings to reduce the risk of competitive harm that

described in the letter from S. Kaimal, CEO of NRGI (Mar. 16, 2020).

[177] *See* letters from letters from Elise J. Bean; Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020); *see also* letter from Kaufmann.

[178] *See* letter from PWYP–US (Mar. 16, 2020).

[179] *See id.; see also* letters from Elise J. Bean; Oxfam America and Earthrights International; Eric Postel; Sierra Club; and Congr. Waters *et al.*

[180] *See* letters from Elise J. Bean; Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[181] *See, e.g.,* letters from Sens. Cardin *et al.;* FACT Coalition; and F. Samama *et al.*

[182] *See* letter from Total (stating that, together with the proposed project definition, the different ''not de minimis'' threshold may result in a competitive disadvantage detrimental to EU issuers).

[183] *See, e.g.,* letters from Better Markets; Oxfam America and Earthrights International; and Public Citizen.

[184] *See supra* note 174.

[185] *See* Item 2.01(d)(8) of Form SD.

[186] *See* Instruction 2 to Item 2.01 of Form SD.

[187] *See id.* (stating that ''[i]n all cases, a resource extraction issuer must disclose the method used to calculate the currency conversion and must choose a consistent method for all such currency conversions within a particular Form SD submission'').

[188] *See API* v. *SEC*, 953 F. Supp. 2d at 21–23.

[189] *See* 2019 Rules Proposing Release at Section II.J.

[190] The Commission recently amended the definition of ''smaller reporting company'' to expand the number of registrants that qualify as smaller reporting companies, and to reduce compliance costs for these registrants and promote capital formation, while maintaining appropriate investor protections. The amended definition of ''smaller reporting company'' includes registrants with a public float of less than $250 million (compared to $75 million in the earlier rule), as well as registrants with annual revenues of less than $100 million for the previous year and either no public float or a public float of less than $700 million. *See* Release No. 33–10513 (Jun. 28, 2018) [83 FR 31992 (Jul. 10, 2018)].

[191] The term ''emerging growth company'' means an issuer that had total annual gross revenues of less than $1,070,000,000 during its most recently completed fiscal year. *See* the definition of emerging growth company in Securities Act Rule 405 and Exchange Act Rule 12b–2.

[192] *See* 2016 Adopting Release, Section II.G.3.

[193] *See* 2019 Rules Proposing Release at Section II.J.6.

[194] *See* 2019 Rules Proposing Release at Section II.J.7.

could result from the required Section 13(q) payment disclosure. According to these commenters, without these exemptions, a resource extraction issuer that faced a legal or contractual conflict would have to choose between complying with Section 13(q) or the host country law or contract.[195] We believe that these exemptions and the proposed transitional relief would address the previously expressed concerns about the burdens and potential risks of Section 13(q) disclosure.

We also believe that the proposed exemptions are consistent with the CRA's prohibition on adopting rules that are in substantially the same form as the disapproved rules. Accordingly, we are adopting these provisions largely as proposed, except that we have added a condition to the exemption for emerging growth companies and smaller reporting companies to address specific concerns raised by commenters. We discuss each of these provisions in more detail below.

1. Exemption for Conflicts of Law

We are adopting, as proposed, a conditional exemption for when an issuer is unable to provide the required disclosure without violating the laws of the jurisdiction where the project is located.[196] We proposed this exemption after reconsidering comments in the 2016 rulemaking concerning the potential harm that could occur from a situation involving a conflict with foreign law.[197] Congressional members who voted to disapprove the 2016 Rules also expressed concern about the lack of exemptions under the 2016 Rules.[198]

Several commenters in the current rulemaking continued to express concerns about a conflict of law situation in the host country and supported an exemption to address the potential competitive harm and administrative difficulties resulting from such a situation.[199] Some industry commenters also stated their belief that a case-by-case exemptive approach for handling situations involving conflicts of law (or contract prohibitions) is problematic. These commenters stated that the substantial practical and administrative difficulties associated with obtaining timely exemptive relief, particularly for an issuer threatened with the potential total loss of its operations in the host country, render this option unworkable.[200]

Other commenters objected to any exemption to the Section 13(q) rules, including one for conflicts of law situations.[201] These objections were largely based on (1) the absence of exemptions under the EU and Canadian transparency regimes and the comparative gap in coverage that would occur; [202] (2) a concern that the Section 13(q) exemptions, particularly the conflicts of law exemption, could create an incentive for countries to enact similar provisions that would undermine international transparency promotion efforts; [203] and (3) the lack of demonstrated need for the exemptions, which some commenters viewed as overly broad.[204]

After considering the comments, and with a view to limiting delay and burdens, the final rules will permit issuers, as proposed, to avail themselves of the exemptions for situations involving conflicts with foreign laws (or pre-existing contract terms) without seeking individual relief on a case-by-case basis. This approach will help facilitate an issuer's timely submission of Form SD and alleviate some of the uncertainties of handling conflicts of law situations. Further, to the extent that the requirement to obtain a case-by-case exemption (and the attendant uncertainties surrounding whether such relief might be granted) could inhibit companies from bidding on or initiating resource extraction projects in particular countries or otherwise impair the ability of companies to compete effectively for such projects, we anticipate that our revised approach will substantially eliminate these potential barriers.

Although commenters differed regarding whether there is a demonstrated need for a conflicts of law exemption, in order to address concerns about the potentially significant consequences of such a conflict, on balance we think it is appropriate to provide such an exemption. One commenter has identified at least two countries—China and Qatar—that have laws that may prohibit the Section 13(q) disclosure.[205] Although publicly available information reveals that some resource extraction issuers have disclosed payments to governments in those countries,[206] the possibility remains that those countries, or others, could elect in the future to enforce or enact laws that conflict with the Section 13(q) requirements. We agree with those commenters who indicated that, to the extent that such a conflict exists, resource extraction issuers should not have to choose between complying with the Section 13(q) rules and violating host country laws.[207]

We also do not believe that the conflicts of law exemption is overly broad. The mere existence of a foreign law that may prohibit the Section 13(q) disclosure will not be sufficient to justify use of the exemption. We proposed, and are now adopting, several conditions that limit the availability of the exemption. These conditions are expressly designed to help ensure that issuers forgo disclosure only when there is a legitimate conflict of law, so that the exemption does not unreasonably frustrate the statutory goal of increasing transparency regarding resource extraction payments. Specifically, an issuer seeking to rely on the exemption will be required to take certain steps to qualify for the exemption, including providing specified disclosures about its eligibility for relief. Although issuers can avail themselves of the exemption

[195] *See* 2019 Rules Proposing Release at Section II.J. (citing letters from API (Feb. 16, 2016) and (Nov. 7, 2013); Chevron (Feb. 16, 2016); ExxonMobil (Feb. 16, 2016); and Nouveau (Feb. 16, 2016)).

[196] *See* 17 CFR 240.13q–1(d)(1).

[197] *See, e.g.,* 2019 Rules Proposing Release at Section II.J.; *see also* letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016). (Indicating that if an issuer chose to provide the payment disclosure in violation of the host country law, the issuer could face the shut down and, in the extreme case, expropriation of its facilities in the host country, the imposition of fines, or the withholding of permits.)

[198] *See, e.g.,* 163 Cong. Rec. H. 848, 853 (February 1, 2017) (Statement of Rep. Rothfus) (''I am also concerned that this rule could force companies to withdraw from certain countries. Among other things, some foreign countries have laws to prohibit the sort of disclosures called for in this rule. Since the rule provides no exemptions, American firms may be forced to abandon business ventures that provide jobs and opportunities for Americans.''); *see also* letter from Sen. Corker *et al.*

[199] *See* letters from API (Mar. 16, 2020); Chamber; Davis Polk & Wardwell (Mar. 6, 2020) (Davis Polk); NAM; Petrobras (Mar. 16, 2020); and SAF.

[200] *See* letters from API (Mar. 16, 2020); NAM; and SAF. Some commenters articulated this concern about a case-by-case exemptive approach for handling conflict of laws situations in the 2016 rulemaking. *See* letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016).

[201] *See, e.g.,* letters from Africa Center for Energy Policy; Elise J. Bean; Sens. Cardin *et al.;* DAR; EG Justice (Mar. 11, 2020); FACT Coalition; Friends of the Nation (Mar. 16, 2020); Shannon Gough; KCSPOG; Eric Postel; Robert Rutkowski (Mar. 16, 2020); Transparency International (U.S.) (Mar. 13, 2020); and Congr. Waters *et al.*

[202] *See, e.g.,* letters from Elise J. Bean; and Congr. Waters *et al.* In this regard, we acknowledge that the conflicts of law exemption may lessen comparability with the EU and Canadian transparency regimes to a certain extent.

[203] *See, e.g.,* letters from Elise J. Bean; FACT Coalition; and Robert Rutkowski.

[204] *See, e.g.,* letters from Elise J. Bean; Eric Postel; and Congr. Waters *et al.*

[205] *See, e.g.,* letter from API (Mar. 16, 2020). In addition, commenters on the 2016 Rules discussed how such conflicts could ultimately force a resource extraction issuer to abandon or sell its assets in the host country. *See, e.g.,* letter from API (Feb. 16, 2016).

[206] *See, e.g.,* the data cited in letter from PWYP–US (Mar. 16, 2020).

[207] *See, e.g.,* letters from NAM; and API (Feb. 16, 2016).

without further Commission action, they can only do so in the prescribed manner and under the prescribed circumstances. Moreover, as is the case with all filings, the issuer's disclosure and reliance on this exemption will be subject to Commission staff review, which should discourage potentially inappropriate uses of the exemption.

To be eligible to claim the conflicts of law exemption, an issuer will first have to take reasonable steps to seek and use exemptions or other relief under the applicable law of the foreign jurisdiction.[208] After taking such steps and failing to obtain an exemption or other relief, the issuer will have to disclose the foreign jurisdiction for which it has excluded disclosure, the law preventing disclosure, its efforts to seek and use exemptions or other relief under such law, and the results of those efforts.[209] This disclosure will be required in the body of Form SD. The issuer will also be required to furnish as an exhibit to Form SD a legal opinion from counsel that opines on the inability of the issuer to provide the required disclosure without violating the foreign jurisdiction's law.[210]

These conditions are similar to some of the suggested conditions recommended by some commenters. Those commenters indicated that, although they did not believe a conflicts of law exemption was necessary, they acknowledged that such an exemption would address specific concerns of some members of Congress who disapproved the 2016 Rules, would significantly contribute to the final rules' being not substantially the same as the disapproved rules, as required by the CRA, and would be a permissible change as long as accompanied by sufficient safeguards.[211]

Several commenters recommended that we include an additional condition that limits the exemption to foreign laws in existence before the enactment of Section 13(q) in July 2010, or at least before adoption of the final rules.[212] After considering all of the comments, we have determined not to limit the conflicts of law exemption to pre-existing foreign laws. Unlike the situation involving a conflict with pre-existing contract terms, where an issuer has control over the contract terms and would be in a position to negotiate or modify terms so that they do not conflict with the Section 13(q) requirements following adoption of the final rules, a resource extraction issuer has no control over a foreign government's enactment of laws, including those that may prohibit the Section 13(q) disclosure.

We acknowledge that adoption of the conflicts of law exemption could incentivize a foreign government to adopt a law that prohibits the Section 13(q) disclosure. We further note that commenters on both sides of this issue indicated in support of their respective positions that no government has adopted a law or rule prohibiting the payment disclosures since the adoption of Section 13(q).[213] While this may be correct, it is not determinative of what countries may do in the future. In light of the potential harm that could result to a resource extraction issuer from a future conflicts of law situation, we are not limiting this exemption to pre-existing foreign laws.

2. Exemption for Conflicts With Pre-Existing Contracts

We are adopting a conditional exemption, as proposed, from Section 13(q)'s disclosure requirements when the terms of an existing contract prohibit the disclosure.[214] The exemption will only apply to contracts in which such terms are expressly included in writing prior to the effective date of the final rules. As previously noted, we believe this limitation is justified because issuers have control over the terms of their contracts and have the ability to modify future contract terms. Similar to the exemption for conflicts of law, and for the same reasons, issuers will not need to seek the exemption on an individual, case-by-case basis. The issuer will, however, be required to meet certain conditions to qualify for relief,[215] and its disclosure and reliance on the exemption will be subject to staff review, which should help to discourage potentially inappropriate uses of the exemption. In addition, since multiple contracts may constitute a project under the Modified Project Definition, the exemption would only be available to exempt the specific payment information in the applicable contract that the issuer is expressly prohibited from disclosing by the relevant contract provision.

Several commenters supported the proposed exemption for conflicts with pre-existing contract terms for reasons similar to those expressed in support of the exemption for conflicts of law.[216] For example, one commenter stated that the proposed exemption would allow companies to avoid being forced into a choice between complying with the new disclosure requirements and complying with agreements entered into with foreign governmental partners.[217] Other commenters indicated that the proposed exemption would minimize the harm and ease the administrative difficulties caused by conflicts with pre-existing contract terms.[218]

Other commenters opposed the proposed exemption for conflicts with pre-existing contract terms for reasons similar to those expressed in opposition to the exemption for conflicts with foreign law. These commenters stated that the proposed exemption was overly broad, was not needed, would reduce comparability with the non-U.S. payments-to-governments reporting regimes, which lack such an exemption, and would not further international transparency promotion efforts.[219] Other commenters that did not believe the proposed exemption for conflicts with pre-existing contracts was warranted nevertheless stated that such an exemption would be a permissible change to help make the new rule not substantially the same as the disapproved 2016 Rules as long as there are sufficient safeguards to protect against abuse.[220]

After reviewing all of the comments, we are adopting the proposed exemption for conflicts with pre-existing contract terms. As one commenter noted, without such an exemption, an issuer whose contract prohibits the disclosure of payment information without the host government's permission, and who fails to obtain such permission, could face adverse financial consequences.[221] The adopted exemption for conflicts with pre-existing contract terms will help to mitigate the potential burdens of the Section 13(q) rules in this regard. We also believe that the exemption is not overly broad or susceptible to misuse

[208] *See* 17 CFR 240.13q–1(d)(1)(i).

[209] *See* 17 CFR 240.13q–1(d)(1)(ii).

[210] *See* 17 CFR 240.13q–1(d)(1)(iii).

[211] *See* letters from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International.

[212] *See* letters from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International.

[213] *Compare* letter from PWYP–US (Mar. 16, 2020) *with* letter from API (Mar. 16, 2020).

[214] *See* 17 CFR 240.13q–1(d)(2).

[215] *Id.*

[216] *See* letters from API (Mar. 16, 2020); Chamber; Davis Polk; NAM; and Petrobras.

[217] *See* letter from NAM.

[218] *See* letters from API (Mar. 16, 2020); and Chamber.

[219] *See, e.g.,* letters from Elise J. Bean; Eric Postel; and Congr. Waters *et al.*

[220] *See* letters from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International.

[221] *See* letter from API (Feb. 16, 2016) (stating that ''many companies' contracts with host governments contain clauses requiring the government's permission before a company publicly reveals payment information'' and noting that ''[a]lthough some of these contracts allow an issuer to disclose payment information to comply with securities laws, many do not, particularly older contracts.'').

because of the several conditions proposed for use of the exemption, which we are now adopting.

An issuer will first be required to take reasonable steps to seek and use any contractual exceptions or other contractual relief (*e.g.,* attempting to obtain the consent of the relevant contractual parties) to disclose the payment information.[222] This obligation to take reasonable steps would not include an obligation to renegotiate an existing contract or to compensate the other contractual parties in exchange for their consent to disclose the payments. If the issuer fails to obtain consent, the issuer will have to disclose the jurisdiction where it has excluded such disclosure, the particular contract terms preventing the issuer from providing disclosure, its efforts to seek consent or other contractual relief, and the results of those efforts.[223] This disclosure will be required in the body of Form SD. The issuer will also be required to furnish as an exhibit to Form SD a legal opinion from counsel that opines on the inability of the issuer to provide the required disclosure without violating the applicable contractual terms.[224] The opinion should confirm that counsel has reviewed all of the contracts underlying or related to a project under the Modified Project Definition, that the applicable contractual provision prohibits the disclosure of the payment information that the issuer would otherwise be required to provide under Section 13(q), and that the exemption is only being applied to exempt that specific disclosure.

Some commenters recommended adding other conditions in order to prevent abuse of the exemption. For example, commenters recommended limiting the exemption to contracts that existed prior to the enactment of Section 13(q) in July 2010 in order to exclude issuers that have engaged in ''10 years of gamesmanship and sub-standard contracting practice meant to avoid transparency.'' [225] We do not believe such a limitation is appropriate as we are not aware of any evidence demonstrating that issuers have drafted contract terms during the last decade to preclude reporting of payments to governments in this context.

Some commenters also indicated that it is common practice to include a non-confidentiality provision in oil, gas, and mining contracts that allows for the disclosure of information when required by an issuer's home government or its securities exchange.[226] These commenters stated that we should prohibit an issuer from using the exemption if such a standard confidentiality exclusion provision exists. We do not believe that adding such a provision is necessary because an issuer will be required to submit a legal opinion that explains why it is contractually precluded from providing the Section 13(q) disclosure. In such situations, the opinion would necessarily have to address why the issuer is contractually precluded from providing the Section 13(q) disclosure in light of the presence of a contractual provision that expressly permits such disclosure when required by home government laws or securities exchange regulations.

One commenter requested that we modify the exemption for conflicts with pre-existing contracts by providing that the exemption applies to contracts signed prior to an issuer's initial public offering, but after the effective date of the final rules.[227] We decline to make this modification because we believe that such an issuer will have received ample notice of the Section 13(q) rules and will have the opportunity to negotiate or modify the contract terms to remedy any conflict. Moreover, as discussed below, we are providing transitional relief for issuers that have recently completed their initial public offering, which should mitigate any resulting hardship.[228]

3. Exemption for Smaller Reporting Companies and Emerging Growth Companies

When proposing to exempt smaller reporting companies [229] and emerging growth companies [230] from the scope of Rule 13q–1,[231] we explained that the proposed exemption would be consistent with our statutory duty in a public rulemaking to consider, in addition to investor protection concerns, whether an action will promote efficiency, competition, and capital formation.[232] The proposed exemption also would be consistent with our treatment of smaller reporting companies and emerging growth companies in other rulemakings [233] undertaken since the enactment of the Jumpstart Our Business Startups Act (''JOBS Act'').[234]

Some commenters supported the proposed exemption for smaller reporting companies and emerging growth companies.[235] For example, one commenter stated that the proposed exemption would provide important cost savings for growing companies.[236] Another commenter indicated that the proposed exemption aligned with the streamlined disclosure requirements typically afforded to smaller and newer reporting issuers.[237]

Several other commenters opposed the proposed exemption for smaller reporting companies and emerging growth companies.[238] Most of those commenters opposed the proposed exemption primarily because it would exclude a significant percentage of the issuers that currently report under the EU Directives and Canada's ESTMA and that would have been included under the 2016 Rules.[239] Some commenters also asserted that smaller reporting companies and emerging growth companies are equally susceptible to corruption as larger issuers while posing a greater risk.[240]

We continue to be concerned that the fixed cost component of the Section 13(q) rules would have a greater relative impact on smaller reporting companies

[222] *See* 17 CFR 240.13q–1(d)(2)(i).

[223] *See* 17 CFR 240.13q–1(d)(2)(ii).

[224] *See* 17 CFR 240.13q–1(d)(2)(iii).

[225] *See* letters from PWYP–US (Mar. 16, 2020); and Oxfam American and Earthrights International.

[226] *See* letters from PWYP–US (Mar. 16, 2020); and Oxfam American and Earthrights International.

[227] *See* letter from Davis Polk.

[228] *See infra* Section II.D.6.

[229] *See supra* note 190 for the definition of ''smaller reporting company,'' as amended.

[230] *See supra* note 191 for the definition of ''emerging growth company.''

[231] *See* 2019 Rules Proposing Release at Section II.J.3. In particular, we expressed concern about the impact of the fixed cost component of the proposed rules on smaller reporting companies and emerging growth companies.

[232] *See* Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)].

[233] *See, e.g., Pay Ratio Disclosure,* Release No. 33–9877 (Aug. 5, 2015) [80 FR 50103 (Aug. 18, 2015)] (exempting smaller reporting companies and emerging growth companies, among others, from the scope of the required pay ratio disclosure). Prior to the JOBS Act, the Commission provided a number of accommodations to smaller reporting companies, such as not requiring risk factor disclosure from smaller reporting companies in their Exchange Act registration statements and annual and periodic reports, which continue today. *See, e.g.,* Release No. 33–10825 (Aug. 26, 2020) [85 FR 63726 (Oct. 8, 2020)], note 197.

[234] Public Law 112–106, 126 Stat. 306 (2012).

[235] *See* letters from Chambers and NAM.

[236] *See* letter from NAM.

[237] *See* letter from Chamber.

[238] *See, e.g.,* letters from Africa Center for Energy Policy; Sens. Cardin *et al.;* the Carter Center; DAR; Shannon Gough; KCSPOG; Oxfam America and Earthrights International; Eric Postel; Public Citizen; PWYP–US (Mar. 16, 2020), F. Samama *et al.;* and Congr. Waters *et al.*

[239] *See, e.g.,* letters from Sens. Cardin *et al.;* Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); F. Samama *et al.;* and Eric Postel.

[240] *See, e.g.,* letters from Public Citizen (stating that smaller reporting companies and emerging growth companies have been involved in the same industry practices that have enabled corruption and misappropriation in the past, and indicating that smaller issuers are generally more susceptible to equity risks than larger issuers because they take more operational risks); *see also* letter from PWYP–US (Mar. 16, 2020).

and emerging growth companies and thus could impede their growth and access to capital markets.[241] We also understand commenters' concerns about the potentially large number of resource extraction issuers that would be excluded under the proposed exemption and the gap in coverage that would result. Therefore, while we are adopting an exemption for smaller reporting companies and emerging growth companies, we are removing from the scope of the exemption any company that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime that has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q).[242] There will be only limited additional costs as such issuers will be able to submit a report complying with the reporting requirements of the alternative jurisdiction to satisfy its Section 13(q) disclosure obligations.[243]

Those companies eligible for alternative reporting will have a significantly reduced compliance burden under Section 13(q) and therefore will not need the exemption from Section 13(q) reporting as much as those smaller reporting companies and emerging growth companies that are not subject to an alternative reporting regime. We believe that this added limitation will reduce the scope of the exemption while retaining the exemption for companies that otherwise would bear the full burden of the Section 13(q) rules. For these latter companies, neither a smaller reporting company nor an emerging growth company will be required to provide any of the payment disclosure mandated by Section 13(q) and Rule 13q–1.

By tailoring the exemption in this way, we believe that the exemption for smaller reporting companies and emerging growth companies is consistent with the Commission's authority under Section 36(a) of the Exchange Act to adopt an exemption that is necessary or appropriate in the public interest, and consistent with the protection of investors.[244] The added limitation is in the public interest because it promotes the transparency objective of Section 13(q) while permitting smaller reporting companies and emerging growth companies not subject to foreign reporting regimes to reduce their regulatory burdens to the ultimate benefit of their investors.[245]

4. Delayed Reporting for Payments Related to Exploratory Activities

We are adopting a provision permitting delayed reporting of payments related to exploratory activities, as proposed.[246] Pursuant to this provision, issuers will not be required to report payments related to exploratory activities in the Form SD for the fiscal year in which payments are made. Instead, an issuer may delay reporting such payments until it submits a Form SD for the fiscal year following the fiscal year in which the payments were made.[247] We are proposing a limited, delayed approach because we believe that the likelihood of competitive harm from the disclosure of payment information related to exploratory activities diminishes over time. For example, once exploratory activities end and development activities begin, the likelihood of competitive harm from payments terms related to the exploratory activities (*e.g.,* payment information that might reveal the scope or significance of the project) is greatly diminished.

We adopted a similar delayed reporting provision in the 2016 Rules after considering the concerns raised by industry commenters that the disclosure of payment information regarding exploratory activities could result in competitive harm to a resource extraction issuer.[248] Industry commenters have continued to support a delayed reporting provision for payments related to exploratory activities. For example, one commenter stated that exploration activity represents some of the most commercially sensitive investments by issuers and that reporting needs should be balanced to protect such information.[249] Another commenter described the proposed delayed reporting provision as critical to protecting commercially sensitive information about resource extraction issuers' exploratory activities.[250]

Other commenters, however, opposed the proposed delayed reporting of payments related to exploratory activities. One commenter stated that exploratory activities can pose a high risk of corruption.[251] Another commenter indicated that, in the EU and Canadian transparency regimes, no issuer appears to have raised concerns about disclosures during the exploratory phase.[252]

We continue to believe that a provision permitting delayed reporting for payments related to exploratory activities is appropriate because of the commercially sensitive nature of exploratory activities. In reaching this conclusion, we have considered whether such a provision continues to be appropriate in light of the Modified Project Definition, which will provide the geographic location of a project at the national and major subnational political jurisdiction and therefore should mitigate the potential competitive harm that could result from disclosing a project at the contract level.

Although the Modified Project Definition should help alleviate competitive harm, and despite the absence of a similar exemption under the foreign reporting regimes,[253] we remain concerned that such harm could still occur. For example, harm could occur to the extent that the disclosure of a particular type or amount of a payment associated with the issuer's exploratory activities could reveal competitively sensitive information about the nature, significance, or specific details of such activities.[254] Thus, we continue to believe that a delayed reporting provision for disclosure of payments related to exploratory activities would mitigate the potential competitive harm that issuers might experience in these circumstances. Importantly, we do not believe it would substantially reduce the overall benefits of the disclosure to its users. Although one commenter

[241] *See infra* Section III.D.2.

[242] *See* 17 CFR 240.13q–1(c).

[243] *See* 17 CFR 240.13q–1(d)(3). We discuss the alternative reporting provision in Section II.N and its associated costs in Section III.D.1.

[244] *See* 15 U.S.C. 78mm(a).

[245] *See supra* note 241.

[246] *See* Item 2.01(b)(1) of Form SD.

[247] In the Form SD for the fiscal year following the fiscal year in which the exploratory payments were made, the issuer would be required to report those exploratory payments as well as all applicable non-exploratory payments, if any, made during the fiscal year following the fiscal year in which the issuer made the exploratory payments.

[248] *See* 2016 Adopting Release, Section II.I.3. (citing letter from API (Feb. 16, 2016), which explained the competitive harm that could result from the disclosure of bonus and other payments to the host government regarding high-potential exploratory territory and stating that a case-by-case exemptive approach would be insufficient to protect against competitive harm in those situations). *See also* letter from ExxonMobil (Feb. 16, 2016) (discussing the competitive harm from the forced disclosure of payments that may allow competitors to identify new areas of potential resource development an issuer has identified, and to determine the value the issuer places on such resources).

[249] *See* letter from API (Mar. 16, 2020).

[250] *See* letter from NAM.

[251] *See* letter from PWYP–US (Mar. 16, 2020).

[252] *See* letter from Oxfam America and Earthrights International.

[253] We reject the commenter's suggestion that the absence of a similar exemption under the foreign reporting regimes means that the concern for potential competitive harm resulting from the premature disclosure of payments related to exploratory activities does not exist or does not need to be addressed.

[254] *See supra* note 248.

indicated that exploratory activities can pose a high risk of corruption, we believe that any such risk is mitigated because the exemption is of limited duration. Specifically, the payments related to the exploratory activities must be reported in the fiscal year following the fiscal year in which the issuer made the payments.

We also have considered whether this delayed reporting provision is appropriate in light of the extended deadline for furnishing the payment information compared to the deadline under the 2016 Rules. Again, we believe it is appropriate because of the difficulty of determining the precise point at which exploratory activities cease being commercially sensitive.

For purposes of this provision, we will consider payments to be related to exploratory activities if they are made as part of the process of: (1) Identifying areas that may warrant examination; (2) examining specific areas that are considered to have prospects of containing oil and gas reserves; or (3) conducting a mineral exploration program. In all cases, exploratory activities will be limited to activities conducted prior to the commercial development of the oil, natural gas, or minerals that are the subject of the exploratory activities.[255]

When proposing this provision, we also considered that the total payment streams from the first year of exploration that would be covered by the exemption would typically be relatively small compared to, for example, the annual payment streams that would likely occur once an issuer commences development and production. Given this, we continue to believe that any diminished transparency as a result of the one-year delay in reporting of such payments is justified by the potential competitive harm that we anticipate may be avoided as a result of this exemptive relief. Nevertheless, we are limiting the delay to one year because we believe that the likelihood of competitive harm from disclosing the payment information diminishes over time once exploratory activities have begun.[256]

5. Transitional Relief for Recently Acquired Companies

We are adopting, as proposed, transitional relief with respect to recently acquired companies where such companies were not previously subject to Section 13(q) or an alternative reporting regime deemed by the Commission to satisfy the transparency objectives of Section 13(q).[257] The Commission provided this relief under the 2016 Rules based on the recommendations of commenters who asserted that such relief was necessary to reduce the compliance costs associated with recently acquired companies that may experience difficulty timely complying with the payment disclosure requirements.[258] As noted by those commenters, the Commission adopted a similar provision under Rule 13p–1,[259] which also requires disclosure on Form SD.[260]

We received little comment on the proposed transitional relief for recently acquired companies. One commenter did not believe that the proposed relief was necessary and noted that this issue never arose during adoption of the EU and Canadian transparency regimes.[261] This commenter also stated that since the relief is temporary, and of short duration, the commenter would not object if the Commission finds that this transitional relief for recently acquired companies provides necessary compliance cost reductions.

Under Section 13(q) and the final rules, an issuer is required to disclose resource extraction payment information for every entity it controls. Therefore, absent an exemption, an issuer would be required to include the acquired issuer's resource extraction payment information in its first annual submission after obtaining control. We continue to be concerned that implementing the appropriate reporting mechanisms in a timely manner for an issuer that was not previously subject to reporting under Section 13(q) or an alternative reporting regime might remain a significant undertaking. As such, we are adopting the proposed transitional relief with respect to such issuers.

Under the final rules, issuers will not need to report payment information for an issuer that it acquired or over which it otherwise obtained control, if the acquired issuer, in its last full fiscal year, was not obligated to disclose resource extraction payment information pursuant to Rule 13q–1 or an alternative reporting regime's requirements deemed by the Commission to satisfy Section 13(q)'s transparency objectives. In these circumstances, the resource extraction issuer will begin reporting payment information for the acquired issuer starting with the Form SD submission for the first full fiscal year immediately following the effective date of the acquisition. As under the 2016 Rules, and in contrast to the delayed reporting provision for exploratory activities, an issuer will not be required to provide the (excluded) payment disclosure for the year in which it acquired the issuer in a future Form SD.[262]

As explained in the 2016 rulemaking, the transitional relief will not apply to companies that have been subject to Section 13(q)'s disclosure requirements or to those of an alternative reporting regime in their last full fiscal year prior to their acquisition.[263] Those companies should already be generally familiar with the Section 13(q) requirements or have sufficient notice of them to establish reporting systems and prepare the appropriate disclosure during the fiscal year of their acquisition.

6. Transitional Relief for Initial Public Offerings

We are adopting, as proposed, similar transitional relief for a resource extraction issuer that has completed its initial public offering in the United States in its last full fiscal year.[264] Such an issuer will not have to comply with the Section 13(q) rules until the first fiscal year following the fiscal year in which it completed its initial public offering.

We received a small number of comments on the proposed transitional relief for initial public offerings. Those

[255] *See* Item 2.01(b)(1) of Form SD.

[256] We appreciate that the exploratory phase may vary from project to project, and that this variance can depend on such considerations as the geographic area in which the exploration is being undertaken and the type of resource being sought. In adopting a one-year reporting delay, we note that commenters in the oil and gas industry asserted a specific need for the exemptive relief. We understand that the exploratory period for oil and gas generally involves a seismic survey/analysis phase followed by an exploratory drilling phase. We further understand that, while the time periods for those activities can vary considerably, conducting seismic surveys and analyzing the data can take six months or more, while (at least for conventional onshore hydrocarbons) exploratory drilling and site clearance can potentially take a similar length of time. These considerations lead us to believe that one year is an appropriate period for the delay in reporting exploratory payments. Although we solicited comment on other potential timeframes for relief, no commenters suggested other timeframes. We further note that an issuer would be able to apply for an exemption on a case-by-case basis, as discussed below in Section II.D.6., if it believes that its individual circumstances warranted a longer exemptive period than the proposed one-year exemption.

[257] *See* Item 2.01(b)(2) of Form SD.

[258] *See* 2016 Adopting Release, Section II.G.3. (citing letters from Cleary, Gottlieb, Steen and Hamilton (Feb. 17, 2016); and Ropes & Gray (Feb. 16, 2016)).

[259] 17 CFR 240.13p–1.

[260] *See* Instruction (3) to Item 1.01 of Form SD. The final rules differ, however, from what is provided for under Rule 13p–1 because disclosure under Rule 13p–1 occurs on a calendar year basis rather than a fiscal year basis.

[261] *See* letter from PWYP–US (Mar. 16, 2020).

[262] *See* 2016 Adopting Release at Section II.G.3.

[263] *See id.*

[264] *See* Item 2.01(b)(3) of Form SD.

commenters stated that, although the proposed measure would result in some loss of transparency, because the relief would be temporary, it was an appropriate modification of the 2016 Rules that would help meet the CRA mandate that the new rule not be substantially the same as the disapproved rule.[265]

This transitional relief for companies that have recently completed their U.S. initial public offerings is a change from the 2016 Rules. At that time, the Commission stated its belief that such companies would have sufficient notice of the payment reporting requirements to establish reporting systems and prepare the appropriate disclosure prior to undertaking the initial public offering.[266]

In reconsidering the 2016 Rules, however, we believe that the Section 13(q) rules could impose a compliance burden on a non-reporting resource extraction issuer that could impede its ability to become a public company and fully gain access to U.S. capital markets. We further believe that providing transitional relief for issuers conducting initial public offerings is consistent with our statutory duty in a public rulemaking to consider whether an action will promote efficiency, competition, and capital formation.[267] Reducing regulatory burdens in connection with initial public offerings not only helps issuers conducting those offerings but provides investors with expanded investment opportunities.[268] For the foregoing reasons, we believe that providing transitional relief to resource extraction issuers conducting initial public offerings is also consistent with our authority under Section 36(a) of the Exchange Act to provide an exemption to the extent that such exemption is appropriate in the public interest and is consistent with the protection of investors.[269]

As we explained when proposing this transitional relief for initial public offerings, an issuer that is preparing to conduct its U.S. initial public offering would have notice of the Section 13(q) rules. Thus, such an issuer would likely need to incur costs to establish a payment reporting system to comply with the Section 13(q) rules in advance of the public offering despite not knowing whether it will successfully conduct that initial public offering. The issuer would then incur these costs unnecessarily if it chose not to move forward with a planned initial public offering.[270] We also continue to believe that the adopted transitional relief is an appropriate measure to prevent the situation where an issuer contemplating a U.S. initial public offering would need to postpone or, in the extreme case, refrain from conducting its U.S. initial public offering to avoid the Section 13(q) compliance costs. These outcomes would be inconsistent with our statutory duty to adopt rules that promote capital formation and would result in lost investment opportunities to the detriment of investors. They also would be contrary to the stated goals of Section 13(q) as they would delay the disclosure provided under that section.

7. Case-by-Case Exemption

We are adopting the proposed rule provision that will permit issuers to apply for exemptions on a case-by-case basis using the procedures set forth in 17 CFR 240.0–12 (Rule 0–12 of the Exchange Act).[271] This provision will enable issuers to address any other potential bases for exemptive relief, beyond the rule-based exemptions and transitional relief described above. We adopted a similar provision in the 2016 Rules.[272]

We received a limited number of comments on the proposed case-by-case exemption.[273] One commenter opposed the proposed exemption because it did not believe that any other exemptions are warranted, and noted that no such exemptions exist in the other markets where companies are already regularly reporting their payments to governments.[274] Other commenters suggested that the case-by-case exemptive approach in the 2016 Rules was preferable to the proposed exemptions for conflicts of law and pre-existing contracts and the proposed exemption for smaller reporting companies and emerging growth companies, which they believed to be overly broad.[275]

Under the final rules, issuers seeking a case-by-case exemption will be required to submit a written request for exemptive relief to the Commission.[276] The request should describe the particular payment disclosures it seeks to omit (*e.g.,* signature bonuses in Country X or production entitlement payments in Country Y) and the specific facts and circumstances that warrant an exemption, including the particular costs and burdens it faces if it discloses the information. The Commission will be able to consider all appropriate factors in deciding whether to grant requests, including whether the disclosure is already publicly available and whether (and how frequently) similar information has been disclosed by other companies, under the same or similar circumstances. We anticipate relying on Section 36(a) of the Exchange Act[277] to provide exemptive relief under this framework. In situations where exigent circumstances exist, the Commission staff, acting pursuant to delegated authority from the Commission, could rely on 15 U.S.C. 78*l*(h) (Exchange Act Section 12(h)) for the limited purpose of providing interim relief while the Commission considered the Section 36(a) exemptive application.

This approach will allow the Commission to determine if and when exemptive relief may be warranted and how broadly it should apply, based on the specific facts and circumstances presented in the application. For example, an issuer could apply for an exemption in situations where disclosure would have a substantial likelihood of jeopardizing the safety of an issuer's personnel, or in other situations posing a significant threat of commercial harm that fall outside the scope of the proposed rule-based exemptions and transitional relief described above. The Commission could then determine the best approach to take based on the facts and circumstances, including denying an exemption, providing an individual exemption, providing a broader exemption for all issuers operating in a particular country, or providing some other appropriately tailored exemption.

E. Definition of ''Subsidiary'' and ''Control''

Section 13(q) requires a resource extraction issuer to disclose payments by a subsidiary or an entity under the control of the issuer.[278] We are adopting

[265] *See* letters from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International.

[266] *See* 2016 Adopting Release, Section II.G.

[267] *See supra* note 232.

[268] *See, e.g.,* Remarks of Chairman Jay Clayton on Capital Formation at the 36/86 Entrepreneurship Festival (Aug. 29, 2018), which is available at *https://www.sec.gov/news/speech/speech-clayton-082918.*

[269] *See* 15 U.S.C. 78mm(a).

[270] *See* 2019 Rules Proposing Release at II.J.6.

[271] *See* 17 CFR 240.13q–1(d)(4).

[272] *See* 2016 Rules Adopting Release at Section II.I.3.

[273] *See, e.g.,* letters from Elise J. Bean; and PWYP–US (Mar. 16, 2020).

[274] *See* letter from PWYP–US (Mar. 16, 2020).

[275] *See, e.g.,* letter from Elise J. Bean.

[276] *See* 17 CFR 240.13q–1(d)(4) (requiring an issuer that files an application for a case-by-case exemption to follow the procedures of 17 CFR 240.0–12, which, pursuant to 17 CFR 240.0–12(a), requires the request for exemptive relief to be in writing).

[277] *See* 15 U.S.C. 78mm(a)(providing the Commission with broad authority to provide exemptions when it is necessary or appropriate in the public interest, and it is consistent with the protection of investors).

[278] *See* 15 U.S.C. 78m(q)(2)(A).

the proposed definition of ''subsidiary'' to mean an entity controlled directly or indirectly through one or more intermediaries.''[279] We also are adopting the proposed definition of ''control'' based on accounting principles rather than using the definition of that term provided in 17 CFR 240.12b–2 (''Exchange Act Rule 12b–2''),[280] which was the case under the 2012 Rules.[281]

Under the final rules, a resource extraction issuer will have ''control'' of another entity when the issuer consolidates that entity under the accounting principles applicable to its financial statements included in the periodic reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act. Thus, for purposes of determining control, the resource extraction issuer should follow the consolidation requirements under generally accepted accounting principles in the United States (''U.S. GAAP'') or under the International Financial Reporting Standards (''IFRS'') as issued by the International Accounting Standards Board, as applicable.[282] A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP, and files with the Commission a reconciliation to U.S. GAAP should consider determining control using U.S. GAAP.[283]

We continue to believe that this definition of control, compared to the definition of ''control'' in Rule 12b–2, would better balance transparency for users of the payment disclosure and the burden on issuers. Issuers already apply this concept of control for financial reporting purposes, which should facilitate compliance. Assuming a reporting issuer consolidates the entity making the eligible payment, this approach also should have the benefit of limiting the potential overlap of the disclosed payments because generally, under applicable financial reporting principles, only one party can control, and therefore consolidate, that entity. Further, this approach could enhance the quality of the reported data since each resource extraction issuer is required to provide audited financial statement disclosure of its significant consolidation accounting policies in the notes to the audited financial statements included in its existing Exchange Act annual reports.[284] The disclosure of these accounting policies should provide greater transparency about how the issuer determined which entities and payments should be included within the scope of the required disclosures. Finally, a resource extraction issuer's determination of control under the Section 13(q) rules will be subject to the audit process as well as to the internal accounting controls that issuers are required to have in place with respect to reporting audited financial statements filed with the Commission.[285]

The 2016 Rules included the same definition of ''subsidiary'' and a similar definition of ''control.''[286] Unlike the 2016 Rules, the definition of control we are adopting excludes entities or operations in which an issuer has only a proportionate interest, so that a resource extraction issuer will not be required to disclose the proportionate amount of the payments made by its proportionately consolidated entities or operations.[287] We proposed to exclude such entities after reconsidering some of the comments in the 2016 rulemaking that raised concern about the definition of control and the potential compliance burden and impracticalities associated with using a broader definition of control.[288] Compared to an issuer that consolidates an entity, an issuer with a proportionate interest in an entity or operations may not have the same level of ability to direct the entity or operations making the payments. For example, as commenters in the 2016 rulemaking noted, an issuer that holds a proportionate interest in a joint venture typically does not have ready access to detailed payment information when it is not the operator of that venture.[289] Requiring such a non-operator issuer to provide the payment disclosure based on its proportionate interest in the venture could compel that issuer to renegotiate its joint venture agreement or make other arrangements to obtain sufficiently detailed payment information to comply with the Section 13(q) rules, which could significantly increase its compliance burden.

Most commenters that addressed the issue supported the proposed definition of control based on applicable accounting principles.[290] For example, one commenter stated that the proposed approach will reduce compliance costs for issuers since the definition of control is consistent with the entities that are included in financial filings, will align with internal controls, and lead to greater consistency in interpretation of Section 13(q) obligations across resource extraction issuers.[291]

A number of commenters also supported the proposed treatment of proportionate interests.[292] One commenter stated that proportionate reporting would require a significant number of issuers subject to Section 13(q) to modify their internal accounting/financial reporting systems and processes.[293] Several commenters also reiterated their concern that requiring the reporting of payments by proportionate interests would conflict with the typical operating model in the oil and natural gas industry for joint ventures or similar arrangements. In those arrangements, a single company typically explores, develops, and operates a field, including making the necessary disbursements to governments for the entire joint venture or arrangement. The other (non-operator) members then reimburse the operator for their respective share of the payments. The non-operator members typically do not have access to the level of information required to report the payments and may be forced to renegotiate the joint venture agreement or make other arrangements to obtain sufficiently detailed payment information, or may not be able to obtain that information from the operator. In addition, the resource extraction issuer that is the operator of the joint venture or arrangement would

[279] *See* Item 2.01(d)(12) of Form SD.

[280] Under Exchange Act Rule 12b–2, ''control'' (including the terms ''controlling,'' ''controlled by'' and ''under common control with'') is defined to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

[281] *See* 2012 Adopting Release at Section II.D.4.c.

[282] *See* Item 2.01(d)(3) of Form SD.; *see also* Accounting Standards Codification (''ASC'') 810, Consolidation; and IFRS 10, Consolidated Financial Statements.

[283] *See* Item 2.01(d)(3) of Form SD.

[284] *See* ASC 235–10–50; IFRS 8. *See also* 17 CFR 210.1–01, 2–01 and 4–01 (Rules 1–01, 3–01, and 4–01 of Regulation S–X).

[285] *See* Exchange Act Section 13(b)(2)(B) [15 U.S.C. 78m(b)(2)(B)]. *See also* 17 CFR 240.13a–15 and 17 CFR 240.15d–15. We note, however, that the final rules will not create a new auditing requirement.

[286] *See* 2016 Rules Adopting Release at Section II.D.3.

[287] *See* Item 2.01(d)(3) of Form SD. Proportionately consolidated entities or operations include those entities or operations that are proportionately consolidated in accordance with ASC 810–10–45–14 and ''joint operations'' as defined in IFRS 11, Joint Arrangements.

[288] *See* 2019 Rules Proposing Release at Section II.E (citing letters from API (Feb. 16, 2016); BP (Feb. 16, 2016); Chevron (Feb. 16, 2016); ExxonMobil (Feb. 16, 2016); Petrobras (Feb. 16, 2016); and Royal Dutch Shell (Feb. 5, 2016)).

[289] *See, e.g.,* letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016).

[290] *See* letters from API (Mar. 16, 2020); Ovintiv; Petrobras; and SAF.

[291] *See* letter from API (Mar. 16, 2020).

[292] *See* letters from API (Mar. 16, 2020); Ovintiv; Petrobras; and SAF.

[293] *See* letter from API (Mar. 16, 2020).

then be required to provide its non-operating partners with the amount and type of each payments remitted to each governmental entity, the timing of the remittance and their corresponding share of the remittance.[294] Thus, not requiring proportionate reporting should reduce the compliance burden on all members of the joint venture or arrangement.[295]

In addition, according to one commenter, not requiring proportionate reporting would reduce the risks of double counting payments, uncertainties relating to the proportionate amount that should be included in each member's report and inconsistent approaches being taken between different joint ventures.[296]

Other commenters stated that, while they were not in favor of eliminating the requirement to report the payments of proportionate interests because of the significant loss of data that would result, this change would be an acceptable way to cause the new rule to be not substantially the same as the 2016 Rules, because it would reduce compliance costs without undermining consistency with the non-U.S. payment-to-governments reporting regimes. According to these commenters, the question of joint venture reporting is neither squarely addressed in Section 13(q) nor has it been settled globally, as the reporting of joint venture payments has been inconsistent.[297] A small number of commenters opposed the proposed definition of control because of its potential detrimental effect on the reporting of payments by joint ventures.[298]

We recognize that excluding proportionate interest entities or operations from the proposed definition of control could potentially result in less payment information about joint ventures or arrangements becoming public, as compared to the 2016 Rules. The most recent comments on this issue, which are mostly in favor of excluding such entities, have nevertheless reinforced our belief that this potential reduction in transparency is justified as a means to help reduce the compliance burden of the Section 13(q) rules.

Some commenters requested that we clarify the payment disclosure obligations of members in a joint venture or other joint arrangement where no one party has control.[299] We agree that additional clarification would be useful and have added an appropriate instruction. That instruction provides that in a joint venture or arrangement, where no single party has control, a resource extraction issuer that is the operator of the venture or arrangement and makes payments to governments for the entire venture or arrangement, on behalf of its non-operator members, must report all of the payments. The non-operator members are not required to report payments that they make to reimburse the operator for their share of the payments to governments. Such non-operator members are only required to report payments that, as resource extraction issuers, they make directly to governments.[300]

F. Treatment for Purposes of the Exchange Act and Securities Act

We are adopting the proposed treatment of the disclosure provided pursuant to Section 13q–1 on Form SD as being furnished to, but not filed with, the Commission.[301] The Commission originally proposed a similar approach in the 2012 Rules Proposing Release,[302] but chose to require the disclosure to be filed in both the 2012 and the 2016 Rules.[303] When most recently proposing the Section 13(q) rules, after reviewing the various reasons articulated for treating the Section 13(q) disclosure as filed or furnished,[304] the Commission stated that compelling arguments could be made on both sides of this policy choice.[305]

Several commenters supported the proposed treatment of the Section 13(q) disclosure on Form SD as furnished.[306] One commenter favored the proposed treatment because it viewed the purpose of the Section 13(q) disclosure as different from the type of information normally filed with the Commission by issuers. This commenter also indicated that, in its view, the proposed treatment strikes an appropriate balance between addressing the need for transparency with the costs and liabilities associated with filing it with the Commission.[307] Other commenters supported treating the payment disclosure as furnished because, in addition to not resulting in Section 18 liability, such treatment would not subject the disclosure to incorporation by reference in a Securities Act filing.[308]

Some commenters, however, opposed the proposed treatment of the Section 13(q) reports as being furnished.[309] For example, one commenter stated that the objectives of Section 13(q) are identical in nature and purpose to other disclosures required under the Exchange Act that are designed to benefit investors.[310] Another commenter stated that subjecting the payment disclosure to Section 18 liability would be appropriate because Section 18 imposes liability on any person who makes false and misleading statements of material fact on any report filed under the Exchange Act.[311] Other commenters stated that the proposed treatment would diminish the rules' effectiveness and ease the level of accountability to which resource

[294] *See* letter from API (Mar. 16, 2020).

[295] *See, e.g.,* letters from API (Mar. 16, 2020); and Ovintiv.

[296] *See* letter from Ovintiv.

[297] *See* letter from PWYP–US (Mar. 16, 2020); *see also* letter from Oxfam America and Earthrights International.

[298] *See* letter from Public Citizen; *see also* letter from KCSPOG.

[299] *See* letters from API (Mar. 16, 2020); and Ovintiv.

[300] *See* Instruction 6 to Item 2.01 of Form SD.

[301] The final rules use the term ''furnished'' when referring to the requirement to submit Form SD to provide Section 13(q) payment information to the Commission. *See, e.g.,* 17 CFR 240.13q–1(a); *see also* General Instruction B.4 to Form SD (stating that, for purposes of Rule 13q–1, the information and documents furnished on Form SD shall not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, unless a registrant specifically incorporates them by reference into such filing).

[302] *See* 2012 Rules Proposing Release at Section II.F.3 (noting that Section 13(q) neither specifically states how the information should be submitted nor states that the disclosure be included in the annual reports that are customarily filed with the Commission, such as Form 10–K, Form 20–F, or Form 40–F.)

[303] *See* 2012 Rules Adopting Release at Section II.F.3; and 2016 Rules Adopting Release at Section II.L.3.

[304] For example, in the prior rulemakings, commenters that indicated the Section 13(q) information should be deemed ''filed'' maintained that investors would benefit from the payment information being subject to Exchange Act Section 18 liability. Other commenters asserted that allowing the information to be furnished would diminish the importance of the information while requiring it to be filed would enhance the quality of the disclosure and ensure that it could be used reliably for investment analysis and other purposes. Commenters who favored treating the Section 13(q) disclosure as ''furnished'' emphasized that, in contrast to disclosure that is typically required to be filed under Section 13, the nature and purpose of the Section 13(q) disclosure requirements are not for the protection of investors but, rather, to increase the accountability of governments for the proceeds they receive from their natural resources and to support international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals, and that users of the payment information did not need the level of protection associated with Section 18 liability. *See* 2012 Adopting Release at Section II.F.3.b.; and 2016 Adopting Release at Section II.L.2.

[305] *See* 2019 Rules Proposing Release at Section II.M.

[306] *See* letters from API (Mar. 16, 2020); Chamber; Equinor; Ovintiv; and Royal Dutch Shell (Mar. 30, 2020).

[307] *See* letter from API (Mar. 16, 2020).

[308] *See* letters from Chamber; and Equinor.

[309] *See* letters from Chris Barnard (Mar. 19, 2020); KCSPOG; Public Citizen; and PWYP–US (Mar. 16, 2020).

[310] *See* letter from PWYP–US (Mar. 16, 2020).

[311] *See* letter from Chris Barnard.

extraction issuers are held when reporting payments.[312]

After reviewing all of the comments, we are persuaded to treat the Section 13(q) reports as furnished to, and not filed with, the Commission. We believe this is a reasonable and appropriate policy choice because of the different nature and purpose of the Section 13(q) disclosures compared to other disclosures required under Section 13. Specifically, in contrast to disclosure that is typically required to be filed under Section 13, the Section 13(q) disclosure requirements are not for the protection of investors. Rather, they are to increase the accountability of governments for the proceeds they receive from their natural resources and to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[313] While such disclosures may be considered by some investors, as noted above, the disclosure is not for investor protection purposes. Since Section 18 is designed to protect investors, we do not believe it is necessary or appropriate to apply it to the Section 13(q) disclosures. Additionally, we believe that this treatment will not significantly undermine the transparency objectives of Section 13(q), as it will limit the Section 18 liability for the required disclosures but will not affect the content of those disclosures. Moreover, we note that the Section 13(q) disclosures will continue to be subject to the Exchange Act's general antifraud provisions.[314]

This treatment will eliminate the possibility of Section 18 liability for the Section 13(q) disclosure. It will also eliminate the risk that the disclosure would be incorporated by reference into a filing under the Securities Act of 1933 (the ''Securities Act'') and be potentially subject to strict liability under Section 11 of the Securities Act, unless the issuer expressly incorporates such information.[315]

G. Definitions of ''Foreign Government'' and ''Federal Government''

We are adopting the proposed definitions of ''foreign government'' and ''Federal Government'' with a slight modification. Consistent with Section 13(q),[316] we proposed to define ''foreign government'' to mean a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority-owned by a foreign government. In order to eliminate the circularity of the first part of the proposed definition, we are clarifying that, under the final rules, a ''foreign government'' means the national government of a foreign country, as well as any department, agency, or instrumentality of the national government, or a company at least majority owned by the national government of a foreign country.[317] Similar to the proposed definition, the adopted definition also provides that the term ''foreign government'' also includes any subnational governments of a foreign country, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.[318] As proposed, ''Federal Government'' is defined as the Federal government of the United States and does not include subnational governments within the United States.[319]

These definitions are essentially the same definitions of ''foreign government'' and ''Federal Government'' adopted in the 2016 and 2012 rulemakings.[320] We included all subnational governments within the definition of ''foreign government'' in both the 2012 and 2016 rulemakings.[321] We believe this is a reasonable and appropriate way to define the term ''foreign government.'' For example, we note that this approach is consistent with the inclusion of subnational governments under the foreign reporting regimes and the EITI.[322] Although we received little comment on the proposed definitions in the current rulemaking, many prior commenters supported the inclusion of subnational governments in the definition of foreign government because resource extraction issuers frequently make payments to subnational governments.[323]

In the current rulemaking, one commenter supported both of the proposed definitions but recommended that we include under the definition of ''foreign government'' a company that is controlled by a foreign government.[324] We decline to follow this recommendation because, as we explained when proposing the definition of ''foreign government'' to include a company that is at least majority-owned by a foreign government,[325] we believe it would be difficult for issuers to determine when the government has control over a particular entity outside of a majority-ownership context. In this regard, we note that Section 13(q) refers to a company ''owned'' by a foreign government, not ''controlled'' by a foreign government. Moreover, the ''control'' concept is explicitly included in Section 13(q) in other contexts.[326]

For purposes of identifying the foreign governments that received payments at a level below the major subnational government level, we proposed to permit an issuer to aggregate all of its payments of a particular payment type without having to identify the particular subnational government payee. The proposed instruction to Form SD would have permitted an issuer to aggregate payments by payment type made to multiple counties and municipalities (the level below major subnational government level), disclose the aggregate amount without having to identify the particular subnational government payee, and instead generically identify the subnational government payee (*e.g.,* as ''county,'' ''municipality'' or some combination of

[312] *See* letters from KCSPOG; and Public Citizen.

[313] *See, e.g.,* letter from API (Mar. 16, 2020).

[314] *See, e.g.,* Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and 17 CFR 240.10b–5.

[315] *See* General Instruction B.4 of Form SD. Form S–3 requires reports ''filed'' pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering to be incorporated by reference into the prospectus. Although Form SD will be the form used for disclosures under Section 13(q), Section 15(d) of the Exchange Act refers generally to periodic information, documents, and reports required by Section 13 reports with respect to securities registered under Section 12, not simply Section 13(a) reports. Thus, if Form SD were deemed ''filed,'' it could raise concerns that the payment disclosure would be incorporated by reference into a Securities Act filing.

[316] *See* 15 U.S.C. 78m(q)(1)(B).

[317] *See* Item 2.01(d)(7) of Form SD.

[318] *See id.* To the extent that aboriginal, indigenous, or tribal governments are subnational governments in foreign countries, payments to those government entities will be covered by the Section 13(q) rules.

[319] *See* Item 2.01(d)(6) of Form SD.

[320] *See* 2016 Rules Adopting Release at Section II.F.3; and 2012 Rules Adopting Release at Section II.E.3.

[321] *See id.*

[322] *See, e.g.,* Article 41(3) of the EU Accounting Directive, which defines ''government'' to mean ''any national, regional or local authority of a Member State or of a third country'' and which ''includes a department, agency or undertaking controlled by that authority. . .''; *see also* Article 2 of Canada's ESTMA, which defines ''payee'' to mean ''(a) any government in Canada or in a foreign state; (b) a body that is established by two or more governments; (c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government . . . or (d) any other prescribed payee;'' and Requirement 4.6 of the EITI Standard (2019), which requires the multi-stakeholder group to ensure that company payments to subnational government entities and the receipt of these payments are disclosed, if material.

[323] *See* 2012 Rules Adopting Release at Section II.E.2., note 341 and accompanying text.

[324] *See* letter from PWYP–US (Mar. 16, 2020).

[325] *See* 2019 Rules Proposing Release at Section II.G.

[326] *Compare* Section 13(q)(1)(B) *with* Section 13(q)(2(A).

subnational governments).[327] We proposed this option for aggregated disclosure of subnational government payments to reduce the potential for competitive harm that could result from implementation of the Section 13(q) rules.[328]

A few commenters supported the proposed approach permitting the generic description and aggregated disclosure of subnational government payments.[329] One commenter indicated that because payments below the major subnational jurisdictional level tend to be relatively minimal, it did not believe that more granular reporting below that level would provide meaningful transparency benefits.[330] Another commenter stated that the proposed approach would reduce compliance costs.[331]

In contrast, several commenters opposed the proposed approach regarding the aggregated and generic disclosure of subnational government payments.[332] For example, several of these commenters stated that the disclosure of each subnational payee is critical to fulfill the transparency and anti-corruption objectives of Section 13(q).[333] One commenter indicated that the proposed approach would equate to anonymity for local government entities, which would deprive citizens of the information needed to hold local government entities accountable for receipt and management of payments to them and which, in the absence of such information, could fuel suspicion that payments were not made in accordance with fiscal obligations.[334] This commenter further maintained that transparent disclosure of payments made at the subnational government level would not increase the potential for competitive harm because many issuers are already disclosing such payments and identifying the subnational government payee pursuant to the requirements of non-U.S. reporting regimes.[335]

Another commenter stated that the proposed generic approach to subnational government payments is inconsistent with the statutory language, which dictates that the payment disclosure include electronic tags that *identify* the government that received the payment, in addition to the country in which the government is located.[336] This commenter, along with others, also indicated that the proposed generic approach would undermine the anti-corruption objective of Section 13(q).[337]

After considering all of the comments, we have reconsidered our proposed generic approach to the disclosure of payments to subnational governments. Under the final rules, an issuer will still be able to aggregate payments by payment type when disclosing payments made at a level below the major subnational government level. It will, however, now be required to disclose the aggregated amount paid to, and identify, each subnational political jurisdiction. For example, an issuer with extractive operations in the three oil sands regions of Alberta, Canada[338] (the Regional Municipality of Wood Buffalo, Northern Sunrise County, and the Municipality of Cold Lake), would be required to identify each such subnational government entity, as well as aggregate and report all of its fees paid for environmental and other permits to each such entity.

In this regard, an issuer's reporting obligations at the level below major subnational government will be the same as its reporting obligations at the major subnational government level. For example, an issuer could aggregate all of the royalties arising from its operations in the three oil sands areas paid at the provincial level but will be required to disclose the particular agency payee, *e.g.,* the Alberta Department of Energy.

We find persuasive commenters' concerns that Section 13(q)'s transparency objective will be better served by this approach. Further, we believe that adoption of the Modified Project Definition is sufficient to render the final rules not substantially the same as the 2016 Rules for the purpose of satisfying the CRA. Thus, while the proposed approach could help distinguish the final rules from the disapproved rules, we do not believe it is necessary or appropriate in light of the changes described above and its likely adverse impact on Section 13(q)'s transparency objective.

Moreover, as one industry commenter indicated in the 2016 rulemaking, the disclosure of payments at the subnational government level and the identification of the subnational government payee would work in tandem with a definition of ''project'' that permits the aggregation of payments at the major subnational jurisdiction level. According to this commenter, this information would provide citizens with the payment data necessary to hold their leaders accountable at all levels of government.[339] We note that this industry commenter, who consistently argued that a less granular project definition was necessary to minimize the potential for competitive harm, also supported the required identification of subnational government payees. Upon reconsideration, we similarly believe that the proposed generic approach to subnational government payments is a discretionary choice that is not necessary to minimize the potential for competitive harm.

With respect to the definition of ''Federal Government,'' we believe that Section 13(q) is clear in only requiring disclosure of payments made to the Federal government in the United States and not to state, local, or tribal governments. In this regard, we believe that typically the term ''Federal Government'' refers only to the U.S. national government and not the states or other subnational governments in the United States.

H. Definition of ''Resource Extraction Issuer''

We are adopting the proposed definition of ''resource extraction

[327] *See* 2019 Rules Proposing Release at Section II.G (discussing proposed Instruction (14) to Item 2.01 of Form SD).

[328] *See id.*

[329] *See* letters of API (Mar. 16, 2020); Chamber; and NAM.

[330] *See* letter from API (Mar. 16, 2020).

[331] *See* letter from NAM.

[332] *See* letters from Oxfam America and Earthrights International; POGO; PWYP–US (Mar. 16, 2020); and Congr. Waters *et al.*

[333] *See* letters from PWYP–US (Mar. 16, 2020); and Congr. Waters *et al.* (stating that full public reporting—including of the company making the payment and the entity receiving it—is a basic requirement of an effective transparency regime).

[334] *See* letter from PWYP–US (Mar. 16, 2020).

[335] *See id.* (stating that, under Canada's ESTMA, issuers must disclose payments to governments at any level, including national, regional, state, provincial, territorial, or local/municipal levels; under UK payments-to-governments regulations, ''government'' is defined as any national, regional, or local authority of a country; and under the EITI Standard, payment data must be disaggregated by each government entity).

[336] *See* Oxfam America and Earthrights International (citing 15 U.S.C. 78m(q)(2)(D)(ii)(V)).

[337] *See id.; see also* letter from POGO.

[338] The three major oil sands regions in Alberta are the Athabasca, Peace River, and Cold Lake regions. *See, e.g.,* Regional Aquatics Monitoring Program, ''The Oil Sands Described,'' *available at http://www.ramp-alberta.org/resources/development/distribution.aspx.*

[339] *See* letter from ExxonMobil (Feb. 16, 2016) (''. . . some commenters appear to overlook the fact that project tagging is only one aspect of the multiple data points to be included in 1504 reports. In addition to tagging payments by project, companies would also report each payment outside the U.S. by specific government payee, including national, sub-national, and local and community-level government payees. Thus, the API project definition combined with reporting of payments at all levels of government will enable host country citizens easily to determine the amounts received by their local, state and federal government agencies from resource extraction activities occurring in their state or province. Citizens would know how much money is coming directly from the industry at each level of government and be able to lobby the applicable level of government for greater accountability for the use of such revenues, such as by advocating for changes in revenue sharing or allocations to local needs.'')

issuer'' to mean an issuer that is required to file an annual report with the Commission on Form 10–K,[340] Form 20–F,[341] or Form 40–F [342] pursuant to Section 13 or 15(d) of the Exchange Act [343] and engages in the commercial development of oil, natural gas, or minerals.[344] Section 13(q) defines a resource extraction issuer in part as an issuer that is ''required to file an annual report with the Commission.'' [345] As we explained when proposing this definition, we believe this language could reasonably be read to include or to exclude issuers that file annual reports on forms other than Forms 10–K, 20–F, or 40–F.[346] We are therefore exercising our discretion and covering only issuers that file annual reports on Forms 10–K, 20–F, or 40–F. As with the 2016 Rules, we believe that covering issuers that provide disclosure outside of the Exchange Act reporting framework would do little to reasonably likely achieve the transparency objectives of Section 13(q) but would add costs and burdens to the existing disclosure regime governing those categories of issuers. The adopted definition therefore excludes issuers subject to Tier 2 reporting obligations under Regulation A and issuers filing annual reports pursuant to Regulation Crowdfunding.[347] In addition, investment companies registered under the Investment Company Act of 1940 (''Investment Company Act'') [348] will not be subject to the final rules.[349]

Although almost all of the commenters on the 2016 Rules Proposing Release supported a definition similar to the one we are adopting in this release,[350] we received little comment on the more recently proposed definition of ''resource extraction issuer.'' [351] One commenter supported the proposed definition because, in the commenter's view, it aligns with the statutory definition of resource extraction issuer.[352] This commenter also agreed that foreign private issuers [353] that file annual reports on Forms 20–F or 40–F should be included within the scope of the definition. The commenter stated that to exclude such foreign private issuers would be inconsistent with Congressional intent underlying Section 13(q) and the international transparency promotion laws, none of which exclude foreign companies.[354]

Although the final rules will apply to reporting foreign private issuers, as proposed, consistent with the 2016 Rules, the final rules will not apply to foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to 17 CFR 240.12g3–2(b) (''Rule 12g3–2(b)''). As discussed in prior releases, we continue to believe that expanding the statutory definition of ''resource extraction issuer'' to include foreign private issuers that are relying on Rule 12g3–2(b) would discourage reliance on the Rule 12g3–2(b) exemption and would be inconsistent with the effect and purpose of that rule.[355]

I. Definition of ''Commercial Development of Oil, Natural Gas, or Minerals''

We are adopting the proposed definition of ''commercial development of oil, natural gas, or minerals'' to mean exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.[356] This definition is consistent with the statutory definition.[357] Although we have discretionary authority to include other significant activities relating to oil, natural gas, or minerals,[358] we have elected not to expand the list of covered activities beyond the explicit terms of Section 13(q). As we noted when proposing this definition, we adopted the same approach when defining ''commercial development of oil, natural gas, or minerals'' in the 2016 rulemaking, and most commenters that addressed this aspect of the prior rules supported this approach.[359] As was the case with the 2016 Rules, we have not sought to impose disclosure obligations that extend beyond Congress' required disclosures in Section 13(q) and the disclosure standards developed in connection with international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals. This approach should limit the compliance costs of the Section 13(q) rules.

The proposed definition of ''commercial development of oil, natural gas, or minerals'' received little comment. One commenter supported the proposed definition because it is consistent with the statutory language of Section 13(q) and is in line with established international transparency standards.[360]

As proposed, the adopted definition of ''commercial development'' will capture only those activities that are directly related to the commercial development of oil, natural gas, or minerals, and not activities ancillary or preparatory to such commercial development. Accordingly, an issuer that is only providing products or services that support the exploration, extraction, processing, or export of such resources will not be a ''resource extraction issuer'' under the final rules.[361] For example, an issuer that manufactures drill bits or provides hardware to help issuers explore and extract will not be considered a resource extraction issuer. Similarly, an issuer engaged by an operator to provide hydraulic fracturing or drilling services, to enable the operator to extract resources, will not be a resource

[340] 17 CFR 249.310.

[341] 17 CFR 249.220f.

[342] 17 CFR 249.240f.

[343] 15 U.S.C. 78m or 78o(d).

[344] *See* 17 CFR 240.13q–1(d)(11).

[345] 15 U.S.C. 78m(q)(1)(D).

[346] *See* 2019 Rules Proposing Release at Section II.A.

[347] In prior releases, the Commission noted that, in the staff's experience, resource extraction issuers rarely use Regulation A. This continues to be the case. Between June 2015 through December 2019, we estimate that only 5 of the 343 Regulation A issuers with a qualified offering statement appears to have been a resource extraction issuer at the time of filing based on a review of assigned Standard Industrial Classification (SIC) codes listed in Part 1 of Form 1–A. Similarly, between May 2016 through December 2019, we estimate that only 1 of the 1,975 Regulation Crowdfunding issuers appears to have been a resource extraction issuer.

[348] 15 U.S.C. 80a–1 *et seq.*

[349] It seems unlikely that an entity that fits within the definition of ''investment company'' would be one that is ''engag[ing] in the commercial development of oil, natural gas, or minerals.'' *See* Section 3(a)(1) of the Investment Company Act (15 U.S.C. 80a–3(a)(1)).

[350] *See* 2016 Rules Adopting Release at Section II.A.2.

[351] We did receive related comments objecting to broad exemptions from the scope of the Section 13(q) rules for classes of companies, such as emerging growth companies and smaller reporting companies, which would have been covered resource extraction issuers under the 2016 Rules. *See, e.g.,* letters from KCSPOG; PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International. As previously explained, we are exempting emerging growth companies and smaller reporting companies from the scope of Rule 13q–1 because we believe that this change from the 2016 Rules will reduce the overall cost of the Section 13(q) rules. *See supra* Section II.D.3.

[352] *See* letter from PWYP–US (Mar. 16, 2020).

[353] *See* the definition of ''foreign private issuer'' in 17 CFR 230.405 and 17 CFR 240.3b–4.

[354] *See* letter from PWYP–US (Mar. 16, 2020).

[355] *See* 2016 Rules Adopting Release at Section II.A.3; and 2016 Rules Proposing Release at Section II.A.

[356] *See* Item 2.01(d)(2) of Form SD.

[357] *See* 15 U.S.C. 78m(q)(1)(A).

[358] *See id.*

[359] *See* 2019 Rules Proposing Release at Section II.B; and 2016 Rules Adopting Release at Section II.B.2.a.

[360] *See* letter from PWYP–US (Mar. 16, 2020).

[361] Marketing and security-related activities are not included within the final rules because those activities are not specifically included in the list of activities covered by the definition of ''commercial development'' under Section 13(q). In addition, including marketing and security-related activities within the final rules under Section 13(q) would go beyond what is covered by the non-U.S. payments-to-governments reporting regimes. *See* 2019 Rules Proposing Release at note 96.

extraction issuer.[362] We believe this approach is consistent with Section 13(q) and the approach adopted in the 2016 rulemaking, which most commenters that addressed the issue supported.[363] We also note that no commenter opposed this approach when commenting on the 2019 Rules Proposing Release.

Because, in response to commenters' requests, we provided guidance to clarify certain activities covered by the definition of ''commercial development'' in prior rulemakings,[364] we proposed to define or provide similar guidance on several terms contained within the definition.[365] We discuss these definitions and guidance and our reasons for adopting them in the subsections that follow.

1. ''Extraction'' and ''Processing''

The final rules define ''extraction'' to mean the production of oil or natural gas or the extraction of minerals.[366] This definition largely tracks the proposed definition [367] and is consistent with the definition adopted in the 2016 rulemaking.[368]

We received few comments on the proposed definition of extraction. One commenter supported the proposed definition because it is consistent with the statutory language of Section 13(q) and is in line with the established international transparency standards.[369] No commenter opposed the proposed definition on substantive grounds.

We are also adopting the proposed instruction regarding ''processing.'' [370] Like the definition of extraction, the instruction regarding processing largely tracks the one adopted in the 2016 rulemaking. Pursuant to that instruction, ''processing'' includes, but is not limited to, midstream activities such as removing liquid hydrocarbons from gas, removing impurities from natural gas prior to its transport through a pipeline, and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. ''Processing'' also includes the crushing or preparing of raw ore prior to the smelting or refining phase.

The instruction regarding ''processing'' also provides, as proposed, that ''processing'' does not include downstream activities, such as refining or smelting. The focus of Section 13(q) is on transparency in connection with the payments that resource extraction issuers make to governments. Those payments are primarily generated by ''upstream'' activities like exploration and extraction and not in connection with refining or smelting.[371] Accordingly, we do not believe that, for purposes of the Section 13(q) rules, the term ''processing'' should cover downstream activities. We also note that including refining or smelting within the final rules under Section 13(q) would go beyond what is contemplated by the statute.

We received a limited number of comments on the proposed instruction regarding ''processing.'' One commenter agreed with the list of activities proposed to be included under the term ''processing'' because it is consistent with the statutory language of Section 13(q) and in line with established international transparency standards.[372] Another commenter stated that it was unclear whether certain midstream activities that it engaged in would be included within the definition of ''processing,'' but then did not identify the activities for which it sought further guidance.[373]

2. ''Export''

We are adopting the proposed definition of ''export'' to mean the movement of a resource across an international border from the host country to another country by an issuer with an ownership interest in the resource.[374] Pursuant to this definition, ''export'' will not include the movement of a resource across an international border by an issuer that (i) is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals and (ii) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government. ''Export'' also will not include cross-border transportation activities by an entity that is functioning solely as a service provider, with no ownership interest in the resource being transported.[375] This definition is the same definition of export adopted under the 2016 Rules.

As in the 2016 rulemaking, we received a small number of comments that recommended defining ''export'' to include trading-related activities when an issuer makes a payment for the purchase of oil, natural gas, or minerals sold by a government, including a nationally owned company (''NOC'').[376] These commenters indicated that commodity-trading related payments to governments for the purchase of oil, natural gas, or minerals has become an important source of revenue for many resource-rich countries across the globe, and is a commonly recognized revenue stream in relation to the commercial development of oil, natural gas, and minerals.[377]

We decline to follow this recommendation for similar reasons expressed when we elected not to include commodity-trading activities in connection with the purchase of oil, natural gas, or minerals from a government, including a NOC, in the 2016 rulemaking.[378] The adopted

[362] As under the 2016 Rules, and as proposed, a resource extraction issuer will be required to disclose payments when a service provider makes a payment to a government on its behalf that meets the definition of ''payment.'' *See* 2019 Rules Proposing Release at note 97. However, at the request of commenters, and consistent with our treatment of proportionate interests, *see supra* Section II.E., we have clarified that this disclosure obligation does not apply to a non-operator partner of a joint venture or arrangement that reimburses the operator for its share of the payments to governments made by the operator. *See* Instruction 7 to Item 2.01 of Form SD.

[363] *See* the 2016 Rules Adopting Release at Section II.B.2.a.

[364] *See* 2016 Rules Adopting Release at Section II.B.2; and 2012 Rules Adopting Release at Section II.C.2.

[365] *See* 2019 Rules Proposing Release at Section II.B.1–3.

[366] *See* Item 2.01(d)(5) of Form SD.

[367] We proposed to define ''extraction'' to mean the production of oil and natural gas as well as the extraction of minerals. *See* 2019 Rules Proposing Release at Section II.B.1. In response to a suggestion by one commenter, the final rules use the disjunctive ''or'' in the definition of extraction. *See* letter from Keith P. Bishop (Jan. 1, 2020).

[368] *See* 2016 Rules Adopting Release at Section II.B.3.

[369] *See* letter from PWYP–US (Mar. 16, 2020).

[370] The proposed rules included an instruction on the meaning of the term ''processing'' but did not provide a defined term. *See* Instruction (8) to Item 2.01 of Form SD.

[371] In other contexts, Congress has treated midstream activities like ''processing'' and downstream activities like ''refining'' as separate activities, which further supports our view that Congress did not intend to include ''refining'' and ''smelting'' as ''processing'' activities. For example, the Sudan Accountability and Divestment Act of 2007 (''SADA''), which also relates to resource extraction activities, specifically includes ''processing'' and ''refining'' as two distinct activities in its list of ''mineral extraction activities'' and ''oil-related activities . . .'' *See* 110 Public Law No. 174 (2007). Similarly, the Commission's oil and gas disclosure rules exclude refining and processing from the definition of ''oil and gas producing activities'' (other than field processing of gas to extract liquid hydrocarbons by the issuer and the upgrading of natural resources extracted by the issuer other than oil or gas into synthetic oil or gas). *See* 17 CFR 210.4–10(a)(16)(ii) (Rule 4–10(a)(16)(ii) of Regulation S–X).

[372] *See* letter from PWYP–US (Mar. 16, 2020).

[373] *See* letter from Petrobras.

[374] *See* Item 2.01(d)(4) of Form SD.

[375] *See id.*

[376] *See* letters from PWYP–US (Mar. 16, 2020); and Joseph Williams, Advocacy Manager, NRGI (Mar. 16, 2020) (J. Williams, NRGI); *see also* letter from Pietro Poretti (Feb. 15, 2016).

[377] *See* letters from PWYP–US (Mar. 16, 2020); and J. Williams, NRGI.

[378] *See* 2016 Rules Adopting Release at Section II.B.3.

definition of export reflects the significance of the relationship between upstream activities, such as exploration and extraction, and the categories of payments to governments identified in the statute. We do not believe that Section 13(q) was intended to capture payments related to transportation on a fee-for-service basis across an international border by a service provider with no ownership interest in the resource.[379] We also do not believe that ''export'' was intended to capture activities with little direct relationship to upstream or midstream activities, such as commodity trading-related activities. We also note that, although commenters have stated that payments in connection with commodity trading-related activities have become a commonly recognized revenue stream in relation to the commercial development of oil, gas and minerals,[380] it does not appear that any of the other non-U.S. payments-to-governments reporting regimes (other than the EITI) have included such payments within their scope.

The adopted definition of export will cover, however, the purchase of such government-owned resources by a company otherwise engaged in resource extraction due to the stronger nexus between the movement of the resource across an international border and the upstream development activities. We believe this nexus would be particularly strong in instances where the company is repurchasing government production entitlements that were originally extracted by that issuer.[381]

3. ''Minerals''

The proposed rules included an instruction on the meaning of the term ''minerals'' but did not define the term.[382] The proposed instruction to Form SD referred issuers to the use of the term ''minerals'' in our other disclosure rules.[383] We used this approach based on our belief that the term ''minerals'' is commonly understood[384] and includes, at a minimum, any material for which an issuer with mining operations would provide disclosure under the Commission's existing or successor disclosure requirements and policies for mining properties.[385] We also believed that a flexible approach to this term would preserve consistency between the term's use under the Section 13(q) rules and its use in our other disclosure requirements and policies.[386] As such, the Form SD guidance on the term ''minerals'' would encompass any changes to that term that may be reflected in our disclosure requirements for mining registrants. In support of this approach, which is consistent with the Commission's approach in the 2016 rulemaking, we noted that no industry commenter suggested that we define the term in connection with the 2016 Rules.[387]

We received limited comment on our approach to the term ''minerals.'' One commenter supported the proposed instruction regarding ''minerals'' and did not believe that further defining the term was necessary.[388] Another commenter, however, did not believe that there was a commonly understood meaning of ''minerals'' and recommended that we provide a definition for the term.[389]

We decline to follow the recommendation of the commenter who suggested that we define the term ''mineral.'' In this regard, we note that, in response to the 2019 proposed rulemaking, as well as to the 2016 rulemaking, no industry commenter has requested that we provide a definition of ''minerals.'' This reinforces our belief that the term ''minerals'' is commonly understood. We also continue to believe that our flexible approach will preserve consistency with the use of that term in our other disclosure requirements and policies, and in particular, with the use of that term under the Commission's new disclosure rules for mining registrants.[390]

We are therefore not adopting a separate definition for ''minerals'' and, instead, are adopting the proposed instruction with one minor revision. Because the new disclosure rules for mining registrants will be effective, and will supersede the older guidance in Industry Guide 7, when issuers will be required to comply with the Section 13(q) rules, the adopted instruction refers solely to the new mining disclosure rules, and omits the reference to Industry Guide 7.[391]

J. Definition of ''Payment''

Section 13(q) defines ''payment'' to mean a payment that:

- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not de minimis; and
- Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the EITI's guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[392]

As with the 2016 Rules, we proposed to define ''payment'' to include the specific types of payments identified in

[379] It is noteworthy that Section 13(q) includes export, but not transportation, in the list of covered activities. In contrast, SADA specifically includes ''transporting'' in the definition of ''oil and gas activities'' and ''mineral extraction activities.'' The inclusion of ''transporting'' in SADA, in contrast to the language of Section 13(q), suggests that the term export means something different than transportation.

[380] *See supra* note 377.

[381] *See infra* Section II.J.6. (discussing when and how payments must be reported in instances where an issuer is repurchasing government production entitlements that were originally extracted by that issuer).

[382] *See* 2019 Rules Proposing Release at Section II.B.3.

[383] *See* proposed Instruction (13) to Item 2.01 of Form SD, which stated that ''minerals,'' as used in Item 2.01 of Form SD, includes any material for which an issuer with mining operations would provide disclosure under the Commission's existing disclosure requirements and policies, including Industry Guide 7 or any successor requirements or policies (*see* 17 CFR 229.1300 *et seq.* (subpart 1300 of Regulation S–K)). The proposed instruction further stated that ''minerals'' does not include oil and gas resources (as defined in 17 CFR 210.4–10(a)(16)(D) or any successor provision).

[384] The Commission's staff has previously provided similar guidance. *See* Disclosure of Payments by Resource Extraction Issuers FAQ 3 (May 30, 2013) *available at https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.*

[385] In 2018, the Commission revised its disclosure requirements for mining properties to provide investors with a more comprehensive understanding of a registrant's mining properties and to align those disclosure requirements and policies more closely with current industry and global regulatory practices and standards. *See* Release No. 33–10570 (October 31, 2018) [83 FR 66344 (December 26, 2018)]. The new mining property disclosure rules, which are codified in subpart 1300 of Regulation S–K, will replace the mining property disclosure guidance in 17 CFR 229.801(g) and 802(g) (Industry Guide 7) and requirements in 17 CFR 229.102 (Item 102 of Regulation S–K). Registrants engaged in mining operations must comply with the new rules for the first fiscal year beginning on or after January 1, 2021. *See* Release No. 33–10570 at Section I.

[386] For example, new subpart 1300 of Regulation S–K defines ''mineral resource'' to mean a concentration or occurrence of material of economic interest in or on the Earth's crust in such form, grade, or quality, and quantity that there are reasonable prospects for economic extraction. ''Material of economic interest'' is then defined to include ''mineralization, including dumps and tailings, mineral brines, and other resources extracted on or within the earth's crust'' while excluding oil and gas resources resulting from oil and gas producing activities, gases (*e.g.,* helium and carbon dioxide), geothermal fields, and water. *See* 17 CFR 229.1300. Industry Guide 7 similarly does not explicitly define the term ''minerals,'' but does provide a definition of, and guidance regarding the disclosure of, ''reserves,'' which includes references to ''minerals'' and ''mineralization.''

[387] *See* 2019 Rules Proposing Release at Section II.B.3 (citing 2016 Rules Adopting Release, note 149 and accompanying text).

[388] *See* letter from PWYP–US (Mar. 16, 2020).

[389] *See* letter from Keith P. Bishop.

[390] *See* subpart 1300 of Regulation S–K.

[391] *See* Instruction (13) to Item 2.01 of Form SD.

[392] 15 U.S.C. 78m(q)(1)(C).

the statute, as well as community and social responsibility (''CSR'') payments that are required by law or contract, payments of certain dividends, and payments for infrastructure. We also proposed guidance on the statutory payment categories of royalties, fees, and bonuses, and addressed in-kind payments.[393]

We received only a limited number of comments on the proposed definition of ''payment'' and the proposed guidance regarding the payment types. We discuss these comments below along with our reasons for adopting the proposed definition of ''payment'' and related guidance.

In addition to the types of payments expressly included in the definition of ''payment'' in the statute, Section 13(q) provides that the Commission include within the definition ''other material benefits'' that it determines are ''part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.'' [394] According to Section 13(q), these ''other material benefits'' must be consistent with the EITI's guidelines ''to the extent practicable.'' [395]

Some commenters recommended that we include commodity trading-related payments for the purchase of oil, natural gas, or minerals from a government, including a NOC, within the definition of ''payment'' because, according to those commenters, those payments have become a commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[396] We decline to follow this recommendation for the same reasons that we rejected the suggestion to include activities related to such commodity trading within the definition of export.[397] We acknowledge that significant payments may be made by buying/trading companies or similar companies to purchase natural resources. Nevertheless, we do not believe that purchasing or trading oil, natural gas, or minerals, even at a level above the ''not de minimis threshold,'' is on its own sufficiently related to the ''commercial development'' of those resources to warrant being covered by the final rules, particularly when the rules will require disclosure of in-kind payments of production entitlements.[398]

We continue to believe that Section 13(q) directs us to make an affirmative determination that the other ''material benefits'' are part of the commonly recognized revenue stream. Accordingly, the other material benefits specified in the final rules are limited to CSR payments required by law or contract, dividends, and infrastructure payments. As was the case with the 2016 Rules, and as discussed in more detail below, we have determined that these payment types represent material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, and minerals and that otherwise meet the definition of payment.

1. Taxes

Consistent with Section 13(q), the final rules require a resource extraction issuer to disclose payments made in the form of taxes.[399] The final rules also include an instruction, as proposed, to clarify that a resource extraction issuer will be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but will not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes.[400] We are also adopting the proposed instruction stating that, if a government levies a payment obligation, such as a tax or dividend, at the entity level rather than on a per project basis, a resource extraction issuer may disclose that payment at the entity level.[401] Both instructions were also included in the 2016 Rules.

We received a small number of comments on the tax payment reporting requirement. Some commenters supported the proposed requirement, including the treatment of taxes levied at the entity level.[402] One commenter stated that it is often impossible to identify, on a project basis, the relevant portion of a given payment obligation that is imposed at the entity level.[403] Another commenter indicated that it is impractical to isolate the corporate income tax payments made on income generated from the commercial development of oil, natural gas, or minerals.[404]

A third commenter supported the proposed approach to tax payments because it is consistent with the approach afforded to tax payments under the EITI and the other non-U.S. payments-to-governments reporting regimes.[405] This commenter, however, recommended that we include a provision requiring that, if a government requires a corporate tax to be ring-fenced to a particular project, an issuer must report such payments at the project level. By way of example, this commenter stated that the UK imposes such a requirement.[406] We do not believe this suggested provision is necessary because the adopted instruction already provides that tax reporting by the entity level on Form SD is dependent on the government levying the tax at the entity level. Moreover, if an issuer listed or registered in the UK is subject to such a per project tax reporting requirement, it would likely provide such tax reporting when it submits its Form SD under the alternative reporting provision.[407]

Another commenter recommended that we require the reporting of tax payments at the contract level.[408] We decline to adopt this recommendation because, even under the 2016 Rules, which used a contract-based project definition, we permitted the reporting of corporate taxes levied at the entity level in response to earlier expressed concerns by commenters about the difficulty of allocating payments that are made for obligations levied at the entity level, such as corporate taxes, to the project level.[409]

2. Royalties, Fees, and Bonuses

We are adopting the proposed inclusion of royalties, fees, and bonuses in the list of payment types required to be disclosed [410] because Section 13(q) includes them in its definition of ''payment.'' The statute provides ''license fees'' as an example of the types of fees covered by that term but

[393] *See* 2019 Rules Proposing Release at Section II.C.

[394] 15 U.S.C. 78m(q)(1)(C)(ii).

[395] *Id.*

[396] *See* letters from Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); and J. Williams, NRGI.

[397] *See supra* Section II.I.2.

[398] *See infra* Section II.J.6.

[399] *See* Item 2.01(d)(9)(A) of Form SD.

[400] *See* Instruction (9) to Item 2.01 of Form SD.

[401] *See* Instruction (4) to Item 2.01 of Form SD. Pursuant to this instruction, and as proposed, if an issuer does report a tax at the entity level, it may omit certain inapplicable electronic tags, such as a project or business segment tag, for that payment as long as it provides all other electronic tags, including the tag identifying the recipient government.

[402] *See* letters from API (Mar. 16, 2020); Petrobras; and PWYP–US (Mar. 16, 2020).

[403] *See* letter from API (Mar. 16, 2020).

[404] *See* letter from Petrobras. This commenter urged the Commission to provide additional guidance on the reporting of tax payments ''considering the particularities of income tax payments in each country.'' *Id.* Providing such detailed guidance would exceed the scope of this rulemaking. To the extent that issuers have questions regarding the reporting of tax payments, or any other payments, on Form SD, they should contact the staff.

[405] *See* letter from PWYP–US (Mar. 16, 2020).

[406] *See id.*

[407] *See infra* Section II.N.

[408] *See* letter from KCSPOG.

[409] *See* Instruction (4) to Item 2.01 of Form SD under the 2016 Rules; *see also* 2012 Rules Adopting Release, note 155 and accompanying text.

[410] *See* Item 2.01(d)(B), (C), and (E).

does not provide examples of royalties and bonuses.[411] As under the 2016 Rules, we proposed an instruction to Form SD to provide further clarification of these terms.[412] The proposed instruction stated that royalties include unit-based, value-based, and profit-based royalties; fees include license fees, rental fees, entry fees, and other considerations for licenses or concessions; and bonuses include signature, discovery, and production bonuses.[413]

We received a limited number of comments on the proposed instruction. One commenter supported the disaggregation of payments into the proposed categories of royalties, fees, and bonuses because it would help the public hold their governments accountable for the specific types of payments.[414] Another commenter supported the inclusion of an instruction that provides a non-exhaustive list of fees, bonuses, and royalties because providing examples of these payment types would help companies more accurately interpret the rules' requirements.[415] In order to clarify that the list of examples is non-exhaustive, this commenter recommended revising the proposed instruction to state that each payment type includes, but is not limited to, the provided list of examples.[416]

While it was our intention that the list of examples for royalties, fees, and bonuses would be non-exhaustive,[417] we agree with the commenter that stating this in the instruction would be a useful improvement. We are therefore adopting the proposed instruction with this one modification.[418]

The examples of fees and bonuses included in the instruction are specifically mentioned in the EITI's guidance as payments that should be disclosed by EITI participants,[419] which supports our view that they are part of the commonly recognized revenue stream. The instruction also includes examples of royalties.[420] Although not mentioned in the EITI's guidance, based on the experience of the Commission staff's mining engineers and the support of commenters,[421] we believe that these examples are part of the commonly recognized revenue stream and that the instruction will provide additional clarity for issuers. These are only examples, however, and resource extraction issuers could be required to disclose other types of royalties, fees, and bonuses, depending on the facts and circumstances.

3. Dividend Payments

We are adopting the proposed inclusion of dividends in the list of payment types required to be disclosed.[422] We also are adopting the proposed instruction clarifying that a resource extraction issuer generally would not need to disclose dividends paid to a government as a common or ordinary shareholder of the issuer as long as the dividend is paid to the government under the same terms as other shareholders.[423] The issuer would, however, be required to disclose any dividends paid to a government in lieu of production entitlements or royalties. Under this approach, ordinary dividend payments would not be part of the commonly recognized revenue stream because they are not made to further the commercial development of oil, natural gas, or minerals.

This approach is consistent with the approach taken towards dividend payments in both the 2012 Rules and 2016 Rules. Most of the commenters who discussed the definition of payments in the earlier rulemakings either supported or did not object to this approach towards dividends.[424]

Although we received little comment on the treatment of dividend payments in response to the 2019 proposed rules, the comments that we received supported our approach. One commenter stated that our proposed approach would align with the text and Congressional intent of Section 13(q), as dividend payments are material benefits that are part of the commonly recognized revenue stream, and are recognized by the EU Directives, ESTMA, and the EITI Standard as payments required to be disclosed.[425] As in 2016, no commenter objected to the treatment of dividend payments.

4. Infrastructure Payments

We are also adopting the proposed inclusion of payments for infrastructure in the list of payment types required to be disclosed.[426] Such payments would include those made to build a road or railway to further the development of oil, natural gas, or minerals. As we have previously noted, payments for infrastructure often are in-kind payments rather than direct monetary payments.[427] We continue to believe such payments are ''other material benefits'' that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals because they are required to be disclosed under the EITI[428] and their inclusion as required payments under Section 13(q) has been supported by commenters since the earliest rulemaking.[429]

Our inclusion of infrastructure payments in the list of payment types required to be disclosed under Section 13(q) continues to find support in the current rulemaking. As in 2016, no commenter objected to the inclusion of such payments, and one commenter provided affirmative support. That commenter indicated that because natural resources are frequently located in remote or under-developed areas, many extractive companies, in particular mining companies, make infrastructure-related payments, which are generally viewed as part of the cost of doing business in these regions.[430] According to this commenter, infrastructure payments make up a commonly recognized revenue stream from natural resource extraction and are covered payments under the EU Directives, ESTMA, and the EITI.[431] We therefore agree with this commenter that the inclusion of infrastructure payments under Section 13(q) would help support the commitment of the Federal Government to international transparency promotion efforts, pursuant to Section 13(q).[432]

[411] 15 U.S.C. 78m(q)(1)(C)(ii).

[412] *See* 2019 Rules Proposing Release at Section II.C.2.

[413] *See* proposed Instruction (10) to Form SD in the 2019 Rules Proposing Release.

[414] *See* letter from KCSPOG.

[415] *See* letter from PWYP–US (Mar. 16, 2020).

[416] *See id.*

[417] *See* 2019 Rules Proposing Release at II.C.2.

[418] *See* Instruction (10) to Item 2.01 of Form SD.

[419] *See* EITI Standard (October 15, 2019) at 22–23.

[420] For a discussion of these types of royalties, *see* World Bank, *Mining Royalties: Their Impact on Investors, Government and Civil Society* (2006), pp.50–54 *available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/11/000090341_20060911105823/Rendered/PDF/372580Mining0r101OFFICIAL0USE0ONLY1.pdf.*

[421] *See, e.g.,* letter from PWYP–US (Mar. 16, 2020).

[422] *See* Item 2.01(d)(9)(F) of Form SD.

[423] *See* Instruction (11) to Item 2.01 of Form SD.

[424] *See* 2016 Adopting Release, Section II.C.2.a.; and 2012 Adopting Release at Section II.D.1.b.

[425] *See* letter from PWYP–US (Mar. 16, 2020).

[426] *See* Item 2.01(d)(9)(G) of Form SD.

[427] *See* 2019 Rules Proposing Release at Section II.C.4.

[428] *See* EITI Standard at 24.

[429] *See, e.g.,* letters from AngloGold Ashanti (Jan. 31, 2011); Barrick Gold Corporation (Feb. 28, 2011); EarthRights International (Jan. 26, 2011); Earthworks (Mar. 2, 2011); Global Witness (Feb. 25, 2011) ; ONE (Mar. 2, 2011); and PWYP–US (Feb. 25, 2011).

[430] *See* letter from PWYP–US (Mar. 16, 2020).

[431] *See id..*

[432] *See* 15 U.S.C. 78m(q)(2)(E).

5. Community and Social Responsibility Payments

We are adopting the proposed inclusion of CSR payments that are required by law or contract in the list of payment types required to be disclosed under Section 13(q).[433] CSR payments could include, for example, funds to build or operate a training facility for oil and gas workers, funds to build housing, payments for tuition or other educational purposes, and in general payments to support the social or economic well-being of communities within the country where the expenditures are made. For the reasons discussed below, we continue to believe that such CSR payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

When proposing the inclusion of CSR payments required by law or contract, we noted that most commenters on the 2016 Rules Proposing Release that addressed the issue supported the inclusion of CSR payments.[434] This view was supported by a broad range of commenters, including one industry commenter.[435] Although we received little comment on this issue in the current rulemaking, the one party that did comment supported the proposed inclusion of CSR payments required by law or contract because they are material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals, as evidenced by: The required reporting of mandatory CSR payments by the EITI; the adoption by numerous countries of provisions in their mining laws and policies that require extractive companies to make CSR payments; the significant amount of CSR payments routinely made by oil, gas, and mining companies, which can total in the millions or, in some cases, billions of dollars annually; and the fact that many oil, gas, and mining companies already voluntarily report CSR payments.[436]

We find the evidence cited by this commenter and those in the 2016 rulemaking to be persuasive.[437] When determining whether there are ''other material benefits'' that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals, we are statutorily required, to the extent practicable, to adopt a determination that is consistent with the EITI's guidance.[438] We find it instructive that disclosure of CSR payments that are required by law or contract has been required under the EITI since 2013.[439] The fact that several resource extraction issuers already report their voluntary or required CSR payments also supports our conclusion that such payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[440]

6. In-Kind Payments

We are adopting the proposed requirement that a resource extraction issuer must disclose payments that fall within the specified payment types that are made in-kind rather than through a monetary payment to the host country government.[441] Examples include production entitlement payments[442] and infrastructure payments. Although no commenter objected to the inclusion of in-kind payments, a small number of commenters raised concerns about different aspects of the proposed instruction providing guidance on how to report in-kind payments.[443]

Section 13(q) specifies that the rules require the disclosure of the type and total amount of payments made for each project and to each government. Accordingly, the proposed instruction stated that, when reporting an in-kind payment, a resource extraction issuer must determine the monetary value of the in-kind payment.[444] Similar to the 2016 Rules, the proposed instruction further provided that a resource extraction issuer must report the in-kind payment at cost, or if cost is not determinable, fair market value, and provide a brief description of how the monetary value was calculated.[445]

One commenter objected to the proposed instruction to use historical cost when determining the monetary value of an in-kind payment.[446] The commenter stated that fair market value represents the best benchmark for valuing in-kind payments because fair market values are readily available and more relevant to providing transparency than cost data. The commenter also expressed concern that publishing specific cost information could result in issuers having to share business sensitive data with third party competitors.[447]

We continue to believe that the required disclosure would be more consistent and comparable if issuers are required to report in-kind payments at cost and only permitted to report using fair market value if historical costs are not reasonably available or determinable. We also believe that adoption of the Modified Project Definition, which allows for the aggregation of payments, including in-kind payments, across multiple contracts should mitigate the concern raised about the publishing of competitively sensitive information.

Two other commenters supported the proposed instruction requiring the use of historical cost if determinable, but recommended that we also require the disclosure of the volume of in-kind payments, where applicable.[448] Those commenters stated that such a requirement would be consistent with the valuing of in-kind payments under the EU Directives and would enable users of the payment data to understand better the methodology used to calculate the value of in-kind payments.[449] We decline to follow this recommendation because we do not believe such information is necessary.[450] The adopted instruction requires an issuer to provide a brief description of how the monetary value of an in-kind payment was calculated, which would provide additional context for assessing the reasonableness of the disclosure.[451] An issuer may disclose volume information when providing this description if it

[433] *See* Item 2.01(d)(9)(H) of Form SD.

[434] *See* 2019 Rules Proposing Release at Section II.C.5; and 2016 Rules Adopting Release at Section II.C.2.a.

[435] *See* letter from ExxonMobil (Feb. 16, 2016).

[436] *See* letter from PWYP–US (Mar. 16, 2020).

[437] For example, in the 2016 rulemaking, one commenter noted the prevalent discussion of CSR payments in industry conferences, studies, guidance, and compliance manuals. *See* letter from Harry G. Broadman and Bruce H. Searby (Jan. 25, 2016).

[438] *See* 15 U.S.C. 78m(q)(1)(C)(ii).

[439] *See* EITI Standard at 29; *see also* 2019 Rules Proposing Release at Section II.C.5.

[440] *See, e.g.,* Equinor 2019 Sustainability Report (disclosing that in 2019 Equinor made $23 million in social investments, sponsorships, and donations); Newmont 2019 Sustainability Report (reporting a total of $23.3 million in community development and donations); and BHP 2019 Sustainability Report (reporting that BHP's voluntary community investment totaled $93.5 million in 2019).

[441] *See* Instruction (12) to Item 2.01 of Form SD.

[442] *See* Item 2.01(d)(9)(D) of Form SD.

[443] *See* letters from API (Mar. 16, 2020); Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[444] *See* 2019 Rules Proposing Release at Section II.C.6. In addition, in light of the requirement in Section 13(q) to tag the information to identify the currency in which the payments were made, the proposed instruction further stated that issuers providing a monetary value for in-kind payments must tag the information as ''in-kind'' for purposes of the currency tag.

[445] *See id.*

[446] *See* letter from API (Mar. 16, 2020).

[447] *See id.*

[448] *See* letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[449] *See id.*

[450] *See* 2019 Rules Proposing Release at Section II.C.6 (citing letter from ExxonMobil (Mar. 8, 2016)).

[451] *See* Instruction (12) to Item 2.01 of Form SD.

believes such information would be appropriate under the circumstances.

As proposed, the adopted instruction clarifies how to report payments made to a foreign government or the Federal Government to purchase the resources associated with production entitlements that are reported in-kind. An issuer's purchase of production entitlements affects the ultimate cost of such entitlements. Accordingly, if the issuer is required to report an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the issuer will be required to use the purchase price (rather than using the valuation methods described above) when reporting the in-kind value of the production entitlement.[452]

If the in-kind production entitlement payment and the subsequent purchase are made in different fiscal years and the purchase price is greater than the previously reported value of the in-kind payment, the issuer will be required to report the difference in values in the latter fiscal year if that amount exceeds the ''not de minimis'' threshold. In other situations, such as when the purchase price in a subsequent fiscal year is less than the in-kind value already reported, no disclosure relating to the purchase price would be required.[453]

7. Accounting Considerations

We are adopting the proposed item on Form SD stating that the payment disclosure must be made on a cash basis instead of an accrual basis and need not be audited.[454] This is consistent with the approach that the Commission proposed and adopted in the 2016 rulemaking.[455] We continue to believe that requiring reporting to be made on a cash basis is the best approach because: (1) These payment disclosures are largely cash-based, so reporting them on a cash basis would limit the associated compliance burden; and (2) requiring a consistent approach to reporting would improve comparability and therefore result in greater transparency.

No commenter opposed the proposed ''cash basis'' requirement, and one commenter supported it. This commenter stated that the proposed approach is consistent with the approach under the EITI and other non-U.S. payments-to-governments reporting regimes.[456]

When proposing that the payment information is not required to be audited, we noted that the EITI approach is different from Section 13(q).[457] Under the EITI, companies and the host country's government generally each submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, frequently an independent auditor, who reconciles the information provided by the companies and the government and then produces a report.[458] In contrast, Section 13(q) does not contemplate that an administrator would audit and reconcile the information or produce a report as a result of the audit and reconciliation. Moreover, while Section 13(q) refers to ''payments,'' it does not require the information to be included in the financial statements. In addition, by not imposing an audit requirement for the payment information, we are mindful of the concerns raised by some previous commenters that such an auditing requirement would significantly increase implementation and ongoing reporting costs.[459]

K. Anti-Evasion

We are adopting the proposed provision that will require disclosure with respect to an activity or payment that, although not within the categories included in the final rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).[460] This provision is designed to emphasize substance over the form or characterization of payments. We believe that it covers most of the situations that have concerned commenters in prior rulemakings. For example, the provision would cover payments that were substituted for otherwise reportable payments in an attempt to evade the disclosure rules,[461] as well as activities and payments that were structured, split, or aggregated in an attempt to avoid application of the rules.[462] Similarly, a resource extraction issuer could not avoid disclosure by improperly characterizing an activity as transportation that would otherwise be covered under the rules, or by making a payment to the government via a third party in order to avoid disclosure under the rules.

We received a limited number of comments that addressed the proposed anti-evasion provision.[463] Some commenters recommended specifically stating, to align more closely with the EU Directives and ESTMA, that activities and payments must not be artificially structured, split, or aggregated to avoid the application of the rules.[464] Another commenter recommended that, because a government official may demand that a transaction be structured a certain way to avoid application of the rules, we strengthen the anti-evasion provision to prevent an issuer in such circumstances from claiming that it is just following the demands of the government and is not part of a plan or scheme to evade the disclosure required under Section 13(q).[465] We decline to adopt either recommendation because we believe that the proposed principles-based anti-evasion provision is broad enough, and the most effective way, to prohibit the evasive activity in these, as well as other, cases.[466]

L. Annual Report Requirement

1. Form SD

Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report but otherwise does not specify the location of the disclosure, either in terms of a specific form or in terms of location within a form.[467] For the following reasons, and consistent with the 2016 Rules, we are adopting the proposed requirement that resource extraction issuers provide the required disclosure about payments on Form SD.[468]

Form SD is already used for specialized disclosure not included within an issuer's periodic or current

[452] *See id.*

[453] *See id.*

[454] *See* Item 2.01(a)(2) of Form SD.

[455] *See* the 2016 Adopting Release at Section II.C.3.

[456] *See* letter from PWYP–US (Mar. 16, 2020).

[457] *See* 2019 Rules Proposing Release at Section II.C.8.

[458] *See* EITI Standard at 26.

[459] *See, e.g.,* letters from Anadarko Petroleum Corporation (Mar. 2, 2011); API (Jan. 28, 2011); British Petroleum p.l.c. (Feb. 11, 2011); Chevron Corporation (Jan. 28, 2011); Ernst & Young (Jan. 31, 2011); New York State Bar Association, Securities Regulation Committee (Mar. 1, 2011); Petroleo Brasileiro S.A. (Feb. 21, 2011); and PricewaterhouseCoopers LLP (Mar. 2, 2011).

[460] *See* 17 CFR 240.13q–1(b). This provision is identical to the one included in the 2016 Rules.

[461] *See, e.g.,* letter from Elise J. Bean (Feb. 16, 2016).

[462] *See, e.g.,* letter from PWYP–US (Feb. 16, 2016).

[463] *See* letters from Better Markets; Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[464] *See* letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[465] *See* letter from Better Markets.

[466] For example, an issuer would be required to report payments characterized or structured as related to exploratory activities, without applying the delayed reporting provision, when in fact they are payments related to development activities.

[467] *See* 15 U.S.C. 78m(q)(2)(A).

[468] *See* 17 CFR 240.13q–1(a). As proposed, the amended Form SD will require an issuer to include a brief statement in the body of the form in an item entitled, ''Disclosure of Payments by Resource Extraction Issuers,'' directing readers to the detailed payment information provided in the exhibits to the form. *See* Item 2.01(a)(3) of Form SD.

reports, specifically, the disclosure required by the rule implementing Section 1502 of the Dodd-Frank Act.[469] As such, we believe that using Form SD would facilitate interested parties' ability to locate the disclosure. In this regard, we disagree with the commenter that opposed the use of Form SD because it believed that using the same form as is used for conflict minerals disclosure would unnecessarily confuse users of the payment information and cause them to conflate the two issues.[470] Because the amendment to Form SD includes the Section 13(q) disclosure requirements in its own section (Section 2), distinct from the conflict minerals requirements in Section 1 of that Form, we believe that any user confusion would be kept to a minimum.

We also believe that using Form SD would address the concerns expressed by issuers in prior rulemakings about having to provide the disclosure in their Exchange Act annual reports on Forms 10–K, 20–F or 40–F.[471] For example, the adopted approach should alleviate the concern that the disclosure will be subject to the officer certifications required by 17 CFR 240.13a–14 and 240.15d–14 (Exchange Act Rules 13a–14 and 15d–14). It also will allow the Commission, as discussed below, to adjust the timing of the submission without directly affecting the broader Exchange Act disclosure framework.[472]

Section 13(q) also does not specifically mandate the time period in which a resource extraction issuer must provide the disclosure. We are adopting the proposed requirement that an issuer report the payments made in its last fiscal year.[473] We continue to believe that fiscal year reporting would limit resource extraction issuers' compliance costs by allowing them to use their existing tracking and reporting systems for their public reports to also track and report payments under Section 13(q).

We also considered the possibility that certain resource extraction issuers may be required to submit two reports on Form SD every year if we use a reporting period based on the fiscal year and they are subject to the May 31st conflict minerals disclosure deadline.[474] Nevertheless, we continue to believe that the fiscal year is the appropriate reporting period for the payment disclosure. We believe it would reduce resource extraction issuers' compliance costs when compared to a fixed, annual reporting requirement by allowing them to use their existing tracking and reporting systems for their public reports to also track and report payments under Section 13(q). In addition, although minimizing the number of Forms SD an issuer would need to submit if it was also subject to the conflict minerals disclosure rules could have benefits, we do not believe that those benefits outweigh those arising from a reporting regime tailored to a resource extraction issuer's fiscal year.[475]

2. Annual Deadline for Form SD

We proposed a Form SD submission deadline that differed depending on a resource extraction issuer's fiscal year-end. We proposed to require an issuer with a fiscal year ending on or before June 30 to submit Form SD no later than March 31 in the calendar year following its most recent fiscal year. For an issuer with a fiscal year ending after June 30, we proposed the Form SD submission deadline to be no later than March 31 in the second calendar year following its most recent fiscal year.[476] This approach differed from the 2016 Rules, which required all resource extraction issuers to submit Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year. We based the 2016 deadline in part on the need to avoid a conflict with the deadline for an issuer's annual report on Form 10–K, 20–F, or 40–F under the Exchange Act.[477] When proposing the different annual reporting deadline in 2019, we explained that, although we continued to believe that it is reasonable to provide a deadline that would be later than an issuer's Exchange Act annual report deadline, in light of the concerns about compliance burdens under the 2016 Rules, we were proposing a submission deadline for Form SD that is longer than the 150 day deadline.[478]

Several commenters objected to the proposed annual deadline for submitting Form SD.[479] Noting that the proposed reporting deadline would be significantly longer than the 2016 reporting deadline, particularly for calendar year-end companies, most of those commenters stated that the proposed reporting deadline would limit the usefulness of the disclosed payment information and undermine its effectiveness for citizens, investors, and other data users.[480] For example, one commenter stated that, under the proposed deadline, for a calendar year-end company, there would be 465 days between the end of the fiscal year and the deadline for reporting payments for that fiscal year, which would unnecessarily limit benefits to citizens and investors.[481] Some commenters recommended that we instead reinstate the annual report deadline under the 2016 Rules (*i.e.,* 150 days after the end of the issuer's most recent fiscal year).[482]

We understand commenters' concerns regarding adopting an annual report deadline that could significantly limit the usefulness of the payment disclosures. We also, however, believe that the annual report deadline should be longer than the 150-day deadline under the 2016 Rules so that it does not interfere with an issuer's annual reporting obligations under the Exchange Act.

Accordingly, we are adopting an annual deadline for Form SD that requires an issuer to submit Form SD no later than 270 days following the end of its most recently completed fiscal year.[483] Although this deadline is longer than the deadline imposed under the 2016 Rules, it is significantly shorter

[469] 17 CFR 240.13p–1 (Rule 13p–1). *See also* Exchange Act Release No. 34–67716 (Aug. 22, 2012) [77 FR 56273 (Sept. 12, 2012)] (''Conflict Minerals Release'').

[470] *See* letter from PWYP–US (Mar. 16, 2020).

[471] *See* 2012 Rules Adopting Release, notes 366–370 and accompanying text. Under the rules proposed in the 2012 Rules Proposing Release, a resource extraction issuer would have been required to furnish the payment information in its annual report on Form 10–K, Form 20–F, or Form 40–F. One commenter continued to support this approach after the 2012 Rules Adopting Release. *See* letter from Susan Rose-Ackerman (Mar. 28, 2014) (''[t]here is no need for the cost of a separate report.'').

[472] In this regard, we considered permitting the resource extraction payment disclosure to be submitted as an amendment to Form 10–K, 20–F, or 40–F, as applicable, but we are concerned that this might give the false impression that a correction had been made to a previous filing. *See also* 2012 Rules Adopting Release, n.379 and accompanying text.

[473] *See* Item 2.01(a)(1) of Form SD.

[474] General Instruction B.1 of Form SD. *See also* Exchange Act Rule 13p–1.

[475] Of the 414 companies that we estimate would be subject to the final rules, only 50 filed a Form SD pursuant to Rule 13p–1 in 2019. In addition, we note that the conflict minerals reporting regime adopted a uniform reporting period, in part, because such a period allows component suppliers that are part of a manufacturer's supply chain to provide reports to their upstream purchasers only once a year. *See* Conflict Minerals Release, note 352 and accompanying text. The same reasoning does not apply to the issuer-driven disclosure under the Section 13(q) rules.

[476] *See* 2019 Rules Proposing Release at Section II.H.

[477] *See* 2016 Adopting Release at Section II.G.3.

[478] *See* 2019 Rules Proposing Release at Section II.H.

[479] *See* letters from Sens. Cardin *et al.;* EITI Civil Society Board (Mar. 13, 2020); PolicyAlert!; Eric Postel; Public Citizen; and PWYP–US (Mar. 16, 2020).

[480] *See, e.g.,* letters from Sens. Cardin *et al.;* EITI Civil Society Board; Eric Postel; Public Citizen; and PWYP–US (Mar. 16, 2020).

[481] *See* letter from PWYP–US (Mar. 16, 2020).

[482] *See, e.g.,* letters from EITI Civil Society Board; Eric Postel; Public Citizen; and PWYP–US (Mar. 16, 2020).

[483] *See* General Instruction B.2. to Form SD.

than what we proposed. We believe that this annual report deadline appropriately balances the interest of users in maintaining the effectiveness of the payment disclosures with the interest of issuers in reducing the compliance burdens of the Section 13(q) rules. We also believe that reducing the likelihood that the filing of the Form SD will interfere with an issuer's annual reporting obligations under the Exchange Act is consistent with the Commission's statutory duty to adopt rules that promote efficiency in U.S. capital markets.[484]

M. Exhibits and Interactive Data Format Requirements

As required by Section 13(q),[485] and as proposed, the final rules will require a resource extraction issuer to submit the required disclosure on EDGAR in an XBRL exhibit to Form SD.[486] Providing the required disclosure elements in a machine readable (electronically tagged) format will enable users easily to extract, aggregate, and analyze the information in a manner that is most useful to them. For example, it will allow the information received from the issuers to be converted by EDGAR and other commonly used software and services into an easily readable tabular format.

When proposing to require the use of XBRL as the interactive data format, we noted that most commenters on the 2016 Rules Proposing Release that addressed the issue supported the use of XBRL, but did not similarly support the use of Inline XBRL.[487] Inline XBRL is a particular form of XBRL that allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit.

The Commission recently adopted rule amendments to require the use of the Inline XBRL format for the submission of operating company financial statement information and mutual fund risk/return summaries.[488] One commenter recommended that we require the use of Inline XBRL for the Section 13(q) payment disclosure.[489] Another commenter, however, supported the proposed use of XBRL and was ''agnostic as to whether conventional (XML-based) XBRL or Inline (HTML-based XBRL) is adopted.[490] Like the proposed rules, however, the final rules do not require a resource extraction issuer to use Inline XBRL when submitting the Section 13(q) payment information. Given the nature of the disclosure required by the Section 13(q) rules, which is primarily an exhibit with tabular data, we continue to believe that Inline XBRL would not improve the usefulness or presentation of the required disclosure.

Under the final rules, and consistent with the statute, a resource extraction issuer will be required to submit the payment information in XBRL using electronic tags—a taxonomy of defined reporting elements—that identify, for any payment required to be disclosed:

- The total amounts of the payments, by payment type;[491]
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located;[492] and
- The project of the resource extraction issuer to which the payments relate.[493]

In addition to the electronic tags specifically required by the statute, a resource extraction issuer will also be required, as proposed, to provide and tag the type and total amount of payments, by payment type, made for each project and the type and total amount of payments, by payment type, for all projects made to each government.[494] These additional tags relate to information that is specifically required to be included in the resource extraction issuer's annual report by Section 13(q).[495]

The final rules will also require resource extraction issuers, as proposed, to tag the particular resource that is the subject of commercial development, the method of extraction, and the country and major subnational political jurisdiction of the project.[496] While these three items of information also would be included in the project description, we believe that having separate electronic tags for these items will further enhance the usefulness of the data with an insignificant corresponding increase in compliance costs.

For the country in which the government and project is located and the major subnational geographic location of a project, the final rules require, as proposed, that the issuer use an electronic tag that is consistent with the appropriate ISO code.[497] As some previous commenters pointed out, such use would standardize references to those geographic locations and thereby help to reduce confusion caused by a particular project description.[498]

Consistent with the statute, the final rules will require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments.[499] The statute also requires a resource extraction issuer to present the type and total amount of payments made for each project and to each government, but does not specify how the issuer should report the total amounts. We believe that the statutory requirement to provide a tag identifying the currency used to make the payment, coupled with the requirement to disclose the total amount of payments by payment type for each project and to each government, requires issuers to perform currency conversions when payments are made in multiple currencies.

We are adopting the instruction to Form SD, as proposed, clarifying that issuers will be required to report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, in U.S. dollars or in the issuer's reporting currency if not U.S. dollars.[500] We understand that

[484] *See supra* note 232.

[485] Section 13(q) provides that the rules shall require that the information included in the annual report of a resource extraction issuer be submitted in an interactive data format. *See* 15 U.S.C. 78m(q)(2)(C). and 15 U.S.C. 78m(q)(2)(D)(ii). The Commission has defined an ''interactive data file'' to be the interactive data submitted in a machine-readable format. See 17 CFR 232.11; Release No. 33–9002 (Jan. 14, 2009) [74 FR 6776 (Feb. 10, 2009)], 6778, note 50.

[486] *See* Item 2.01(a)(5) of Form SD.

[487] *See* 2019 Rules Adopting Release at Section II.K.

[488] *See* Release No. 33–10514 (Jun. 28, 2018) [83 FR 40846 (Jul. 16, 2018)].

[489] *See* letter from PWYP–US (Mar. 16, 2020) (stating that Inline XBRL would be useful because, in the reports filed under the EU Directives and Canada's ESTMA, issuers include narrative, context, and clarifying footnotes in addition to the statutorily required data). In this regard, however, the final rules require that the alternative reports must be tagged using XBRL.

[490] Letter from XBRL US (Mar. 16, 2020).

[491] For example, payment types could be royalties, bonuses, taxes, fees, or production entitlements.

[492] An issuer must provide an electronic tag identifying the government for each national and subnational government payee.

[493] *See* Item 2.01(a)(5) of Form SD.

[494] *See* Item 2.01(a)(5)(i) through (ii).

[495] *See* Section 13(q)(2)(A)(i) through (ii).

[496] *See* Item 2.01(a)(5)(ix) through (xi).

[497] *See* Instruction (3) to Item 2.01 of Form SD. ISO 3166–1 pertains to countries whereas ISO 3166–2 pertains to major subdivisions in the listed countries.

[498] *See* 2016 Rules Adopting Release at Section II.K.3.

[499] *See* Item 2.01(a)(5)(iv) of Form SD.

[500] *See* Instruction 2 to Item 2.01 of Form SD. Foreign private issuers may currently present their financial statements in a currency other than U.S. dollars for purposes of Securities Act registration and Exchange Act registration and reporting. See 17 CFR 210.3–20 (Rule 3–20 of Regulation S–X).

issuers may have concerns regarding the compliance costs related to making payments in multiple currencies and being required to report the information in another currency.[501] As we did in the 2016 Rules,[502] in order to address those concerns, we are adopting the proposed instruction that allows a resource extraction issuer to choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways:

- By translating the expenses at the exchange rate existing at the time the payment is made;
- By using a weighted average of the exchange rates during the period; or
- Based on the exchange rate as of the issuer's fiscal year end.[503]

No commenter opposed this instruction, and the one commenter that addressed the Commission's identical currency conversion approach in the 2016 rulemaking supported it.[504]

The adopted instruction requires a resource extraction issuer to disclose the method used to calculate the currency conversion. In addition, as proposed, in order to avoid confusion, the issuer will be required to choose a consistent method for all such currency conversions within a particular Form SD.[505]

Consistent with the statute, the final rules will require a resource extraction issuer to include an electronic tag that identifies the business segment of the resource extraction issuer that made the payments.[506] We are adopting the proposed definition of ''business segment'' to mean a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.[507] Defining ''business segment'' in this way would enable issuers to report the information according to how they currently report their business operations, which should help to limit compliance costs.

Finally, to the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, issuers will be able to omit certain tags that may be inapplicable (*e.g.,* project tag, business segment tag) for those payment types. Issuers will, however, be required to provide all other electronic tags, including the tag identifying the recipient government.[508]

N. Alternative Reporting

1. Alternative Reporting Requirements

As noted above, several countries have implemented resource extraction payment disclosure laws.[509] In light of these developments, and with a view towards limiting compliance costs, we are adopting the proposed provision that will allow issuers to meet the requirements of the Section 13(q) rules, in certain circumstances, by providing disclosures that comply with a foreign jurisdiction's reporting regime. Specifically, this provision would apply if the Commission has determined that the alternative reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q).[510] The Commission adopted a similar approach to alternative reporting in connection with the 2016 Rules.[511] As in the 2016 rulemaking, all of the commenters that addressed the issue supported this approach.[512]

If the Commission has determined that the foreign reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q), the alternative reporting provision will allow an issuer subject to the foreign reporting regime to submit the report it prepared under the foreign requirements in lieu of the report that would otherwise be required by our disclosure rules, subject to certain conditions. This framework for alternative reporting will, at least in part, allow a resource extraction issuer to avoid the costs of having to prepare a separate report meeting the requirements of our Section 13(q) disclosure rules when it already submits a report pursuant to another jurisdiction's requirements deemed by the Commission to satisfy Section 13(q)'s transparency objectives.

An issuer will only be permitted to use an alternative report for an approved foreign jurisdiction or regime if the issuer was subject to the resource extraction payment disclosure requirements of that jurisdiction or regime and had made the report prepared in accordance with that jurisdiction's requirements publicly available prior to submitting it to the Commission.[513] An issuer choosing to avail itself of this accommodation will be required to submit as an exhibit to Form SD the same report that it previously made publicly available in accordance with the approved alternative jurisdiction's requirements.[514] The issuer also will be required to state in the body of its Form SD that it is relying on this accommodation and identify the alternative reporting regime for which the report was prepared.[515]

In addition, we are adopting the proposed requirement that the alternative reports must be tagged using XBRL.[516] We believe that requiring a consistent data format for all reports submitted to the Commission would enhance the ability of users to access the data and create their own compilations in a manner most useful to them. We also believe that requiring a consistent data format would better enable the Commission's staff to provide any additional compilations of Section 13(q) information.

An issuer relying on the alternative reporting accommodation will also be required to provide a fair and accurate English translation of the entire report if prepared in a foreign language.[517] Given the specificity of the disclosure and the electronic tagging required under Rule 13q–1 and Form SD, we do not believe it would be appropriate to permit an English summary of a foreign language document that is being provided as an alternative report.[518] Other than the XBRL and English translation

[501] *See* 2019 Rules Proposing Release at Section II.K.

[502] *See* 2016 Adopting Release at Section II.K.1.

[503] *See* Instruction 2 to Item 2.01 of Form SD.

[504] *See* letter from Petrobras (Feb. 16, 2016) (stating that the three proposed methods for calculating the currency conversion when payments are made in multiple currencies provide issuers with sufficient options to address any possible concerns about compliance costs and comparability of the disclosure among issuers).

[505] *See* Instruction 2 to Item 2.01 of Form SD.

[506] *See* Item 2.01(a)(5)(vi) of Form SD.

[507] *See* Item 2.01(d)(1) of Form SD. The term ''reportable segment'' is defined in FASB ASC Topic 280, Segment Reporting, and IFRS 8, Operating Segments. We did not receive any comments on the proposed definition of ''business segment.''

[508] *See* Instruction 4 to Item 2.01 of Form SD.

[509] *See supra* note 20.

[510] *See* Item 2.01(c) of Form SD.

[511] *See* 2016 Rules Adopting Release at Section II.J.2.

[512] *See, e.g.,* letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Eni; Equinor; PWYP–US (Mar. 16, 2020); Rio Tinto; Royal Dutch Shell; SAF; and Total (Feb. 10, 2020).

[513] *See* Item 2.01(c)(1) through (2) of Form SD.

[514] *See* Item 2.01(c)(2) of Form SD. The format of the report could differ to the extent necessary to comply with the conditions placed by the Commission on the alternative reporting accommodation. For example, the report may not have been originally submitted in the home jurisdiction in XBRL or may not have been in English, both of which are requirements under the rules we are adopting.

[515] *See* Item 2.01(c)(3) of Form SD.

[516] *See* Item 2.01(c)(4) of Form SD.

[517] *See* Item 2.01(c)(5) of Form SD.

[518] 17 CFR 232.306 (Rule 306 of Regulation S–T) requires that all electronic filings and submissions be in the English language. If a filing or submission requires the inclusion of a foreign language document, Rule 306 requires that the document be translated into English in accordance with 17 CFR 230.403(c) (Securities Act Rule 403(c)) or 17 CFR 240.12b–12(d) (Exchange Act Rule 12b–12(d)).

requirements, an issuer that elects to use the alternative reporting option will not be required to meet a requirement under the final rules to the extent that the alternative reporting regime imposes a different requirement.

Similar to the 2016 Rules, a resource extraction issuer will be able to follow the submission deadline of an approved alternative jurisdiction if it submits a notice on or before the due date of its Form SD indicating its intent to submit the alternative report using the alternative jurisdiction's deadline.[519] We proposed that if a resource extraction issuer fails to submit such notice on a timely basis, or submits such a notice but fails to submit the alternative report within four business days of the alternative jurisdiction's deadline, as proposed, it will not be able to rely on the alternative reporting accommodation for the following fiscal year.[520] One commenter recommended that we permit an issuer to submit an alternative report up to ten business days after the deadline of the approved alternative jurisdiction.[521] Although we believe that four business days is a reasonable amount of time to file the alternative report,[522] we are adopting a seven business day deadline instead of the proposed four business day deadline to address concerns about the need for additional time for an issuer to submit its alternative report.

We anticipate making determinations about whether a foreign jurisdiction's disclosure requirements satisfy Section 13(q)'s transparency objectives either on our own initiative or pursuant to an application submitted by an issuer or a jurisdiction. We will then publish the determinations in the form of a Commission order. We anticipate considering, among others, the following criteria in determining whether a foreign jurisdiction's reporting regime requires disclosure that satisfies Section 13(q)'s transparency objectives: (1) The types of activities that trigger disclosure; (2) the types of payments that are required to be disclosed; and (3) whether project-level disclosure is required and how ''project'' is defined. We also anticipate considering other factors as appropriate or necessary under the circumstances.

Applications could be submitted by issuers, governments, industry groups, and trade associations.[523] Applicants would follow the procedures set forth in 17 CFR 240.0–13 (Rule 0–13 of the Exchange Act) to request recognition of other jurisdictions' reporting regimes as satisfying Section 13(q)'s transparency objectives.[524] Pursuant to Rule 0–13, the applicant will be required to include supporting documents, and, once complete, the application will be referred to the Commission's staff for review.[525] Also pursuant to Rule 0–13, the Commission will publish a notice in the **Federal Register** that a complete application has been submitted and allow for public comment.[526] The Commission could also, in its sole discretion, schedule a hearing before the Commission on the matter addressed by the application.[527]

2. Recognition of EU Directives, U.K.'s Reports on Payments to Governments Regulations, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA as Alternative Reporting Regimes

In conjunction with our adoption of the final rules, we are issuing an order recognizing the EU Directives, the UK's Reports on Payments to Governments Regulations 2014,[528] Norway's Regulations on Country-by-Country Reporting,[529] and Canada's ESTMA as alternative reporting regimes that satisfy the transparency objectives of Section 13(q) for purposes of alternative reporting under the final rules, subject to certain conditions. We similarly issued a concurrent order when adopting the 2016 Rules.[530] Several commenters requested that we issue such an order concurrent with or shortly after adoption of these final rules.[531]

We have determined that these disclosure regimes satisfy the transparency objectives of Section 13(q). For example, all four regimes require annual, public disclosure, including the identity of the filer; include the same or similar activities within the scope of their laws or regulations; require project-level reporting; cover similar payment types; cover similar controlled entities and subsidiaries; and require foreign subnational payee reporting. Although we acknowledge differences between these regimes and the final rules,[532] we do not believe that such differences support reaching a different conclusion, particularly in light of the requirements we are imposing on alternative reporting.[533] We note that, among those commenters that addressed the issue, there was agreement that the Commission should allow alternative reporting under the EU Directives, U.K.'s Reports on Payments to Governments Regulations, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA.[534] This further persuades us that it is appropriate at this time to grant these regimes alternative reporting status in their current form.

O. Compliance Date

Section 13(q) provides that, with respect to each resource extraction issuer, the final rules issued under that section shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the issuer's fiscal year that ends not earlier than one year after the date on which the Commission issues the final rules under Section 13(q).[535] We are adopting the proposed two-year transition period so that a resource extraction issuer will be required to comply with Rule 13q–1 and Form SD for fiscal years ending no earlier than two years after the effective date of the final rules. For example, if the rules were to become effective on March 1, 2021, the compliance date for an issuer with a December 31 fiscal year-end would be Monday, September 30, 2024 (*i.e.,* 270 days after its fiscal year end of December 31, 2023).

This two-year transition period is the same as the transition period for the 2016 Rules. In this regard, we note that issuers that have not previously been subject to an alternative reporting regime would likely have to modify their internal systems to track, record, and report the required payment information. The two-year transition period should provide these issuers with sufficient time to establish the

[519] *See* Item 2.01(c)(6) of Form SD.

[520] *See* 2019 Rules Proposing Release at Section II.L. We proposed the four business day deadline because it is consistent with other Commission reporting deadlines. *See, e.g.,* General Instruction B.1. to Form 8–K.

[521] *See* letter from PWYP–US (Mar. 16, 2020).

[522] *See supra* note 520.

[523] *See* 17 CFR 240.13q–1(c).

[524] Rule 0–13 permits an application to be filed with the Commission to request a ''substituted compliance order'' under the Exchange Act.

[525] *See* 17 CFR 240.0–13(e) and (g).

[526] *See* 17 CFR 240.0–13(h).

[527] *See* 17 CFR 240.0–13(i).

[528] 2014 UK Statutory Instrument No. 3209.

[529] FOR–2013–12–20–1682.

[530] *See* Release No. 34–78169 (Jun. 16, 2016) [81 FR 49163 (July 27, 2016)] (stating that a resource extraction issuer that files a report complying with the reporting requirements of the EU Directives, ESTMA, and the USEITI would satisfy its disclosure obligations under Rule 13q–1).

[531] *See, e.g.,* letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Equinor; and Rio Tinto.

[532] For example, the EU Directives impose disclosure requirements for logging companies in addition to oil, natural gas, and mining companies.

[533] For example, the final rules require alternative reports to be submitted in XBRL format. *See supra* Section II.N.1.

[534] *See, e.g.,* letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Equinor; Rio Tinto; and Total.

[535] 15 U.S.C. 78m(q)(2)(F).

necessary systems and procedures to capture and track all the required payment information before the fiscal year covered by their first Form SD. It also should afford issuers an opportunity to make any other necessary arrangements to comply with Section 13(q) and the final rules, such as seeking exemptive relief on a case-by-case basis.

P. Other Matters

Pursuant to the Congressional Review Act,[536] the Office of Information and Regulatory Affairs has designated these rules as a ''major rule,'' as defined by 5 U.S.C. 804(2).

Separately, if any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application. Implementation of these rules has been ongoing since 2011. As a result, we are specifying how the Commission intends for the rule to operate in the event that it is challenged and a court rejects the rule's approach to either of the two matters that have been a particular focus of dispute among the commenters: The definition of project and the need for, and scope of, exemptions. If the definition of project is challenged and invalidated or otherwise not permitted to take effect, issuers must continue to make all the disclosures required by Section 13(q), but issuers may utilize their own reasonable definition of project while the Commission reconsiders the project definition. In such circumstances, allowing issuers to utilize their own reasonable definition of project (which they will need to identify in Form SD) until such time as a revised rule may be issued and all litigation connected to it is resolved would be an appropriate interim alternative for the reasons discussed in the 2012 Rules Proposing Release. Further, if one or more of the rule's exemptions is invalidated or otherwise not permitted to take effect, resource-extraction issuers must continue to make all of the required disclosures under this rule, but the Commission, while reconsidering how to proceed with any possible revised rulemaking, retains the authority under Section 36(a) of the Exchange Act to issue exemptive orders as appropriate.

[536] 5 U.S.C. 801 *et seq.*

III. Economic Analysis

A. Introduction and Baseline

As discussed above, Section 13(q) mandates a new disclosure provision under the Exchange Act that requires resource extraction issuers to identify and report payments they make to foreign governments or the Federal Government relating to the commercial development of oil, natural gas, or minerals. It does so to help foster payment transparency in resource-rich countries. According to some commenters, increased transparency of payments may further increased accountability and anti-corruption efforts in resource-rich countries.[537]

Exchange Act Section 23(a)(2) requires us to consider the impact that any new rule would have on competition. In addition, Section 3(f) of the Exchange Act directs us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

As such, we have considered the costs and benefits that would result from the final rules, as well as the potential effects on efficiency, competition, and capital formation. Many of the potential economic effects of the final rules stem from the statutory mandate, while others stem from the discretion we are exercising in implementing the statutory mandate. As noted above, our discretionary choices have been informed, in part, by the disapproval of the 2016 Rules under the CRA and in particular the CRA's prohibition on promulgating a new rule in substantially the same form. The following discussion addresses the costs and benefits that might result from both the statute and our discretionary choices.[538]

The baseline the Commission uses to analyze the potential effects of the final rules is the current set of legal requirements and market practices.[539] To the extent that resource extraction issuers are not already tracking and disclosing the information required under the rules, the final rules likely will have a significant impact on their disclosure practices and in addition increase aggregate compliance costs. The overall magnitude of the potential costs of the final disclosure requirements will depend on the number of affected issuers and individual issuers' costs of compliance.[540] In addition, the final rules could impose burdens on competition, although as discussed elsewhere in this release, the anti-competitive effects of transparency disclosures have been called into question based upon resource extraction issuers' experiences with the disclosure regimes in Europe and Canada.[541] In any event, the changes we are making from the 2016 Rules are intended to mitigate any such effects.

One commenter asserted that the baseline contains significant gaps and fails to recognize current market trends.[542] According to this commenter, we do not consider that the global transparency landscape has changed dramatically since the 2016 Rules; specifically that the international standards of reporting have moved towards fully public, project-level reporting, defined at the contract-level consistent with every other transparency regime, and towards a consistent definition of ''not de minimis.'' We agree with the commenter that the global transparency landscape has evolved since the 2016 Rules. This has had an effect on the competitive landscape as well, because some of the competitors of U.S.-reporting issuers are now required to provide similar disclosures. We disagree with the commenter that our baseline fails to recognize that change. Indeed, in the baseline we discuss and quantify the number of potential issuers that are reporting under existing regimes and the potential effect on their costs.

We expect that the final rules will affect both U.S. issuers and foreign issuers that meet the definition of ''resource extraction issuer'' in much the same way, except for issuers already subject to requirements adopted in the EU, EEA, UK, or Canada, as discussed above in Section I.B. The discussion below describes the Commission's understanding of the markets and issuers that would be affected by the final rules.[543]

[537] *See, e.g.,* letters from Oxfam American and Earthrights International; and PWYP–US (Mar. 16, 2020).

[538] Because our discretionary choices are informed by the statutory mandate, our discussion of the benefits and costs of those choices necessarily involves the benefits and costs of the underlying statute.

[539] *See supra* Sections I.A. through B. for a discussion of the current legal requirements and significant international transparency promotion regimes that affect market practices.

[540] Based on the available data, however, it does not appear that the increased compliance costs would be significant on a per issuer basis. *See infra* Section III.D.11.

[541] *See supra* Section II.

[542] *See* letter from Oxfam America and Earthrights International.

[543] In addition to our analysis against the baseline, we have also noted other instances where

Continued

To estimate the number of potentially affected issuers, we use data from Exchange Act annual reports filed on Forms 10–K, 20–F, and 40–F for the period January 1, 2018, through December 31, 2019. We consider all issuers with oil, natural gas, and mining Standard Industrial Classification (''SIC'') codes [544] as likely to be resource extraction issuers. We also include issuers that do not have the above-mentioned oil, natural gas, and mining SIC codes (because their primary business is not necessarily resource extraction) as likely resource extraction issuers if they have some resource extraction operations, such as ownership of mines. In addition, we remove issuers that use oil, natural gas, and mining SIC codes but appear to be more accurately classified under other SIC codes based on the disclosed nature of their business. Finally, we exclude royalty trusts from our analysis because we believe it is uncommon for such companies to make the types of payments that will be covered by the final rules.

From these filings, we estimate that the number of potentially affected issuers is 678. We note that this number does not reflect the number of issuers that actually made resource extraction payments to governments in the period under consideration but rather represents the estimated number of issuers that might make such payments.

In determining which issuers are likely to bear the full costs of compliance with the final rules, we make three adjustments to the list of affected issuers. First, we exclude issuers that are smaller reporting companies or emerging growth companies and that are not subject to alternative reporting regimes that the Commission has deemed to satisfy the transparency objectives of Section 13(q), as the final rules provide an exemption for those issuers. Second, we exclude issuers that are subject to disclosure requirements in foreign jurisdictions that generally require more granular disclosure than the final rules and therefore are likely already bearing compliance costs for such disclosure.[545] Third, we exclude small issuers that likely could not have made any payment above the de minimis amount of $100,000 to any government entity in the period January 1, 2018, through December 31, 2019.[546]

First, among the 678 issuers that we estimate will be affected by the final rules, 214 reported being smaller reporting companies (SRCs) and 191 reported being emerging growth companies (EGCs) in the period January 1, 2018, through December 31, 2019. There are 84 issuers that reported both SRC and EGC status during this period. There are also 69 issuers with SRC or EGC status that were subject to alternative reporting regimes that, concurrent with adoption of the final rules, the Commission is deeming to satisfy the transparency objectives of Section 13(q). These issuers are therefore not eligible for the EGC/SRC exemption. Subtracting the 69 non-exempt issuers that are either SRCs or EGCs from the total of 321 issuers with SRC or EGC status results in 252 SRCs and EGCs that are potentially exempt from the final rules. Subtracting these 252 SRCs and EGCs from the sample of 678 potentially affected issuers results in 426 issuers that will be subject to the final rules.

To address the second consideration, we searched the filed annual forms for issuers that have a business address, are incorporated, or are listed on markets in the EEA, UK, or Canada.[547] For purposes of our analysis, we assume that issuers in these jurisdictions already are providing more granular resource extraction payment disclosure than the disclosure that will be required by the final rules and that the additional costs to comply with the final rules will be much lower than costs for other issuers.[548] We identified 177 such issuers (including the 69 previously mentioned SRCs and EGCs). For purposes of our economic analysis, we assume that these issuers will not have to incur significant compliance costs related to the final rules, as they are already tracking, recording, and reporting resource extraction payment disclosure at a more granular level.[549]

Third, among the remaining 249 issuers (*i.e.,* 426 minus 177) we searched for issuers that, in the most recent fiscal year as of the date of their Exchange Act annual report filing, reported that they are shell companies and thus have no or only nominal operations, or have both revenues and absolute value net cash flows from investing activities of less than the de minimis payment threshold of $100,000. Under these financial constraints, such issuers are unlikely to have made any non-de minimis and otherwise reportable payments to governments and therefore are unlikely to be subject to the final reporting requirements. We identified 12 such issuers.

Taking these estimates of the number of excluded issuers together, we estimate that approximately 237 issuers (*i.e.,* 678 minus 252 minus 177 minus 12) will bear the full costs of compliance with the final rules.[550]

In the following economic analysis, we discuss the potential benefits and costs and likely effects on efficiency, competition, and capital formation that might result from both the new reporting requirement mandated by Congress and from the specific implementation choices that we have made in formulating the final rules.[551] We analyze these potential economic effects through a qualitative and, where possible, a quantitative discussion of the potential costs and benefits that might result from the payment reporting requirement (Sections III. B and III.C) and our specific implementation choices (Section III.D), respectively. Several commenters provided us with data on compliance costs, which we

the final rules differ in their economic effects from the 2016 Rules. To be clear, however, our assessment of the final rules' economic effects is measured against the current state of the world in which issuers are not required by U.S. law to disclose resource extraction payments.

[544] Specifically, the oil, natural gas, and mining SIC codes considered are 1000, 1011, 1021, 1031, 1040, 1041, 1044, 1061, 1081, 1090, 1094, 1099, 1220, 1221, 1222, 1231, 1311, 1321, 1381, 1382, 1389, 1400, 2911, 3330, 3331, 3334, and 3339.

[545] We note that such issuers may incur certain tagging and translation costs. *See infra* Section III.D.5. Given that, because we exclude these issuers from the number of potentially affected issuers, our estimates of the aggregate compliance costs associated with the final rules may be understated to the extent of these costs.

[546] In a change from the Proposing release, the final rules define ''not de minimis'' as a payment that equals or exceeds $100,000. The analysis in this section reflects this change.

[547] We assume that an issuer is subject to the EEA or Canadian rules if it is listed on a stock exchange located in one of these jurisdictions or if it has a business address or is incorporated in the EEA or Canada and its total assets are greater than $50 million. The latter criterion is a proxy for multipronged eligibility criteria underlying both EEA and Canadian rules that include issuer assets, revenues, and the number of employees.

[548] We are adopting an alternative reporting option for resource extraction issuers that are subject to foreign disclosure requirements that the Commission determines satisfy the transparency objectives of Section 13(q). *See infra* Section III.D.5 for a discussion concerning how this alternative reporting option could potentially reduce compliance costs to a negligible amount for eligible issuers.

[549] The primary costs for issuers using the alternative reporting provision would be those related to electronic tagging and translating. *See supra* Section II.N.1. *See infra* Section III.D.5 for a discussion concerning the costs related to tagging and translating.

[550] Because it may be unclear at the beginning of a financial period whether payments from an issuer will exceed the de minimis threshold by the end of such period, an excluded issuer may incur costs to collect the information to be reported under the final rules even if that issuer is not subsequently required to file an annual report on Form SD. Our estimate thus may understate the aggregate compliance costs associated with the final rules.

[551] Our consideration of potential benefits and costs and likely effects on efficiency, competition, and capital formation also is reflected throughout the discussion in Section II above.

have used to estimate the potential initial and ongoing compliance costs for issuers likely to bear the full costs of compliance with the final rules.[552]

Although aspects of the final rules are similar to the 2016 Rules, the final rules include several changes from the 2016 Rules that we believe will help limit the resulting compliance costs and burdens without significantly affecting the potential benefits that the Section 13(q) disclosure is designed to achieve. These changes include: (1) The Modified Project Definition, which requires disclosure at the national and major subnational political jurisdiction, as opposed to the contract level; (2) the addition of two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure; (3) the addition of an exemption for smaller reporting companies (SRCs) and emerging growth companies (EGCs); (4) revisions to the definition of ''control'' to exclude entities or operations in which an issuer has a proportionate interest; (5) limitations on liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission; (6) revisions to the filing deadline; and (7) the addition of transitional relief for issuers that have recently completed their U.S. initial public offerings. As explained below, we believe that these changes taken as a whole would meaningfully reduce, in the aggregate, the compliance costs and burdens for issuers compared to the compliance costs and burden estimated for the 2016 Rules.

B. Potential Benefits Resulting From the Payment Reporting Requirement

Section 13(q) seeks increased transparency about the payments that companies in the extractive industries make to foreign governments and the Federal Government. While this statutory goal and intended benefits are of potential global significance, the potential positive economic effects that may result cannot be readily quantified with any precision. The current empirical evidence on the direct causal effect of increased transparency in the resource extraction sector on societal outcomes is inconclusive,[553] and several academic papers have noted the inherent difficulty in empirically validating a causal link between transparency interventions and governance improvements.[554]

Importantly, Congress has directed us to promulgate a rule requiring disclosure of resource extraction payments. Thus, in assessing the potential benefits resulting from the rule, we believe it reasonable to rely on Congress' determination that such a rule will produce the transparency benefits by providing significant and useful payment information to persons seeking to understand the resource extraction payment flows to foreign governments.[555] In that regard, we note that Congress did not repeal the mandate under Section 13(q), and in fact, some members of Congress who supported the joint resolution to disapprove the 2016 Rules also expressed their ''strong support'' for the transparency and anti-corruption objectives of the rules.[556] In addition, none of the industry commenters over the years has expressed the view that the disclosures required by Section 13(q) would fail to help produce anti-corruption and accountability benefits.

To the extent that the Section 13(q) disclosures increase transparency and reduce corruption, they could increase efficiency and capital formation either directly abroad or indirectly in the United States. While the objectives of Section 13(q) may not appear to be ones that would necessarily generate measurable, direct economic benefits to investors or issuers, investors and issuers might benefit from the final rules' indirect effects. In the following paragraphs, we discuss existing theoretical arguments and empirical evidence that reduced corruption and better governance could have longer term positive impacts on economic growth and investment in certain countries where the affected issuers operate, which could in turn benefit issuers and their shareholders.

Although the research and data available at this time do not allow us to draw any firm conclusions, we have considered several theoretical causal explanations for why reductions in corruption may increase economic growth and political stability, which in turn may reduce investor risk.[557] High levels of corruption could introduce inefficiencies in market prices as a result of increased political risks and the potential awarding of projects to companies for reasons other than the merit of their bids. This, in turn, could prop up inefficient companies and limit investment opportunities for others. These potential distortions could have a negative impact on the economies of countries with high corruption, particularly to the extent that potential revenue streams are diminished or diverted.

Additionally, the cost of corrupt expenditures, direct or indirect, impacts profitability, and, if the cost is

[552] *See infra* Section III.D.11.

[553] For positive findings, *see* Caitlin C. Corrigan, ''Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative,'' *Resources Policy,* 40 (2014), 17–30 (finding that the negative effect of resource abundance on GDP per capita, the capacity of the government to formulate and implement sound policies and the level of rule of law is mitigated in EITI countries but noting that the EITI has little effect on the level of democracy, political stability and corruption (the author also submitted a comment letter in the 2016 rulemaking attaching an updated version of the study; *see* Letter from Caitlin C. Corrigan (Feb. 16, 2016))); Liz David-Barrett and Ken Okamura, ''The Transparency Paradox: Why Do Corrupt Countries Join EITI?'', Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) (finding that EITI compliant countries gain access to increased aid the further they progress through the EITI implementation process and that EITI achieves results in terms of reducing corruption), *available at https://eiti.org/document/transparency-paradox-why-do-corrupt-countries-join-eiti,* Maya Schmaljohann, ''Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI,'' University of Heidelberg Discussion Paper Series No. 538 (Jan. 2013) (finding that joining the EITI increases the ratio of the net foreign direct investment inflow to GDP by two percentage points); Paul F. Villar and Elissaios Papyrakis, ''Evaluating the Impact of the Extractive Industries Transparency Initiative (EITI) on Corruption in Zambia. *The Extractive Industries and Society,* (2017), forthcoming (finding that EITI implementation reduced corruption in Zambia); Elissaios Papyrakis, Matthias Rieger, and Emma Gilberthorpe, ''Corruption and the Extractive Industries Transparency Initiative,'' Journal of Development Studies, 53 (2017), 295–309 (finding that EITI reduces corruption). For negative findings, *see* Ölcer, Dilan (2009): Extracting the Maximum from the EITI (Development Centre Working Papers No. 276): Organisation for Economic Cooperation and Development (finding that the EITI has not been able to significantly lower corruption levels); Benjamin J. Sovacool, Goetz Walter, Thijs Van De Graaf, and Nathan Andrews, ''Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI),'' *World Development,* 83 (2017), 179–192 (finding that the first 16 countries that attained EITI compliance do not perform better than other countries or their own past performance in terms of accountability, political stability, government effectiveness, regulatory quality, rule of law, corruption, foreign direct investment, and GDP growth); Kerem Oge, ''Which transparency matters? Compliance with anti-corruption efforts in extractive industries,'' *Resources Policy,* 49 (2016), 41–50 (finding that EITI disclosure had no significant effect on corruption in EITI countries).

[554] *See* Andrés Mejía Acosta, *The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources,* 31 DEV. POL'Y REV. s89–s105 (2013); Alexandra Gillies and Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries,* YALE J. INT'L AFF. 25–42 (2011).

[555] We note that these intended benefits differ from the investor protection benefits that our disclosure rules typically strive to achieve.

[556] *See supra* note 30.

[557] *See, e.g.,* Pranab Bardhan, *Corruption and Development: A Review of Issues,* 35 J. ECON. LITERATURE 1320–1346 (1997); Jakob Svensson, *Eight Questions about Corruption,* 19(3) J. ECON. PERSP. 19–42 (2005) (''Svensson Study'').

sufficiently high, some potentially economically efficient or productive investments may not be made. Thus, reducing corruption could increase the number of productive investments and the level of profitability of each investment and could lead to improved efficiency in the allocation of talent, technology, and capital. Insofar as these effects are realized, each of them could benefit issuers operating in countries with reduced corruption levels. These and other considerations form a basis for several dynamic general equilibrium models predicting a negative relationship between corruption and economic development.[558]

A number of empirical studies have also shown that reducing corruption might result in an increase in the level of GDP and a higher rate of economic growth through more private investments, better deployment of human capital, and political stability.[559] Other studies find that corruption reduces economic growth, both directly and indirectly, through lower investments.[560] To the extent that increased transparency could lead to a reduction in corruption and, in turn, improved political stability and investment climate, some investors may consider such factors in their investment decisions, including when pricing resource extraction assets of affected issuers operating in these countries.[561]

There also could be positive externalities from increased investor confidence to the extent that improved economic growth and investment climate could benefit other issuers working in those countries. Although we believe the evidence is presently too inconclusive to allow us to predict the likelihood that such a result would occur, there is some empirical evidence suggesting that lower levels of corruption might reduce the cost of capital and improve valuations for some issuers.[562]

One commenter provided additional citations of studies that present empirical evidence on the role of transparency in reducing corruption.[563] Those studies, according to the commenter, show a positive relation between transparency and the lowering of corruption and improvements in socio-economic and human development indicators. The commenter also argued that transparency is a necessary, but not sufficient condition for reducing corruption. Two commenters also listed studies that show benefits from disclosure and transparency improvements in extractive industries.[564] One of these commenters pointed out, however, that there are a number of studies that show mixed or no evidence of a positive effect of transparency in the extractive industries on reduction in corruption.[565] One commenter also provided several concrete examples from countries such as Ghana, Indonesia, and Mozambique on how the transparency resulting from the disclosure of payments to governments from issuers under the European Union regime has enabled citizens to more effectively hold companies and governments accountable.[566]

We also note that global transparency efforts such as the EITI and others are relatively new, which makes it difficult at this time to draw any firm empirical conclusions about the potential long-term benefits that such transparency regimes may produce for resource-rich countries. Many studies suggest a possible link between improvements in transparency, which they measure as a resource-rich country joining the EITI, and increases in GDP and net foreign direct investments, reduction in conflict and unrest, and effects on economic development.[567] The causal mechanisms involved, however, are complex (impacted by myriad factors) and it may take several decades before those mechanisms yield empirically verifiable social gains. While some of these studies provide useful insight into the potential benefits of resource payment transparency regimes, we believe that there are limitations associated with each of these studies that make it difficult for us to draw firm conclusions based on their findings. Additionally, other factors could affect both corruption and economic development (*e.g.,* a country's institutions), making it difficult to detect a causal relationship between the former and the latter.

Some commenters on the 2019 Rules Proposing Release criticized us for not discussing in detail the benefits that the disclosures required by Section 13(q) could provide to investors.[568] According to those commenters, the rules, especially the contract-level project definition, provide very useful information to investors in making investment decisions. We discuss the effects of our choice of project definition in more detail below. Although we do not believe this is the primary purpose of the required disclosures, we acknowledge the possibility that the disclosures might provide potentially useful information to certain investors. Notwithstanding the commenters' views, we believe the direct incremental benefit to investors from the Section 13(q) disclosures is limited. Most impacted issuers, other than smaller reporting companies, are already

[558] *See, e.g.,* Isaac Ehrlich and Francis Lui, *Bureaucratic Corruption and Endogenous Economic Growth,* 107(7) J. POL. ECON. 270–293 (1999); Keith Blackburn, Niloy Bose, and M. Emanrul Haque, *The Incidence and Persistence of Corruption in Economic Development,* 30 J. ECON. DYNAMICS & CONTROL 2447–2467 (2006); Carlos Leite and Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth* (Int'l Monetary Fund, Working Paper No. 99/85, July 1999).

[559] *See, e.g.,* Paulo Mauro, *The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis, in* CORRUPTION & THE GLOBAL ECONOMY 83–107, (Kimberly Ann Elliot ed., 1997); Helene Poirson, *Economic Security, Private Investment, and Growth in Developing Countries* (Int'l Monetary Fund, Working Paper No. 98/4, Jan. 1998); Institute for Economics and Peace, *Peace and Corruption 2015: Lowering Corruption—A Transformative Factor for Peace* (2015) *available at https://reliefweb.int/sites/reliefweb.int/files/resources/Peace%20and%20Corruption.pdf.*

[560] *See* Pak Hung Mo, *Corruption and Economic Growth,* 29 J. COMP. ECON. 66 (2001); Kwabena Gyimah-Brempong, *Corruption, Economic Growth, and Income Inequality in Africa,* 3 ECON. GOVERNANCE 183–209 (2002); Pierre-Guillaume Méon and Khalid Sekkat, *Does corruption grease or sand the wheels of growth?,* 122 PUBLIC CHOICE 69–97 (2005).

[561] Several studies present evidence that reduction in corruption increases foreign direct investments. *See, e.g.,* Shang-Jin Wei, *How Taxing is Corruption on International Investors?,* (Nat'l Bureau of Econ. Research, Working Paper 6030 (1997); George Abed and Hamid Davoodi, *Corruption, Structural Reforms, and Economic Performance in the Transition Economies* (Int'l Monetary Fund, Working Paper No. 00/132 (July 2000).

[562] *See* Daniel Kaufmann and Shang-Jin Wei, *Does 'Grease Money' Speed Up the Wheels of Commerce?* (Nat'l Bureau of Econ. Research, Working Paper 7093 (1999) (finding, based on survey evidence, that firms that pay fewer bribes have lower, not higher, cost of capital); Charles Lee and David Ng, *Corruption and International Valuation: Does Virtue Pay?,* 18(4) J. INVESTING 23–41 (2009) (finding that firms from more corrupt countries trade at significantly lower market multiples).

[563] *See* letter from Kaufmann (May 1, 2020).

[564] *See* letters from Kaufmann and PWYP–US (Mar. 16, 2020).

[565] *See* letter from Kaufmann.

[566] *See* letter from PWYP–US (Mar. 16, 2020).

[567] *See* letter from C. Corrigan (Feb. 16, 2016) (referring to her earlier study: Caitlin Corrigan, *Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative,* 41 RESOURCES POL'Y 17–30 (2014); Letter from PWYP–US (Feb. 16, 2016) (referring to Fernando Londoño, *Does Joining the Extractive Industries Transparency Initiative Have an Impact on Extractive and Non-Extractive FDI Inflows?* (2014), *available at http://gppreview.com/wp-content/uploads/2014/02/Londono-F.pdf)* (''Londoño Study'') and Maya Schmaljohann, *Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI* (Jan. 2013), *available at http://archiv.ub.uni-heidelberg.de/volltextserver/14368/1/Schmaljohann_2013_dp538.pdf* (''Schmaljohann Study'')); Letter from ONE Campaign (Mar. 16, 2016).

[568] *See* letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

required to disclose their most significant operational and financial risks [569] as well as certain financial information related to the geographic areas in which they operate, in their Exchange Act annual reports.[570] We discuss this issue in greater detail in Section III.D.1 below where we discuss the implications of the definition of ''project.''

C. Potential Costs Resulting From the Payment Reporting Requirement

The disclosures required by Section 13(q) could result in direct compliance costs for affected issuers. The direct compliance costs will stem from the time and effort, to the extent necessary, to modify issuers' core enterprise resource planning systems and financial reporting systems to capture and report payment data at the project level, for each type of payment, government payee, and currency of payment, to the extent that such payments are not currently tracked by the issuers' reporting systems. Examples of modifications that may be necessary include establishing additional granularity in existing coding structures (*e.g.,* splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by ''project,'' building new collection tools within financial reporting systems, establishing a trading partner structure to identify and provide granularity around government entities, establishing transaction types to accommodate different types of payment (*e.g.,* royalties, taxes, or bonuses), and developing a systematic approach to handle ''in-kind'' payments. We estimate the direct compliance costs resulting from the final rules in Section III.D.11 below.

Several commenters asserted that Section 13(q)'s mandated disclosures could result in competitive harm to issuers, especially those that are not currently subject to payment disclosure in other jurisdictions.[571] These commenters did not provide specific information or data that would allow us to assess the likelihood or magnitude of any such effect. As a general matter, we acknowledge that the final rules' mandated disclosures may have under certain circumstances adverse competitive effects on resource extraction issuers covered by the final rules; however, we are not aware of, and no commenter has provided us evidence of, any information demonstrating that the resource extraction companies that have been subject to similar foreign disclosure requirements for several years have experienced significant adverse competitive effects. We base this on the fact that for several years a large number of companies have been disclosing payment information in the European Union, UK, and Canada, all of which have transparency laws that require more granular disclosure than that required by the final rules, and we are not aware of evidence that would suggest these companies have suffered from competitive harm as a result. We also note that those regimes cover a wider pool of affected companies than the final rules as these regimes are not limited to companies that are publicly traded in their jurisdictions but instead also cover companies of a certain size that are domiciled in their jurisdictions (including potentially foreign subsidiaries of U.S. resource extraction issuers).[572]

We discuss below the significant choices we have made to implement the statutory requirements that are the main drivers of the direct compliance costs of the final rules. We then discuss the associated benefits and costs of those choices. In that regard, we are unable to quantify the impact of each of the choices discussed below because reliable, empirical evidence about the effects is not readily available to the Commission. For most of the choices described below, commenters did not provide any data allowing us to quantify costs or benefits. We do, however, provide an estimate of total compliance costs in Section III.D.11.

D. Discussion of Discretionary Choices

1. Definition of ''Project''

Section 13(q) requires a resource extraction issuer to disclose information about the type and total amount of payments made to a foreign government or the Federal Government for each project relating to the commercial development of oil, natural gas, or minerals, but it does not define the term ''project.'' The final rules define ''project'' using a three-pronged definition: (1) The type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place.

The definition of ''project'' can affect the extent of direct compliance costs imposed on affected issuers. The extent of this effect depends on the degree to which issuers' financial and reporting systems track and report payments using a definition of project different from the one included in the final rules (or using no definition at all). The definition of ''project'' may require modifications to issuers' core enterprise resource planning systems and financial reporting systems to capture and report payment data for each type of payment, government payee, and currency of payment, thus generating compliance costs, at least in the short run. To the extent that some issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q), or that any necessary adjustments to issuers' existing reporting systems could be done in a timely and cost-effective manner, compliance costs may be low.

The Modified Project Definition that we are adopting may help limit direct compliance costs for affected issuers. With respect to direct compliance costs, the Modified Project Definition will allow an issuer to make the payment disclosure at a higher level of aggregation than under the 2016 Rules' contract-based definition. Instead of tracking, recording, and disclosing payment information at the single contract, license, or lease level, under the Modified Project Definition, affected issuers will have to report this information at the resource type, extraction method, and the major subnational political jurisdiction level. This higher level of information aggregation should lower the cost of providing the required payment disclosure (as compared to the 2016 Rules) because there will be fewer individual data points to be tracked, electronically tagged, and reported. It should also make it easier for the issuer to report the payment information. However, as discussed in Section III.D.11, below, the most recent cost estimates provided by commenters based on experience reporting under the EU Directives indicates that the initial and ongoing costs estimated in the 2016 Adopting Release may have been overstated. To the extent these reporting costs are lower than the Commission previously anticipated, the cost savings associated with the Modified Project Definition, as compared to a contract-based definition, would be reduced.

[569] *See* 17 CFR 229.305 and 229.503.

[570] *See* 17 CFR 229.101(d).

[571] See letters from API, Chamber, and NAM.

[572] *See, e.g.,* Canada's ESTMA at Section 8(1), providing that ESTMA's reporting requirement apply to ''(a) an entity that is listed on a stock exchange in Canada; (b) an entity that has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (i) It has at least $20 million in assets, (ii) it has generated at least $40 million in revenue, (iii) it employs an average of at least 250 employees; and (c) any other prescribed entity.

In addition, because the required payment information is at a higher level of aggregation than under a contract-based definition, it is likely that an issuer already aggregates some of the required payment information for its own internal accounting or financial reporting purposes. For example, one commenter asserted that the vast majority of the revenue stream for extractive industry issuers is realized at the national or subnational jurisdictional level, and that payments below that level tend to be minimal.[573] In that event, requiring payment information at a higher level of aggregation may be less costly because the issuer may be able to modify its existing internal accounting systems to collect the required payment information rather than having to build a new system to collect the payment information on a contract-by-contract basis.

At the same time, the Modified Project Definition will continue to provide a level of transparency that people could use to assess revenue flows from projects in their local communities. As we discuss above in Section III.B, this should have a number of potential benefits for information users seeking to prevent corruption and promote accountability.

Finally, we acknowledge that the Modified Project Definition may narrow the scope of the transparency benefits compared to the previous definition proposed in 2016. We believe, however, that the revised definition, because it identifies the type of resource, the method of extraction, and the location, will, in conjunction with other aspects of the final rules, provide substantial transparency about the overall revenue flows to national and subnational governments, as explained in Section II.A above.

Several commenters supported the Modified Project Definition, arguing that it would reduce compliance costs while promoting transparency.[574] One commenter noted that this approach would reduce regulatory costs and unnecessary exposure of issuers' competitively sensitive data while promoting transparency.[575]

Many commenters did not support the Modified Project Definition and disagreed with the Commission's analysis in the Proposing Release of the potential benefits and costs of the Modified Project Definition, especially compared to the contract-level definition used in the 2016 Rule and in other jurisdictions. The criticism followed several broad themes, which we summarize below.

a. Effects on Transparency

Many commenters argued that the Modified Project Definition would impede the benefits of transparency compared to a contract-based definition.[576] One commenter stated that the aggregation of payments permitted by the revised definition would increase issuers' ability to hide payments made to smaller municipalities or government officials.[577] Another commenter stated that contract-level disclosure is more valuable since corruption occurs within individual deals and not across them.[578] Several commenters also opposed the Commission's proposal to permit an issuer to aggregate payments of a particular payment type below the major subnational government level without having to identify the particular subnational government payee.[579] We note that under the final rules, an issuer, while still able to aggregate payments by payment type when disclosing payments made at a level below the major subnational government level, will now be required to disclose the aggregated amount paid to, and identify, each subnational government payee.

One commenter argued that contract-level data was very useful for investors and civil society who could only get it from disclosures under Section 13(q).[580] According to this commenter, by eliminating contract-level reporting and allowing the aggregation in the Modified Project Definition, the Commission is effectively proposing to shift the burden of identifying which payments relate to which project, and tracking financial flows from a company to a particular government, to the public and investors. The commenter argued that competitors could get such contract-level information from energy intelligence firms and services, but the price of those is prohibitively high for individual investors and civil society.

We acknowledge, as commenters have asserted, that compared to a contract-based level of disclosure, the Modified Project Definition may limit the ability of citizens and civil society organizations to identify some payments made to their local government and thus advocate more effectively with them. As discussed above, however, the final rules' disclosure will include the name of the issuer as well as the particular subnational government payee. Thus, although the revised definition will provide less granular information as compared to the 2016 Rules, we believe it still will provide substantial transparency about the overall revenue flows to foreign governments and the U.S. Federal government, as required by Section 13(q).

b. Effects on Compliance Costs

Some commenters argued that the Modified Project Definition would not decrease issuers' compliance costs compared to a contract-based definition. One commenter asserted that issuers already track payments at the contract level because of standard business practices.[581] According to that commenter, because of the widespread use of contract-level reporting, our Modified Project Definition could actually increase compliance costs because registrants will have to switch their systems to a new project definition. Also, the commenter stated that issuers that are cross-listed or have substantial subsidiaries in Canada and the EU will not incur large costs because they already collect this information at a contract-based level. Similarly, the commenter argued that many issuers collect data for similar IRS payment disclosure categories and hence have internalized the cost of creating a system that could be used to provide disclosure at a contract-based definition.

We note, however, there is no indication that affected issuers track payments at the contract level as a matter of standard business practices. In addition, not all issuers that would be affected by the final rules have subsidiaries in countries that require contract-level reporting and thus may not have systems in place to track payments at the contract level. Finally, companies that are reporting under other reporting regimes (that the Commission has determined satisfy the transparency objectives of Section 13(q)) can file those reports under the alternative reporting provision. Such issuers will not have to change their reporting systems to conform to the Modified Project Definition.[582]

[573] *See* letter from API (Mar. 16, 2020).

[574] *See* letters from API (Mar. 16, 2020); Chamber; NAM; Petrobas; and SAF.

[575] *See* letter from API (Mar. 16, 2020).

[576] *See, e.g.,* letters from Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); and Better Markets.

[577] *See* letter from Better Markets.

[578] *See* letter from Oxfam America and Earthrights International.

[579] *See, e.g.,* letters from Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); Congr. Waters *et al.,* and POGO.

[580] *See* letter from Oxfam America and Earthrights International.

[581] *See Id.*

[582] *See supra* Section II.N.

c. Competitive Harm Effects

While some commenters expressed concern that the Section 13(q) disclosures could potentially cause competitive harm,[583] a number of commenters who opposed the Modified Project Definition argued that there is no need to modify the project definition to address concerns related to competitive harm.[584] Some commenters stressed that a contract-level definition of project would not result in competitive harm to resource extraction issuers based upon the numerous issuers already subject to contract-level disclosure requirements in the foreign payments-to-governments reporting regimes and the EITI and because contract information about competitors is available from paid third-party service providers.[585] Others noted that there has not been evidence of any competitive harm by global and overseas issuers already subject to detailed contract-level disclosures resulting from the EU directives and Canadian legislation.[586]

As noted above, as a general matter, we do not believe that the final rules' mandated disclosures are likely to result in significant adverse competitive effects for affected issuers. Therefore, although the Modified Project Definition might help to mitigate any risk of competitive harm for those issuers that are not currently subject to payment disclosure in other jurisdictions, we view this as an ancillary rather than primary benefit of the modified definition.

d. Investor Benefit Effects

Some commenters argued that, compared to the Modified Project Definition, a contract-based definition would provide significant benefits to investors, and criticized us for not highlighting these benefits in the economic analysis.[587] According to these commenters, the main investor benefits would be the ability to evaluate regulatory and political risks of registrants in the extractive sectors, value the projects and registrants more accurately, and perform a better portfolio risk evaluation. One commenter argued that it would help investors understand portfolio risk.[588] The same commenter noted that the current disclosures in Regulation S–K do not apply to smaller reporting companies, which means investors would not be able to evaluate the risks associated with investing in such companies. Another commenter quoted a number of institutional investors stating that contract-based payment disclosure would enhance the identification of opportunities and risks in portfolios with exposure to the extractives sectors, which have a history of volatility due to political and regulatory risk.[589] According to these investors, the disclosures required by Section 13(q) would also help address the need for detailed information regarding the financial relationship between extractives companies and the governments where they operate.

While we acknowledge, as we did in the 2019 Rules Proposing Release, that Section 13(q) disclosures could be helpful for some investors, we remain skeptical of the benefit of contract-level disclosure, as put forth by commenters, for evaluating portfolio risk or providing more accurate project or issuer valuation. It is true that Section 13(q) disclosures, whether contract-level or based on the Modified Project Definition, may provide some information (*e.g.,* taxes paid, operating expenditures such as royalties, etc.) that could be used to value an issuer or its projects in various countries, or the volatility of these projects. Significant information about these projects, however, will still remain unreported because there is no requirement in the relevant laws or regulations that require issuers to report it. This would significantly limit an investor's ability to perform project valuation and risk analyses and hence would limit the usefulness of the Section 13(q) disclosures (whether contract-level or based on the Modified Project Definition) for investors.

For example, even with Section 13(q) disclosures, a major driver of project value and risk such as cash flows will be impossible to calculate because the applicable financial statement disclosure requirements do not necessarily compel issuers to disclose project level revenues and other key project level operating costs such as employee compensation. This lack of key information will make it very difficult for an investor to determine and/or quantify a particular project's valuation and risk. Similar reasoning applies regarding the potential usefulness of Section 13(q) disclosures (whether contract-level or based on the Modified Project Definition) for the valuation of issuers. The Section 13(q) payments already will be reflected in an issuer's consolidated financial statements, thus making the Section 13(q) payments disclosure (whether contract-level or based on the Modified Project Definition) redundant for an issuer's cash flow projections and its valuation. Moreover, an issuer would also be required to disclose any information concerning a particular project or operation in a country when necessary to understand its financial condition or results of operations.[590]

We also believe that there will be little or no marginal benefit of using the Section 13(q) disclosures to evaluate a country's political and regulatory risks, as suggested by commenters. In this regard, there are other disclosure requirements (risk factors, management's discussion of known trends and uncertainties, etc.) as well as other measures of such risks (*e.g.,* various indices measuring a country's corruption level, governance, ease of doing business, freedom of press, etc.) that are freely available to investors.

2. Exemptions From Disclosure

The final rules would provide conditional exemptions for situations in which a conflict with foreign law or a pre-existing (pre-adoption) contract term prohibits the Section 13(q) disclosure. We acknowledge that absent potential exemptive relief, resource extraction issuers operating in countries that prohibit, or may in the future prohibit, the disclosure required under Section 13(q) could bear substantial costs. Such costs could arise if issuers are forced to cease operations in certain countries or otherwise violate local law. Specifically, if an issuer violates local law, it could suffer expropriation of its facilities in the host country, the imposition of fines or the withholding of permits, or otherwise be forced to abandon the project. In addition, the country's laws could have the effect of preventing them from participating in future projects. Similar to the 2016 Rules, we are also adopting a provision that will allow an issuer to apply for an exemption on a case-by-case basis using the procedures set forth in Rule 0–12 of the Exchange Act for other situations posing a significant threat of commercial harm.

Several commenters supported the exemptions for conflicting laws or pre-

[583] *See supra* note 571.

[584] *See, e.g.,* letters from Kaufmann; Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

[585] *See, e.g.,* letters from PWYP–US (Mar. 16, 2020); Kaufmann; and POGO.

[586] See, *e.g.,* letter from Oxfam America and Earthrights International.

[587] See, *e.g.,* letters from Oxfam America and Earthrights International; PWYP–US (Mar. 16, 2020); F. Samama *et al.;* and WK Associates (Mar. 16, 2020).

[588] *See* letter from Oxfam America and Earthrights International.

[589] *See* letter from PWYP–US (Mar. 16, 2020).

[590] *See* 17 CFR 229.303.

existing contract terms.[591] These commenters generally argued that the exemptions could reduce costs and competitive burdens for issuers and potentially investors. One of these commenters argued that the exemptions would not impede the statutory purpose because transparency continues to grow as an international practice as new countries continue to join the EITI, and the exemptions are designed to be used in very limited circumstances.[592] That commenter asserted that two countries—Qatar and China—prohibit the required disclosures.[593]

Many commenters opposed the exemptions for conflicting laws or pre-existing contract terms that we are adopting.[594] In general, those commenters pointed out that other disclosure regimes such as those in the EU and Canada do not provide such exemptions and issuers disclosing under those regimes did not report any concerns. One commenter argued that several years of reporting of disaggregated project-level payment information by nearly 800 companies under reporting regimes that provide no exemptions have not led to any companies being barred from operating in certain jurisdictions, or to any large costs to issuers.[595] The same commenter asserted that it was a standard industry practice to include contract provisions that allow disclosure of information that would otherwise be considered confidential if it is required by law, regulators, or exchanges.

We do not believe that the exemptions will undermine the purpose of Section 13(q) disclosures as they include several conditions that are designed to limit the availability of the exemptions and help ensure that issuers forgo disclosure only when there is a legitimate conflict. At the same time, we believe the exemptions will substantially decrease any indirect costs and competitive effects that could result from any potential conflicts with foreign law and pre-existing contracts, or from other situations where the required payment disclosure would pose a significant threat of commercial harm.

In addition to the exemptions for conflicts with foreign law and pre-existing contracts, and the case-by-case exemptive procedure, the final rules will allow for delayed reporting for explorative activities and transitional relief for recently acquired companies not previously obliged to disclose resource extraction payment information. In a change from the 2016 Rules, the final rules would also provide transitional relief for companies that have completed their U.S. initial public offering in the last full fiscal year. These additional forms of exemptive relief should reduce compliance costs for affected issuers.

In a change from the Proposing Release, we have modified the proposed exemption for smaller reporting companies (SRCs) and emerging growth companies (EGCs). As we discussed, we proposed this exemption because the final rules could result in significant fixed compliance costs, which are likely to have a greater relative impact on smaller resource extraction issuers. Thus, we believe that this exemption will promote capital formation by decreasing compliance costs for SRCs and EGCs.[596]

The exemption we are adopting in this release, however, exempts only those SRCs and EGCs that are not subject to the EU Directives, Canada's ESTMA, or other similar disclosure regimes. We believe that SRCs and EGCs that already provide such payments disclosure under a similar disclosure regime will incur small compliance costs when providing the Section 13(q) disclosure, mainly related to tagging and translation.[597] This is because the final rules will allow them to meet their reporting obligations by submitting the report required by that foreign jurisdiction with the Commission subject to the condition that the Commission has determined that the foreign jurisdiction's reporting obligations satisfy the transparency objectives of Section 13(q).[598]

As noted above, we identified a total of 321 issuers with SRC or EGC status in the period January 1, 2018, through December 30, 2019: 214 issuers reported being SRCs, 191 issuers reported being EGCs and 84 issuers reported being both SRCs and EGCs. Of these 321 issuers, there are 69 issuers with SRC or EGC status that were subject to alternative reporting regimes that, concurrent with adoption of the final rules, the Commission is deeming to satisfy the transparency objectives of Section 13(q), and which are therefore not eligible for the EGC/SRC exemption. This results in 252 issuers that are potentially exempt from the final rules. The exemption for SRCs and EGCs would avoid adding to the costs of being a public reporting company for these companies.

Two commenters supported the exemption for EGCs and SRCs on the grounds that it would result in important cost savings for such companies.[599] Several commenters opposed the exemption for EGCs and SRCs, arguing that those issuers may be equally susceptible to corruption and that they tend to take greater operational risks than larger issuers.[600] We note, however, that exposure to greater operational risks does not automatically result in greater engagement in corruption activity, and we are not aware of any empirical evidence that documents such a link.

3. Annual Report Requirement

Section 13(q) provides that the resource extraction payment disclosure must be ''include[d] in an annual report.'' As under the 2016 Rules, the required payment information would be reported on Form SD. Following a 2-year transition period, during which no report would be due, the Form SD would be due no later than 270 days following the end of its most recently completed fiscal year. This should lessen the burden of compliance with Section 13(q) and the related rules because issuers will have additional time to prepare their report and will not have to incur the burden and cost of providing the payment disclosure at the same time that they must fulfill their disclosure obligations with respect to Exchange Act annual reports.[601]

An additional benefit is that this requirement would provide payment information to users in a standardized manner for all issuers rather than in different annual report forms depending on whether a resource extraction issuer is a domestic or foreign filer. Moreover, requiring the disclosure in Form SD, rather than in issuers' Exchange Act annual reports, should alleviate any concerns and costs associated with the disclosure being subject to the officer certifications required by Exchange Act Rules 13a–14 and 15d–14.

In a change from the 2016 Rules, the final rules require an issuer to furnish

[591] *See* letters from API, (Mar. 16, 2020); Chamber; Davis Polk; FACT Coalition; NAM; Petrobras; PWYP–US (Mar. 16, 2020); and SAF.

[592] *See* letter from API (Mar. 16, 2020).

[593] *Id.*

[594] *See* letters from Africa Center for Energy Policy; Elise J. Bean; Sens. Cardin *et al.;* DAR; EG Justice; FACT Coalition; Friends of the Nation; Shannon Gough; KCSPOG; Eric Postel; Robert Rutkowski; Transparency International; and Congr. Waters *et al.*

[595] *See* letter from Elise J. Bean.

[596] *See* 2019 Rules Proposing Release at Section II.J.3.

[597] *See infra* Section III.D.5.

[598] *See supra* Section II.N.

[599] *See* letters from Chamber and NAM.

[600] *See* letters from and NRGI (Mar. 16, 2020); Public Citizen; and PWYP–US (Mar. 16, 2020).

[601] This submission deadline is longer than the 2016 Rules' deadline, which required the Form SD report to be filed no later than 150 days following the most recently completed fiscal year end. A resource extraction issuer may be able to save resources to the extent that the timing of these obligations with enable it to allocate its resources, in particular personnel, more efficiently.

rather than file the payment disclosure in an annual report on Form SD. This will limit the incremental risk of liability under Section 18 of the Exchange Act and promote capital formation. This limit to the incremental risk of liability could decrease the quality of payment information reported to the extent that issuers are less attentive to collecting and submitting the information. We note, however, that Section 18 does not create strict liability for ''filed'' information. In addition, issuers would still be subject to antifraud liability under the Federal securities laws for material misstatements or omissions, which should mitigate the risk of decreased quality of the reported payment information. We also believe this change is appropriate given the nature and purpose of the Section 13(q) disclosure requirements, which are not for the protection of investors, although some investors may find the disclosures to be useful. Rather, they are to increase the accountability of governments and to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[602] Since Section 18 is designed to protect investors,[603] we do not believe it is necessary or appropriate to apply it to the Section 13(q) disclosures.[604]

Commenters were split in their views on whether issuers should file or furnish the payment disclosure. Several commenters argued that furnishing it would reduce compliance costs without compromising the benefits of transparency.[605] A similar number of other commenters generally argued that without the liability that comes with filing the disclosures, the disclosure might be ineffective.[606]

Resource extraction issuers would incur costs associated with preparing and furnishing the required information on Form SD. We do not believe, however, that the costs associated with furnishing the information on Form SD instead of providing it in an existing Exchange Act form would be significant given that the existing form would have to be modified to accommodate the requirements of Section 13(q) disclosure.

4. Public Availability of Data

The final rules will require a resource extraction issuer to furnish the required payment disclosure publicly, including the name of the issuer. As an alternative to requiring payment disclosure by individual issuers, we could have permitted resource extraction issuers to furnish the information non-publicly and having the Commission publish, an aggregated and anonymized compilation of company-provided resource extraction payment information. Such an approach would mitigate concerns regarding the disclosure of potentially sensitive issuer information that could create competitive harm. Additionally, such an alternative would still result in the disclosure of the type and amount of payments to governments, albeit on an aggregated basis.

Such anonymized public compilation, however, may not further transparency efforts to the same degree as company-specific disclosure. As discussed in Section II.A above, we believe that Section 13(q) is reasonably understood to promote Project-to-Government Payment Disclosure, which identifies the project of the issuer that generated specific payments and the foreign government that received those payments. Absent disclosure of the issuer, the Modified Project Definition would not identify the specific project of the issuer that was the source of the payments. Rather, all similar activities in the same subnational jurisdiction, regardless of issuer, would be indistinguishable. In addition, requiring issuers to disclose their payment information publicly would also provide users with more current and immediately available information than a separate compilation produced by the Commission.

In contrast, under an approach that depends upon the Commission publishing a separate public compilation of previously submitted non-public information, users of the information would have to wait to access the information in an issuer's Form SD until the Commission publishes its periodic compilation. We do not believe that the requirement for issuers to disclose the payment information publicly would increase an issuer's compliance burden compared to the alternative of issuers submitting the payment information non-publicly (and the Commission using the nonpublic submissions to produce a publicly available compilation). The compliance costs would be similar under each alternative because the issuer would have to furnish the same payment information to the Commission. In addition, for the reasons discussed above, we do not believe there is a significant risk of competitive harm from public disclosure. Moreover, any such risk would be marginal because of the Modified Project Definition and the extended filing deadline.

Many commenters supported the public reporting of the Section 15(q) disclosure.[607] These commenters generally argued that the aggregated, anonymized reporting would undermine the transparency benefits that the statute is supposed to generate and limit the usefulness of the payment disclosure to interested parties such as citizens and civil society in those countries. Some commenters favored the alternative, anonymized compilation approach.[608] According to those issuers, public reporting would cause competitive harm to reporting issuers. As we noted above, however, the potential for competitive harm would be marginal because the Modified Project Definition should significantly alleviate the likelihood of such harm occurring, and because of the extended filing deadline.

5. Alternative Reporting

The final rules would allow resource extraction issuers subject to a foreign jurisdiction's resource extraction payment disclosure requirements to meet their reporting obligations by submitting the report required by that foreign jurisdiction with the Commission subject to the condition that the Commission has determined that the foreign jurisdiction's reporting obligations satisfy the transparency objectives of Section 13(q). Concurrently with the 2016 Rules Adopting Release, the Commission issued an order designating the EU Directives and ESTMA as eligible substitute reporting regimes for purposes of the alternative reporting provision in those rules. The Commission is making a similar determination in connection with adoption of the final rules, which should significantly decrease compliance costs for issuers that are cross-listed or incorporated in these jurisdictions.

As noted above, we estimated that 177 issuers are subject to other regulatory regimes that may allow them to utilize

[602] *See, e.g.,* letter from API (Mar. 16, 2020).

[603] Exchange Act Section 18 [15 U.S.C. 78r] imposes liability for false or misleading statements made in any application, report, or document filed with the Commission pursuant to the Exchange Act.

[604] *See supra* Section II.F.

[605] *See* letters from API (Mar. 16, 2020); Chamber; Equinor; Ovintiv; and Royal Dutch Shell.

[606] *See* letters from Chris Barnard; KCSPOG; Public Citizen; and PWYP–US (Mar. 16, 2020).

[607] *See* letters from Sens. Cardin *et al.;* EITI (International Secretariat) (Mar. 16, 2020); Equinor; FACT Coalition; Friends of the Nation; Oxfam America and Earthrights International; ONE.org; Oxfam in Kenya; POGO; Eric Postel; PWYP–US (Mar. 16, 2020); Transparencia por Colombia; Congr. Waters *et al.;* and Zimbabwe Environmental Law Organization.

[608] *See* letters from API (Mar. 16, 2020); Chamber; and NAM.

this provision.[609] For these issuers, the costs associated with preparing and furnishing a Form SD should be negligible when compared to the costs associated with tracking, recording, and filing such information, although they would be required to format the data in interactive (XBRL) format and potentially translate it into English before submitting it with the Commission. Thus, such issuers may incur certain tagging and translation costs. We are not able to quantify those costs, and no commenter provided estimates of such costs.[610] Commenters generally supported the alternative reporting provision.[611]

As an alternative, we could have excluded such a provision from the final rules. Such an alternative would have increased the compliance costs for issuers that are subject to foreign disclosure requirements that satisfy the transparency objectives of Section 13(q). These issuers would have to comply with multiple disclosure regimes and bear compliance costs for each regime, although the marginal costs for complying with an additional disclosure regime would likely be mitigated to the extent of any overlap between these reporting regimes and the final rules.

6. Definition of Control

Section 13(q) requires resource extraction issuers to disclose payments made by a subsidiary or entity under the control of the issuer. As discussed in Section II.E above, the final rules will define the term ''control'' based on accounting principles. Alternatively, we could have used a definition based on Exchange Act Rule 12b–2, as in the 2012 Rules.[612] We believe that the approach we are adopting would be less costly for issuers to comply with than such an alternative because issuers are currently required to apply the accounting concept of ''control'' on at least an annual basis for financial reporting purposes.

Using a definition based on Rule 12b–2 would require issuers to undertake additional steps beyond those currently required for financial reporting purposes. Specifically, a resource extraction issuer would be required to make a factual determination as to whether it has control of an entity based on a consideration of all relevant facts and circumstances. Thus, this alternative would require issuers to engage in a separate analysis of which entities are included within the scope of the required disclosures (apart from the consolidation determinations made for financial reporting purposes) and could increase the compliance costs for issuers compared to the approach we are proposing.

In addition, there are several other advantages of using a definition based on accounting principles. There will be audited financial statement disclosure of an issuer's significant consolidation of accounting policies in the footnotes to its audited financial statements contained in its Exchange Act annual reports. Also, an issuer's determination of control under the proposed rules would be subject to the audit process as well as subject to the internal accounting controls that issuers are required to have in place with respect to audited financial statements filed with the Commission.[613] All of these advantages may lead to more accurate, reliable, and consistent reporting of subsidiary payments, thereby enhancing the quality of the reported data.

In a change from the 2016 Rules, the final rules do not require disclosure of the proportionate amount of the payments made by a resource extraction issuer's proportionately consolidated entities or operations. Excluding proportionate interest entities or operations from the final definition of control would eliminate concerns about the ability of an issuer to obtain sufficiently detailed payment information from proportionately consolidated entities or operations when it is not the operator of that venture.[614] This in turn could limit compliance costs for affected issuers who might otherwise be forced to renegotiate their joint venture agreements or make other arrangements in order to be able to obtain sufficiently detailed payment information to comply with the Section 13(q) rules.

At the same time, this approach would exclude some joint ventures from the scope of the proposed rules, thereby limiting the transparency benefits of the Section 13(q) disclosures. It also could potentially provide an incentive for affected parties to structure their resource extraction operations to include proportionately consolidated entities or operations in order to avoid disclosure. We believe, however, that many factors, other than Section 13(q) disclosure, likely would influence how parties structure their operations and agreements, and some of these factors may outweigh the disclosure consideration.

As an alternative, we could have required disclosure of payments made by a resource extraction issuer's proportionately consolidated entities or operations. This alternative would have resulted in disclosure of payments made by some joint ventures that would not be covered by the scope of the proposed rules, which would increase the transparency benefits of the Section 13(q) disclosures compared to the proposed approach. As noted above, however, it could also increase compliance costs to the extent issuers were forced to renegotiate their joint venture agreements or make other arrangements to obtain sufficiently detailed payment information.

Most commenters supported the definition of control that we are adopting.[615] Those commenters generally pointed out that the definition would reduce burdens for issuers, will drive greater consistency in interpretation across companies, and will align with companies' internal controls.

7. Definition of ''Commercial Development of Oil, Natural Gas, or Minerals''

The final rules define ''commercial development of oil, natural gas, or minerals'' to include exploration, extraction, processing, and export, or the acquisition of a license for any such activity. As described above, the final rules generally track the language in the statute.

We acknowledge that a broader definition of ''commercial development of oil, natural gas, or minerals'' could increase issuers' costs. We also acknowledge that expanding the definition in a way that is broader than other reporting regimes could potentially lead to a competitive disadvantage for those issuers covered only by our rules, provided that issuers subject to other disclosure regimes are exempt from the final rules under the alternative reporting provision. We decided to use the proposed definition

[609] These are issuers that have a business address, are incorporated, or are listed on exchanges, in the EEA or Canada.

[610] *See supra* note 545.

[611] *See* letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Sarah Chayes *et al.;* Eni; Equinor; PWYP–US (Mar. 16, 2020); Rio Tinto; Royal Dutch Shell; SAF; Gayle Smith *et al.;* and Total (Feb. 10, 2020).

[612] *See* 2012 Rules Proposing Release at Section II.D.4.

[613] *See supra* Section II.E.

[614] As some commenters noted (*see, e.g.,* letter from API (Mar. 16, 2020)), it is not standard industry practice for an operator to aggregate, quantify and provide its non-operating partners with a list of payments remitted to each governmental entity, the timing of the remittance, and their corresponding share of the remittance. As such, it is possible, if not likely, that affected issuers would have to pay the operator a fee to obtain this information, increasing their compliance costs.

[615] *See* letters from API; Ovintiv; Oxfam America and Earthrights International; Petrobras; PWYP–US (Mar. 16, 2020); and SAF.

because we believe that the language is consistent with what we believe to be the plain meaning of the statute. Additionally, most commenters did not object to this definition.

On the other hand, we recognize that limiting the definition to these specified activities could adversely affect those using the payment information if disclosure about payments made for activities not included in the list of specified activities, such as refining, smelting, marketing, or stand-alone transportation services (*i.e.,* transportation that is not otherwise related to export), would be useful to users of the information. We believe, for the reasons identified above, that the definition adopted in the final rules appropriately takes into account both issuers' compliance costs and the benefits of transparency.

8. Types of Payments

As under the 2016 Rules, the final rules include the specific types of payments identified in the statute, as well as CSR payments that are required by law or contract, payments of certain dividends, and payments for infrastructure. The final rules will include payments of certain dividends and payments for infrastructure because, based on comments to the Proposing Release and received in prior rulemakings, we believe they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas and minerals. For example, payments for infrastructure improvements have been required under the EITI since 2011. Additionally, the EU Directives and ESTMA require these payment types to be disclosed. Thus, including dividends and payments for infrastructure improvements (*e.g.,* building a road) in the list of payment types required to be disclosed under the final rules would further the statutory objective of supporting the commitment of the Federal Government to international transparency promotion efforts.

As under the 2016 Rules, the final rules would include CSR payments that are required by law or contract in the list of covered payment types. We also note that the EITI requires the disclosure of CSR payments if required by law or contract.[616] Thus, the addition of CSR payments to the list of types of payments that must be disclosed should improve the quality of the disclosure required by the statute and would further the statutory objective of supporting the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals. Additionally, requiring issues to disclose both CSR payments and infrastructure payments may lead to lower compliance costs, as issuers will not be required to make what can be a difficult distinction, that is, determining whether a particular payment is an infrastructure payment, and as such reportable, or a CSR payment, in the event that such payments were not reportable.

As discussed earlier, under the final rules, resource extraction issuers would incur costs to provide the payment disclosure for the required payment types. For example, there would be costs to modify the issuers' core enterprise resource planning systems and financial reporting systems so that they can track and report payment data at the project level, for each type of payment, government payee, and currency of payment. Since some of the payments would be required to be disclosed only if they are required by law or contract (*e.g.,* CSR payments), resource extraction issuers presumably already track such payments and hence the costs of disclosing these payments may not be large. Nevertheless, the addition of dividends, payments for infrastructure improvements, and CSR payments to the list of payment types for which disclosure is required may marginally increase some issuers' costs of complying with the final rules because they will have to track a larger number of payments.

To address concerns about the difficulty of allocating payments that are made for obligations levied at the entity level,[617] such as corporate income taxes, to the project level, the final rules would permit issuers to disclose those payments at the entity level rather than the project level. This accommodation also should help limit compliance costs for issuers without significantly interfering with the goal of achieving increased payment transparency.

Under the final rules, issuers must disclose payments made in-kind. The EU Directives and ESTMA also require disclosure of in-kind payments, as does the EITI. Consequently, this requirement should help further the goal of supporting the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals and enhance the effectiveness of the payment disclosure. At the same time, this requirement could impose costs if issuers have not previously had to value their in-kind payments. To minimize the potential additional costs, the final rules provide issuers with the flexibility of reporting in-kind payments at cost, or if cost is not determinable, at fair market value. We believe this approach should help limit the overall compliance costs associated with our requirement to disclose in-kind payments. Due to the lack of data, we are unable to quantify the costs related to valuing in-kind payment, either at cost or fair value.

As an alternative, one commenter suggested that the final rules should include large payments that are not a part of the legitimate revenue stream, yet may nonetheless be a common, if ''unwelcome and illegitimate,'' source of revenue for a government or its officials.[618] We note, however, that identifying such payments would create significant compliance costs for issuers because by nature they are likely to be irregular and hence more difficult to track.

9. Definition of ''Not De Minimis''

Section 13(q) requires the disclosure of payments that are ''not de minimis,'' leaving that term undefined. In a change from the Proposing Release, we have reduced the ''not de minimis'' threshold: Under the final rule's definition of ''not de minimis'' resource extraction issuers would be required to disclose payments made to each foreign government in a host country or the Federal government that equal or exceed $100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments.

We could have adopted a definition of ''not de minimis'' based on a qualitative standard or a relative quantitative standard rather than an absolute quantitative standard. We are adopting an absolute quantitative approach because an absolute quantitative approach would be easier for issuers to apply than a definition based on either a qualitative standard or relative quantitative standard. Thus, using an absolute dollar amount threshold for disclosure purposes should help limit compliance costs by reducing the work necessary to determine what payments must be disclosed.

Two commenters supported the definition of ''not de minimis'' in the 2019 Rules Proposing Release primarily because such a definition would reduce issuers' compliance costs.[619] Specifically, defining payments that equal or exceed $100,000 as ''not de

[616] *See supra* Section II.J.5.

[617] *See, e.g.,* letters from API (Mar. 16, 2020); Petrobras; and PWYP–US (Mar. 16, 2020).

[618] *See* letter from Elise J. Bean.

[619] *See* letters from API and NAM.

minimis'' will lead to more payments disclosure, which could result in higher compliance costs for issuers than under the proposed definition.

Numerous commenters opposed the definition of ''not de minimis'' in the 2019 Rules Proposing Release.[620] Commenters' chief concern was the potential elimination of a large number of projects and payments from the Section 13(q) disclosure under the higher threshold in the Proposing Release and the resulting significant negative effect on transparency. One commenter asserted that, based on analysis that that commenter did using disclosure data from issuers reporting under the EU Directives and ESTMA, the threshold in the Proposing Release was expected to leave out about 50% of projects.[621] We believe that adopting a $100,000 threshold for ''not de minimis,'' which is similar to the threshold used in the international transparency regimes and is the same as the threshold under the 2016 Rules, will alleviate such concerns. By scoping in more projects, the $100,000 threshold will enhance the benefits of transparency, and will provide for a standardized reporting threshold across jurisdictions, benefiting the potential users of this disclosure. The $100,000 threshold could generate higher compliance costs for affected issuers who are not otherwise tracking and recording these payments at the $100,000 level, compared to the higher threshold in the Proposing Release, but we believe, for the reasons set forth above, that any such costs are justified by the benefits of the additional disclosure.

10. Exhibit and Interactive Data Requirement

Section 13(q) requires the payment disclosure to be electronically formatted using an interactive data format. The final rules will require a resource extraction issuer to provide the required payment disclosure in an XBRL exhibit to Form SD that includes all of the electronic tags required by Section 13(q) and the proposed rules.[622]

We believe that requiring the specified information to be presented in XBRL format will offer advantages to issuers and users of the information by promoting consistency and standardization of the information and increasing the usability of the payment disclosure. Providing the required disclosure elements in a machine-readable (electronically tagged) format will allow users to quickly examine, extract, aggregate, compare, and analyze the information in a manner that is most useful to them. This includes searching for specific information within a particular submission as well as performing large-scale statistical analysis using the disclosures of multiple issuers and across date ranges.

Specifying XBRL as the required interactive data format may increase compliance costs for some issuers. The electronic formatting costs would vary depending upon a variety of factors, including the amount of payment data disclosed and an issuer's prior experience with XBRL. We believe that most issuers are already familiar with XBRL as they use it to tag financial and cover page information in their annual and quarterly reports filed with the Commission. Thus, we do not expect most affected issuers to incur start-up costs associated with the format.

Additionally, we do not believe that the ongoing costs associated with this formatting requirement will be significantly greater than filing the data in a custom XML format.[623] One commenter stated that the final rules should require Inline XBRL tagging rather than XBRL tagging so that the payment information could be ''electronically tagged but also be made available in a human readable format together with any further narrative, context, clarificatory footnotes or basis of preparation deemed helpful by the issuer.''[624] Another commenter supported the proposal and was ''agnostic as to whether conventional (XML-based) XBRL or Inline (HTML-based XBRL) is adopted.''[625] For the reasons discussed above, we do not believe an Inline XBRL requirement would improve the usefulness or presentation of the payment information.[626]

Consistent with the statute, the final rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. Under the final rules, if multiple currencies are used to make payments for a specific project or to a government, a resource extraction issuer may choose to provide the amount of payments made for each payment type and the total amount per project or per government in either U.S. dollars or the issuer's reporting currency. We recognize that a resource extraction issuer could incur costs associated with converting payments made in multiple currencies to U.S. dollars or its reporting currency. Nevertheless, given the statute's tagging requirements and the requirement to disclose total amounts, we believe reporting in one currency is necessary.[627] The final rules provide flexibility to issuers in how to perform the currency conversion, which may help to limit compliance costs by allowing issuers to choose the option that works best for them.

The final rules also require issuers to tag the subnational geographic location of a project using ISO codes. Using ISO codes will standardize references to those subnational geographic locations and would benefit the users of this information by making it easier for them to sort and compare the data. It will also increase compliance costs for issuers to the extent that they do not currently use such codes in their reporting systems.

11. Quantitative Estimates of Costs Resulting From the Rulemaking

In this section, we discuss the quantitative data in the administrative record relating to the economic considerations connected to this rulemaking. This new lower cost data (as noted in Section I) is based on actual experiences rather than estimates and as such we believe that it is likely more accurate than the estimates the Commission included in the 2016 Rules Adopting Release.[628] While, as reflected in the discussion in Section II above, we have considered these appreciably reduced cost estimates in crafting the final rules, this data has not been the sole basis of any discretionary determinations that we have made.

In the 2016 Rules Adopting Release, the Commission estimated initial issuer compliance costs to be in the range of $128,787 to $1,352,268 assuming no fixed costs and in the range of $561,932 to $1,547,437 assuming the rule requirements would generate fixed costs for affected issuers. Similarly, the Commission estimated the ongoing issuer compliance costs to be in the range of $51,515 to $1,287,874 assuming no fixed costs and in the range of $224,773 to $1,389,882 assuming fixed

[620] *See* letters from Africa Center for Energy Policy; Elise J. Bean; Better Markets; Sens. Cardin *et al.;* Carter Center; DAR; FACT Coalition; Shannon Gough; Kaufmann; KCSPOG; NRGI (Mar. 16, 2020); *ONE.org;* Oxfam America and Earthrights International; Eric Postel; Public Citizen; PWYP–US (Mar. 16, 2020); F. Samama *et al.;* Sierra Club; Total (Feb. 10, 2020); and Congr. Waters *et al.*

[621] See letter from NRGI (Mar. 16, 2020).

[622] Users of this information should be able to render the information by using software available on the Commission's website at no cost.

[623] *See* 2016 Rules Adopting Release at Section II.C.9.

[624] *See* letter from PWYP–US (Mar. 16, 2020).

[625] *See* letter from XBRL US.

[626] *See supra* Section II.M.

[627] *See id.*

[628] We similarly believe that the discussions and explanations concerning competitive effects, also based on actual experiences, are likely more accurate than those included in the 2016 Rules Adopting Release. *See supra* note 67.

costs. We note that those estimates were based on cost estimates provided mostly by three large issuers: Barrick Gold, ExxonMobil, and Rio Tinto.[629] For the reasons discussed below, we no longer rely on these estimates.

Several commenters provided information relevant to the expected compliance costs of the Section 13(q) rules.[630] Total S.A. estimated that its costs to comply with the EU Directives were $100,000 for a one-time external auditor fee and $200,000 per year for internal costs.[631] Another commenter reported EU Directives' compliance costs for two companies based on information collected by the EC for its 2018 evaluation of the EU Directives: BASF (Germany), which reported a start-up cost of €47,000 and an annual reporting cost of €26,000; and Eni (Italy), which reported a start-up cost of €1,000,000 and annual reporting costs of €500,000.[632] Similarly, a commenter provided compliance cost estimates for an unaffiliated company: Tullow Oil. According to this commenter, Tullow reported initial costs of $150,000 and on-going annual costs of $150,000 to comply with the UK payments-to-governments rules.[633] Similar to the issuers that provided the cost estimates used in the 2016 Rules, all of the cost estimates provided by commenters were for large issuers. Tullow Oil is the smallest issuer with total assets of $8.3 billion as of 2019,[634] while Total S.A. is the largest issuer with total assets as of 2019 of $273.3 billion.[635] Additionally, no commenters provided estimates of the compliance costs under the ESTMA reporting regime.

Both the initial and ongoing cost estimates reported by the commenters are generally smaller than the ranges of cost estimates from the 2016 Rules, especially the range that includes fixed costs. We believe these cost estimates are more accurate than the cost estimates considered in the adoption of the 2016 Rules because they are based on real expenses incurred by issuers under a currently functioning disclosure regime: The EU Directives and the UK reporting regime. In contrast, the estimates in the 2016 Rules were hypothetical estimates based on the requirements of a reporting regime that was not yet implemented. We acknowledge, however, that our current estimates, as were the estimates from the 2016 Rules, are based on a small sample of issuers, and, thus, this limits our ability to draw firm conclusions from the data.

We estimate the average initial cost and ongoing annual cost associated with the final rules by calculating the average of the cost estimates provided by commenters. The average initial cost is approximately $420,000 per issuer,[636] while the average ongoing cost is approximately $240,000 per issuer.[637] Based on these averages, the initial cost would be 0.005% of the total assets of the smallest issuer, Tullow Oil, that provided cost estimates. Further, we note that the commenters' estimates are based on compliance with the EU Directives, which has a more granular definition of ''project'' than the final rules. Thus, to the extent that compliance costs are materially less expensive under the Modified Project Definition, an issuer's costs, both initial and ongoing, are likely to be smaller under the final rules.

Other commenters provided qualitative assessments of compliance costs. One commenter described the costs to comply with the EU Directives as modest and acceptable.[638] Another commenter stated that he did not believe that the compliance costs of reporting at the contract level could be deemed burdensome for companies because many already provide such data under the EITI, EU Directives, or ESTMA.[639] Another commenter similarly stated that the Section 13(q) compliance costs would be negligible because, in addition to being subject to payments-to-governments reporting under other regimes, many extractive companies already report detailed tax payment information on a country-by-country basis.[640]

A 2018 study by the UK Department for Business, Energy & Industrial Strategy (the ''UK study'') is another source of potential cost estimates.[641] We reviewed that data and note that the cost estimates presented in the study, like cost estimates provided by commenters, are not based upon compliance with the Modified Project Definition. Based on the data provided by the study, the total compliance costs under the UK rules ranged from approximately $24,547 per company for small companies to approximately $2,260,263 per company for large companies. As discussed, the payment disclosure would be provided at a greater level of aggregation under the final rules than under the UK contract-level definition. As such, to the extent that compliance costs under the Modified Project Definition are smaller than those resulting from compliance with the UK rules, the data in the UK study may overestimate the cost estimates for the final rules. Also, the small sample size in the UK study, as only 15 companies that responded, makes it difficult for us to assess with any confidence the actual costs of the UK's regime (which, broadly speaking, is very similar to the 2016 Rules that were disapproved by Congress under the CRA). In addition, the majority of companies (84%) surveyed in the UK study indicated that they do not track compliance costs. As such, the study, relying on actual or estimated compliance cost data from 15 companies, may or may not be representative of the broader population.

With those caveats, the estimates of total compliance costs (initial and ongoing) in the UK report are broadly consistent with the range we estimated in the 2016 Rules, which like the UK regime had a contract-level definition of project. Our compliance costs estimates based on commenters' data fall within this range. Thus, we can view the range of estimates from the UK study as a lower and upper limit on compliance cost estimates under the EU Directives and the UK regime.

A European Commission report in 2018 provided a range of total compliance cost estimates based on data provided by two companies.[642] According to the report that range was between $14,040 (EUR 12,000) and $42,120 (EUR 36,000). We note that these estimates are considerably lower

[629] *See* 2012 Rules Adopting Release (citing letters from Barrick Gold (Feb. 28, 2011), ExxonMobil (Jan. 31, 2011), and Rio Tinto plc (Mar. 2, 2011)).

[630] *See* letters from Alan Detheridge (Mar. 15, 2020); FACT Coalition; Kaufmann; ONE Campaign; Oxfam America and Earthrights International; PWYP (International Secretariat); PWYP–US (Mar. 16, 2020); Total (Feb. 17, 2020); and Congr. Waters *et al.*

[631] *See* letter from Total (Feb. 17, 2020) at 1.

[632] *See* letter from PWYP (International Secretariat) at 4.

[633] *See* letter from PWYP–US (Mar. 16, 2020).

[634] See *https://www.tullowoil.com/application/files/5815/8636/0065/2019_Annual_Report_and_Accounts.pdf.*

[635] See *https://www.sec.gov/Archives/edgar/data/879764/000119312520080490/d862109d20f.htm.*

[636] It is calculated as ($300,000 + $1,170,000 + $54,990 + $150,000)/4. We convert BASF's ongoing cost of Euro €47,000 into US dollars using a USD/Euro exchange rate of 1.17.

[637] It is calculated as ($200,000 + $585,000 + $30,420 + $150,000)/4. We convert BASF's annual cost of Euro €26,000 into US dollars using a USD/Euro exchange rate of 1.17.

[638] *See* letter from Equinor.

[639] *See* letter from Alan Detheridge.

[640] *See* letter from FACT Coalition.

[641] *See* 2019 Rules Proposing Release at note 66 and accompanying text. *See also* letter from PWYP–US (Mar. 16, 2020).

[642] See letter from PWYP–US; *see also* European Comm'n, Review of Country-By-Country Reporting Requirements for Extractive and Logging Industries (2018), *available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/company_reporting_and_auditing/documents/181126-country-by-country-reporting-extractive-logging-industries-study_en.pdf.*

than those provided by commenters and in the UK study. Given that the estimated range is based on data from only two companies, we found it to be of limited use.

In Section IV below, we estimate for the purposes of PRA average total compliance costs of $300,000 per issuer per year (using $400/hr. for both internal and professional costs and averaging over three years). If we estimate an average total compliance cost per issuer based on the average initial and ongoing estimates derived above, this estimate is approximately $300,000 per issuer.[643] Thus, the PRA estimate is approximately equal to the estimate derived using data provided by commenters. It includes an estimate of IT costs ($100,000) which could be viewed as a fixed cost to issuers.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the final rules contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[644] The Commission submitted the proposed rules to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[645] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is:

- ''Form SD'' (OMB Control No. 3235–0697).[646]

Form SD is currently used to file Conflict Minerals Reports pursuant to Rule 13p–1 of the Exchange Act. We are adopting amendments to Form SD to accommodate disclosures required by Rule 13q–1. We are adopting Rule 13q–1 to implement Section 13(q) of the Exchange Act, which was added to the Exchange Act by Section 1504 of the Dodd-Frank Act. As described in detail above,[647] Section 13(q) directs the Commission to issue rules requiring resource extraction issuers to include in an annual report certain specified information relating to payments made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. In addition, Section 13(q) requires a resource extraction issuer to provide information about those payments in an interactive data format.

The final rules will require that the mandated payment information be provided in an XBRL exhibit to Form SD, which will be submitted to the Commission on EDGAR. The disclosure requirements will apply equally to U.S. issuers and foreign issuers meeting the definition of ''resource extraction issuer.'' Compliance with the rules by affected issuers will be mandatory. Responses to the information collections will not be kept confidential and there will be no mandatory retention period for the collection of information. A description of the final rules, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the final amendments can be found in Section III above.

B. Estimate of Issuers

The number, type and size of the issuers that would be required to file the payment information required in Form SD, as amended, is uncertain, but, as discussed in the economic analysis above, we estimate that the number of potentially affected issuers is 678.[648] Of these issuers, we excluded 252 issuers that reported being either smaller reporting companies, emerging growth companies, or both, and that are not subject to alternative reporting regimes that the Commission has deemed to satisfy the transparency objectives of Section 13(q), because the final rules will exempt these issuers from the Section 13(q) requirements. In addition, we excluded 177 issuers that are subject to resource extraction payment disclosure rules in other jurisdictions that require more granular payment disclosure than will be required by the final rules, and 12 issuers with no or only nominal operations, or that are unlikely to make any payments that would be subject to the final disclosure requirements.[649]

For the 177 issuers subject to those alternative reporting regimes, the additional costs to comply with the final rules likely will be much lower than costs for other issuers.[650] For the 12 issuers that are unlikely to make payments subject to the final rules, we believe there will be no additional costs associated with the final rules.[651] Accordingly, we estimate that 237 issuers will bear the full costs of compliance with the final rules[652] and 177 will bear significantly lower costs.

C. Estimate of Issuer Burdens

We derive our burden estimates by estimating the average number of hours it will take an issuer to prepare and furnish the required disclosure. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the size and complexity of their operations and whether they are subject to similar disclosure requirements in other jurisdictions.

When determining the estimates described below, we have assumed that 75 percent of the burden of preparation is carried by the issuer internally and 25 percent of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour.[653]

[643] It is estimated in the following way: ($420,000 + $240,000 + $240,000)/3 = $300,000 (estimated over a three-year period for purposes of the PRA).

[644] 44 U.S.C. 3501 *et seq.*

[645] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[646] As discussed above, Rule 13q–1 requires a resource extraction issuer to submit the payment information specified in Form SD. The collection of information requirements associated with the final rules will be reflected in the burden hours estimated for Form SD. Therefore, there is no separate burden estimate for Rule 13q–1.

[647] *See supra* Section I.A.

[648] *See supra* Section III.A. (explaining how we use data from Exchange Act annual reports for the period January 1, 2018 through December 31, 2019 to estimate the number of issuers that might make payments covered by the final rules). As noted in that section, this number does not reflect the number of issuers that actually made resource extraction payments to governments.

[649] *See id.* (describing how we identify issuers that may be subject to those alternative reporting regimes and how we use shell company status and revenues and net cash flows from investing activities to identify issuers that would be unlikely to make payments exceeding the proposed ''not de minimis'' threshold).

[650] Issuers subject to the alternative reporting regimes described above will already be gathering, or have systems in place to gather, resource extraction payment data, which should reduce their compliance burden. In addition, under the final rules, a resource extraction issuer that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime, deemed by the Commission to require disclosure that satisfies Section 13(q)'s transparency objectives, may satisfy its payment disclosure obligations by including, as an exhibit to Form SD, a report complying with the reporting requirements of the alternative jurisdiction. *See* Item 2.01(c) of Form SD. Concurrent with adoption of the final rules, we are issuing an order deeming the following alternative reporting regimes as requiring disclosure that satisfy the transparency objectives of Section 13(q): The EU Directives; U.K.'s Reports on Payments to Governments Regulations; Norway's Regulations on Country-by-Country Reporting; and Canada's ESTMA. Since the 177 issuers are subject to one or more of these alternative reporting regimes, they will incur relatively small compliance burdens and costs associated with the final rules. We have nevertheless included them in our estimate of affected issuers for PRA purposes because under the final rules they will still have an obligation to furnish a report on Form SD in XBRL and English, and will incur related electronic tagging and translation costs, but those costs will be significantly lower than the overall compliance burden of issuers subject solely to the final rules.

[651] *See supra* Section III.A.

[652] 678 minus 252 minus 177 minus 12 = 237.

[653] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. We expect that the final rules' burden will be greatest during the first year of their effectiveness and diminish in subsequent years. We believe that the burden associated with this collection of information will be greatest during the initial compliance period in order to account for initial set up costs, including initial adjustments to an issuer's internal books and records, plus costs associated with the collection, verification, and review of the payment information for the first year. We believe that ongoing compliance costs will be less because an issuer will have already made any necessary modifications to its internal systems to capture and report the information required by the final rules. To account for this expected diminishing burden, we use a three-year average of the expected implementation burden during the first year and the expected ongoing compliance burden during the next two years.

When conducting the PRA analysis in connection with the proposed rules, we estimated that the incremental burden of the proposed rules would be at least 25 percent less than the incremental burden of the 2016 Rules.[654] We continue to believe that this reduction in the burden estimate is reasonable primarily because of the change to the definition of project, which should generally simplify and reduce the collection and reporting of payment information for a resource extraction issuer.[655] We note that this reduction in the burden estimate does not take into account the two new exemptions for conflicts with foreign law and pre-existing contracts.[656] While these exemptions may result in a reduced PRA burden compared to the 2016 Rules,[657] because it is more difficult to estimate the effects of these exemptions, and to avoid underestimating the final rules' burden and costs, we have not factored them into the current PRA estimates.

The following table shows the estimated internal burden hours and professional and other external costs for the 237 issuers bearing the full costs and burden of the final rules and for the 177 issuers subject to more granular resource extraction payment disclosure requirements in foreign jurisdictions when preparing and submitting Form SD. These total burden hours and total external costs will be in addition to the existing estimated hour and cost burdens applicable to Form SD because of compliance with Exchange Act Rule 13p–1.

PRA TABLE—ESTIMATED INCREASE IN TOTAL BURDEN HOURS AND COSTS

Whether issuer is subject to alternative reporting regime	Number of estimated affected responses	Burden hours per current affected response	Total burden hours for current affected responses	Internal burden hours for current affected responses	Professional (external) hours for current affected responses	Professional (external) costs for current affected responses	Additional (external) IT costs per current affected response	Total additional IT costs	Total external costs
	(A)	(B)	(C) = (A) × (B)	(D) = (C) × .75	(E) = (C) × .25	(F) = (E) × $400	(G)	(H) = (A) × (G)	(I) = (F) + (H)
No	237	[1] 500	118,500	88,875	29,625	$11,850,000	[3] $100,000	$23,700,000	$35,550,000
Yes	177	[2] 25	4,425	3,319	1,106	442,400	0	0	442,400
Total	414			92,194		12,292,400		23,700,000	35,992,400

[1] This is based on 25 percent of 500 hours (the incremental hourly increase estimated for the 2016 Rules). 500 × .25 = 125. We estimate that compliance with the final rules would require 375 hours (500 − 125) to make initial changes to an issuer's internal books and records and another 375 hours a year on an ongoing basis to review and verify the payment information, resulting in 750 hours per issuer for the initial incremental PRA burden. Using the 3-year average of the expected burden during the first year and the expected ongoing burden during the next 2 years, we estimate that the incremental PRA burden would be 500 hours per fully affected issuer (750 + 375 + 375 hours/3 years).

[2] As proposed, and as we did in the 2016 rulemaking, we estimate that an issuer that is already subject to a qualifying alternative reporting regime will incur an internal burden that is five percent of the burden incurred by a fully affected issuer. 500 hours × .05 = 25 hours.

[3] We estimate that an issuer bearing the full costs of the final rules will incur additional initial compliance costs for IT consulting, training, and travel of $100,000. We have increased the proposed estimate of $75,000 for such additional costs based on total cost estimates received in response to the 2019 proposed rules. We do not, however, believe that these initial IT costs will apply to the issuers that are already subject to a qualifying alternative reporting regime since those issuers should already have IT systems in place to comply with the alternative reporting regime.

V. Regulatory Flexibility Act Certification

In connection with the 2019 Rules Proposing Release, the Commission certified that the proposed rules would not, if adopted, have a significant economic impact on a substantial number of small entities. The certification, including the factual bases for the determination, was published with the 2019 Rules Proposing Release in satisfaction of Section 605(b) of the Regulatory Flexibility Act (''RFA'').[658] The Commission requested comment on the certification and received none.

The final rules will exempt smaller reporting companies and emerging growth companies from the requirements of Section 13(q) and Rule 13q–1, but in a change from the 2019 proposed rules, those companies will be exempt only if they are not subject to an alternative reporting regime that has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q).[659] Most small entities[660] will fall

of this PRA analysis, we estimate that such costs will be an average of $400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting. Because we believe that a resource extraction issuer likely will seek the advice of an attorney to help it comply with the rule and form requirements under U.S. Federal securities laws, including Section 13(q), we continue to use the $400 per hour estimate when considering the applicable costs and burdens of this collection of information.

[654] *See* 2019 Rules Proposing Release at Section IV.C. We continue to believe that basing the PRA analysis initially on the compliance burden estimated for the 2016 Rules is a reasonable approach because the 2016 assessment was based on an estimate of the hourly increase in the compliance burden provided by a prior commenter. Although we received estimates of the costs in dollars to comply with the 2019 proposed rules, we did not receive any estimates of the incremental increase in burden hours resulting from such compliance. Nevertheless, we believe that our PRA assessment of the final rules is consistent with the recent cost estimates provided by commenters. *See supra* Section III.D.11.

[655] *See supra* Section II.A. and Section III.D.1.

[656] *See supra* Section II.D.1 and 2.

[657] For example, issuers may spend fewer internal hours and/or incur fewer professional costs to prepare case-specific exemptive relief requests in connection with the required disclosures.

[658] 5 U.S.C. 601 *et seq.*

[659] *See* 17 CFR 240.13q–1(c). Concurrent with adoption of the final rules, the Commission is issuing an order finding that the following alternative reporting regimes satisfy the transparency objectives of Section 13(q): The EU Directives; U.K.'s Reports on Payments to Governments Regulations; Norway's Regulations on Country-by-Country Reporting; and Canada's ESTMA. *See supra* Section II.N.

[660] For purposes of the RFA, Exchange Act Rule 0–10(a) [17 CFR 240.0–10(a)] defines an issuer (other than an investment company) to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. Because Exchange Act Rule 12b–2 defines a smaller reporting company as an issuer (that is not an investment company) with either a public float of less than $250 million, or annual revenues of less than $100 million for the previous year and either no public float or a public float of less than $700 million, most small entities likely will fall within the definition of smaller

Continued

within the scope of this exemption and, therefore, will not be subject to the final rules. Although some small entities will not be eligible for the exemption because they are subject to the reporting requirements of a Commission-recognized alternative reporting regime,[661] because those entities will be able to submit a report prepared for the alternative reporting regime to satisfy their Section 13(q) reporting obligations, those entities will have relatively few costs to comply with the final rules.[662] Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the final rules, including Rule 13q–1 and the amendments to Form SD, will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

VI. Statutory Authority

We are adopting the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249b

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

In accordance with the foregoing, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78*o*, 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.13q–1 is also issued under sec. 1504, Pub. L. 111–203, 124 Stat. 2220.

■ 2. Section 240.13q–1 is revised to read as follows:

§ 240.13q–1 Disclosure of payments made by resource extraction issuers.

(a) *Resource extraction issuers.* Every issuer that is required to file an annual report with the Commission on Form 10–K (17 CFR 249.310), Form 20–F (17 CFR 249.220f), or Form 40–F (17 CFR 249.240f) pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78*o*(d)) and engages in the commercial development of oil, natural gas, or minerals must furnish a report on Form SD (17 CFR 249b.400) within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.

(b) *Anti-evasion.* Disclosure is required under this section in circumstances in which an activity related to the commercial development of oil, natural gas, or minerals, or a payment or series of payments made by a resource extraction issuer to a foreign government or the Federal Government for the purpose of commercial development of oil, natural gas, or minerals, is not, in form or characterization, within one of the categories of activities or payments specified in Form SD, but is part of a plan or scheme to evade the disclosure required under this section.

(c) *Alternative reporting.* An application for recognition by the Commission that an alternative reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), for purposes of alternative reporting pursuant to Item 2.01(c) of Form SD, must be filed in accordance with the procedures set forth in § 240.0–13, except that, for purposes of this paragraph (c), applications may be submitted by resource extraction issuers, governments, industry groups, or trade associations.

(d) *Exemptions*—(1) *Conflicts of law.* A resource extraction issuer that is prohibited by the law of the jurisdiction where the project is located from providing the payment information required by Form SD may exclude such disclosure, subject to the following conditions:

(i) The issuer has taken all reasonable steps to seek and use any exemptions or other relief under the applicable law of the foreign jurisdiction, and has been unable to obtain or use such an exemption or other relief;

(ii) The issuer must disclose on Form SD:

(A) The foreign jurisdiction for which it is omitting the disclosure pursuant to this paragraph (d)(1);

(B) The particular law of that jurisdiction that prevents the issuer from providing such disclosure; and

(C) The efforts the issuer has undertaken to seek and use exemptions or other relief under the applicable law of that jurisdiction, and the results of those efforts; and

(iii) The issuer must furnish as an exhibit to Form SD a legal opinion from counsel that opines on the issuer's inability to provide such disclosure without violating the foreign jurisdiction's law.

(2) *Conflicts with pre-existing contracts.* A resource extraction issuer that is unable to provide the payment information required by Form SD without violating one or more contract terms that were in effect prior to the effective date of this section may exclude such disclosure, subject to the following conditions:

(i) The issuer has taken all reasonable steps to obtain the consent of the relevant contractual parties, or to seek and use another contractual exception or other relief, to disclose the payment information, and has been unable to obtain such consent or other contractual exception or relief;

(ii) The issuer must disclose on Form SD:

(A) The jurisdiction for which it is omitting the disclosure pursuant to this paragraph (d)(2);

(B) The particular contract terms that prohibit the issuer from providing such disclosure; and

(C) The efforts the issuer has undertaken to obtain the consent of the contracting parties, or to seek and use another contractual exception or relief, to disclose the payment information, and the results of those efforts; and

(iii) The issuer must furnish as an exhibit to Form SD a legal opinion from counsel that opines on the issuer's inability to provide such disclosure without violating the contractual terms.

(3) *Exemption for emerging growth companies and smaller reporting companies.* An issuer that is an emerging growth company or a smaller reporting company, each as defined under § 240.12b–2, is exempt from, and need not comply with, the requirements of this section, unless it is subject to the resource extraction payment disclosure requirements of an alternative reporting regime, which has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), pursuant to § 240.13q–1(c).

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reporting company and, therefore, will be eligible for the exemption from the final rules.

[661] *See supra* Section III.A. (indicating that, based upon a review of filings in 2018–2019, 69 of the 321 issuers with smaller reporting company or emerging growth company status were subject to alternative reporting regimes that likely made them ineligible for the exemption).

[662] The primary costs for issuers using the final rules' alternative reporting provision would be those related to XBRL tagging and, if necessary, translating the alternative report into English. *See supra* Section III.A.

(4) *Case-by-case exemption.* A resource extraction issuer may file an application for exemptive relief under this section in accordance with the procedures set forth in § 240.0–12.

(e) *Compilation.* To the extent practicable, the staff will periodically make a compilation of the information required to be submitted under this section publicly available online. The staff may determine the form, manner and timing of the compilation, except that no information included therein may be anonymized (whether by redacting the names of the resource extraction issuers or otherwise).

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for part 249b continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.,* unless otherwise noted.

* * * * *

Section 249b.400 is also issued under secs. 1502 and 1504, Public Law 111–203, 124 Stat. 2213 and 2220.

■ 4. Amend Form SD (referenced in § 249b.400) by:

■ a. Adding a check box for Rule 13q–1;

■ b. Revising instruction A. under ''General Instructions'';

■ c. Redesignating instruction B.2. as B.3 and adding new instructions B.2. and B.4. under the ''General Instructions''; and

■ d. Redesignating Section 2 as Section 3, adding new Section 2, and revising newly redesignated Section 3 under the ''Information to be Included in the Report''.

The addition and revision read as follows:

Note: The text of Form SD does not, and this amendment will not, appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SD
SPECIALIZED DISCLOSURE REPORT

_____
(Exact name of the registrant as specified in its charter)

(State or other jurisdiction of incorporation or organization)	(Commission File Number)	(I.R.S. Employer Identification No.)

_____
(Address of principal executive offices)

_____
(Name and telephone number, including area code, of the person to contact in connection with this report.)

Check the appropriate box to indicate the rule pursuant to which this Form is being submitted, and provide the period to which the information in this Form applies:

___ Rule 13p-1 under the Securities Exchange Act (17 CFR 240.13p-1) for the reporting period from January 1 to December 31, _____.

___ Rule 13q-1 under the Securities Exchange Act (17 CFR 240.13q-1) for the fiscal year ended _____.

GENERAL INSTRUCTIONS

A. Rule as to Use of Form SD.

This Form shall be used for a report pursuant to Rule 13p-1 (17 CFR 240.13p-1) and Rule 13q-1 (17 CFR 240.13q-1) under the Securities Exchange Act of 1934 (the "Exchange Act").

B. Information to be Reported and Time for Furnishing Reports.

1. * * *

2. *Form furnished under Rule 13q-1.* A resource extraction issuer must furnish the information required by Section 2 of this form no later than 270 days following the end of the issuer's most recently completed fiscal year.

3. If the deadline for furnishing this Form occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the deadline shall be the next business day.

4. The information and documents furnished in this report shall not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, unless a registrant specifically incorporates it by reference into such filing.

* * * * *

INFORMATION TO BE INCLUDED IN THE REPORT

* * * * *

Section 2 – Resource Extraction Issuer Disclosure

Item 2.01 Resource Extraction Issuer Disclosure and Report

(a) *Required Disclosure.* (1) A resource extraction issuer must furnish an annual report on Form SD with the Commission, and include as an exhibit to this Form SD, the information specified in Item 2.01(a)(5) of this Form, relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government, for the purpose of the commercial development of oil, natural gas, or minerals.

(2) The resource extraction issuer is not required to have the information audited. The payment information must be provided on a cash basis and not an accrual basis.

(3) The resource extraction issuer must provide a statement in the body of the Form SD, under the caption "Disclosure of Payments by Resource Extraction Issuers," that the specified payment disclosure required by this Form is included in an exhibit to the Form SD.

(4) A resource extraction issuer that is claiming an exemption under Rule 13q-1(d)(1) or (2) (17 CFR 240.13q-1(d)(1) or (2)) must provide the disclosure required by those rules, as applicable, in the body of the Form SD. If applicable, a resource extraction issuer must disclose in the body of Form SD that it has filed an application for exemptive relief pursuant to Rule 13q-1(d)(4) (17 CFR 240.13q-1(d)(4)).

(5) The resource extraction issuer must include the following information in the exhibit to Form SD, which must present the information in the eXtensible Business Reporting Language (XBRL) electronic format:

(i) The type and total amount of such payments, by payment type listed in paragraph (d)(9)(iii) of this Item, made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(ii) The type and total amount of such payments, by payment type listed in paragraph (d)(9)(iii) of this Item, for all projects made to each government;

(iii) The total amounts of the payments, by payment type listed in paragraph (d)(9)(iii) of this Item;

(iv) The currency used to make the payments;

(v) The fiscal year in which the payments were made;

(vi) The business segment of the resource extraction issuer that made the payments;

(vii) The governments (including any foreign government or the Federal Government) that received the payments and the country in which each such government is located;

(viii) The project of the resource extraction issuer to which the payments relate;

(ix) The particular resource that is the subject of commercial development;

(x) The method of extraction used in the project; and

(xi) The major subnational political jurisdiction of the project.

(b) *Delayed Reporting*. (1) A resource extraction issuer may delay disclosing payment information related to exploratory activities until the Form SD submitted for the fiscal year immediately following the fiscal year in which the payment was made. For purposes of this paragraph, payment information related to exploratory activities includes all payments made as part of the process of (i) identifying areas that may warrant examination, or (ii) examining specific areas that are considered to have prospects of containing oil and gas reserves, or (iii) conducting a mineral exploration program, in each case limited to exploratory activities that were commenced prior to the commercial development (other than exploration) of the oil, natural gas,

or minerals on the property, any adjacent property, or any property that is part of the same project.

(2) A resource extraction issuer that has acquired (or otherwise obtains control over) an entity that has not been obligated to provide disclosure pursuant to Rule 13q-1, or pursuant to another alternative reporting regime deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), in such entity's last full fiscal year is not required to commence reporting payment information for such acquired entity until the Form SD submitted for the fiscal year immediately following the effective date of the acquisition. A resource extraction issuer must disclose that it is relying on this accommodation in the body of its Form SD submission.

(3) A resource extraction issuer that has completed its initial public offering in its last full fiscal year is not required to commence reporting payment information pursuant to Rule 13q-1 until the Form SD submitted for the fiscal year immediately following the fiscal year in which the registration statement for its U.S. initial public offering became effective.

(c) *Alternative Reporting.* (1) A resource extraction issuer that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime, which has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), may satisfy its disclosure obligations under paragraph (a) of this Item 2.01 by including, as an exhibit to this Form SD, a report complying with the reporting requirements of the alternative jurisdiction.

(2) The alternative report must be the same as the one prepared and made publicly available pursuant to the requirements of the approved alternative reporting regime, subject to changes necessary to comply with any conditions to alternative reporting set forth by the Commission.

(3) The resource extraction issuer must: (i) state in the body of the Form SD that it is relying on the alternative reporting provision; (ii) identify the alternative reporting regime for which the report was prepared; (iii) describe how to access the publicly submitted report in the alternative jurisdiction; and (iv) specify that the payment disclosure required by this Form is included in an exhibit to this Form SD.

(4) The alternative report must be provided in XBRL format.

(5) A fair and accurate English translation of the entire report must be submitted if the report is in a foreign language. Project names may be presented in their original language, in addition to the English translation of the project name, if the resource extraction issuer believes that such an approach would facilitate identification of the project by users of the disclosure.

(6) A resource extraction issuer may follow the submission deadline of an approved alternative jurisdiction if it submits a notice on Form SD on or before the due date of its Form SD indicating its intent to submit the alternative report using the alternative jurisdiction's deadline. If a resource extraction issuer fails to submit such notice on a timely basis, or submits such a notice but fails to submit the alternative report within seven business days of the alternative jurisdiction's deadline, it may not rely on this Item 2.01(c) for the following fiscal year.

(7) Resource extraction issuers must also comply with any additional requirements that are provided by the Commission upon granting an alternative reporting accommodation, as well as subsequent changes in such requirements.

(d) *Definitions*. For purposes of this item, the following definitions apply:

(1) Business segment means a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.

(2) Commercial development of oil, natural gas, or minerals means exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(3) Control means that the resource extraction issuer consolidates the entity under the accounting principles applicable to the financial statements included in the resource extraction issuer's periodic reports filed pursuant to the Exchange Act (*i.e.*, under generally accepted accounting principles in the United States (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS)). A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP, and files with the Commission a reconciliation to U.S. GAAP should consider determining control using U.S. GAAP. A resource extraction issuer that holds only a proportionate interest in an entity does not control that entity for purposes of Section 13(q) (15 U.S.C. 78m(q)) and is not required to disclose the proportionate amount of payments made by that entity.

(4) Export means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. Export does not include the movement of a resource across an international border by a company that (i) is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals and (ii) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government. Export also does not include cross-border transportation activities by an entity that is functioning solely as a service provider, with no ownership interest in the resource being transported.

(5) Extraction means the production of oil or natural gas or the extraction of minerals.

(6) Federal Government means the Federal government of the United States.

(7) Foreign Government means the national government of a foreign country, as well as any department, agency, or instrumentality of the national government, or a company at least majority owned by the national government of a foreign country. As used in this Item 2.01, foreign government also includes a foreign subnational government, such as the government of a state, province, department, county, district, municipality, or territory under a foreign national government.

(8) Not de minimis means any Payment made to each Foreign Government in a host country or the Federal Government that equals or exceeds $100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that

series of payments, and accordingly, whether disclosure is required.

(9) Payment means an amount paid that:

(i) Is made to further the commercial development of oil, natural gas, or minerals;

(ii) Is not de minimis; and

(iii) Is one or more of the following:

(A) Taxes;

(B) Royalties;

(C) Fees;

(D) Production entitlements;

(E) Bonuses;

(F) Dividends;

(G) Payments for infrastructure improvements; and

(H) Community and social responsibility payments that are required by law or contract.

(10) Project is defined by using the following three criteria:

(i) The type of resource being commercially developed;

(ii) The method of extraction; and

(iii) The major subnational political jurisdiction where the commercial development of the resource is taking place.

(11) Resource extraction issuer means an issuer that:

(i) Is required to file an annual report with the Commission on Form 10-K (17 CFR 249.310), Form 20-F (18 CFR 249.220f), or Form 40-F (17 CFR 249.240f) pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)); and

(ii) Engages in the commercial development of oil, natural gas, or minerals.

(12) Subsidiary means an entity controlled directly or indirectly through one or more intermediaries.

Instructions to Item 2.01

Disclosure by Subsidiaries and other Controlled Entities

(1) If a resource extraction issuer is controlled by another resource extraction issuer that has submitted a Form SD disclosing the information required by Item 2.01 for the controlled entity, then such controlled entity is not required to provide the disclosure required by Item 2.01 separately. In such circumstances, the controlled entity must submit a notice on Form SD indicating that the required disclosure was submitted on Form SD by the controlling entity, identifying the controlling entity and the date it submitted the disclosure. The reporting controlling entity must note that it is submitting the required disclosure for a controlled entity and must identify the controlled entity on its Form SD submission.

Currency Disclosure and Conversion

(2) A resource extraction issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in either U.S. dollars or the resource extraction issuer's reporting currency. If a resource extraction issuer has made payments in currencies other than U.S. dollars or its reporting currency, it may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the resource extraction issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the resource extraction issuer's fiscal year end. When calculating whether a payment meets or exceeds the "not de minimis" threshold, a resource extraction issuer may be required to convert the payment to U.S. dollars, even though it is not required to disclose those payments in U.S. dollars. For example, this may occur when the resource extraction issuer is using a non-U.S. dollar reporting currency. In these instances, the resource extraction issuer may use any of the three methods described above for calculating the currency conversion. In all cases a resource extraction issuer must disclose the method used to calculate the currency conversion and must choose a consistent method for all such currency conversions within a particular Form SD submission.

Location Tagging

(3) When identifying the country and major subnational political jurisdiction where the commercial development of the resource is taking place, a resource extraction issuer must use the combined country and subdivision code provided in ISO 3166, if available. When identifying the country in which a government is located, a resource extraction issuer must use the two letter country code provided in ISO 3166, if available.

Entity Level Disclosure and Tagging

(4) If a government levies a payment obligation, such as a tax or a requirement to pay a dividend, at the entity level rather than on a particular project, a resource extraction issuer may disclose that payment at the entity level. To the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, a resource extraction issuer may omit certain tags that may be inapplicable (*e.g.*, project tag, business segment tag) for those payment types as long as it provides all other electronic tags, including the tag identifying the recipient government.

Project Disclosure

(5)(i) When identifying the type of resource that is being commercially developed for purposes of identifying a project, the resource extraction issuer must identify whether the resource is oil, natural gas, or a type of mineral. A resource extraction issuer should identify synthetic oil obtained through processing tar sands, bitumen, or oil shales as "oil" and should identify gas obtained from methane hydrates as "natural gas." Synthetic oil or gas obtained through processing of coal should be identified as "coal." Minerals must be identified by type, such as gold, copper, coal, sand, or gravel, but additional detail is not required. For information on which materials are covered by the term "minerals," refer to Instruction 13 below.

(ii) When identifying the method of extraction for purposes of identifying a project, the resource extraction issuer must choose from the following three parameters: well, open pit, or underground mining.

(iii) When identifying the national and major subnational political jurisdiction for purposes of identifying a project, refer to Instruction 3 to Item 2.01. Onshore and offshore development of resources may not be treated as a single project. A resource extraction issuer must identify when a project is offshore and identify the body of water in which the project is located, using the smallest body of water applicable (*e.g.*, gulf, bay, sea), in addition to identifying the nearest major subnational political jurisdiction pursuant to Instruction 3 of Item 2.01. If an offshore project is equidistant from two major subnational political jurisdictions, the issuer may identify both jurisdictions.

(iv) A resource extraction issuer may treat all the activities within a major subnational political jurisdiction as a single project, but must describe each type of resource being commercially developed and each method of extraction used in the description of the project. A resource extraction issuer may not combine as one project activities that cross the borders of a major subnational political jurisdiction.

Payment Disclosure

(6) In a joint venture or arrangement, where no one party has control, a resource extraction issuer that is the operator of the venture or arrangement and makes payments to governments for the entire venture or arrangement on behalf of its non-operator members must report all of the payments. The non-operator members are not required to report payments made to reimburse the operator for their share of the payments to governments. Such non-operator members are only required to report payments that, as resource extraction issuers, they make directly to governments.

(7) Although an entity providing only services to a resource extraction issuer to assist with exploration, extraction, processing or export would generally not be considered a resource extraction issuer, where such a service provider, acting as a third-party agent or broker, makes a payment that falls within the definition of "payment" to a government on behalf of a resource extraction issuer, the resource extraction issuer must disclose such payment. This disclosure obligation, however, does not apply to a non-operator partner of a joint venture or arrangement that reimburses the operator for its share of the payments to governments made by the operator.

(8) "Processing," as used in Item 2.01, includes, but is not limited to, midstream activities such as removing liquid hydrocarbons from gas, removing impurities from natural gas prior to its transport through a pipeline, and upgrading bitumen or heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. It also

includes the crushing or preparing of raw ore prior to the smelting phase. It does not include the downstream activities of refining or smelting.

(9) A resource extraction issuer must disclose taxes on corporate profits, corporate income, and production when such taxes are made to further the commercial development of oil, natural gas, or minerals. Disclosure of taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes, is not required.

(10) Royalties include, but are not limited to, unit-based, value-based, and profit-based royalties. Fees include, but are not limited to, license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include, but are not limited to, signature, discovery, and production bonuses.

(11) Dividends paid to a government as a common or ordinary shareholder of the resource extraction issuer that are paid to the government under the same terms as other shareholders need not be disclosed. The resource extraction issuer, however, must disclose any dividends paid in lieu of production entitlements or royalties.

(12) If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the resource extraction issuer must disclose the payment. When reporting an in-kind payment, a resource extraction issuer must determine the monetary value of the in-kind payment and tag the information as "in-kind" for purposes of the currency. For purposes of the disclosure, a resource extraction issuer must report the payment at cost, or if cost is not determinable, at fair market value and must provide a brief description of how the monetary value was calculated. If a resource extraction issuer makes an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the resource extraction issuer must report the payment using the purchase price (rather than at cost, or if cost is not determinable, at fair market value). If the in-kind production entitlement payment and the subsequent repurchase are made in different fiscal years and the purchase price is greater than the previously reported value of the in-kind payment, the resource extraction issuer must report the difference in values in the latter fiscal year (assuming the amount of that difference exceeds the de minimis threshold). In other situations, such as when the purchase price in a subsequent fiscal year is less than the in-kind value already reported, no disclosure relating to the purchase price is required.

(13) "Minerals," as used in Item 2.01, includes any material for which an issuer with mining operations would provide disclosure under subpart 1300 of Regulation S-K (17 CFR 229.1300 *et seq.*) or any successor requirements or policies. It does not include oil and gas resources (as defined in 17 CFR 210.4-10(a)(16)(D) or any successor provision).

Section 3 – Exhibits

Item 3.01 Exhibits

List below the following exhibits submitted as part of this report:

Exhibit 1.01 – Conflict Minerals Report as required by Items 1.01 and 1.02 of this Form.

Exhibit 2.01 – Resource Extraction Payment Report as required by Item 2.01 of this Form.

Exhibit 3.01 – Opinion of Counsel as required by Rule 13q-1(d)(1) or (2) (17 CFR 240.13q-1(d)(1) or (2))

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the duly authorized undersigned.

_____
(Registrant)

_____ _____
By (Signature and Title)* (Date)

*Print name and title of the registrant's signing executive officer under his or her signature.

* * * * *

By the Commission.

Dated: December 16, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–28103 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–C

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90680]

Order Recognizing the Resource Extraction Payment Disclosure Requirements of the European Union, the United Kingdom, Norway, and Canada as Alternative Reporting Regimes that Satisfy the Transparency Objectives of Section 13(q) Under the Securities Exchange Act of 1934

December 16, 2020.

For the reasons set forth in the Commission adopting release ''Disclosure of Payments by Resource Extraction Issuers'' for 17 CFR 240.13q-1 (Rule 13q-1) and the accompanying amendments to Form SD,[1] the Commission hereby finds that the following resource extraction payment disclosure regimes are alternative reporting regimes that satisfy the transparency objectives of Section 13(q) under the Exchange Act for purposes of alternative reporting under Rule 13q-1(c) and paragraph (c) of Item 2.01 of Form SD:

1. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (''EU Accounting Directive'')[2] as implemented in a European Union or European Economic Area member country;

2. Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC on the implementation of certain provisions of Directive 2004/109/EC (''EU Transparency Directive'')[3] as implemented in a European Union or European Economic Area member country;

3. United Kingdom's Reports on Payments to Governments Regulations 2014;[4]

4. Norway's Regulations on Country-by-Country Reporting;[5] and

5. Canada's Extractive Sector Transparency Measures Act (''ESTMA'').[6]

Issuers are advised that our determination of an alternative reporting regime satisfying the transparency objectives of Section 13(q) with respect to each of these five regimes may be subject to reconsideration if there should be any significant modifications to such regime.

The Commission also hereby finds that this determination is in the public interest and consistent with the protection of investors. Accordingly, it is hereby ordered pursuant to Section 36(a) of the Exchange Act[3] that a resource extraction issuer, as defined in Item 2.01(d) of Form SD, that submits a report complying with the reporting requirements of either the EU Accounting Directive or the EU Transparency Directive, in each case as implemented in a European Union or European Economic Area member country, the United Kingdom's Reports on Payments to Governments Regulations 2014, Norway's Regulations on Country-by-Country Reporting, or

Canada's ESTMA, in accordance with the requirements set forth in paragraph (c) of Item 2.01 of Form SD, will satisfy its disclosure obligations under Rule 13q–1.

By the Commission.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–28104 Filed 1–14–21; 8:45 am]

BILLING CODE 8011–01–P

[1] *See* Release No. 34–90679.

[2] OJ L 182, 29.6.2013.

[3] OJ L 294, 6.11.2013.

[4] 2014 UK Statutory Instrument No. 3209.

[5] FOR–2013–12–20–1682.

[6] S.C. 2014, c. 39, s. 376.

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Part IX

Department of The Treasury

Internal Revenue Service

26 CFR Part 1

Credit for Carbon Oxide Sequestration; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD9944]

RIN 1545–BP42

Credit for Carbon Oxide Sequestration

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance regarding the credit for carbon oxide sequestration under section 45Q of the Internal Revenue Code (Code). These final regulations affect persons who physically or contractually ensure the capture and disposal of qualified carbon oxide, use of qualified carbon oxide as a tertiary injectant in a qualified enhanced oil or natural gas recovery project, or utilization of qualified carbon oxide in a manner that qualifies for the credit.

DATES:

Effective date: These regulations are effective on January 13, 2021.

Applicability dates: For dates of applicability, see §§ 1.45Q–1(i), 1.45Q–2(j), 1.45Q–3(f), 1.45Q–4(e), and 1.45Q–5(j).

FOR FURTHER INFORMATION CONTACT: Maggie Stehn of the Office of Associate Chief Counsel (Passthroughs & Special Industries) at (202) 317–6853 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 45Q of the Code.

Section 45Q was enacted on October 3, 2008, by section 115 of Division B of the Energy Improvement and Extension Act of 2008, Public Law 110–343, 122 Stat. 3765, 3829, to provide a credit for the sequestration of carbon oxide. On February 17, 2009, section 45Q was amended by section 1131 of Division B of the American Recovery and Reinvestment Tax Act of 2009, Public Law 111–5, 123 Stat. 115, 325. Section 45Q was further amended on December 19, 2014, by section 209(j)(1) of Division A of the Tax Increase Prevention Act of 2014, Public Law 113–295, 128 Stat. 4010, 4030, and again on February 9, 2018, by section 41119 of Division D of the Bipartisan Budget Act of 2018 (BBA), Public Law 115–123, 132 Stat. 64, 162, to encourage the construction and use of carbon capture and sequestration projects. On December 27, 2020, section 45Q was amended by section 121 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, 3051, to extend the beginning of construction deadline for qualified facilities and carbon capture equipment by two years.

On March 9, 2020, the Department of the Treasury (Treasury Department) and the IRS published Revenue Procedure 2020–12, 2020–11 I.R.B. 511, and Notice 2020–12, 2020–11 I.R.B. 495. Revenue Procedure 2020–12 provides a safe harbor under which the IRS will treat partnerships as properly allocating the section 45Q credit in accordance with section 704(b). Notice 2020–12 provides guidance on the determination of when construction has begun on a qualified facility or on carbon capture equipment that may be eligible for the section 45Q credit.

On June 2, 2020, the Treasury Department and the IRS published a notice of proposed rulemaking (REG –112339–19) in the **Federal Register** (85 FR 34050) containing proposed regulations under section 45Q (proposed regulations). The Treasury Department and the IRS received written and electronic comments responding to the proposed regulations. A public hearing on the proposed regulations was held on August 26, 2020. Copies of written comments and the list of speakers at the public hearing are available at *https://www.regulations.gov* or upon request.

After full consideration of the comments received on the proposed regulations and the testimony presented at the public hearing, this Treasury decision adopts the proposed regulations with clarifying changes and additional modifications in response to comments and testimony as described in the Summary of Comments and Explanation of Revisions section.

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the proposed regulations, with certain revisions. This Summary of Comments and Explanation of Revisions section discusses the revisions as well as comments received.

II. General Credit Provisions

A. Credit Amount in General

Section 45Q(a)(1) allows a credit of $20 per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility before the date of the enactment of the BBA (February 9, 2018); (ii) disposed of by the taxpayer in secure geological storage; and (iii) neither used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project nor utilized in a manner described in section 45Q(f)(5).

Section 45Q(a)(2) allows a credit of $10 per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility before February 9, 2018; and (ii) either (A) used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of by the taxpayer in secure geological storage; or (B) utilized by the taxpayer in a manner described in section 45Q(f)(5).

Section 45Q(a)(3) allows a credit of the applicable dollar amount (as determined under section 45Q(b)(1)) per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018, during the 12-year period beginning on the date the equipment was originally placed in service; (ii) disposed of by the taxpayer in secure geological storage; and (iii) neither used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project nor utilized in a manner described in section 45Q(f)(5) (referred to as ''disposal'' or ''disposed of,'' respectively, throughout the final regulations).

Section 45Q(a)(4) allows a credit of the applicable dollar amount (as determined under section 45Q(b)(1)) per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018, during the 12-year period beginning on the date the equipment was originally placed in service; and (ii) either (A) used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of by the taxpayer in secure geological storage (referred to as ''injection'' or ''injected,'' respectively, throughout the final regulations), or (B) utilized by the taxpayer in a manner described in section 45Q(f)(5) (referred to as ''utilization'' or ''utilized,'' respectively, throughout the final regulations). Section 45Q(b)(1)(A)(i)(I) and (ii)(I) provides that the applicable dollar amount for activities under section 45Q(a)(3) for any taxable year beginning in a calendar year (1) after 2016 and

before 2027, is an amount equal to the dollar amount established by linear interpolation between $22.66 and $50 for each calendar year during such period, and (2) after 2026 is an amount equal to the product of $50 and the inflation adjustment factor for such calendar year determined under section 43(b)(3)(B) for such calendar year, determined by substituting ''2025'' for ''1990.''

Section 45Q(b)(1)(A)(i)(II) and (ii)(II) provides that the applicable dollar amount for activities under section 45Q(d)(4) for any taxable year beginning in a calendar year (1) after 2016 and before 2027, is an amount equal to the dollar amount established by linear interpolation between $12.83 and $35 for each calendar year during such period, and (2) after 2026, is an amount equal to the product of $35 and the inflation adjustment factor for such calendar year determined under section 43(b)(3)(B) for such calendar year, determined by substituting ''2025'' for ''1990.'' Section 45Q(b)(1)(B) provides that the applicable dollar amount determined under section 45Q(b)(1)(A) is rounded to the nearest cent.

Section 45Q(b)(2) provides a method to compute the amount of qualified carbon oxide captured at a qualified facility that was placed in service before February 9, 2018, and for which additional carbon capture equipment is placed in service on or after February 9, 2018. For purposes of section 45Q(a)(1)(A) and (2)(A), the amount of qualified carbon oxide that is captured by the taxpayer is equal to the lesser of (i) the total amount of qualified carbon oxide captured at such facility for the taxable year, or (ii) the total amount of the carbon dioxide capture capacity of the carbon capture equipment in service at such facility on February 8, 2018 (the day before the date of enactment of the BBA). For purposes of section 45Q(a)(3)(A) and (4)(A), the amount of qualified carbon oxide captured by the taxpayer is an amount (not less than zero) equal to the excess of (i) the total amount of qualified carbon oxide captured at such facility for the taxable year, over (ii) the total amount of the carbon dioxide capture capacity of the carbon capture equipment in service at such facility on February 8, 2018. These final regulations explain the difference between a physical modification or equipment addition that results in an increase in the carbon dioxide capture capacity of existing carbon capture equipment, which will be treated as newly placed in service, and a mere increase in the amount of carbon dioxide captured by existing carbon capture equipment, which will not be treated as newly placed in service.

Pursuant to section 45Q(b)(3), a taxpayer may elect to have the dollar amounts applicable under section 45Q(a)(1) or (2) apply in lieu of the dollar amounts applicable under section 45Q(a)(3) or (4) for each metric ton of qualified carbon oxide which is captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018. These final regulations provide that the election will apply to all metric tons of qualified carbon oxide captured by the taxpayer at the qualified facility for the full 12-year credit period.

Section 45Q(f)(6)(A) provides that for any taxable year in which an applicable facility captures not less than 500,000 metric tons of qualified carbon oxide, the person described in section 45Q(f)(3)(A)(ii) may elect to have such applicable facility, and any carbon capture equipment placed in service at such applicable facility, deemed as having been placed in service on February 9, 2018. The term ''applicable facility'' means a qualified facility (i) which was placed in service before February 9, 2018, and (ii) for which no taxpayer claimed a section 45Q credit for any taxable year ending before February 9, 2018.

Section 45Q(f)(7) provides that in the case of any taxable year beginning in a calendar year after 2009, there is substituted for each dollar amount contained in section 45Q(a)(1) and (2) an amount equal to the product of (i) such dollar amount, multiplied by (ii) the inflation adjustment factor for such calendar year determined under section 43(b)(3)(B) for such calendar year, determined by substituting ''2008'' for ''1990.''

Section 45Q(g) provides that in the case of any carbon capture equipment placed in service before February 9, 2018, the section 45Q credit applies with respect to qualified carbon oxide captured using such equipment before the end of the calendar year in which the Secretary of the Treasury or his delegate (Secretary), in consultation with the Administrator of the Environmental Protection Agency (EPA), certifies that a total of 75,000,000 metric tons of qualified carbon oxide have been taken into account in accordance with former section 45Q(a) (as in effect before February 9, 2018) and sections 45Q(a)(1) and (2).

The proposed regulations restated the statutory credit amounts. Commenters did not request changes to the proposed regulations regarding the statutory amounts. Therefore, these final regulations adopt the amounts in the proposed regulations.

Regarding the 75,000,000 metric ton cap on the amount of qualified carbon oxide that may be taken into account under sections 45Q(a)(1) and (a)(2), commenters inquired as to whether the cap should be adjusted to account for claimed section 45Q credits that are subsequently disallowed. Section 45Q credits that are subsequently disallowed are added back to the pool of available metric tons, and are reflected in the yearly notices in which the IRS publishes the carbon oxide sequestration credit inflation adjustment factor and the amount of qualified carbon oxide that has been taken into account by taxpayers during the year. The most recent notice is Notice 2020–40, 2020–25 I.R.B. 952. Once the 75,000,000 metric ton cap has been reached, the IRS will publish a notice certifying that the cap has been reached.

A commenter suggested that the final regulations clarify who can make the election under section 45Q(f)(6) to treat applicable facilities as placed in service on the date of enactment of the BBA, by revising § 1.45Q–2(g)(4) of the proposed regulations to state the definition of the attributable taxpayer, rather than cross referencing to section 45Q(f)(3)(A)(ii) and § 1.45Q–1(h)(1). Because the commenter's suggested clarification improves the readability of the regulations, § 1.45Q–2(g)(4) has been revised to specifically refer to the person that owns the carbon capture equipment and physically or contractually ensures the capture and disposal, injection or utilization of such qualified carbon oxide as the person who can make the election under section 45Q(f)(6).

A commenter recommended that the final regulations clarify what constitutes a single applicable facility for purposes of making an election under section 45Q(f)(6). The commenter referred to section 8.01(1) of Notice 2020–12, which sets out factors indicating that multiple qualified facilities or units of carbon capture equipment are operated as part of a single project for purposes of determining whether construction of a qualified facility or carbon capture equipment has begun for purposes of the section 45Q credit. The commenter noted that these rules do not apply to the section 45Q(f)(6) election, and suggested that they provide a very useful methodology for determining whether carbon capture operations should be aggregated for purposes of section 45Q(f)(6). The final regulations allow taxpayers to apply the rules of section 8.01 of Notice 2020–12 to treat multiple facilities as a single facility for

purposes of whether a facility satisfies the requisite annual carbon oxide capture thresholds described in section 45Q(d)(2), and, therefore, is a qualified facility. Because a section 45Q(f)(6) election apples to a qualified facility that must meet a similar carbon oxide capture threshold, the final regulations adopt this comment.

B. Contractually Ensuring Capture and Disposal, Injection, or Utilization of Qualified Carbon Oxide

Section 45Q(f)(3)(A)(i) provides that in the case of qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility before February 9, 2018, the section 45Q credit is attributable to the person that captures and physically or contractually ensures the disposal through secure geological storage, use for tertiary injection and disposal through secure geological storage, or utilization in a manner consistent with section 45Q(f)(5).

Section 45Q(f)(3)(A)(ii) provides that in the case of qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018, the section 45Q credit is attributable to the person that owns the carbon capture equipment and physically or contractually ensures the capture and disposal, injection, or utilization of such qualified carbon oxide.

The proposed regulations provided a framework for the types of contracts, terms, and reporting requirements that will demonstrate the contractual assurance of the capture and disposal, injection, or utilization of qualified carbon oxide. The proposed regulations also provided that a taxpayer may enter into multiple contracts with multiple parties for the disposal, injection, or utilization of qualified carbon oxide. For example, a taxpayer that captures qualified carbon oxide may contract with one party to dispose of a portion of its captured qualified carbon oxide in a deep saline formation, with another party to use another portion of its captured qualified carbon oxide as a tertiary injectant in multiple enhanced oil recovery (EOR) sites, and with several parties to utilize the remaining portion of its captured qualified carbon oxide. The existence of each contract and the parties involved must be reported to the IRS on an annual basis on *Form 8933,* ''Carbon Oxide Sequestration Credit.'' For purposes of this Summary of Comments and Explanation of Revisions section, a reference to *Form 8933* includes any successor form(s), pursuant to instructions to any of the foregoing (see § 601.602 of this chapter), or other guidance.

The proposed regulations provided that for contracts for the disposal of qualified carbon oxide or use of qualified carbon oxide as a tertiary injectant in enhanced oil or natural gas recovery, the following information must be included: Identifying information (name of operator, field, unit and reservoir), the location (county and state) and the identification number assigned to the facility by the EPA's electronic Greenhouse Gas Reporting Tool (e-GGRT ID number).

The final regulations provide more details regarding the requirements of both parties to a contract for the disposal of qualified carbon oxide or use of qualified carbon oxide as a tertiary injectant in enhanced oil or natural gas recovery. Specifically, the failure of the taxpayer claiming the credit to satisfy this reporting requirement in a taxable year will result in the inability of that taxpayer to claim the credit with respect to any qualified carbon oxide that is disposed of, injected, or utilized in that taxable year pursuant to that particular contract.

1. Binding Written Contract

The proposed regulations required taxpayers to contractually ensure the disposal, injection, or utilization of qualified carbon oxide in a binding written contract that includes commercially reasonable terms that provide for enforcement. The proposed regulations provided that taxpayers may include information regarding the amount of qualified carbon oxide the parties agree to dispose of, inject, or utilize in their contracts. Contracts may also include other specific provisions relating to enforcement, such as long-term liability provisions, indemnity provisions, or penalties for breach of contract or liquidated damages. While the proposed regulations required that the contract include a mechanism for enforcement, no specific enforcement-related provision or other particular kind of enforcement provision was mandated.

Under the proposed regulations, a taxpayer did not elect to allow all or a portion of the section 45Q credit to any of the contracting parties merely by contracting with that party to ensure the disposal, injection, or utilization of qualified carbon oxide. Any election to allow all or a portion of the credit to another taxpayer was required to be made separately in the manner provided in the proposed regulations. See Election to Allow the Credit to Another Taxpayer in section II.C. of this Summary of Comments and Explanation of Revisions.

In response to the proposed regulations, commenters requested that the Treasury Department and the IRS clarify which contract provisions are necessary to contractually ensure the capture and disposal, injection, or utilization of qualified carbon oxide. Several commenters requested broad guidance on commercially reasonable terms rather than specifying exact language. One commenter requested guidance regarding the assurance of capture, remedies, guarantees, and the prevention of leakage.

Further, commenters recommended that the final regulations harmonize the permission for liquidated damages in § 1.45Q–1(h)(2)(iii)(B) of the proposed regulations and the exclusion of contracts that limit damages to a specified amount in § 1.45Q–1(h)(2)(i) of the proposed regulations. To further the goal of harmonizing the conflicting provisions, commenters recommended that the words ''and does not limit damages to a specified amount'' in § 1.45Q–1(h)(2)(i) of the proposed regulations be excluded from the final regulations, or the final regulations should include language from section 8.02 of Notice 2020–12 that provides that a contractual provision that limits damages to an amount equal to at least five percent of the total contract price will not be treated as limiting damages to a specified amount.

The final regulations harmonize the conflicting provisions regarding liquidated damages by replacing the definition of binding written contract in § 1.45Q–1(h)(2)(i) of the proposed regulations with the definition of binding written contract in section 8.02(1) of Notice 2020–12 and § 1.168(k)–1(b)(4)(ii)(A)–(D).

2. Multiple Binding Written Contracts Permitted

A commenter noted that while § 1.45Q–1(h)(2)(ii) of the proposed regulations permitted a taxpayer to enter into multiple binding written contracts with multiple parties for disposal, injection, or utilization of the qualified carbon oxide, the proposed regulations failed to address the possibility that a sequestration party may enter into a binding written contract with more than one party that owns carbon capture equipment or captures or ensures the capture of qualified carbon oxide. The commenter suggested adding the following clarifying language to § 1.45Q–1(h)(2)(ii): ''A party that physically carries out the disposal, injection, or utilization of qualified

carbon oxide may enter into multiple binding written contracts with multiple parties that own carbon capture equipment to capture or contractually ensure the capture of qualified carbon oxide.'' The final regulations adopt the commenter's clarification.

3. Contract Provisions

A commenter suggested that § 1.45Q–1(h)(2) of the proposed regulations be revised to clarify that the owner of carbon capture equipment is not required to physically carry out the capture of qualified carbon oxide to claim the section 45Q credit as long as the owner contractually ensures that the party that physically carries out the capture satisfies the requirements of the regulations. The commenter's suggestion is consistent with section 45Q(f)(3)(ii), which applies to qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018. Section 45Q(f)(3)(ii) requires the person that owns the carbon capture equipment to physically or contractually ensure the capture of the qualified carbon oxide. However, the commenter's suggestion is inconsistent with section 45Q(f)(3)(i), which applies to qualified carbon oxide captured using carbon capture equipment that is originally placed in service at a qualified facility before February 9, 2018. Section 45Q(f)(3)(i) requires the person that owns the carbon capture equipment to capture the qualified carbon oxide. Unlike section 45Q(f)(3)(ii), section 45Q(f)(3)(i) does not include ''or contractually ensures the capture.'' Therefore, the final regulations adopt the commenter's suggestion for qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018, but not for qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility before February 9, 2018.

Commenters sought clarification that taxpayers may employ a chain of contracts or contractual assurances with subcontractors to ensure disposal, injection, or utilization. Many commenters requested revising § 1.45Q–1(h)(2) of the proposed regulations and the examples thereunder to provide that direct privity of contract is not required between the taxpayer to which the credit is attributable (the carbon capture equipment owner) and the party that performs the disposal, injection, or utilization of qualified carbon oxide, as long as there is a chain of contractual privity ultimately connecting those parties and satisfying the requirements of the regulation. Similarly, several commenters requested clarification that a taxpayer can satisfy the ''contractual assurance'' requirement through a single offtake contract with a counterparty who contractually assures the disposal, injection, or utilization of qualified carbon oxide through one or more levels of subcontractors.

The final regulations provide that a taxpayer may enter into a binding written contract with a general contractor that hires subcontractors to physically carry out the capture, disposal, injection, or utilization of the qualified carbon oxide, but the contract must bind the subcontractors to the requirements of § 1.45Q–1(h)(2). The final regulations also permit multiple binding written contracts. Further, as long as all the requirements of § 1.45Q–1(h)(2) are met, parties to these contracts may be related.

One commenter requested that the final regulations include a rule that parties to a contract that contractually assures the disposal, injection, or utilization of qualified carbon oxide for the taxpayer may be commonly owned or controlled or otherwise have some overlapping ownership relationship. Neither the statute, the proposed regulations, nor these final regulations prevent such relationships. The contracts simply must conform to all of the requirements of these final regulations.

4. Pre-Existing Contracts

A commenter requested that the final regulations provide that an amendment of a contract is unnecessary to meet the requirements of the regulation as long as there is a unilateral undertaking, such as side letter or certification, that meets the terms required by proposed regulations. The determination of whether an amendment of a contract is binding depends on whether the amendment is enforceable under State law against both the taxpayer and the party that physically carries out the disposal, injection, or utilization of qualified carbon oxide. Therefore, the final regulations do not adopt this commenter's request.

Commenters requested that existing contracts should be grandfathered from the requirements of § 1.45Q–1(h)(2) of the proposed regulations and treated as providing contractual assurance until new contracts that include conforming provisions are executed. Commenters presented alternative definitions of ''existing contracts,'' such as ''pre-BBA contracts and contracts signed before the date the final regulations are promulgated.''

In response to these commenters, the final regulations provide taxpayers who have existing contracts that were signed before the date these final regulations are published in the **Federal Register** additional time to conform their contracts to the requirements of § 1.45Q–1(h)(2). To be eligible for the section 45Q credit, taxpayers must execute new contracts or amend existing contracts so as to conform to all of the requirements of these final regulations by July 12, 2021.

C. Election To Allow the Credit to Another Taxpayer

Section 45Q(f)(3)(B) provides that a person that is entitled to claim the credit under section 45Q(f)(3)(A)(i) or section 45Q(f)(3)(A)(ii) may elect to allow the person that disposes of the qualified carbon oxide, utilizes the qualified carbon oxide, or uses the qualified carbon oxide as a tertiary injectant to claim the section 45Q credit (section 45Q(f)(3)(B) election).

The proposed regulations provided guidance regarding who may make a section 45Q(f)(3)(B) election and the time and manner for making a section 45Q(f)(3)(B) election. The proposed regulations also provided that section 45Q(f)(3)(B) elections must be made on an annual basis no later than the time prescribed by law (including extensions) for filing the Federal income tax return or Form 1065, U.S. Return of Partnership Income, and may not be made on an amended Federal income tax return. However, the proposed regulations provided that a section 45Q(f)(3)(B) election may be made on an amended Federal income tax return, an amended Form 1065 or an administrative adjustment request under section 6227 of the Code (AAR), for any taxable year ending after February 9, 2018, but not for taxable years beginning after June 2, 2020. In addition, as provided in Revenue Procedure 2020–23, 2020–18 I.R.B. 749, the exception applies regarding the time to file an amended return by a partnership subject to the centralized partnership audit regime enacted as part of the BBA (BBA partnership) for the 2018 and 2019 taxable years. The amended Federal income tax return or the amended Form 1065 must be filed, in any event, not later than the applicable period of limitations on assessment for the taxable year for which the amended Federal income tax return or Form 1065 is being filed. A BBA partnership may make a late election by filing an AAR on or before October 15, 2021, but in any event, not later than the period of limitations on filing an AAR under section 6227(c).

The proposed regulations also set forth information to be provided as part of a section 45Q(f)(3)(B) election, requiring both an electing taxpayer and a credit claimant to include a Form 8933 with its timely filed Federal income tax return or Form 1065 (including extensions) as applicable. The proposed regulations required an electing taxpayer to provide each credit claimant with a copy of the electing taxpayer's Form 8933, and each credit claimant must attach that copy of the electing taxpayer's Form 8933 to its own Form 8933.

Further, the proposed regulations provided that section 45Q(f)(3)(B) elections may be made for all or a portion of the available section 45Q credit and may be made for one or more credit claimants. If an electing taxpayer elects to allow multiple credit claimants to claim section 45Q credits, the proposed regulations provided that the maximum amount of section 45Q credits allowable to each credit claimant is proportional to the amount of qualified carbon oxide disposed of, utilized, or used as a tertiary injectant by the credit claimant.

1. Parties Eligible To Qualify as Credit Claimants

Commenters sought clarification concerning whether elections could be made for several parties along a contractual chain, or whether only the end disposer, injector, or utilizer would qualify as credit claimants. The commenters supported permitting the electing taxpayers to retain a portion of the credit and allow portions of the credit to various intermediaries, as well as the end disposer, injector, or utilizer.

The final regulations provide that the disposer, injector, or utilizer that enters into the contract with the electing taxpayer for the disposal, injection, or utilization of the electing taxpayer's qualified carbon oxide is the party that may qualify as a credit claimant pursuant to a section 45Q(f)(3)(B) election. If such disposer, injector, or utilizer enters into a subcontract with a third-party to carry out the disposal, injection, or utilization, then the subcontractor may not be a credit claimant. This is consistent with the provisions in these final regulations relating to contractual assurance under section 45Q(f)(3)(ii) that allow a third party who hired subcontractors to contract directly with the carbon capture equipment owner and also be allowed to subcontract the physical disposal, injection, or utilization of qualified carbon oxide through one or more levels of subcontractors, and is premised on the fact that the third party who hired subcontractors is the party that has contractual privity with the attributable taxpayer for the disposal, injection, or utilization of the qualified carbon.

2. Failure To Satisfy Reporting Requirements

A commenter recommended that the credit allowable under section 45Q should not be jeopardized by a counterparty (the person physically disposing, injecting or utilizing) failing to meet the reporting requirements under § 1.45Q–1(h)(2)(iv) of the proposed regulations, noting that the proposed regulations do not provide what happens if a counterparty fails to report the required information. The commenter suggested that the failure of a counterparty to meet the reporting requirements under § 1.45Q–1(h)(2)(iv) of the proposed regulations should not affect whether a compliant taxpayer is entitled to section 45Q credits.

The final regulations require both parties to a contract to report their contract information to the IRS on a Form 8933, and also require the party that contracts with the taxpayer claiming the section 45Q credit (counterparty) to provide that taxpayer with a copy of its Form 8933. The taxpayer claiming the section 45Q credit must attach and file the Form 8933 received from the counterparty to its own signed Form 8933. If the taxpayer claiming the section 45Q credit fails to satisfy this reporting requirement, then that taxpayer may not claim the section 45Q credit. Permitting a section 45Q credit to a taxpayer that fails to meet its applicable reporting requirements would undermine tax administration. However, the failure of the counterparty to file its Form 8933 with the IRS will not impact the ability of the taxpayer to claim the section 45Q credit.

Commenters sought to clarify whether a minimum amount of tonnage or credit would be required to make a section 45Q(f)(3)(B) election, and whether the election would be limited to either whole tons, whole dollars, or the minimum capture requirements based on the type of qualified facility.

The final regulations do not limit the election to whole metric tons or whole dollars. Because the value of the pre-BBA credit is based on an annual inflation adjustment, and the post-BBA credit is based on linear interpolation until arriving at the $35 and $50 values, limiting an election to whole metric tons or whole dollars would improperly distort the value of the credit in certain instances. The final regulations place minimum capture requirements on the owner of the carbon capture equipment to be considered a qualified facility, but do not impose such requirements on the credit claimant, which is the party that disposes, uses, or utilizes the qualified carbon oxide.

D. Timing of Credit—Placed in Service Date

A commenter suggested that the twelve-year credit period should not begin until the disposal, injection, or utilization operations are active and a sequestration plan is in place. Therefore, the commenter suggested that the twelve-year period should begin on the later of February 9, 2018, and the date the MRV plan is approved or the ISO plan is certified. Section 45Q(a)(3) and (4) clearly provides that the 12-year credit period begins on the date the carbon capture equipment was originally placed in service. Therefore, the final regulations do not adopt the commenter's suggestion.

A commenter proposed that taxpayers be allowed to treat the placed in service date as (1) the date the facility (or specific unit of carbon capture equipment) is capable of being placed in service, even if the facility or the carbon capture equipment is not fully operable on that date; or (2) the earlier of the conclusion of a 180-day ramp-up period or the date upon which the facility or carbon capture equipment at the facility is fully operable.

The final regulations do not alter the placed in service standard provided in other guidance, but instead apply the placed in service standard consistent with existing guidance. The current standard is clear, and applying the same standard should provide clarity to taxpayers and avoid the confusion of having multiple standards.

III. Definitions

A. Qualified Carbon Oxide

Section 45Q(c) provides that ''qualified carbon oxide'' means (A) any carbon dioxide which (i) is captured from an industrial source by carbon capture equipment which is originally placed in service before February 9, 2018; (ii) would otherwise be released into the atmosphere as industrial emission of greenhouse gas or lead to such release; and (iii) is measured at the source of capture and verified at the point of disposal, injection, or utilization; (B) any carbon dioxide or other carbon oxide which (i) is captured from an industrial source by carbon capture equipment which is originally placed in service on or after February 9, 2018; (ii) would otherwise be released into the atmosphere as industrial emission of greenhouse gas or lead to

such release; and (iii) is measured at the source of capture and verified at the point of disposal, injection, or utilization; or (C) in the case of a direct air capture facility, any carbon dioxide which (i) is captured directly from ambient air; and (ii) is measured at the source of capture and verified at the point of disposal, injection, or utilization.

While ''qualified carbon oxide'' includes the initial deposit of captured carbon oxide used as a tertiary injectant, section 45Q(c)(2) provides that the term does not include carbon oxide that is recaptured, recycled, and re-injected as part of the qualified enhanced oil or natural gas recovery process. Additionally, section 45Q(f)(1) provides that the section 45Q credit applies only with respect to qualified carbon oxide the capture and disposal, injection, or utilization of which is within the United States (within the meaning of section 638(1)), or a possession of the United States (within the meaning of section 638(2)).

The proposed regulations generally conformed to the statutory definition of qualified carbon oxide, including the provision that only qualified carbon oxide captured and disposed of, injected, or utilized within the United States or a possession of the United States is taken into account.

One commenter requested that the final regulations explicitly state that because carbon dioxide is fungible, carbon dioxide transported or stored in shared pipelines or facilities meets the definition of qualified carbon oxide in § 1.45Q–2(a) of the proposed regulations, so long as the amount of carbon dioxide (as opposed to the particular molecules) is measured at the source of capture and verified at the point of disposal, injection, or utilization.

The International Organization for Standardization (ISO) standard for carbon dioxide capture, transportation, and geological storage has been endorsed by the American National Standards Institute (ANSI) and the CSA Group (CSA). CSA/ANSI ISO 27916:2019, ''Carbon Dioxide Capture, Transportation and Geological Storage—Carbon Dioxide Storage Using Enhanced Oil Recovery (CO_2-EOR) (hereafter referred to as CSA/ANSI ISO 27916:2019) was developed for the purpose of quantifying and documenting the total carbon dioxide that is stored in association with EOR. In general, reporting under CSA/ANSI ISO 27916:2019 uses mass balance accounting, has established reporting and documentation requirements, and includes requirements for documenting a monitoring program and a containment assurance plan.

Subpart RR and CSA/ANSI ISO 27916:2019 both provide for methods of accounting for qualified carbon oxide, expressly providing for mass balance accounting, which recognizes the fungibility of carbon dioxide. Because this guidance addresses the fungibility issue, the recommended change is unnecessary, and the final regulations do not adopt this comment.

A commenter suggested that based on the plain language of the statute, only carbon dioxide and carbon monoxide may satisfy the definition of qualified carbon oxide for purposes of qualifying for the credit, and that other greenhouse gases that may be included as part of a lifecycle analysis should not be eligible for the credit. However, another commenter stated that because of the methodology for preparing a lifecycle analysis for utilization provided in section 45Q(f)(5)(B)(i) and (ii), all greenhouse gases should be eligible for section 45Q credits as carbon dioxide equivalents.

Section 45Q(c) clearly provides that only carbon dioxide or other carbon oxide may be qualified carbon oxide. The section 45Q credit may be calculated only on the amount of qualified carbon oxide that is captured and utilized. Section 45Q makes this clear in a number of instances. The final regulations provide that the amount of the section 45Q credit is not computed on all greenhouse gases, but is based only on qualified carbon oxide measured at the source of capture and utilized. See section IV.A. of this Summary of Comments and Explanation of Revisions for a detailed explanation regarding lifecycle analysis and the amount utilized.

A commenter requested that the final regulations recognize that both subpart RR and the ISO standard do not apply to any carbon oxide other than carbon dioxide (*e.g.,* carbon monoxide). Because the section 45Q credit is computed on the total volume of qualified carbon dioxide and any other carbon oxide captured and disposed of, injected, or utilized in the tax year, and the ISO standard and subpart RR are made applicable to section 45Q pursuant to these final regulations for purposes of establishing secure storage and monitoring standards, rather than defining carbon oxide, the final regulations do not adopt the commenter's request.

A commenter suggested that § 1.45Q–2(h)(5) of the proposed regulations, which provides that carbon oxide that is injected into an oil reservoir that is not a qualified enhanced oil recovery project under section 43(c)(2) cannot be treated as qualified carbon oxide unless the reservoir permanently ceased oil production, the operator has obtained an Underground Injection Control Class VI permit, and the operator complies with 40 CFR part 98 subpart RR, conflicts with section 45Q(c), which defines qualified carbon oxide. The commenter proposed that the provision be revised as follows:

> Carbon oxide that is injected into an oil reservoir that is not a qualified enhanced oil recovery project under section 43(c)(2) cannot be treated as qualified carbon oxide, disposed of, injected, or utilized. This rule will not apply to an oil reservoir if (i) The reservoir permanently ceased oil production; (ii) The operator has obtained an EPA Underground Injection Control class VI permit; and (iii) The operator complies with 40 CFR part 98 subpart RR.

This suggested revision removes the requirement to timely file a petroleum engineer's inspection, which the final regulations retain on the grounds of uniformity and transparency. In addition, the revision removes the provision for the first injection occurring before 1991, which the final regulations retain to comport with section 43. Further, section 45Q(c)(1)(A)(iii), (B)(iii), and (C)(iii) takes into account the end use of qualified carbon oxide when determining which volumes constitute qualified carbon oxide. Accordingly, the final regulations do not adopt the commenter's suggestion.

B. Carbon Capture Equipment

Section 45Q does not define carbon capture equipment. The proposed regulations provided that in general, carbon capture equipment includes all components of property that are used to capture or process carbon oxide until the carbon oxide is transported for disposal, injection, or utilization. Further, the proposed regulations listed specific uses for the equipment, as well as items that are included in, or excluded from, the definition of carbon capture equipment. Components of property related to the function of capturing carbon oxides, such as components of property necessary to compress, treat, process, liquefy, or pump carbon oxides, are included within the definition of carbon capture equipment. Components of property related to transporting carbon oxides for disposal, injection, or utilization are not included in the general definition.

1. General Comments

Several commenters asserted that the definition of carbon capture equipment in the proposed regulations at § 1.45Q–

2(c) is overbroad. Commenters generally requested alternative definitions or tests to determine whether equipment is considered carbon capture equipment for section 45Q purposes.

One commenter suggested deleting the list of carbon capture equipment components in proposed regulation § 1.45Q–2(c)(2) as it results in more confusion in practice. Similarly, another commenter suggested deleting the proposed regulation § 1.45Q–2(c)(3) list of ''excluded components'' as it causes confusion.

A commenter suggested that the following components should be included in the list of carbon capture equipment: Pressure and temperature swing adsorption units, absorbers and regenerators, columns, storage tanks, and vaporizers, biogas compression equipment, equipment used for the primary purpose of removing compounds other than carbon oxide from biogas or biomethane, and biomethane compression equipment.

A commenter recommended defining carbon capture equipment as equipment that is placed in service at a qualified facility and that performs the function of, or is used for the purpose of, capturing qualified carbon oxide from an industrial source, or in the case of a direct air capture facility, directly from the ambient air.

Another commenter recommended revising the list of excluded components to exclude land and marine transport vessels used for transporting captured qualified carbon oxide for disposal, injection, or utilization. The commenter also recommended excluding pipelines and branch lines, except where they are part of a gathering and distribution system that collects carbon oxide captured from a qualified facility or multiple facilities that constitute a single project and are used to transport that carbon oxide away from the qualified facility or single project to a pipeline that transports carbon oxide from multiple taxpayers or projects.

In response to these comments, the final regulations provide that carbon capture equipment generally includes all components of property that are used to capture or process carbon oxide until the carbon oxide is transported for disposal, injection, or utilization. The final regulations also remove the list of qualifying carbon capture components and the excluded components. Further, the final regulations provide that carbon capture equipment generally does not include components of property used for transporting qualified carbon oxide for disposal, injection, or utilization. However, the final regulations provide that carbon capture equipment includes a system of gathering and distribution lines that collect carbon oxide captured from a qualified facility or multiple qualified facilities that constitute a single project (as described in section 8.01 of Notice 2020–12). These revisions provide a functionality-based definition of carbon capture equipment, and provide flexibility without limiting the definition of carbon equipment solely to a list of components, which caused confusion in the proposed regulations.

2. Primary Purpose Test

Commenters requested that the final regulations provide a primary purpose test to distinguish between equipment for which the primary function is the separation of qualified carbon oxide and equipment that incidentally separates qualified carbon oxide but for which the primary function is the manufacture of other products. One commenter elaborated that only equipment whose primary purpose is to capture, process, separate, purify, dry or compress qualified carbon oxide should be treated as carbon capture equipment. Another commenter requested that the final regulations clarify that only additional equipment, installed with the primary purpose to separate and capture qualified carbon oxide in a manner such that carbon oxide is of suitable quality for transport, disposal, and utilization, be treated as carbon capture equipment.

Commenters suggested that the definition of carbon capture equipment consider whether the equipment is integral to the industrial facility. The commenters suggested that any equipment that is integral to the industrial facility would be part of the industrial facility and equipment that is not necessary for the functioning of the industrial facility that captures, processes, separates, purifies, dries or compresses qualified carbon oxide should be considered carbon capture equipment.

A commenter requested that § 1.45Q–2(c) of the proposed regulations be revised to clarify that in the context of a biogas processing facility, carbon capture equipment is limited to the equipment used for the primary purpose of separating and capturing or processing qualified carbon oxide until the qualified carbon oxide is transported for disposal, injection or utilization.

3. Dual Use Property

Commenters requested clarification of the definition of carbon capture equipment in the case of a dual purpose facility that produces gases suitable for process usage and qualified carbon oxide as a by-product. The commenters noted that the definition of carbon capture equipment under the proposed regulations did not differentiate between dual purpose equipment that is tied to both an industrial process not related to carbon capture and to carbon capture as defined by the proposed regulations. Consequently, the commenters recommended that the final regulations allow a taxpayer to treat the two types of systems differently when the taxpayer owns both the dual purpose industrial process units and the downstream components that only serve a carbon capture function, and that taxpayers should be permitted to elect to exclude such dual purpose equipment from the definition of carbon capture equipment.

The commenters stated that a bright-line distinction between the two types of equipment is supported by the definition of carbon capture equipment in the proposed regulations and the underlying intent of section 45Q, and that a component of industrial equipment that is essential to the production of chemicals normally is not considered to be carbon capture equipment. Further, the commenters noted difficulties for tax equity partnerships if they are required to own manufacturing equipment in addition to carbon capture equipment. Therefore, these commenters recommended applying a primary purpose test to define carbon capture equipment, which differentiates between equipment that primarily functions to separate qualified carbon oxide and equipment that incidentally separates qualified carbon oxide, but primarily functions to manufacture other products.

The final regulations do not adopt a primary purpose test, and do not allow taxpayers to elect to exclude ''dual purpose'' property from the definition of carbon capture equipment. Instead, the final regulations provide a functionality-based definition of carbon capture equipment and remove the lists of specific items of included components and excluded components. Specifically, and as discussed in section III.B.1. of this Summary of Comments and Explanation of Revisions, the final regulations provide that carbon capture equipment generally includes all components of property that are used to capture or process carbon oxide until the carbon oxide is transported for disposal, injection, or utilization. Further, the final regulations provide that carbon capture equipment generally does not include components of property used for transporting qualified carbon oxide for disposal, injection, or utilization.

4. Unit of Property: Independently Functioning Process Train

Commenters requested that the definition of carbon capture equipment be revised to clarify that all components that make up an independently functioning process train capable of capturing, processing, and preparing carbon oxide for transport should be treated as one unit of carbon capture equipment, consistent with the single project rule in Revenue Ruling 94–31, 1994–1 C.B. 16, 1994–21 I.R.B. 4. A commenter requested that the regulations clarify that at a single industrial facility there can be two or more pieces of carbon capture equipment and that the owner of a component of carbon capture equipment is separately eligible to claim credits.

The final regulations clarify that all components that make up an independently functioning process train capable of capturing, processing, and preparing carbon oxide for transport should be treated as one unit of carbon capture equipment. This clarification is consistent with the single project rule provided in Revenue Ruling 94–31.

5. Safe Harbor

One commenter requested a safe harbor to determine whether a component is considered carbon capture equipment based on the level of qualified carbon oxide in the gas stream entering the piece of equipment. The commenter suggested that carbon capture equipment could include all equipment from the point where the gas stream is 90 percent carbon oxide to the point where the carbon oxide is transported for end use. The commenter recommended that the final regulations clarify the interaction of §§ 1.45Q–2(c) and 1.45Q–2(c)(1) of the proposed regulations consistent with a primary purpose test and the proposed safe harbor.

The final regulations do not adopt this recommendation. Establishing which components within a carbon capture, utilization, or storage process consistently contain a gas stream of 90 percent qualified carbon oxide (by volume) would require a significant expenditure for monitoring and compliance that would put small businesses at a disadvantage.

6. Ownership Issues

Many commenters requested that the final regulations clarify that carbon capture equipment may be owned by a taxpayer other than the taxpayer that owns the qualified facility at which the carbon capture equipment is placed in service. In response, the final regulations clarify that carbon capture equipment that is originally placed in service at a qualified facility on or after February 9, 2018, may be owned by a taxpayer other than the taxpayer that owns the industrial facility at which the carbon capture equipment is placed in service. However, this clarification does not extend to credits granted under section 45Q(a)(1) and (2), which require carbon capture equipment that is originally placed in service at a qualified facility before February 9, 2018.

Commenters recommended that the final regulations provide rules regarding ownership of carbon capture equipment by multiple taxpayers, which respect an allocation agreed to by the parties and, in the absence of such agreement, which provide for a pro rata allocation based on the equipment's contribution to increased carbon oxide capture, for taxpayers to be on firm footing when negotiating the scope and terms of any election under section 45Q(f)(3)(B).

A commenter recommended that the final regulations clarify that at a single industrial facility, two or more taxpayers can own an undivided interest in the same carbon capture equipment. In such circumstance, each owner should be eligible to claim section 45Q credits in an amount equal to the arm's-length negotiated qualified carbon oxide allocated to the owner. One commenter requested that the final regulations clarify that where multiple taxpayers own different components within the same industrial facility, the taxpayer owning the majority by value should claim the credit.

The final regulations do not provide specific rules regarding how to allocate any section 45Q credits generated by carbon capture equipment that captures qualified carbon oxide among multiple taxpayers that own different components within a carbon capture system or an undivided interest in the same carbon capture equipment. Allowing the credit to be shared in this manner will generate significant administrative burden for the IRS. Accordingly, for each single process train of carbon capture equipment, only one taxpayer will be permitted to claim the section 45Q credit, and it will be the taxpayer who either physically ensures the capture and disposal, injection, or utilization of qualified carbon oxide or contracts with others who capture and dispose of, inject, or utilize qualified carbon oxide. However, multiple owners of carbon capture equipment may form a partnership to allocate section 45Q credits among themselves pursuant to Revenue Procedure 2020–12.

7. Characterization of Specific Components as Carbon Capture Equipment

A commenter requested confirmation, through an example or a safe harbor, that the person that owns both an absorber unit and regeneration unit (or their functional equivalents) is treated as the sole ''person that owns the carbon capture equipment'' for section 45Q(f)(3)(A)(ii). A commenter requested clarification that for a project in which the carbon capture equipment owner also owns the pipeline for transporting the qualified carbon oxide that the pipeline should be included in the definition of carbon capture equipment because it is an essential aspect of the carbon capture process.

The final regulations remove the list of included and excluded carbon capture equipment components, which caused confusion among commenters. In addition, the final regulations do not include language discussing whether the owner of specific components of carbon capture equipment is treated as the sole owner. Regarding pipelines, the final regulations provide that carbon capture equipment generally does not include components of property used for transporting qualified carbon oxide for disposal, injection, or utilization.

C. Qualified Facility

Section 45Q(d) provides that ''qualified facility'' means any industrial facility or direct air capture facility, the construction of which begins before January 1, 2026, and (i) the construction of carbon capture equipment begins before such date; or (ii) the original planning and design for such facility includes installation of carbon capture equipment. In addition, a qualified facility must capture: (i) In the case of a facility which emits not more than 500,000 metric tons of qualified carbon oxide into the atmosphere during the taxable year, not less than 25,000 metric tons of qualified carbon oxide during the taxable year which is utilized in a manner described in section 45Q(f)(5) (Section 45Q(d)(2)(A) Facility); (ii) in the case of an electricity generating facility which is not a Section 45Q(d)(2)(A) Facility (Section 45Q(d)(2)(B) Facility), not less than 500,000 metric tons of qualified carbon oxide during the taxable year; or (iii) in the case of a direct air capture facility or any facility which is not a Section 45Q(d)(2)(A) Facility or a Section 45Q(d)(2)(B) Facility, not less than 100,000 metric tons of qualified carbon oxide during the taxable year.

1. Original Planning and Design

A commenter requested that the final regulations provide a bright-line definition of ''original planning and design'' for purposes of section 45Q(d)(1). For example, the commenter suggested that at least one version of the engineering plans or designs for the facility (either issued for construction drawings or earlier version) should identify both the point where the carbon oxide would be captured, such as a tie-in point, and the physical location for the carbon capture equipment to be installed either in conjunction with the initial construction of the facility or at some later date. Because there is more than one possible interpretation of the term ''original planning and design,'' and a definition was not proposed in the proposed regulations, defining the term exceeds the scope of these final regulations, and these final regulations do not define the term.

2. 80/20 Rule

The proposed regulations included an ''80/20 Rule,'' which allowed a qualified facility or carbon capture equipment to qualify as originally placed in service even though it contains some used components of property, if the fair market value of the used components of property is not more than 20 percent of the total value of the qualified facility or carbon capture equipment. For purposes of the 80/20 Rule, the cost of a new qualified facility or carbon capture equipment includes all properly capitalized costs of the new qualified facility or carbon capture equipment. Solely for purposes of the 80/20 Rule, properly capitalized costs of a new qualified facility or carbon capture equipment may, at the option of the taxpayer, include the cost of new equipment for a pipeline owned and used exclusively by that taxpayer to transport carbon oxides captured from that taxpayer's qualified facility that would otherwise be emitted into the atmosphere.

A. Timing of Determination

Several commenters suggested that the fair market value of the used equipment should be the replacement cost of the equipment less physical depreciation, and the appropriate valuation date should be the construction start date. These commenters further recommended that the final regulations provide that costs attributable to any disposal well used exclusively by the taxpayer as necessary for achieving the same underlying policy goals be included in the denominator for purposes of the 80/20 Rule.

The 80/20 Rule has been used in both the section 48 investment tax credit and section 45 production tax credit contexts since the 1990s. Importantly, until the mid-2000s, energy property otherwise eligible for the section 48 credit and qualified facilities otherwise eligible for the section 45 credit were not eligible until they were placed in service. Over time, Congress has amended the section 45 and 48 credits to use a beginning of construction standard for credit eligibility while retaining some placed in service dates. However, the 80/20 Rule has survived and continues to be computed on the date that a facility is placed in service for the section 45 and 48 credits. The section 45Q credit is similar to the section 45 production tax credit. Allowing taxpayers to compute the 80/20 Rule on the beginning of construction date instead of the placed in service date, thereby reducing risk of loss during the years that construction may require, would unfairly favor one group of similarly situated taxpayers over another. Accordingly, the final regulations do not adopt this recommendation.

B. Methodology

A commenter recommended that the final regulations clarify that in determining the value of old or existing equipment compared to new equipment, the general principles of Revenue Ruling 94–31 should apply. Revenue Ruling 94–31 provides that a facility would qualify as originally placed in service even though it contains some used property, provided the fair market value of the used property is not more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property). The final regulations clarify that in determining the value of old or existing equipment as compared to new equipment, the general principles of Revenue Ruling 94–31 will apply.

C. Alternative Basis for Calculation

As previously mentioned, several commenters requested that the fair market value of used property for purposes of the 80/20 Rule be ascertained by determining the replacement cost of new property minus physical depreciation. One commenter requested that for purposes of the 80/20 Rule, the regulations refer to the used equipment's capitalized costs (either depreciated or undepreciated) rather than its fair market value, or cap its fair market value (so determined for the used equipment at the aggregate capitalized costs for the used equipment). Another commenter requested an alternative approach for facilities that cannot meet the 80/20 Rule, allowing facilities to allocate qualified carbon oxide according to the ratio of old/new equipment that constitutes the capture equipment process.

The final regulations do not incorporate these suggestions because they are inconsistent with the conventional understanding and use of the 80/20 Rule. Further, the regulations do not address the appropriate valuation method.

D. Previously Owned Equipment

A commenter suggested that carbon capture equipment that was used at a different industrial facility and is moved to the qualified facility should be treated as new property for purposes of the 80/20 Rule. One commenter sought clarification that if a taxpayer purchases used equipment from the marketplace, which the taxpayer itself had not previously placed in service, the equipment will qualify as new equipment (with a valued based on cost) for purposes of the 80/20 Rule. Another commenter requested that ''New Components of Property'' for purposes of the 80/20 Rule can include two categories of property: (1) Brand new property that has never been used before, and (2) Property that is used, so long as it was never used in connection with a qualified facility or carbon capture equipment for which a section 45Q credit was claimed (used-but-new property).

The final regulations do not adopt these suggestions. The position of the Treasury Department and the IRS has always been that the numerator of the 80/20 Rule is for new equipment, which does not include previously used equipment that is purchased by a taxpayer for use in a project. This has also been the Treasury Department's and the IRS's position for purposes of applying the 80/20 Rule for the section 45 credit, which is a production tax credit akin to the section 45Q credit.

E. Assets Included as Carbon Capture Equipment for Purposes of 80/20 Rule

Noting the concepts in the examples set forth in § 1.45Q–1(g)(4) of the proposed regulations, a commenter asked whether treating all components that make up an independently functioning process train could be considered for purposes of the 80/20 Rule, compared to applying the 80/20 Rule to the entire qualified facility. Another commenter asserted that the relevant unit of carbon capture

equipment is an independently functioning process train for purposes of the 80/20 Rule and the retrofitted carbon capture equipment rules, and requested that the final regulations reflect this assertion.

A commenter recommended that the final regulations clarify whether certain relevant items of equipment, including pressure and temperature adsorption units, adsorbers, and regenerators, columns, storage tanks, and vaporizers, are carbon capture equipment to inform whether and how the 80/20 Rule applies. A commenter suggested that the final regulations clarify that pipeline construction costs may be included for purposes of the 80/20 Rule.

A commenter requested modifications to the 80/20 Rule, suggesting that: (1) The exclusivity requirement be eliminated; (2) the qualified carbon oxides to be transported in the pipeline should be captured ''by the taxpayer's carbon capture equipment'' and not ''from the taxpayer's qualified facility;'' and (3) eliminating the limitation that the pipeline must only transport carbon oxide that ''would otherwise be emitted into the atmosphere'' because the limitation unfairly prejudices direct air capture facilities without justification or cost/benefit analysis. The commenter asserted that direct air capture facilities should be able to enjoy the benefits of this provision in the same way as industrial facilities.

The final regulations clarify that an independently functioning process train is the appropriate unit of carbon capture equipment for purposes of the 80/20 Rule, and clarify the meaning of ''the cost of new equipment for a pipeline owned and used exclusively by that taxpayer.'' However, the final regulations do not eliminate the exclusivity requirement for pipelines because the purpose of the 80/20 Rule is to calculate the fair market value ratio of new to used property within a project. If the taxpayer and the IRS are unable to determine how much of a pipeline the taxpayer actually owns or is part of the project, because it is a common carrier pipeline, the 80/20 Rule cannot be used to determine whether the project has met the test.

3. Electricity Generating Facility

A commenter requested that the final regulations clarify whether carbon capture equipment at a facility that is a combined heat and power system property (CHP) would be categorized as an electricity generating facility, particularly if the facility's primary purpose is to provide steam and electric power to the industrial facilities where they are located, but sometimes sells electricity to the grid. The commenter sought explicit guidance concerning whether a CHP facility emitting carbon oxides that primarily serve the steam and industrial load of the host industrial plant may be treated as an industrial facility that is subject to the ''not less than 100,000 metric tons'' requirement of section 45Q(d)(2)(C).

A commenter noted that it is unclear whether carbon capture equipment installed at a CHP is an electricity generating facility or an industrial facility. The commenter suggested that routine but de minimis sales of electricity to the grid could cause a CHP to be subject to depreciation under one of the MACRS classes listed in § 1.45Q–2(e) of the proposed regulations, thus triggering the 500,000 metric ton threshold applicable to carbon capture equipment installed at electric generating facilities in § 1.45Q–2(g)(1)(ii) of the proposed regulations. The commenter stated that many CHP facilities are small and do not produce 500,000 metric tons of carbon oxide annually, so this categorization could disqualify many otherwise attractive industrial CHP carbon capture projects from meeting the threshold for qualified facilities under § 1.45Q–2(g)(1)(ii) of the proposed regulations. Accordingly, the commenter requested guidance as to whether a CHP facility where the majority of carbon oxides emitted are attributable to serving the steam and industrial load of the host industrial plant may be treated as an industrial facility to which the ''not less than 100,000 metric tons'' threshold under section 45Q(d)(2)(C) applies.

A commenter sought clarification that the MACRS Asset Classes listed in the proposed regulations are the only categories in which a facility may be treated as an ''electricity generating facility'' and other more diverse or less clear facilities would not be at risk of being classified as such.

Based on the definition of electricity generating facility under § 1.45Q–2(e) of the proposed regulations, unless a facility is subject to depreciation under one of the listed MACRS asset classes, the facility does not qualify as an electricity generating facility. If the principal function of a power generation component of an industrial facility or direct air capture facility is to provide power for that facility, the definition provided in § 1.45Q–2(e) of the proposed regulations prevents the characterization of such an industrial facility or direct air capture facility as an electricity generating facility. The final regulations do not revise the MACRS asset categories listed in the proposed regulations. The categories listed in the proposed regulations were generally supported by commenters, and the proposed regulations clearly indicated that only facilities subject to the listed MACRS asset classes are treated as electricity generating facilities for purposes of section 45Q.

4. Minimum Threshold Requirements—Direct Air Capture Facilities

A commenter supported the annualization of the first-year capture amounts described in § 1.45Q–2(g)(3) of the proposed regulations, but noted that this provision could be interpreted to be limited to only facilities that have ''emissions'' and possibly be inapplicable to direct air capture facilities. The commenter suggested that the language of the proposed regulations attempts to try to take into account not only the minimum capture amounts in § 1.45Q–2(g)(1)(ii) and (iii) of the proposed regulations, but also the maximum emission amounts in § 1.45Q–2(g)(1)(i) of the proposed regulations. Therefore, the commenter suggested that the provision should be clarified to apply to all facilities, including direct air capture facilities. The final regulations adopt this commenter's suggestion.

A commenter recommended that the final regulations confirm that for purposes of meeting the section 45Q(d)(2) threshold levels for a qualified facility, all carbon oxide captured at an industrial facility or direct capture facility will be considered together, even if the carbon oxide will be subject to different levels of credits. The commenter explained that if some of the captured carbon oxide will be used for EOR and the remaining captured carbon oxide will immediately be disposed of in secure geological storage, then the total amount of captured carbon oxide should be aggregated for purposes of determining whether the facility meets the definition of a qualified facility.

The statute makes clear that the section 45Q(d)(2) threshold levels for a qualified facility look only to the amount of qualified carbon oxide captured. Taxpayers are permitted to consider all carbon oxide captured at an industrial facility or direct air capture facility together, even if the carbon oxide will be subject to different levels of credits. For example, if a taxpayer captures 100,000 metric tons of qualified carbon oxide and sends 50,000 metric tons to secure geological storage and 50,000 metric tons to enhanced oil recovery, the total 100,000 metric tons will qualify for the section 45Q credit at their respective credit values.

5. Aggregation

Many commenters requested that the final regulations allow taxpayers to aggregate carbon capture amounts from various facilities to meet the minimum capture requirements of section 45Q(d). The commenters generally recommended applying a test similar to the ''single project'' determination applicable for purposes of the beginning of construction requirements in Notice 2020–12. Section 8.01 of Notice 2020–12 allows for multiple facilities or units of carbon capture equipment that are operated as a single project to be treated as a single qualified facility or unit of carbon capture equipment for purposes of determining when construction began. Factors indicating that multiple qualified facilities or units of carbon capture equipment are operated as part of a single project include, but are not limited to: (1) The units of carbon capture equipment are owned by the same legal entity; (2) the units of carbon capture equipment are commonly managed or operated; (3) the units of carbon capture equipment are operated under similar operations and maintenance protocols established by the owner of the equipment, considering differences attributable in resource utilization and expected use of captured carbon oxides; (4) the units of carbon capture equipment are constructed pursuant to a single plan for Front-End Engineering and Design (FEED) or other approaches for front-end planning (*e.g.,* the Front-End Loading (FEL) approach); (5) the carbon oxide captured with the carbon capture equipment is transported, disposed of, utilized, or used as a tertiary injectant pursuant to a shared contract; (6) the units of carbon capture equipment were constructed pursuant to a single construction management contract; and (7) if construction of any unit of carbon capture equipment was debt financed, construction of all units of carbon capture equipment is financed pursuant to a single loan agreement.

Some commenters agreed that factors indicating that sites are operated as a single project listed in Notice 2020–12 provide a helpful start for determining whether multiple landfills are operated under a single program. However, these commenters stated that not all of the beginning of construction factors are readily applied to multiple municipal solid waste landfill sites and should be modified for this purpose.

Commenters suggested an alternative aggregation standard, which authorizes aggregation of all facilities that include carbon capture equipment owned by the same taxpayer treating members of an affiliated group, within the meaning of section 1504, as a single taxpayer for this purpose.

The final regulations allow taxpayers to apply the single project rule in section 8.01 of Notice 2020–12 for purposes of meeting the minimum capture requirements of section 45Q(d). Applying the single project rule in Notice 2020–12 promotes uniformity of application for both the beginning of construction requirement and the minimum capture requirements of section 45Q(d). Also, section 8.01 of Notice 2020–12 states that whether multiple qualified facilities or units of carbon capture equipment are operated as part of a single project will depend on the relevant facts and circumstances. Each of the 8 factors listed in section 8.01 may or may not be relevant in a particular case and, therefore, do not need to be excluded in the final regulations.

D. Industrial Facility

Section 45Q does not define the term ''industrial facility.'' The proposed regulations adopted the definition of industrial facility in section 3.03 of Notice 2020–12, which provides that an ''industrial facility'' is a facility that produces a carbon oxide stream from a fuel combustion source, a manufacturing process, or a fugitive carbon oxide-emission source that, absent capture and disposal, injection, or utilization, would otherwise be released into the atmosphere. Under the proposed regulations, an industrial facility did not include a facility that produces carbon dioxide from carbon dioxide production wells at natural carbon dioxide-bearing formations or a naturally occurring subsurface spring. The proposed regulations provided that a deposit of natural gas that contains less than 10 percent carbon dioxide by volume is not a natural carbon dioxide-bearing formation (10 percent safe harbor). For other deposits, whether a well is producing from a natural carbon dioxide-bearing formation is based on all the facts and circumstances.

1. Exclusion

Commenters sought clarification and revisions to the 10 percent safe harbor for naturally occurring carbon oxides, seeking a higher threshold or a bright-line rule. For example, commenters sought a rule providing that when a facility captures a carbon dioxide stream from a manufacturing process where carbon dioxide is not the exclusive commercial product, it is per se an industrial facility, without regard to whether the carbon dioxide was produced from a deposit of natural gas that contained greater than 10 percent carbon dioxide by volume. A commenter suggested revising the examples in § 1.45Q–2(d)(4) of the proposed regulations to incorporate definitions and applications of industrial facility, natural carbon oxide-bearing formations, and the 10 percent safe harbor. Commenters recommended that producing carbon dioxide from a carbon dioxide-bearing formation should be considered a manufacturing process so long as the facility also manufactures products other than carbon dioxide that are intended to be sold at a profit or for commercial use.

The Treasury Department and the IRS agree with the majority of commenters who noted that a bright line rule that excludes carbon dioxide production wells at natural carbon dioxide-bearing formations, or at naturally occurring subsurface springs, with greater than 90 percent carbon dioxide by volume would conform with the recognized and administrable definition of natural carbon dioxide-bearing formations or a naturally occurring subsurface spring. Thus, the final regulations replace the facts and circumstances standard and the 10 percent safe harbor in the proposed regulations and adopt a greater than 90 percent test.

The final regulations also provide an exception for wells at natural carbon dioxide-bearing formations or naturally occurring subsurface springs that contain a product other than carbon dioxide. This exception provides that a well meeting the 90 percent test will not be treated as a carbon dioxide production well at a natural carbon dioxide-bearing formation or a naturally occurring subsurface spring if: (a) The gas stream contains a product, other than carbon oxide, that is commercially viable to extract and sell, without taking into account the availability of a commercial market for the carbon oxide that is extracted or any section 45Q tax credit that might be available; (b) the taxpayer provides an attestation from an independent registered engineer with experience in feasibility studies for natural gas extraction that the gas stream contains a product, other than carbon oxide, that is commercially viable to extract and sell, without taking into account the availability of a commercial market for the carbon oxide that is extracted; (c) a direct air capture facility (defined in section 45Q(e)(1)(A)) is not used to capture carbon oxide from the gas stream; and (d) any carbon oxide extracted from the deposit is used as tertiary injectant in an enhanced oil or natural gas recovery project or as feedstock of a utilization project (*i.e.,* the cycling of the gas from the deposit

to a processing facility and then back to the deposit will not be considered the capture and storage of carbon oxide for purposes of the section 45Q credit).

2. Electricity Generating Facility

Commenters recommended adding more details to the definition of industrial facility. For example, the commenters suggested expressly including ''electricity generating facility'' in the definition. Under section 45Q(d), an electricity generating facility is treated as an industrial facility. As a result, the final regulations adopt this commenter's recommendation and revise the definition of industrial facility at § 1.45Q–2(d) to include electricity generating facilities. However, to be a qualified facility, an electricity generating facility must capture at least 500,000 metric tons of qualified carbon oxide during the taxable year.

3. Manufacturing Process

A commenter noted that the definition of ''manufacturing process'' in § 1.45Q–2(d)(3) of the proposed regulations is not appropriately applied in the example at § 1.45Q–2(d)(4) of the proposed regulations. The commenter requested that the example be modified to recognize that, to the extent carbon oxide was captured from a process that manufactured methane that fueled and powered processing equipment, the carbon oxide should be considered qualified carbon oxide because the manufactured methane was used for a commercial purpose.

The final regulations clarify the example but do not adopt the commenter's request to treat the carbon oxide as qualified carbon oxide. In the example, because carbon oxide is the only product manufactured that is intended to be sold at a profit or used for a commercial purpose, the process described in the example is not a manufacturing process, and the carbon dioxide captured by the process is not qualified carbon oxide.

4. General Comments

A commenter recommended revising the definition of an ''industrial facility'' under § 1.45Q–2(d) of the proposed regulations as follows: ''An industrial facility is a facility that produces a carbon oxide stream from a fuel combustion source (whether or not the combustion generates mechanical or electrical power) or fuel cell, a manufacturing process, or a fugitive carbon oxide emission source that, absent capture and disposal, would otherwise be released into the atmosphere as industrial emission of greenhouse gas or lead to such release.'' One commenter recommended clarifying what is meant by ''a fugitive carbon oxide emission source'' by applying the definition from the EPA's Clean Air Act regulations, 40 CFR 57.103(m), which defines fugitive emissions as ''any air pollutants emitted to the atmosphere other than from a stack.''

The final regulations do not amend the definition of ''fugitive carbon oxide emission source.'' The definition is accurate in the proposed regulations. However, pursuant to several requests for examples to illustrate the application of the rule for manufacturing processes, the final regulations clarify the example at § 1.45Q–2(d)(4), and add an additional example to illustrate the concept of what qualifies as a manufacturing process.

5. Industry-Specific Comments

Commenters recommended that the final regulations modify the definition of industrial facility to include facilities that produce a carbon dioxide stream from a biogas flare, biogas-to-electricity facility, flare stack gas, LFG-to-electricity, and biogas processing facility. One commenter requested clarification regarding whether a flare facility will satisfy the definition of an industrial facility as a ''facility that produces a carbon oxide stream from a fuel combustion source.''

Another commenter requested clarification regarding whether a facility that combusts biogas to generate electricity (LFGTE Facility) would satisfy the definition of an industrial facility as ''a facility that produces a carbon oxide stream from a fuel combustion source.''

A commenter requested clarification on whether a LFG processing facility would satisfy the definition of an industrial facility as ''a facility that produces a carbon oxide stream from . . . a manufacturing process'' to the extent that they manufacture a biomethane product that is sold on the market or is used for fueling collection vehicles that otherwise would run on conventional natural gas.

One commenter sought confirmation that a biogas flare facility meets the definition of an industrial facility as ''a facility that produces a carbon oxide stream from a fuel combustion source'' despite not resulting in generation of electricity or mechanical work. Alternatively, the commenter requested clarification that an LFTGE Facility meets the definition of an industrial facility because it produces a carbon dioxide stream from a fuel combustion source. The commenter further requested clarification that a biogas facility meets the definition of an industrial facility because it produces a carbon dioxide stream from a manufacturing process. The commenter also requested that the final regulations provide an additional example that demonstrates how biogas facilities meet the definition of an industrial facility.

One commenter requested that the regulations be revised to state that a flare at a facility that utilizes methane from municipal solid waste (MSW) as a fuel to combust regulated non-methane organic compounds (NMOCs contained in biogas qualifies as an industrial facility as ''a producer of a carbon oxide stream from a fuel combustion source.'' The commenter suggested that § 1.45Q–2(d) of the proposed regulations be revised to clarify that a facility producing a carbon oxide stream from a fuel combustion source does not need to generate electrical or mechanic power for productive use to qualify as an industrial facility.

The determination of whether any particular facility qualifies as an industrial facility will depend on the facts and circumstances. A rule that explicitly characterizes certain facilities as industrial facilities would risk being imprecise or giving rise to the perception that those facilities not listed will not qualify, making a facts and circumstances approach preferable. Thus, the final regulations do not adopt these comments.

E. Direct Air Capture Facility

Section 45Q(e)(1) provides that the term ''direct air capture facility'' means any facility which uses carbon capture equipment to capture carbon dioxide directly from the ambient air, except the term does not include any facility which captures carbon dioxide that is deliberately released from naturally occurring subsurface springs or using natural photosynthesis.

The proposed regulations reiterated the statutory provision. In response to the proposed regulations, one commenter requested clarification of the definition of direct air capture facilities, which inherently may capture nominal amounts of carbon dioxide using natural photosynthesis. The commenter discussed that carbon dioxide present in the air not only consists of carbon dioxide vented from industrial sources but also contains small amounts of carbon dioxide that was produced by plant life through natural photosynthesis. The commenter suggested that if the definition of direct air capture facility were strictly interpreted to not allow for capture of even nominal amounts of carbon

dioxide produced through natural photosynthesis, then no direct air capture facility could qualify for the definition.

The final regulations do not adopt this comment. Section 45Q(c)(1)(C) provides that direct air capture facilities capture carbon dioxide from directly from ambient air. By its nature, ambient air includes carbon dioxide and other qualified carbon oxides from all sources, whether from naturally-occurring subsurface springs, animal respiration, or the very trace amounts produced as part of natural photosynthesis when a plant utilizes carbon dioxide to produce oxygen. Therefore, the plain meaning of the term ambient air encompasses these concepts.

F. Secure Geological Storage

Section 45Q(f)(2) provides that the Secretary, in consultation with the Administrator of the EPA, the Secretary of Energy, and the Secretary of the Interior, must establish regulations for determining adequate security measures for the geological storage of qualified carbon oxide under section 45Q(a) such that the qualified carbon oxide does not escape into the atmosphere. Such term includes, but is not limited to, storage at deep saline formations, oil and gas reservoirs, and unminable coal seams under such conditions as the Secretary may determine under such regulations.

Injection of carbon oxide into any underground reservoir, onshore or offshore under submerged lands within the territorial jurisdiction of States, requires the operator to comply with Underground Injection Control (UIC) program regulations under the Safe Drinking Water Act and to obtain the appropriate UIC well permits. Under 40 CFR 146.5 (Classification of injection wells), Class II may be an appropriate UIC well permit for wells that inject fluids (including carbon dioxide) brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants that are an integral part of production operations, unless those fluids are classified as a hazardous waste at the time of injection, and for wells which inject fluids (including carbon oxides) for enhanced recovery of oil or natural gas. Class VI is an appropriate UIC well permit for wells that are not experimental in nature that are used for geologic sequestration of carbon dioxide beneath the lowermost formation containing an underground source of drinking water; or, for wells used for geologic sequestration of carbon dioxide that have been granted a waiver of the injection depth requirements pursuant to requirements at 40 CFR 146.95; or for wells used for geologic sequestration of carbon dioxide that have received an expansion to the areal extent of an existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption pursuant to §§ 146.4 and 144.7(d) of 40 CFR.

Operators that inject carbon dioxide underground are also subject to the EPA's Greenhouse Gas Reporting Program (GHGRP) requirements set forth at 40 CFR part 98. Under 40 CFR part 98 subpart RR (Geologic Sequestration of Carbon Dioxide source category, referred to as subpart RR), certain facilities, including UIC Class VI wells, are required to report basic information on carbon dioxide received for injection, develop and implement an EPA-approved site-specific Monitoring, Reporting, and Verification Plan (MRV Plan), and report the amount of carbon dioxide geologically sequestered using a mass balance approach and annual monitoring activities. Under 40 CFR part 98 subpart UU (Injection of Carbon Dioxide source category, referred to as subpart UU), all other facilities that inject carbon dioxide underground such as for EOR or any other purpose, are required to report basic information on carbon dioxide received for injection. Facilities that conduct EOR are not required by 40 CFR part 98 to report under subpart RR unless (1) the owner or operator chooses to opt into subpart RR or, (2) the facility holds a UIC Class VI permit for the well used for EOR. Annual reports that are submitted under 40 CFR part 98 to the EPA's GHGRP undergo verification by the EPA, and non-confidential data from these reports are published on the EPA's website.

The proposed regulations allowed CSA/ANSI ISO 27916:2019 as an alternative to subpart RR for UIC Class II wells using qualified carbon oxide for EOR, but did not allow standards set by states as an alternative to subpart RR. In addition, the proposed regulations did not provide for an alternative to subpart RR reporting for UIC Class VI wells because all UIC Class VI wells are already subject to subpart RR reporting requirements. A taxpayer that reported volumes of carbon oxide to the EPA pursuant to subpart RR may self-certify the volume of carbon oxide claimed for purposes of section 45Q. Alternatively, if a taxpayer determined volumes pursuant to CSA/ANSI ISO 27916:2019, the taxpayer may prepare documentation as outlined in CSA/ANSI ISO 27916:2019 internally, but such documentation must be provided to a qualified independent engineer or geologist, who then must certify that the documentation provided, including the mass balance calculations as well as information regarding monitoring and containment assurance, is accurate and complete.

1. General Comment

One commenter noted that the proposed regulations use different terms to describe the location where secure geological sequestration occurs, and suggested using a single term ''secure geological storage site'' throughout the final regulations. The final regulations adopt this comment and incorporate the suggestion throughout.

2. Requirements for Qualified Independent Engineers or Geologists

In response to the proposed regulations, commenters discussed the ''qualified independent engineer or geologist'' requirement applicable to the ISO standard for UIC Class II wells using qualified carbon oxide for EOR. Commenters recommended including a company's professional engineer in good standing to be qualified to make the required certification, despite being employed by the taxpayer.

Commenters suggested that the qualified independent engineer or geologist should be able to be either an individual or a team. Commenters recommended that the leader of the team be a licensed petroleum engineer or professional geologist, and that the individual or team be employed independently of the taxpayer. A commenter recommended that the party or teams performing the certification be accredited by a third-party accreditation body to reduce the potential impacts of employment by the taxpayer and still maintain independence.

Commenters requested that the final regulations adopt the established and internationally recognized American National Standards Institute (ANSI) National Accreditation Board ANAB accreditation program for third-party validation and verification bodies found at *https://anab.ansi.org/greenhouse-gas-validation-verification/.* The Commenters requested that this process be used as the accreditation process for certifying qualified, independent individuals or bodies to review all of the relevant documentation for verifying long-term storage of qualified carbon oxide injected into EOR projects under CSA/ANSI ISO 27916:2019.

Some commenters suggested options for a competent accreditation body for implementation of CSA/ANSI ISO 27916:2019 such as the American National Standards Institute (ANSI), which currently acts as the accreditation body for Greenhouse Gas Program reporting verifications, or other

international professional organizations such as the Society of Petroleum Engineers.

The final regulations do not adopt these recommendations. While the suggested accreditation bodies may be able to certify third-party reporting under similar standards, at this time no accreditation body exists that expressly certifies third-party reporting under CSA/ANSI ISO 27916:2019. Instead, the final regulations clarify that the qualified independent engineer or geologist certifying a project must be duly registered or certified in any State.

A commenter noted the difference in language between § 1.45Q–3 of the proposed regulations, regarding ''qualified independent engineer or geologist'' for secure geological storage, and § 1.45Q–4 of the proposed regulations, regarding ''independent third-party'' for utilization, asking whether the geologist would need to be a third party as well or provide affidavits regarding the independence of the geologist or team.

In response to this comment, the final regulations provide that the certification required must be accompanied by an affidavit from the qualified independent engineer or geologist stating under penalties of perjury that the qualified independent engineer or geologist is independent from the taxpayer, electing taxpayer, and/or credit claimants as applicable.

A commenter recommended that for taxpayers using the ISO standard, the final regulations should require annual certification of volumes by a party accredited by a nationally or internationally recognized CSA/ANSI ISO 27916:2019 accreditation body.

In contrast to the recommendation that a company may use its own professional engineer in good standing to make the required certification, another commenter recommended clarifying ''independent'' to mean a person who is not an employee of the taxpayer.

Commenters suggested that the standard of independence for a qualified engineer or geologist should be the same standard of independence for the ''independent third-party'' described in § 1.45Q–4(c)(2) of the proposed regulations. Section 1.45Q–4(c)(2) of the proposed regulations provided that the measurement and written LCA report must be performed by or verified by an independent third-party. The report must contain documentation consistent with the International Organization for Standardization (ISO) 14044:2006, ''Environmental management—Life cycle assessment—Requirements and Guidelines,'' as well as a statement documenting the qualifications of the third-party, including proof of appropriate U.S. or foreign professional license, and an affidavit from the third-party stating that it is independent from the taxpayer. Therefore, the commenters recommended that the certification requirements under § 1.45Q–3(d) of the proposed regulations should be amended to include an affidavit from the qualified engineer or geologist stating that he or she is independent from the taxpayer, the electing taxpayer, and the credit claimant.

Commenters recommended that the qualified independent engineer or geologist make his or her certification under penalties of perjury. The commenters noted that this standard of certification is required for petroleum engineers who certify enhanced oil recovery projects under section 43. Another commenter recommended that the final regulations take into account the EOR-related provisions under § 1.43–3 and limit § 1.45Q–2(h)(4) of the proposed regulations to only natural gas projects, and expressly state that certifications for enhanced oil projects under section 43 must be made annually even if no section 43 credit is being claimed.

Commenters requested that the final regulations define ''qualified engineer/qualified geologist'' as a person, or team led by such a person, with relevant expertise in areas such as enhanced oil or natural gas recovery projects, secure geologic storage of carbon dioxide, and the requirements of CSA/ANSI 27916:2019, and who is licensed as a Professional Engineer or Professional Geologist.

The final regulations take the commenters' recommendations into account by refining the definition of qualified independent engineer or geologist. The revised definition incorporates the same standard of independence used for an ''independent third party'' that was described in § 1.45Q–4(c)(2) of the proposed regulations. Further, the final regulations apply the rules imposed on engineers who provide certifications for the section 43 enhanced oil recovery credit regarding qualifications to the ''qualified independent engineer or geologist'' who provides a certification for the ISO standard.

3. ISO Standard

A commenter noted that the proposed regulations only applied the ISO standard to EOR projects and did not apply the ISO standard to enhanced natural gas recovery projects. The commenter proposed that the final regulations require UIC Class II permit holders to receive an approved MRV plan under subpart RR for enhanced natural gas recovery projects. The commenter requested that the final regulations maintain EPA's GHGRP subpart RR requirements as minimum reporting requirements to demonstrate ''secure storage'' under section 45Q, arguing that allowing claimants to use CSA/ANSI ISO 27916:2019, instead of subpart RR, lowers the bar for demonstrating secure geological storage, weakens the existing transparency of the program, and removes EPA from its role in approving MRV plans. The commenter requested that the regulation be revised to require a taxpayer to receive an approved MRV plan before any section 45Q credit can be claimed. The principles of CSA/ANSI ISO 27916:2019 apply to both EOR projects and enhanced natural gas recovery projects. Accordingly, the final regulations do not adopt this comment.

Another commenter requested that the final regulations prohibit section 45Q credit claims until a new class of UIC well and/or other regulations are developed, specifically for CO_2-EOR. The commenter stated that existing regulations for CO_2-EOR are not designed to ensure secure geological storage of qualified carbon oxides, and allowing a tax credit for this activity is inappropriate.

A commenter suggested that for taxpayers awaiting approval of an MRV plan, during the interim period beginning when carbon capture operations commence and ending when an MRV plan is finalized, the final regulations should allow taxpayers to claim section 45Q tax credits. However, another commenter disagreed with the suggestion for interim allowance of the credit, suggesting that only taxpayers with approved MRV plans should be allowed to claim the credit. The final regulations do not adopt an interim allowance of the credit. Allowing taxpayers that use subpart RR to claim the section 45Q credit before they receive an EPA-approved MRV plan would conflict with the long-standing position of the Treasury Department and the IRS that this condition must be met for purposes of determining adequate security measures for the geological storage of qualified carbon oxide such that the qualified carbon oxide does not escape into the atmosphere.

A commenter disapproved of the allowance of the ISO standard, preferring subpart RR and MRV plans to be the sole standard for disposal and injection of qualified carbon oxide. The Treasury Department and the IRS, in consultation with the EPA, DOE, and the Department of Interior, agree that

the ISO standard is an alternative standard for a qualified enhanced oil or natural gas recovery project. Both subpart RR and CSA/ANSI ISO 27916:2019 require an assessment and monitoring of potential leakage pathways, quantification of inputs, losses and storage through a mass balance approach, and documentation of steps and approaches. Therefore, the final regulations retain the ability for taxpayers to use the CSA/ANSI ISO 27916:2019 standard to establish that qualified carbon oxides are being securely stored.

Another commenter requested that the final regulations provide additional detail regarding what documentation is required to establish the volumes of qualified carbon oxide that were captured and disposed of, injected, or utilized, and what taxpayer(s) would need to file such documentation.

a. Certifications

A commenter recommended that the final regulations require annual qualified, independent, third-party verification of conformance with the ISO standard for taxpayers electing to use it to bolster reporting standards. Another commenter requested that in addition to the currently proposed mass balance calculations and information regarding monitoring and containment assurance (as required by the ISO standard) to be reported on an annual basis, § 1.45Q–3(d) of the proposed regulations should be revised to explicitly require three key types of documentation that cover the lifecycle of a qualified carbon oxide EOR project. The three types of documentation include: (1) Initial documentation (as required by CSA/ANSI ISO 27916:2019 § 4.3) required prior to period of quantification; (2) Periodic documentation (as required by CSA/ANSI ISO 27916:2019 § 4.4) required at least annually throughout the lifespan of the project; and (3) Termination documentation (as required by CSA/ANSI ISO 27916:2019 § 10.4).

Several commenters requested that § 1.45Q–3(d) be revised to allow that a certification by a qualified independent engineer or geologist would be a one-time event based upon the project's physical or contractual manner of use of qualified carbon oxide as a tertiary injectant in a EOR or natural gas recovery project.

One commenter noted that annual confirmation by a credit claimant on Form 8933 that the project is being executed pursuant to the certified CSA/ANSI ISO 27916:2019 standard (subject to IRS audit, recapture and potential penalty) should be sufficient for subsequent years.

The final regulations do not adopt these comments. Taxpayers must provide all documentation required by CSA/ANSI ISO 27916:2019 to the verifying party, and the documentation recommended by the commenters is already required by that standard. Adding a separate documentation requirement for taxpayers to provide all documentation required by CSA/ANSI ISO 27916:2019 to the verifying party and to submit that documentation to the IRS would be redundant and an unwarranted burden on taxpayers.

b. Transparency

A commenter supported the concept that the initial ISO plan and annual reports be made available to the public, similar to MRV Plans and associated subpart RR annual reports.

Several commenters requested that the EPA promulgate a new subpart to the GHGRP regulations to establish procedures for documenting and reporting the amount of carbon oxide securely stored using the ISO standard for EOR projects. Proponents of these rules request that the final regulations include an interim approach to provide public access to the relevant information needed to maintain public confidence in the integrity of the section 45Q tax credit.

The Treasury Department and the IRS do not have the authority to disclose taxpayer information or to require taxpayers to self-disclose taxpayer information as a condition of using the ISO standard provided in the final regulations. Therefore, the final regulations do not adopt the recommendations of the commenters requesting such disclosure. However, the inflation adjustment factor notices published by the IRS annually will continue to provide the total metric tons of credits that have been taken into account claimed, without publishing taxpayer information.

G. Tertiary Injectant

Section 45Q(e)(3) defines tertiary injectant as follows: ''The term 'tertiary injectant' has the same meaning as when used within section 193(b)(1).'' Section 1.45Q–2(h)(6) of the proposed regulations defines tertiary injectant as follows:

> For purposes of section 45Q, a tertiary injectant is qualified carbon oxide that is injected into and stored in a qualified enhanced oil or natural gas recovery project and contributes to the extraction of crude oil or natural gas. The term tertiary injectant has the same meaning as used within section 193(b)(1) of the Code. A commenter requested the definition of tertiary injectant in § 1.45Q–2(h)(6) of the proposed regulations be revised because section 193(b)(1) does not define ''tertiary injectant,'' and § 1.193–1(b)(2), merely references other applicable energy regulations and tax regulations. The commenter suggested that the final regulations define ''tertiary injectant'' as any injectant that is used as part of a qualified enhanced oil or natural gas recovery project, and does not include a hydrocarbon injectant defined in section 193(b)(2) that is recoverable. Section 45Q(e)(3) provides that the term tertiary injectant has the same meaning as when used within section 193(b)(1). Therefore, the final regulations do not adopt the commenter's suggested revision.

IV. Utilization of Qualified Carbon Oxide

Section 45Q(f)(5)(A) provides that ''utilization of qualified carbon oxide'' means (i) the fixation of such qualified carbon oxide through photosynthesis or chemosynthesis, such as through the growing of algae or bacteria; (ii) the chemical conversion of such qualified carbon oxide to a material or chemical compound in which such qualified carbon oxide is securely stored; or (iii) the use of such qualified carbon oxide for any other purpose for which a commercial market exists (with the exception of use as a tertiary injectant in a qualified enhanced oil or natural gas recovery project), as determined by the Secretary.

Section 45Q(f)(5)(B) provides a methodology to determine the amount of qualified carbon oxide utilized by the taxpayer. Such amount is equal to the metric tons of qualified carbon oxide which the taxpayer demonstrates, based upon an analysis of lifecycle greenhouse gas emissions and subject to such requirements as the Secretary, in consultation with the Secretary of Energy and the Administrator of the EPA, determines appropriate, were (i) captured and permanently isolated from the atmosphere, or (ii) displaced from being emitted into the atmosphere, through use of a process described in section 45Q(f)(5)(A). The term ''lifecycle greenhouse gas emissions'' has the same meaning given such term under subparagraph (H) of section 211(o)(1) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)), as in effect on February 9, 2018, except that ''product'' is substituted for ''fuel'' each place it appears in such subparagraph.

The proposed regulations conformed the definition of utilization to the statutory definition. The proposed regulations also provided that an

analysis of lifecycle greenhouse gas emissions (LCA) must be in writing and either performed or verified by a professionally-licensed independent third party. In particular, the proposed regulations required the LCA report to contain documentation consistent with the International Organization for Standardization (ISO) 14044:2006, ''Environmental management—Life cycle assessment—Requirements and Guidelines,'' as well as a statement documenting the qualifications of the independent third party. The proposed regulations required a taxpayer to submit an LCA report to the IRS and the DOE, with the LCA report subject to a technical review by the DOE. Further, the proposed regulations provided that the IRS, in consultation with the DOE and the EPA, would determine whether to approve the LCA report.

A. Lifecycle Analysis—Amount Utilized

In response to the proposed regulations, commenters requested that the final regulations provide more detail regarding the use of LCAs and specifically address whether greenhouse gases other than qualified carbon oxides qualify for the section 45Q credit.

Some commenters requested clarification that the section 45Q credit is not available for a reduction of carbon dioxide equivalents but only for qualified carbon oxides. The commenters based this recommendation on the statutory language in section 45Q(a) and (f)(5) limiting the section 45Q credit to qualified carbon oxide. Some commenters further suggested that an LCA merely should be used to determine whether a product or process generally is eligible for section 45Q credits, while the amount of section 45Q credits generated by a given product or process should be correlated only to the volume of carbon oxides directly utilized from a qualified facility or displaced from being emitted to the atmosphere.

Other commenters suggested that the plain language of section 45Q(f)(5)(B) requires the section 45Q credit calculation to be based on all greenhouse gases reflected in the LCA because the measurement of qualified carbon oxides for purposes of utilization is based on carbon dioxide equivalents (CO_2-e), not carbon oxides. CO_2-e is a unit of measurement, providing a common scale for measuring the climate effects of different greenhouse gases. It includes carbon oxides, as well as methane, and other greenhouse gases. Some of these commenters stated that section 45Q(f)(5)(B)(ii) directs the IRS to look to the Clean Air Act for the definition of lifecycle greenhouse gas emissions, which requires an analysis of all greenhouse gases. According to these commenters, because an LCA performed in accordance with section 45Q(f)(5) must include the aggregate quantity of greenhouse gas emissions captured and permanently isolated from the atmosphere, or displaced from being emitted into the atmosphere, such greenhouse gases are treated as carbon oxides for purposes of measuring the amount of qualified carbon oxide upon which the section 45Q credit is calculated.

One commenter inquired whether the numerical values resulting from direct measurement (via metered flows of qualified carbon oxide at the point of capture and subsequent use) are properly viewed as a ''ceiling'' on allowed section 45Q benefits, subject to netting as a result of the lifecycle impacts on qualified carbon oxide emissions as documented in the LCA report.

Another commenter proposed that the section 45Q credit be based on the lesser of directly utilized emissions and the amount of carbon oxide determined to be displaced by an LCA. According to the commenter, this approach would set a cap on the number of credits that can be claimed by a product or process, equal to the volume of utilized carbon oxides that originated from mechanical carbon capture equipment at a qualified facility, and it is consistent with the section 45Q accounting method for the secure geologic storage of carbon dioxide.

A commenter recommended that the final regulations include examples of how an ''all-greenhouse-gas LCA'' works in connection with the ''only carbon oxides'' tax credit.

Although all greenhouse gas emissions are taken into account by an LCA, the section 45Q credit may only be calculated on the qualified carbon oxides that are captured and utilized. Section 45Q makes this clear in a number of instances. First, the general rule in section 45Q(a) provides a credit for metric tons of ''qualified carbon oxide'' captured and used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of by the taxpayer in secure geological storage, or utilized, not for other greenhouse gases. Second, the statutory definition of ''qualified carbon oxide'' in section 45Q(c) limits the applicability of section 45Q to ''any carbon dioxide or other carbon oxide.'' The definition does not include other greenhouse gases. Third, under section 45Q(f)(1), section 45Q applies to qualified carbon oxide captured and utilized within the United States, not to other greenhouse gases. Fourth, the title of section 45Q, ''Credit For Carbon Oxide Sequestration,'' does not suggest that section 45Q credits may be claimed for greenhouse gases other than carbon oxide. Fifth, if a greenhouse gas other than carbon oxide (such as methane) were to qualify for the section 45Q credit as a CO_2-e, the utilization of that other greenhouse gas would qualify for multiple times the credit as carbon oxide based on its CO_2-equivalence. This is an unreasonable result under the statute. Sixth, greenhouse gases other than carbon oxides do not contribute to the amount of qualified carbon oxide required to meet the emission and capture thresholds for a qualified facility under section 45Q(d)(2). Finally, under section 45Q(f)(5)(B), the amount of qualified carbon oxide utilized is equal to the metric tons of qualified carbon oxide which the taxpayer demonstrates, based upon an LCA, were captured and permanently isolated from the atmosphere, or displaced from being emitted into the atmosphere through use of a process described in section 45Q(f)(5)(A). Therefore, the calculation of the section 45Q credit must be based on qualified carbon oxide, not other greenhouse gases.

The final regulations provide that the amount of the section 45Q credit is not computed on all greenhouse gases, but is based only on qualified carbon oxide captured and utilized. For purposes of determining the amount of qualified carbon oxide utilized by the taxpayer under section 45Q(a)(2)(B)(ii) or (a)(4)(B)(ii), such amount shall be equal to the metric tons of qualified carbon oxide which the taxpayer demonstrates, based upon an LCA, were captured and permanently isolated from the atmosphere, or displaced from being emitted into the atmosphere through a use of a process described in section 45Q(f)(5)(A).

Section 45Q(f)(5)(B) provides that an LCA must be used for purposes of determining the amount of qualified carbon oxide utilized by the taxpayer. However, an LCA does not yield a result in metric tons of qualified carbon oxide that is utilized. An LCA provides the result in CO_2-e. The final regulations reconcile this by requiring the use of an LCA to measure CO_2-e, but limiting the section 45Q credit to the amount of qualified carbon oxide measured at the source of capture. This allows taxpayers to continue to use the current industry-standard LCA process, ensuring an overall decrease in greenhouse gases, while also preventing taxpayers from claiming the section 45Q credit for a reduction in greenhouse gases other than carbon oxides (measured in CO_2-e)

that exceeds the amount of carbon oxides that are captured.

The final regulations do not provide examples, but the Treasury Department and the IRS will consider issuing future guidance regarding common fact patterns.

A commenter requested that LCAs recognize biogenic carbon dioxide in any greenhouse gas as a neutral factor without any global warming potential. This issue exceeds the scope of these final regulations. Therefore, the final regulations do not adopt this comment.

A commenter requested that the final regulations add the phrase ''through use of a process described in paragraph (a) of this section'' to § 1.45Q–4(b)(1) of the proposed regulations, as the phrase modifies ''captured and permanently isolated from the atmosphere,'' and ''displaced from being emitted into the atmosphere.'' This is consistent with the statute. Therefore, the final regulations adopt the commenter's suggestion.

B. Lifecycle Analysis—Standards of Adequate Lifecycle Analysis

The proposed regulations did not provide standards of lifecycle analysis, and the Treasury Department and the IRS requested comments on this issue. Commenters supported adopting the ISO standards, in particular ISO 14044:2006 for preparing an LCA for purposes of section 45Q. One commenter stated that a detailed discussion of the process of determining the appropriate baseline and boundaries is set forth in the ISO LCA Standard. Commenters asserted that it would be very difficult to develop a one-size-fits-all solution to the selection of boundaries and baselines for all products, as these determinations depend on the particular product involved. One commenter posited that attempting to do so in the final regulations likely would undermine the ISO standard.

One commenter supported the use of the ISO 14044:2006 standard, but requested that the final regulations clarify that the results of the LCA for section 45Q purposes are unique compared to how the ISO standard might be used in other contexts.

Another commenter requested that the regulations clarify whether LCA reports are to be prepared in full conformity with the standards of ISO 14044:2006, or just consistent with the standard. The commenter supported full conformity with the standard as this should readily enable LCA review and comparison across LCAs.

The ISO standards provide consistency, especially in the LCA context. ISO 14040:2006, ''Environmental management—Life cycle assessment—Principles and framework,'' establishes the framework for LCAs, by describing the LCA and its phases in general terms, and ISO 14044:2006, ''Environmental management—Life cycle assessment—Requirements and guidelines,'' details the requirements for conducting an LCA.

It would be very difficult to develop a one-size-fits-all solution to the selection of boundaries and baselines for all products. Thus, the final regulations retain the requirement that the LCA must conform with ISO 14044:2006 and add a reference to ISO 14040:2006, ''Environmental management—Life cycle assessment—Principles and framework,'' as that standard discusses the overall framework for LCAs. The final regulations also clarify that LCAs must be prepared and documented in conformance with the ISO standards. The Treasury Department and the IRS note that the DOE's current CO_2 utilization guidelines are consistent with the ISO standards. Such guidance can be found on DOE's website under the National Energy Technology Laboratory's CO_2 Utilization Guidance Toolkit at *https://www.netl.doe.gov/LCA/CO2U.*

One commenter also recommended that the final regulations incorporate the use of ISO 14067:2018, ''Greenhouse gases—Carbon footprint of products—Requirements and guidelines for quantification,'' which addresses the proper boundaries for an LCA. The commenter further recommended that the IRS acknowledge that an LCA performed consistently with ISO 14044 and ISO 14067 satisfies the statutory requirement to assess greenhouse gas emissions from the full product lifecycle.

Another commenter recommended applying regulations implemented by the GHGRP (40 CFR part 98), because 40 CFR part 98 provides comprehensive and detailed rules and equations for measuring greenhouse gas emissions in the United States.

ISO 14067:2018 and the GHGRP do not provide overall guidance on LCAs. The reporting of greenhouse gases serves a different purpose than the LCA for purposes of section 45Q. Therefore, the final regulations do not cite to these standards.

C. Lifecycle Analysis—Boundaries

The Treasury Department and the IRS requested comments regarding how to achieve consistency in boundaries for similarly-situated taxpayers. One commenter requested that the IRS clarify the boundaries of the LCA and how other greenhouse gases should be taken into account in the lifecycle analysis of the utilization process. The commenter recommended that, with respect to non-carbon oxide greenhouse gases, the final regulations set the boundaries for the LCA at the beginning of the utilization process, and after the capture of the qualified carbon oxide. The commenter recommended that if the utilization of the qualified carbon oxide results in emissions of other greenhouse gases, then the emissions should be taken into account in the LCA as CO_2-e, but the capture of greenhouse gases other than carbon oxides should not be taken into account in the LCA.

Another commenter supported the rule in the proposed regulations that calculates lifecycle emissions based on the aggregate quantity of greenhouse gas emissions related to the full product lifecycle relative to a baseline for certain products and processes. According to the commenter, a holistic perspective is needed to account for key factors such as product longevity and durability relative to the status quo.

Another commenter recommended that the final regulations rely on the ISO standards to determine the full product lifecycle, specifically ISO Standards 14044 and 14067. According to the commenter, any requirements in addition to the ISO standards would create an undefined and potentially overbroad LCA requirement that Congress likely did not intend.

A commenter recommended that the final regulations set the LCA end boundary at the facility gate for all products other than fuels, because the carbon intensity for such products outside the boundary gates (in the product-use or product-disposal phase) will not vary between the process that uses captured carbon oxide and the process that sources its carbon oxide elsewhere. Commenters suggested that because respective use and end-of-life phases of the technologies being compared are the same, they could be excluded from the LCA. These commenters noted significant challenges associated with obtaining the information about the products' use and disposal and when the products may be sold to third parties for use and disposal.

During their lifecycle, products undergo different stages from feedstock extraction to production phases, and use phase, until the end-of-life (disposal, recycle). System boundaries set the limits of the product system and must be selected in line with the overall goal of the assessment. The final regulations define lifecycle greenhouse gas

emissions consistently with section 45Q(f)(5)(B)(ii). The definition uses the cradle-to-grave boundary, which considers the entire product life cycle, including all the phases from raw material extraction until end-of-life.

ISO 14040:2006 and ISO 14044:2006 identify the rules regarding the system boundary. Although the cradle-to-grave boundary is used for LCAs, ISO 14044:2006 permits the deletion of lifecycle stages under certain circumstances, when the deletion will not significantly change the overall conclusions of the study.

Because the final regulations require LCAs to be performed in conformity with ISO 14040:2006 and 14044:2006, the final regulations provide that generally an LCA must take into account emissions from cradle to grave, unless the deletion of lifecycle stages is permitted by ISO 14040:2006 and ISO 14044:2006. Any decisions to omit lifecycle stages must be clearly stated in the LCA report, and the reasons and implications for the omission must be explained in the LCA report.

D. Lifecycle Analysis—Comparison Systems

The Treasury Department and the IRS requested comments regarding how to achieve consistency in baselines for similarly-situated taxpayers. One commenter requested guidance regarding the baselines to be used for the LCA, and requested that the regulations clarify that it is not necessary for the LCA to identify as a baseline a process that was previously used by the taxpayer or the taxpayer's industry in which qualified carbon oxide was not used. According to the commenter, if the LCA were required to be prepared using a baseline that illustrates the difference from a changed process, then taxpayers that are engaged in a qualifying activity but cannot demonstrate that they previously made the product using non-qualified carbon oxide will not be able to provide an LCA that shows the greenhouse gas emission reductions from the process they are using. The commenter suggested that the LCA should compare the capture and utilization process to a baseline in which the taxpayer sourced carbon oxide from a fossil carbon source.

The final regulations provide that an LCA must demonstrate that the proposed process results in a net reduction of CO_2-e when compared to a comparison system. The LCA must be prepared in conformity with ISO 14040:2006 and ISO 14044:2006. In addition, Taxpayers must use the NETL's CO_2 Utilization Guidance Toolkit, including the guidance and data available on DOE's website at *https://www.netl.doe.gov/LCA/CO2U.* Further, for purposes of the section 45Q credit, taxpayers must continue to use the NETL's CO_2 Utilization Guidance Toolkit, including the guidance and data available on DOE's website at *https://www.netl.doe.gov/LCA/CO2U,* until such time as additional guidance is developed by the DOE or another federal agency.

E. Lifecycle Analysis—Verification

The proposed regulations stated that the taxpayer measures the amount of carbon oxide captured and utilized through a combination of direct measurement and LCA. Commenters requested clarification of the reference to ''a combination of direct measurement and LCA.'' One commenter stated that the language in the proposed regulations implies that direct measurement and LCA are mutually exclusive, which is inconsistent with ISO 14044. The commenter requested clarification regarding whether measurement of the amount of carbon oxide captured and utilized should be through direct measurement, use of a mass balance model, or a combination. In addition, the commenter requested clarification regarding whether an LCA based on calculated and estimated data would receive the same level of scrutiny. The commenter viewed measured data as the highest standard, providing both transparency and an incentive for incremental improvements that displace additional carbon oxides, for purposes of life cycle analysis.

Another commenter requested clarification that the third party preparing or verifying the LCA does not need to take direct measurements on site. The direct measurement of captured and utilized qualified carbon oxide typically will be provided by metering devices installed at the point of capture and/or use.

A commenter requested that the final regulations be modified to focus on verification at the point of utilization, not measurement of carbon oxide at the source of capture.

To increase clarity, the final regulations change the subheading of § 1.45Q–4(c)(2) of the proposed regulations to focus on verifying the amount of qualified carbon oxide utilized through the LCA. Under the final regulations, the LCA measures CO_2-e and verifies that qualified carbon oxide is utilized by demonstrating that the proposed process results in a net reduction of CO_2-e when compared to a comparison system. Thus, if an LCA indicates that the proposed process reduces CO_2-e emissions by the amount of qualified carbon oxide captured or more, then the LCA has verified that the full greenhouse gas benefit is achieved. The amount of qualified carbon oxide is the lesser of the amount of CO_2-e emission reduction verified by the LCA, or the amount of qualified carbon oxide measured at the source of capture. If the LCA indicates that the CO_2-e emission reduction is less than the amount of qualified carbon oxide captured, then only a portion of the greenhouse gas reduction benefit has been achieved, and the amount of qualified carbon oxide is the amount of CO_2-e emission reduction that is verified by the LCA.

In addition, the final regulations clarify that the LCA may consist of direct and indirect data in conformity with ISO 14040:2006 and 14044:2006. The results of the LCA must be documented in a written LCA report. Regardless of the type of data used, each LCA will be subject to a technical review by the DOE.

Under the final regulations, measurement of qualified carbon oxide at the point of capture is required. The qualified carbon oxide eligible for the section 45Q credit cannot exceed the amount of qualified carbon oxide that is captured.

F. Lifecycle Analysis—Independent Third-Party Review

Section 1.45Q–4(c)(2) of the proposed regulations required a written LCA report to be performed by or verified by an independent third party. In addition, the proposed regulations required the LCA report to include a statement documenting the qualifications of the third party, including proof of appropriate U.S. or foreign professional license, and an affidavit from the third party stating that it is independent from the taxpayer.

Commenters stated that the independent third-party verification requirement seemed reasonable. One commenter suggested substituting a ''critical review'' of LCAs, as provided by the ISO standards, for the otherwise ''undefined 'verification' currently invoked'' by the proposed regulations' requirement that a written LCA report must be performed by or verified by an independent third party.

One commenter encouraged permitting voluntary third-party verification of an LCA to avoid regulatory burdens, and suggested that the final regulations provide a safe-harbor for taxpayers who have their LCAs approved by an accredited third-party verification entity.

The final regulations require the LCA and the LCA report to be performed by

or verified by an independent third party. This requirement is intended to increase consistency in the LCAs and to streamline the DOE's technical review of LCAs. The final regulations do not provide a safe-harbor from review of the LCA.

The final regulations also require an LCA report to provide a statement documenting the qualifications of the third party, including proof of appropriate U.S. or foreign professional license, an affidavit from the third party stating that it is independent from the taxpayer (if a section 45Q(f)(3)(B) election has been made, the affidavit must state that the third party is independent from both the electing taxpayer and the credit claimant), and the statement must be made under penalties of perjury. The final regulations do not use the term ''critical review,'' as a ''critical review'' under ISO does not necessarily require an independent third party.

One commenter noted that the proposed regulations did not describe what constitutes an ''appropriate professional license'' regarding the qualifications of a third party and requested that the final regulations provide additional guidance. The commenter also recommended coordinating the reference to an ''independent third-party'' with § 1.45Q–5(c) of the proposed regulations.

Another commenter stated that the verification of the independent third party should be consistent with the certification of the independent engineer or geologist who certifies documentation prepared as outlined in the CSA/ANSI ISO 27916:2019 standard. At a minimum, the commenter stated the independent third party should provide the verification under penalties of perjury. The final regulations adopt this commenter's recommendation by providing that the independent third-party statement must be made under penalties of perjury.

One commenter suggested that the IRS take advantage of existing accreditation programs, such as that used by California or the voluntary program established under the Clean Air Act renewable fuels program.

The final regulations simply require the independent third party to provide proof of an appropriate U.S. or foreign professional license. This requirement provides flexibility to the taxpayer and recognizes that there are no nationally-recognized accreditation programs for this field.

Another commenter requested clarification regarding how often the third-party preparation or verification of the measurement and LCA must occur. The commenter suggested that the LCA should not need to be repeated unless the production process is changed in a manner that results in a significant increase in the total greenhouse gas emissions during production of the product. The IRS will publish separate procedural guidance that provides how often the third-party preparation or verification must occur.

G. LCA Report Submission and Review

The proposed regulations provided that a taxpayer must submit an LCA report to the IRS and the DOE, and that the LCA report would be subject to a technical review by the DOE. The proposed regulations further provided that the IRS, in consultation with the DOE and the EPA, would determine whether to approve the LCA report.

Commenters requested that the LCA review process be described in more detail. Commenters also suggested that the final regulations provide a defined review period for reviewing an LCA. One commenter recommended a 60-day review period for the IRS, DOE, and EPA to review a taxpayer's LCA.

Commenters suggested that the requirement to submit an LCA for review by the IRS, DOE, and EPA prior to a taxpayer claiming section 45Q credits is overly burdensome, contrary to statutory intent, and likely to result in significant approval delays, dampening commercial interest in utilization projects.

Commenters stated that the IRS should not condition a taxpayer claiming the section 45Q credit on pre-approval of the LCA. One commenter proposed that taxpayers be given the option of seeking advance approval of their LCAs prior to claiming section 45Q credits, or be allowed to claim section 45Q credits while accepting the risk that the credits may be deemed invalid depending on the outcome of the technical review process. Another commenter requested audit protection if pre-approval of LCAs is required.

Another commenter requested a formal interim process, in lieu of requiring pre-approval of LCAs, allowing taxpayers to work with the IRS, the DOE, and the EPA on specific utilization project details and credit claims. The goal of this process would be to provide insight into potential viability of taxpayer's utilization projects.

The final regulations provide that the taxpayer must submit the LCA report and third-party statement to the IRS and the DOE pursuant to the instructions to Form 8933 or other guidance issued by the IRS. The taxpayer must also submit the model if an independent third-party review is not conducted. The final regulations also provide that each LCA report will be subject to a technical review by the DOE. After the completion of the technical review, the IRS will determine whether to approve the LCA and will send a notification to the taxpayer. The taxpayer must receive approval of its LCA prior to claiming the prior to claiming the section 45Q credits for such taxable year on any Federal income tax return. Pre-approval of the LCA is necessary to ensure taxpayers' compliance with the statute. In addition to receiving approval of its LCA, the final regulations require the taxpayer to satisfy all other requirements of section 45Q and sections 1.45Q–1, 1.45Q–2, and 1.45Q–4 in order to be eligible to claim section 45Q credits.

One commenter requested that pre-approval of an LCA should not be required prior to submission prior to filing a claim for a section 45Q credit on an amended return. According to the commenter, if it were, the taxpayer's claim may be limited by the statute of limitations before such approval is received. The final regulations provide that pre-approval of an LCA is required in all circumstances. Priority in the LCA review process will be given to prior tax years to address this concern.

Taxpayers may rely on these regulations to submit an LCA. However, the IRS will issue separate procedural guidance that provides additional details regarding the LCA submission and review process, including the length of time necessary for an LCA review. In response to comments, the IRS has streamlined the LCA review and approval process in these final regulations. The final regulations provide that the DOE will conduct a technical review of each LCA, and the IRS will determine whether to approve the LCA and will send notification to the taxpayer. The Treasury Department and the IRS will consult with the DOE and the EPA on general fact patterns and any future guidance.

One commenter suggested that the final regulations allow taxpayers to claim the section 45Q credit while an LCA is under review and provide a safe harbor to avoid a section 6662 penalty. The final regulations do not provide relief from any applicable penalties.

Another commenter requested a safe harbor permitting taxpayers to rely on an LCA that has been accepted or created by the EPA. The final regulations do not provide a safe harbor for an LCA that has been accepted or created by the EPA. An LCA accepted or created by the EPA may have been accepted or performed for different

purposes, separate and distinct from section 45Q. An LCA must be reviewed independently for compliance with section 45Q and these final regulations.

Commenters requested that taxpayers should be required to make their LCA report, application, and IRS approval public. One commenter requested that the applicant should be required to make public a written LCA report that was approved by the IRS. According to the commenter, this transparency would increase integrity and credibility in the section 45Q credit program. The final regulations do not require taxpayers or the third-party verifier to make an LCA report public, as the LCA report may contain confidential business information. As the DOE and the IRS review LCAs, the Treasury Department and the IRS will consider issuing future guidance regarding common fact patterns.

H. Displacement of Qualified Carbon Oxide

Under section 45Q(f)(5)(B), for purposes of determining the amount of qualified carbon oxide utilized by the taxpayer, such amount shall be equal to the metric tons of qualified carbon oxide which the taxpayer demonstrates, based upon an analysis of lifecycle greenhouse gas emissions, were (I) captured and permanently isolated from the atmosphere through use of a process described in section 45Q(f)(5)(A), or (II) displaced from being emitted into the atmosphere through use of a process described in section 45Q(f)(5)(A).

One commenter recommended eliminating the distinction between displacement and isolation, or explaining its meaning and significance. Another commenter stated that displacement is a term of art used in environmental guidance, referring to indirect reductions in greenhouse gases that result from comparing a process for utilizing qualified carbon oxide against baseline emissions of the processes in the same commercial market. This commenter stated that a rule considering qualified carbon oxide as the lesser of the amount measured at capture or the amount verified ignores the amount of qualified carbon oxide displaced from being emitted into the atmosphere. An LCA, however, takes into account the amount of qualified carbon oxide displaced in addition to the qualified carbon oxide captured and permanently isolated from the atmosphere.

One commenter described displacement as other non-captured carbon dioxide that was displaced by utilization of the captured carbon dioxide.

Another commenter asserted that the section 45Q credit should be available to taxpayers that capture carbon dioxide from an industrial process and recycle the carbon dioxide by selling it to commercial end users such as dry ice manufacturers or other commercial market uses that displace non-captured carbon dioxide.

One commenter also proposed that the best measurement of qualified carbon oxide being displaced would be to measure the difference between a base case without utilization and the section 45Q case that includes carbon oxide utilization.

The final regulations provide that a taxpayer must demonstrate, based on an LCA, that a utilization process leads to a reduction in carbon dioxide equivalents. As section 45Q(f)(5)(B) provides, this reduction may be achieved by capturing and permanently isolating qualified carbon oxide from the atmosphere through use of a process described in section 45Q(f)(5)(A), or by displacing the qualified carbon oxide from being emitted into the atmosphere through use of a process described in section 45Q(f)(5)(A). Displacement is a process which assumes that an existing product in the market will be substituted with the product from the carbon oxide utilization process. The products must be comparable. NETL's most recent guidance, ''Carbon Dioxide Utilization Life Cycle Analysis Guidance for the U.S. DOE Office of Fossil Energy,'' can be found at *http://www.netl.doe.gov/projects/files/NETLCO2ULCAGuidanceDocument_092019.pdf.* The guidance defines displacement as, ''[a] co-product management method in which the system boundary is first expanded to include each co-product. The LCA model results are generated for all systems, the multi-functional unit is then reduced to one-product functional unit, by removing one unwanted product and related impacts at a time until only the desired product is left.''

I. Commercial Market

Section 45Q(f)(5)(A)(iii) provides that ''utilization of qualified carbon oxide'' means the use of such qualified carbon oxide for any other purpose for which a commercial market exists (with the exception of use as a tertiary injectant in a qualified enhanced oil or natural gas recovery project), as determined by the Secretary. The proposed regulations did not define ''any purpose for which a commercial market exists,'' and the Treasury Department and the IRS requested comments on this issue. Many commenters sought clarification regarding the meaning of use for ''any other purpose for which a commercial market exists.''

Several commenters also requested expansive rules regarding commercial markets. For example, some commenters suggested that the IRS should publish a list of qualifying commercial markets, or a list of markets that do not qualify as commercial markets. However, one commenter recommended that the final regulations should not provide an exhaustive list of eligible markets.

Another commenter recommended that the Treasury Department and the IRS acknowledge the existence of specific commercial markets for captured carbon oxide, or describe the manner in which the Treasury Department and the IRS expect to make the determination of the existence of commercial markets, perhaps by defining the meaning of the term ''commercial market'' in the final regulations.

Some commenters suggested that the final regulations provide a broad, plain-language definition of this term. For example, commenters suggested that a use resulting in a good or service that is available for purchase by the public or nongovernmental entities should be deemed to constitute use for a purpose for which a commercial market exists. Some commenters recommended that the IRS look to the DOE's constellation of carbon dioxide uses and recognize each of these as a valid commercial market.

One commenter suggested that the commercial market provision only applies to a product, not a service. This commenter requested that the final regulations state that a product must be the end result of any approved utilization process that uses the qualified carbon oxide.

Another commenter stated that the final regulations should avoid suggesting that qualified carbon oxide must be physically or chemically incorporated into the final product or can only be used in production of a good, as opposed to a service.

A commenter suggested that utilization of qualified carbon oxide for any other purpose for which a commercial market exists occurs when the captured gases are used in a practical and effective way to produce a product.

Another commenter suggested that commercial markets should qualify categorically and not be subject to examination.

A commenter noted that secure storage is not a required element of commercial market use. Therefore, in the commenter's view, the sales covered

by section 45Q(f)(5)(A)(iii) must be: (i) Sales of captured carbon oxide, as such, or (ii) sales of a substance into which carbon oxide has been converted but is not securely stored.

One commenter recommended that the final regulations specifically recognize the many existing and potential uses for carbon dioxide in commercial markets, such as for building products, food production and refrigeration.

A commenter requested that the final regulations identify fuels, chemicals, and building materials as the primary categories of commercial markets for carbon oxide utilization. The commenter suggested that another category should be added for newly developed utilization technologies. Section 45Q allows the carbon capturer to elect to allow the section 45Q credit to the utilizer, which provides an opportunity for fledgling technologies to use the 45Q credit to support innovation in the field of carbon oxide utilization. The commenter noted that these technologies often have insufficient or incomplete data to perform an LCA, and the resulting data may be subject to high uncertainty. This category would allow for developing utilization techniques to benefit from the 45Q credit and allow for the government to track the carbon mitigating benefits of these new technologies. The commenter also suggested that a specific category for these new technologies could require regular updates to an LCA as relevant data becomes available. Further, the commenter stated that the economic viability of the business case must be considered, and suggested that supplemental information, such as a techno-economic assessment of the market viability, be provided for newly developed utilization technologies.

One commenter requested a definition sufficiently broad to encompass not only utilization processes resulting in consumer goods or products but also industrial-grade feedstocks, commodities, materials, and chemicals that may be used as an input for any purpose. Another commenter stated that the food and beverage industry is a significant commercial market for carbon dioxide utilization.

One commenter recommended that the final regulations require taxpayers to provide certain information to enable the IRS to determine whether a commercial market exists. The commenter suggested that a viable approach simply would be to allow a taxpayer to provide this information in a statement attached to its Form 8933. In addition, the commenter requested that the final regulations explicitly provide that a commercial market includes a market for fuel. The commenter also stated that the IRS should provide more details about the process for determining whether a commercial market exists.

A commenter noted that the Secretary's discretion under section 45Q(f)(5)(A)(iii) is limited to determining whether a commercial market exists, and the Secretary does not have discretion to impose requirements as to the nature of the use of the carbon oxide by the market.

The final regulations define the term commercial market broadly as a market in which a product, process, or service that utilizes carbon oxide is sold or transacted on commercial terms. Section 45Q(f)(5)(A)(iii) suggests that the definition of a commercial market should not be limited to particular products or markets by using the phrase ''for any other purpose for which a commercial market exists.'' Thus, the final regulations do not restrict the definition by limiting it to certain products or markets. Further, with the emergence of new technologies, markets are likely to develop and change rapidly. Consequently, the final regulations do not list particular products or markets that qualify or do not qualify as a commercial market.

In addition, carbon dioxide is commonly used for services, and section 45Q does not restrict the definition of commercial market to products. Therefore, the final regulations do not adopt the recommendation of commenters who suggested excluding services from the definition of commercial market.

Under section 45Q(f)(5)(A)(iii), the Secretary must determine whether a commercial market exists. In order to make this determination, the final regulations require a taxpayer to submit a statement attached to its Form 8933 substantiating that a commercial market exists for its particular product, process, or service. The instructions to the form or other guidance will provide more details regarding the information to be provided. This information should be retained by the taxpayer and may be reviewed during an examination.

J. Recapture and Utilization

Commenters requested that the regulations clarify whether the recapture provisions apply to utilization if a product that utilized qualified carbon dioxide releases the qualified carbon dioxide into the atmosphere when it is used, recycled, or disposed of.

One commenter recommended that the final regulations clarify that permanent sequestration is not a prerequisite for carbon oxide utilized according to section 45Q(f)(5)(A) and that eventual emission into the atmosphere does not, in itself, subject the taxpayer to recapture provisions so long as the LCA accounts for a full project lifecycle analysis.

Under section 45Q(f)(4), recapture applies to any qualified carbon oxide which ceases to be captured, disposed of, or used as a tertiary injectant in a manner consistent with the requirements of this section, not to qualified carbon oxide that is utilized according to section 45Q(f)(5)(A). Further, recapture does not apply to utilization of qualified carbon oxide because an LCA accounts for all emissions of greenhouse gases throughout the life cycle of the utilized product. Therefore, the final regulations provide that a recapture event occurs when qualified carbon oxide for which a section 45Q credit has been previously claimed ceases to be disposed of in secure geological storage or used as a tertiary injectant during the recapture period. The final regulations do not provide for recapture when qualified carbon oxide is utilized.

K. Industries and Processes

One commenter requested that the final regulations specifically provide that qualified carbon dioxide captured by ethanol plants and utilized in the food and beverage industry is considered utilization of qualified carbon oxide under section 45Q(f)(5)(A).

A commenter requested that the final regulations define what types of utilization qualify as ''fixation of qualified carbon oxide through photosynthesis or chemosynthesis, such as through the growing of algae or bacteria'' as described in section 45Q(f)(5)(A). Another commenter requested that the final regulations find photosynthesis to be both a qualified carbon dioxide capture process and a qualified utilization process. Further, the commenter urged the IRS to recognize carbon oxide that is verifiably retained in solid form (organic or mineral) in the top 48 inches of the soil layer as ''disposed of.'' The commenter asserted that regenerative agriculture processes should qualify for the section 45Q credit, as these processes are at a minimum carbon neutral. The commenter also recommended expanding section 45Q to include sustainable technologies such as microbial conversion technologies that use photosynthesis for the capture of carbon dioxide in soil.

A commenter sought guidance regarding the fermentation of sugar

waste products (desugarized molasses) in coal seams as an artificially-induced chemical synthesis process that produces substantial amounts of methane (CH4) and carbon dioxide. The commenter asserted that the generation of carbon dioxide through the sugaring process and its subsequent sequestration or disposal in coal seams should qualify for the section 45Q credit.

A commenter suggested that the final regulations should clarify that the conversion of captured carbon dioxide to carbon monoxide is considered utilization of qualified carbon oxide under section 45Q(f)(5). The commenter explained that conversion of carbon dioxide to carbon monoxide should be considered the conversion of qualified carbon oxide to a chemical compound, in which the qualified carbon oxide (carbon dioxide) is securely stored and utilized. The commenter further requested that the IRS should consider utilization of carbon oxide, such as carbon monoxide, as a durable good or chemical feedstock in the production of durable goods as utilized and verified qualified carbon oxide.

The determination of whether particular technologies, processes, or industries qualify for the section 45Q credit exceeds the scope of these final regulations. However, the Treasury Department and the IRS will continue to consider these comments for purposes of potential future guidance regarding section 45Q.

V. Credit Recapture

The recapture rules in the proposed regulations applied on a project-by-project basis. Section 45Q(f)(4) directs the Secretary to provide regulations for recapturing the benefit of any section 45Q credit allowable with respect to any qualified carbon oxide which ceases to be captured, disposed of, or used as a tertiary injectant in a manner consistent with the requirements of section 45Q.

The proposed regulations provided that the period during which a recapture event may occur (recapture period) begins on the date of the first injection of qualified carbon oxide for disposal in secure geological storage or use as a tertiary injectant and ends the earlier of five years after the last taxable year in which the taxpayer claimed a section 45Q credit or the date monitoring ends under subpart RR requirements or the CSA/ANSI ISO 27916:2019 standard.

The proposed regulations provided that any recapture amount will be accounted for in the taxable year that it is identified and reported. If, during the recapture period, a taxpayer, operator, or regulatory agency determines that qualified carbon oxide has leaked to the atmosphere, the taxpayer will have a recapture amount if the leaked amount of qualified carbon oxide exceeds the amount of qualified carbon dioxide disposed of in secure geological storage, including used as a tertiary injectant, in that taxable year. That excess amount of leaked qualified carbon oxide will be recaptured at a credit rate calculated on a LIFO basis (that is, the excess leaked qualified carbon oxide will be deemed attributable first to the first preceding year, then to second preceding year, and then up to the fifth preceding year) to simplify the calculation of the recapture amount.

The taxpayer must add the amount of the recaptured section 45Q tax credit to the amount of tax due in the taxable year in which the recapture event occurs. Consistent with this five-year lookback period, the proposed regulations provided that the post-credit-claiming period ends the earlier of (i) five years after the last taxable year in which the taxpayer claimed a section 45Q credit or (ii) the date monitoring ends under the requirements of the subpart RR standard or the CSA/ANSI ISO 27916:2019 standard.

The proposed regulations also provided that in the event of a recapture event for a secure geological storage location in which the stored qualified carbon oxide had been captured from more than one unit of carbon capture equipment that was not under common ownership, the recapture amount must be allocated among the taxpayers that own the multiple units of carbon capture equipment pro rata on the basis of the amount of qualified carbon oxide captured from each of the multiple units of carbon capture equipment.

Similarly, the proposed regulations provided that in the case of a recapture event where the leaked amount of qualified carbon oxide is deemed attributable to qualified carbon oxide for which multiple taxpayers claimed section 45Q credit amounts, the recapture amount is allocated on a pro rata basis among the taxpayers that claimed the section 45Q credits.

The proposed regulations provided a limited exception to recapture in the event of a leakage of qualified carbon oxide resulting from actions not related to the selection, operation, or maintenance of the storage facility, such as volcanic activity or a terrorist attack. Further, the proposed regulations provided that if qualified carbon oxide is deliberately removed from a secure storage site, a recapture event occurs in the year in which the qualified carbon oxide is removed from its original storage. Finally, section 5 of the Summary of Comments and Explanation of Revisions to the proposed regulations noted that a taxpayer may obtain third-party recapture insurance to protect against recapture.

In the proposed regulations, the Treasury Department and the IRS requested comments on how to apply the recapture provisions to section 45Q credits that are carried forward to future taxable years due to insufficient income tax liability in the current taxable year.

A. Recapture Period

Several commenters approved of a five-year recapture period, noting that the Investment Tax Credit also provided for a five-year lookback period. However, many commenters suggested that a five-year recapture period is too long, and advocated limiting the recapture period to three years or to the most recent taxable year.

Several commenters were supportive of a three-year recapture period to be consistent with the statute of limitations for the IRS to initiate an audit of a tax year, thereby making the provision similarly situated with respect to other tax credits containing recapture provisions. One commenter noted that providing a three-year recapture period would improve tax and financial statement certainty for taxpayers claiming the section 45Q credit, thereby reducing the costs associated with tax equity transactions and in turn, further reducing the cost of CCUS projects. Ultimately, this commenter asserted that reducing the recapture period to three years would make the section 45Q credit more efficient and effective in inducing widespread investment in CCUS projects.

One commenter noted that it takes less than three years for carbon dioxide injected into an underground reservoir to become stable. This commenter noted that once carbon dioxide has stabilized, the carbon dioxide is unlikely to escape to the atmosphere. Because injected carbon dioxide stabilizes in less than three years, this commenter advocated for a three-year recapture period as sufficient for purposes of recapture. Generally, commenters advocating for a shorter recapture period pointed out that the International Panel on Climate Change's 2005 Special Report, available at *http://www.ipcc.ch/report/carbon-dioxide-capture-and-storage/,* stated that carbon dioxide retained in appropriately selected and managed geological reservoirs is very likely to exceed 99 percent secured storage over 100 years and is likely to exceed 99 percent secured storage over 1000 years. Therefore, the commenters suggested that no technical reasons exist for a

recapture period of greater than one year.

However, one commenter suggested that the final regulations adopt a 99-year recapture period, because a 99-year recapture period is practical and commercially feasible compared to geological time scales and other commercial transactions that occur over a span of 99 years, such as ground leases of land. The commenter stated that sequestration of carbon oxide for 99 years also furthers the policy intent of section 45Q to have some real and measurable effect on global warming and global climate change.

The final regulations revise the recapture period from five years to three years. The risk of qualified carbon oxide leakage leading to a recapture event is greatest in the years in which the qualified carbon oxide is injected, and the likelihood decreases over time as the qualified carbon oxide becomes stable and the likelihood of leakage decreases. A three-year recapture period sufficiently accounts for risk and reduces the compliance burden that would be imposed by a five-year recapture period.

B. Exceptions To Recapture

In response to the proposed regulations, commenters recommended that the final regulations expand the limited exceptions to recapture (for volcanic activity and terrorist attacks) specified in the proposed regulations, to include such situations as seismic activity that was not caused by the injection operations; natural disasters, including but not limited to floods, droughts, earthquakes, volcanic eruptions, landslides, hurricanes, cyclones, typhoons, and tornados; and wars, civil disturbances, terrorist acts, military actions, epidemics, pandemics, famines, and actions of a governmental authority.

A commenter suggested that the final regulations provide that the recapture exception include all events outside of the taxpayer's control. Another commenter suggested that the limited exceptions to recapture be eliminated entirely because any leakage of qualified carbon oxide for any reason should be subject to recapture.

A commenter suggested that for Class VI permit holders (*i.e.,* reporting under subpart RR with an MRV plan), leaked qualified carbon oxide should not be treated as related to the selection, operation, or maintenance of the storage facility.

The final regulations do not expand the list of exceptions to recapture. The list of exceptions to recapture in the proposed regulations is illustrative only.

C. Recapture of Credit Carryforwards

A commenter suggested that the final regulations should explain how credit carryforwards and tentative tax values applicable to section 38 are accounted for when determining the actual tax benefit under section 45Q. The commenter suggested that if the taxpayer has other available credits in the year in which the recapture event occurs, such other section 38 credits should apply to offset the recapture amount.

A commenter suggested that the final regulations provide that the carryforward of the credit does not affect the recapture period, recommending that the final regulations revise § 1.45Q–5(f) of the proposed regulations to clarify that the recapture period ends five years after the last taxable year in which the taxpayer claimed a section 45Q credit or was eligible to claim a section 45Q credit which it carried forward.

The final regulations take the recapture of credit into account in the year in which the leakage occurs and is reported. The credit carryforwards should not be affected. In addition, the final regulations provide that the recapture period ends on the earlier of three years after the last taxable year in which the taxpayer claimed a section 45Q credit or was eligible to claim a credit that it elected to carry forward or the expiration of the monitoring period.

D. Recapture in the Event of Deliberate Removal from Storage

Commenters requested clarification concerning when qualified carbon oxide is deliberately removed from secure geological storage. One commenter noted that neither the definition nor the examples detailed in § 1.45Q–5 of the proposed regulations address whether qualified carbon oxide that is recycled and reinjected during EOR operations would be considered as having been intentionally removed from storage. The commenter recommended adding specific examples of using qualified carbon oxide as a tertiary injectant in EOR, the provisions for recycled and reinjected qualified carbon oxide, and the consequent last-in-first-out (LIFO) accounting basis for the qualified carbon oxide.

CSA/ANSI ISO 27916:2019 provides guidance for determining the character of the removed carbon oxide. Consequently, this comment is addressed through subpart RR and ISO 27916:2019 and not addressed further in the final regulations.

A commenter requested further clarity regarding the applicability of the recapture rules to the intentional removal of securely stored qualified carbon oxide, and the subsequent recapture and secure storage of that same qualified carbon oxide, noting that the total net release of qualified carbon oxide in this process is zero. The commenter provided an example of when a natural gas and oil company might undertake this process, such as when EOR injectors intentionally remove previously secured carbon dioxide and then subsequently reinject it into the ground after having completed the extraction of all commercially viable oil. The commenter requested the final regulations state this explicitly and provide an example to clarify that the net calculation yields no credit recapture.

If a taxpayer intentionally removes qualified carbon oxide from a qualified enhanced oil or natural gas recovery project and reinjects it into the same qualified enhanced oil or natural gas recovery project, that intentional removal will not trigger a recapture event. However, if the qualified carbon oxide is instead injected into a different qualified enhanced oil or natural gas recovery project, such intentional removal would trigger a recapture event.

Another commenter suggested that the final regulations be revised to state explicitly that each disposal well or EOR site is separately evaluated for recapture. Subpart RR and CSA/ANSI ISO 27916:2019 provide guidance for monitoring sites where qualified carbon oxide is securely stored. These standards identify the scope of a secure storage project. In addition, section 43(c)(2) defines the scope of an EOR project. The proposed regulations provided that recapture events are determined separately for each project involving the disposal or use of qualified carbon oxide as a tertiary injectant an EOR project. Because taxpayers disposing of or using qualified carbon oxide in such projects are required to follow the provisions of either Subpart RR or ISO 27916:2019 and section 43, the term ''project'' provided in the proposed regulations is one that taxpayers are familiar with. The final regulations follow the rule in the proposed regulations, and thus, there is no need for revision in response to this comment.

E. Miscellaneous Recapture Issues

A commenter requested that the final regulations clarify that recapture of section 45Q credits does not have any bearing upon the minimum threshold capture levels under section 45Q(d)(2), and, therefore, does not cause a facility to retroactively fail to be a qualified

facility. The recapture provisions apply to the amount of credit to which the taxpayer is entitled in a given year, and do not apply to determine how much qualified carbon oxide was captured and disposed of, used, or utilized in a given year. Because the amount of qualified carbon oxide is measured and verified using mass balance accounting, it is possible for a taxpayer to track the number of metric tons captured and disposed of or used as a tertiary injectant before netting to account for the amount of carbon that leaked in the year. The methodology of netting leaked carbon oxide against captured qualified carbon oxide in a given year does not preclude a facility from being considered a qualified facility, provided the capture threshold is satisfied before the netting occurs.

A commenter suggested that leakage of both qualified and non-qualified carbon oxide may need to be taken into account on a pro rata basis and recommended that the final regulations include examples to illustrate this. CSA/ANSI ISO 27916:2019 provides guidance regarding allocations when both qualified anthropogenic and natural carbon dioxide has been injected in prior or current years. Consequently, this comment is addressed through subpart RR and ISO 27916:2019 and not addressed further in the final regulations.

A commenter disagreed with the use of the last-in-first-out method of calculating the recapture values, and recommended calculating recapture percentages based on apportioning leakage by year of injection. The final regulations do not adopt this comment, and instead retain the last-in-first-out method of calculation. The last-in-first-out method promotes administrative ease, and further reflects the fact that carbon oxide is at the greatest risk of leakage shortly after it is initially disposed of or used as a tertiary injectant.

One commenter requested that the final regulations provide that recapture does not apply to storage sites holding a valid Class VI permit. The commenter suggested that any loss of containment of qualified carbon oxide from a Class VI storage site should be treated as resulting from an action unrelated to the selection, operation or maintenance of the storage facility.

The final regulations provide that a recapture event can occur for qualified carbon oxide that has been disposed of or used as a tertiary injectant, including at a Class VI storage site. The final regulations do not exempt Class VI permit holders from the possibility of experiencing a recapture event, even if the permit holder has complied with all of the requirements of maintaining a Class VI storage site.

Commenters sought to clarify whether qualified carbon oxide is subject to the recapture provisions if it migrates or otherwise leaves its primary containment zone but does not leak into the atmosphere. These commenters suggested that a recapture event occurs only when the qualified carbon oxide has leaked to the atmosphere, but not when it has migrated from the containment zone.

Subpart RR and CSA/ANSI ISO 27916:2019 each provide methodologies for monitoring and reporting the secure storage of qualified carbon oxide. Accordingly, this issue is addressed in subpart RR and CSA/ANSI ISO 27916:2019 and is not addressed further in the final regulations.

A commenter suggested that the final regulations should include a limited remedial action and cure period to avoid credit recapture. The commenter requested an opportunity to dispose of or inject metric tons of qualified carbon oxide in secure geologic storage during the post-credit-claiming period, not claim a section 45Q credit for those metric tons, and subtract those metric tons from the quantity of recaptured qualified carbon oxide. The commenter explained that allowing the operator the opportunity to cure a recapture event with remedial action during the post-credit-claiming period should be an alternative method to resolve a recapture event, and to resolve it in such a way that results in greater amounts of ultimate disposal and injection of qualified carbon oxide. The final regulations do not allow for taxpayers to perform remedial actions or otherwise cure a leak to avoid credit recapture because such a provision would significantly lessen the consequences faced by taxpayers that allow qualified carbon oxide to leak to the atmosphere.

VI. Miscellaneous Issues

A. Pre-Combustion of Coal, Biomass or Other Carbon-Based Fuel

One commenter requested that the definition of ''industrial facility'' be clarified to include any facility designed for the purpose of capturing qualified carbon oxide as a part of its operations, including when upgrading coal, biomass or any other carbon-based fuel. The commenter stated that given the evolving technologies in the carbon capture area, the final regulations should recognize that any type of pre-combustion, post-combustion, direct air capture or any combination thereof that captures qualified carbon oxide should qualify under section 45Q so long as such process (i) allows for quantities of qualified carbon oxide to be measured at the source of capture and verified at the point of disposal, injection or utilization and (ii) the taxpayer otherwise satisfies the requirements of section 45Q. The commenter described a facility that will substantially upgrade coal or biomass with higher quality volatile matter, increased BTU content, lower moisture content and lower amount of pollutants. With the upgraded fuel, a power plant will require approximately 20–25 percent less fuel to generate the same amount of electricity. The upgraded coal or biomass produced by the facility will be much a higher ranked and a much improved fuel type than what a supplier would otherwise supply to a power plant or industrial facility.

Whether specific industries and processes may qualify for the section 45Q credit is highly factual and exceeds the scope of these final regulations. Generally, however, a process involving the manufacture of a product that does not produce an emission of carbon oxides that can be captured and disposed of, injected, or utilized until the product is consumed, would not qualify for the section 45Q credit. Conversely, a process involving the manufacture of a product that does produce an emission of carbon oxides that can be captured, and disposed of, injected, or utilized immediately may qualify for the section 45Q credit.

B. Additional Carbon Capture Capacity

One commenter sought clarification concerning how to measure additional carbon capture capacity. The commenter suggested that the carbon dioxide capture capacity should be calculated on an annual basis and define carbon dioxide capture capacity as the capability (metric tons per year) to capture carbon dioxide less the annualized typical constraints with the industrial facility and carbon capture equipment. The commenter further suggested that the definition should provide that annualized typical constraints means the quotient of the total amount of all regular maintenance, scheduled or unscheduled facility downtime, seasonal fluctuations in outdoor temperature, and turn-arounds associated with both the industrial facility and carbon capture equipment occurring in the 60 months prior to the day before the date of the enactment of the BBA divided by five.

The final regulations do not adopt this comment. Different units of carbon capture equipment operate at different efficiencies and their capture levels are

subject to operational variations of the qualified facilities at which they are installed. Applying a subjective standard that takes into account historical capture amounts rather than true potential capture capacity would make it difficult to apply the rules for additional carbon capture equipment in a consistent manner. The capture design capacity of carbon capture equipment reflects an objective measure of the equipment's carbon capture capacity. Accordingly, the final regulations provide that the carbon capture capacity of carbon capture equipment is its capture design capacity.

C. Capture and Utilization—Photosynthesis

One commenter requested that the final regulations clarify that photosynthesis is both a qualified carbon oxide capture process and a qualified carbon oxide utilization under section 45Q. Further, the commenter urged the DOE and the IRS to recognize carbon that is verifiably retained in solid (organic or mineral) form in the top 48 inches of the soil layer as ''disposed.'' The commenter stated that section 45Q(f)(5)(A)(i) provides that photosynthesis is a possible method of utilization, and section 45Q(e)(1)(B)(ii) specifically excludes photosynthesis from being considered a direct air capture facility. The Treasury Department and the IRS do not agree with the commenter. The final regulations do not address photosynthesis further because the Code makes clear the avenues, such as utilization, for using such process to qualify for the credit.

D. Beginning of Construction

Several commentators requested changes to Notice 2020–12, concerning the beginning of construction, such as an extension of the continuity safe harbor from six to eight years, relaxation of the prohibition on combining methods to satisfy the continuing requirement, and revisions to the examples of physical work and the list of preliminary activities. Commenters also requested extending the deadline for beginning of construction by one year in response to the impact of COVID–19, as has been done for the investment tax credit and production tax credit.

A commenter recommended that the IRS issue guidance providing that the work described in section 5.02(2)(d) of Notice 2020–12 be treated as on-site work of a significant nature only at the election of the taxpayer. Other commenters recommended harmonizing certain provisions of Notice 2020–12 and the proposed regulations.

These comments exceed the scope of these final regulations, but the Treasury Department and the IRS will continue to consider these comments for purposes of potential future guidance regarding section 45Q.

E. Partnerships and Economic Substance

Commenters requested clarifications to the partnership guidance provided in Revenue Procedure 2020–12. Commenters recommended that, in the event of a section 45Q(f)(3)(B) election, Revenue Procedure 2020–12 should apply to any credit claimant without presuming the person claiming the credit will always be the owner of the carbon capture equipment.

A commenter recommended striking section 4.02(2)(b) of Revenue Procedure 2020–12, or for subsequent guidance to expand the definition of ''bona fide equity investment'' to include investors reasonably anticipating a return derived from tax credits and cash flow.

These comments exceed the scope of these final regulations, but the Treasury Department and the IRS will consider these comments for purposes of potential future guidance regarding section 45Q.

Commenters requested clarification of the application of the economic substance doctrine and the provisions of section 7701(e) to the section 45Q credit. Commenters recommended the final regulations provide that the economic substance doctrine and section 7701(o) do not apply to carbon capture projects eligible for the credit under section 45Q. The final regulations do not deviate from well-established guidance regarding the economic substance doctrine.

Effect on Other Documents

Sections 1 through 5 of Notice 2009–83, 2009–2 C.B. 588, as modified by Notice 2011–25, 2011–1 C.B. 604, are obsoleted. The remaining sections of Notice 2009–83 provide reporting and recordkeeping requirements associated with the limitation on credits available under section 45Q(a) (as in effect before February 9, 2018) and sections 45Q(a)(1) and (2). After the end of the calendar year in which the Secretary, in consultation with the Administrator of the EPA, certifies that a total of 75,000,000 metric tons of qualified carbon oxide have been taken into account under former section 45Q(a) (as in effect before February 9, 2018) and sections 45Q(a)(1) and (2), the remaining sections of Notice 2009–83 will be obsoleted.

Applicability Date

The final regulations apply to taxable years beginning on or after January 13, 2021. However, a taxpayer may choose to apply the final regulations, provided that the taxpayer applies the final regulations in their entirety and in a consistent manner, for taxable years beginning on or after January 1, 2018, and before January 13, 2021. See section 7805(b)(7).

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 13563, 13771, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

These regulations have been designated by the Office of Management and Budget's Office of Information and Regulatory Affairs as economically significant under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

A. Background and Overview

Section 45Q was enacted on October 3, 2008 by section 115 of Division B of the Energy Improvement and Extension Act of 2008, Public Law 110–343, 122 Stat. 3765, 3829, to provide a credit for the sequestration of carbon dioxide. On February 17, 2009, section 45Q was amended by section 1131 of Division B of the American Recovery and Reinvestment Tax Act of 2009, Public Law 111–5, 123 Stat 115, 325. Section 45Q was further amended on December 19, 2014, by section 209(j)(1) of Division A of the Tax Increase Prevention Act of 2014, Public Law 113–295, 128 Stat. 4010, 4030, and again on February 9, 2018, by section 41119 of Division D of the Bipartisan Budget Act of 2018 (BBA), Public Law 115–123, 132 Stat. 64, 162, to encourage the construction and use of carbon capture and sequestration projects. On December 27, 2020, section 45Q was amended by section 121 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021,

Public Law 116–260, 134 Stat. 1182, 3051, to extend the beginning of construction deadline for qualified facilities and carbon capture equipment by two years.

On June 2, 2020, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–112339–19) in the **Federal Register** (85 FR 34050) containing proposed regulations under section 45Q (proposed regulations). The Treasury Department and the IRS received written and electronic comments responding to the proposed regulations. A public hearing on the Proposed Regulations was held on August 26, 2020. In addition, the Treasury Department and the IRS published Rev. Proc. 2020–12, 2020–11 I.R.B. 511, and Notice 2020–12, 2020–11 I.R.B. 495. Revenue Procedure 2020–12 provides a safe harbor under which the IRS will treat partnerships as properly allocating the section 45Q credit in accordance with section 704(b). Notice 2020–12 provides guidance on the determination of when construction has begun on a qualified facility or on carbon capture equipment that may be eligible for the section 45Q credit.

Section 45Q generally allows a credit of an amount per metric ton of qualified carbon oxide captured by the taxpayer using carbon capture equipment and permanently isolated from the environment. This qualified carbon oxide must be securely stored according to the statute in one of three general manners. First, it may be disposed of in secure geological storage. This would occur if it were injected into a geologic formation, such as a deep saline formation, an oil and gas reservoir, or an unminable coal seam.

Second, the qualified carbon oxide may be used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of in secure geological storage. A ''tertiary injectant'' is qualified carbon oxide that is injected into and stored in a qualified enhanced oil or natural gas recovery project and contributes to the extraction of crude oil or natural gas.

Third, the qualified carbon oxide may be ''utilized'' by fixing it through photosynthesis or chemosynthesis, thus converting it to a material or chemical compound in which it is securely stored, or using it for any other purpose for which a commercial market exists. ''Utilization'' generally means the qualified carbon oxide was captured and permanently isolated from the atmosphere, or displaced from being emitted into the atmosphere.

The amount of the credit depends on the date the carbon capture equipment is placed in service and whether the qualified carbon oxide is disposed of in secure storage, injected, or utilized. Different rules and credit amounts apply to qualified carbon oxide capture projects placed in service before and after the date the enactment of the BBA on February 9, 2018. Based on annual reports filed with the IRS as of June 2020, the aggregate amount of qualified carbon oxide taken into account for purposes of section 45Q was 72,087,903 metric tons as published in Notice 2020–40. This is an increase of 9,935,153 metric tons from the preceding year. According to data reported to the EPA's Greenhouse Gas Reporting Program (GHGRP), there were 65 enhanced oil recovery (EOR) projects operating in the U.S. in 2018. As of 2019, the National Petroleum Council, an oil and natural gas advisory committee to the Secretary of Energy, reports that there were 10 carbon capture, utilization, and storage projects in the United States. DOE models project that the section 45Q credit may result in the sequestration of approximately 570 million metric tons of carbon oxide between 2018 and 2036.

B. Need for the Final Regulations

The final regulations provide guidance regarding the application of section 45Q. Section 45Q requires regulations for determining adequate security measures for the secure geological storage of qualified carbon oxide such that it does not escape into the atmosphere, standards for recapture of section 45Q credits, standards for determining what is a qualified facility for purposes of meeting certain minimum carbon capture thresholds, and standards for carbon oxide utilization.

C. Economic Analysis

1. Baseline

In this analysis, the Treasury Department and the IRS assess the economic impacts of the final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

These final regulations provide taxpayers with greater clarity regarding the definition of terms contained in the statute relative to the alternative of taxpayers having no further descriptions than the statute; more flexibility in methods to establish qualifications for the credit relative to prior guidance; and more transparency regarding business arrangements related to the section 45Q credit relative to the no-action baseline. These features may lower compliance burden and increase economic investment by lowering regulatory barriers to entry, compared to a baseline of having only the statute and not the regulations.

3. Economic Analysis of Specific Provisions

i. Standards for Secure Geological Storage

a. Background

Section 45Q(f)(2) provides that the Secretary, in consultation with the Administrator of the EPA, the Secretary of Energy, and the Secretary of the Interior, must establish regulations for determining adequate security measures for the secure geological storage of qualified carbon oxide under section 45Q such that qualified carbon oxide does not escape into the atmosphere. Such term includes storage at deep saline formations, oil and gas reservoirs, and unminable coal seams under such conditions as the Secretary may determine under such regulations.

Under existing law, injection of carbon oxide into any underground reservoir requires the operator to comply with Underground Injection Control (UIC) program regulations under the Safe Drinking Water Act and to obtain the appropriate UIC well permits. The UIC program is designed to protect underground sources of drinking water from underground injection. Operators that inject carbon dioxide underground are also subject to the EPA's GHGRP requirements set forth at 40 CFR part 98.

Under 40 CFR part 98, facilities that inject carbon dioxide underground for long-term containment of carbon dioxide in subsurface geologic formations are specifically subject to 40 CFR part 98 subpart RR (Geologic Sequestration of Carbon Dioxide source category, referred to as ''subpart RR''). Facilities that are subject to subpart RR, including UIC Class VI wells, are required to report basic information on carbon dioxide received for injection, develop and implement an EPA-approved site-specific Monitoring, Reporting, and Verification Plan (MRV Plans), and report the amount of carbon dioxide geologically sequestered using a mass balance approach and annual monitoring activities.

Facilities that inject carbon dioxide underground for the purposes of enhanced oil (EOR) and gas recovery or any other purpose other than geologic sequestration are required to report basic information on carbon dioxide received for injection under 40 CFR part 98 subpart UU (Injection of Carbon

Dioxide source category, referred to as ''subpart UU''). At present, the EPA generally does not require facilities that conduct EOR to report under subpart RR. However, the owner or operator may choose to opt in to subpart RR. For both subparts RR and UU, annual reports are submitted under 40 CFR part 98 to the EPA's GHGRP and undergo verification by the EPA. Non-confidential data from these reports are published on the EPA's website.

b. Comments Received

Commenters generally supported the continued use of subpart RR. Many commenters supported the adoption of the standard adopted by the International Organization for Standardization (ISO) and endorsed by the American National Standards Institute (ANSI), CSA/ANSI ISO 27916:2019 standard, ''Carbon dioxide capture, transportation and geological storage—Carbon dioxide storage using enhanced oil recovery (CO_2-EOR),'' (CSA/ANSI ISO 27916:2019) (the ''CSA/ANSI ISO 27916:2019 standard'') as a viable alternative to subpart RR for establishing secure geological storage for the use of qualified carbon oxide for EOR. The CSA/ANSI ISO 27916:2019 standard was developed for the purpose of quantifying and documenting the total carbon dioxide that is stored in association with carbon dioxide-EOR. In general, reporting under CSA/ANSI ISO 27916:2019 (i) uses mass balance accounting, (ii) has established reporting and documentation requirements, and (iii) includes requirements for documenting a monitoring program and a containment assurance plan. ANSI, a not-for-profit organization dedicated to supporting the U.S. voluntary standards and conformity assessment system, adopted the CSA/ANSI ISO 27916:2019 standard in 2019.

c. Regulatory Alternatives and Analysis

The Treasury Department and the IRS considered three options for defining standards for secure geological storage: (i) The requirements set forth in 40 CFR part 98 subpart RR; (ii) an election for the taxpayer to comply with either the subpart RR standards or the requirements set forth in CSA/ANSI ISO 27916:2019 and (iii) other alternatives to subpart RR, including allowing use of state programs.

In evaluating option (ii), the Treasury Department and the IRS, in consultation with the EPA, the DOE, and the Interior Department, agree with commenters that CSA/ANSI ISO 27916:2019 is a viable quantification methodology that is adequate for the intent and purpose of the statute. Both subpart RR and CSA/ANSI ISO 27916:2019 require an assessment and monitoring of potential leakage pathways; quantification of inputs, losses and storage through a mass balance approach; and documentation of steps and approaches. Under option (ii), operators of UIC Class II wells that follow the CSA/ANSI ISO 27916:2019 standard could elect to report under subpart RR but would not be required to do so. Rather, they could continue to report to the EPA under subpart UU.

The Treasury Department and the IRS, in consultation with the EPA, the DOE, and the Interior Department, disagree with commenters' suggestions to allow the reporting rules promulgated by states as an alternative to subpart RR or CSA/ANSI ISO 27916:2019. Reporting rules among states are not uniform and states may have different reporting requirements and different governing bodies to whom carbon dioxide injection projects are required to report. The adoption of such rules by the Treasury Department and the IRS would substantially increase the administrative burden on the IRS. The Treasury Department and the IRS did not attempt to determine to what extent particular states' standards would fulfill the intent and purpose of the statute.

The ability for taxpayers to elect to use the CSA/ANSI ISO 27916:2019 standard instead of subpart RR could yield economic differences in three ways. First, if the two standards are different in their costs of compliance, then allowing a choice allows EOR project operators to choose the less costly standard. This would reduce costs of compliance and regulatory burden. Second, to the extent that the difference in compliance costs between the two standards is high and that difference is a significant portion of start-up costs, then allowing a less expensive standard might lead to more investment and more new projects. Third, operators can use the option that best aligns with their project goals and timeframes. The Treasury Department and the IRS project that compliance costs for some taxpayers may be lower under the CSA/ANSI ISO 27916:2019 standard than under subpart RR. Some commenters stated that subpart RR may create a misalignment for UIC Class II wells with both state mineral property and natural resource conservation laws; and that such potential misalignment would be costly to taxpayers. This stated misalignment would not be implicated with the use of the ISO standards.

The Treasury Department and the IRS recognize that the two standards differ in terms of who would be responsible for reviewing and approving a sequestration plan and for identifying leakage once a project is in place. In addition, the standards differ because unless otherwise required by law, the CSA/ANSI ISO 27916:2019 standard does not require public reports of the amount of qualified carbon oxide sequestered, whereas the subpart RR standard does entail the public provision of such data. The Treasury Department and the IRS did not attempt to analyze the economic consequences of these differences.

The Treasury Department and the IRS did not attempt to provide quantitative estimates of the difference in compliance costs between the CSA/ANSI ISO 27916:2019 standard and a regulatory alternative of requiring only subpart RR because suitable data are not readily available at this level of detail. Further, the Treasury Department and IRS did not attempt to estimate the effects of compliance cost differences on investment or sequestration.

ii. Credit Recapture

Section 45Q(f)(4) requires the Treasury Department and the IRS to promulgate regulations to provide for the recapture of section 45Q credits in the event of leakage. ''Recapture'' refers to the repayment of the tax credits claimed, and not to the capturing of carbon dioxide that may have leaked from the project after being injected. The final regulations provide clarification regarding credit recapture, including (i) when the tax would be due in relation to the year of a recapture event, (ii) how long the IRS can ''look back'' to recapture credits in the event of leakage (lookback period), and (iii) the length of time after ceasing to claim credits during which a leakage event would lead to recapture of credits.

All of these issues require a definition of the recapture period. The proposed regulations provided that the recapture period begins on the date of the first injection of qualified carbon oxide for disposal in secure geological storage or use as a tertiary injectant and ends the earlier of a specified number of years after the last taxable year in which the taxpayer claimed a section 45Q credit or the date monitoring ends under subpart RR requirements or the CSA/ANSI ISO 27916:2019 standard.

Thus, under the proposed regulations, the recapture period consists of two sub-portions, the ''post-credit-claiming period'' and the ''lookback period.'' The ''post-credit-claiming period'' is the lesser of a specified number of years after the last taxable year in which the taxpayer claimed a section 45Q credit or

the date monitoring ends under subpart RR requirements or the CSA/ANSI ISO 27916:2019 standard. Depending on the project's individual requirements, the post-credit-claiming period is therefore between zero and the specified number of years. The ''lookback period'' is the portion of the recapture period during which the IRS can recapture section 45Q credits after a leakage event. A leakage event that leads to recapture of credits can occur any time during the recapture period. A leakage event that occurs after the recapture period would not lead to recapture of credits.

The proposed regulations provided that any recapture amount will be accounted for in the taxable year that it is identified and reported. The amount of credits that can be recaptured in the event of leakage depends on the length of the lookback period and the amount of the leakage.

If, during the recapture period, it is determined that qualified carbon oxide has leaked to the atmosphere, the taxpayer will have a recapture amount if the leaked amount of qualified carbon oxide exceeds the amount of qualified carbon dioxide disposed of in secure geological storage, including used as a tertiary injectant, in that taxable year. That excess amount of leaked qualified carbon oxide will be recaptured at a credit rate calculated on a LIFO basis (that is, such excess leaked qualified carbon oxide will be deemed attributable first to the first preceding year, then to second preceding year, and so forth up to five years) for ease of administration. The taxpayer must add the amount of the recaptured section 45Q tax credit to the amount of tax due in the taxable year in which the recapture event occurs. This rule applies regardless of whether the project injected qualified carbon oxide in the taxable year. In the proposed regulations, the ''post-credit-claiming period'' was specified to be the lesser of five years after the last taxable year in which the taxpayer claimed a section 45Q credit or the date monitoring ends under subpart RR requirements or the CSA/ANSI ISO 27916:2019 standard. In response to the proposed regulations, commenters expressed concerns with the length of the lookback period after the project operator stops claiming section 45Q credits (for example, if the project is finished or the period for claiming credits ends) that a leakage event can lead to recapture. Commenters were concerned that investors would deem the risk too high to invest in carbon capture equipment if the end of the recapture period extended too long after the final year of claiming section 45Q credits. To address this concern, the final regulations provide that the recapture period begins on the date of first injection of qualified carbon oxide for disposal in secure geological storage or use as a tertiary injectant and ends the earlier of three (instead of five) years after the last taxable year in which the taxpayer claimed a section 45Q credit or the date monitoring ends under subpart RR requirements or the CSA/ANSI ISO 27916:2019 standard.

The Treasury Department and the IRS considered alternative specifications for the recapture period other than three years. Open-ended or undefined recapture periods would increase the financial risk associated with the project and dissuade investors, particularly for projects for which the section 45Q credit would constitute a sizeable share of revenue. By allowing for a specific and finite lookback period, the final regulations will encourage more investment in projects relative to an unspecified or infinite period. The Treasury Department and the IRS, in consultation with the EPA, the DOE, and the Interior Department, have determined that for the period after the lookback period, existing environmental regulations and standards, such as subpart RR and CSA/ANSI ISO 27916:2019, which taxpayers will need to follow to be entitled to the section 45Q credit, will ensure integrity consistent with the intent and purpose of the statute. A three-year recapture period sufficiently accounts for risk and reduces the compliance burden that would be imposed by a five-year recapture period. Further, a three-year recapture period is consistent with the statutory period for assessing Federal income taxes.

In examining possible recapture periods, the Treasury Department and the IRS have not developed a quantitative model to incorporate the costs of monitoring and the probability of leakage along with the tax administration burden involved in the recapture period.

iii. Aggregation of Qualified Facilities

Section 45Q(d) requires that qualified facilities include carbon capture equipment that meet certain minimum carbon oxide capture thresholds. Electricity generating facilities that emit more than 500,000 metric tons of carbon oxide each year must include carbon capture equipment that captures at least 500,000 metric tons of carbon oxide during the taxable year to qualify for the credit.

Commenters sought additional guidance on whether and under what conditions emissions from multiple facilities may be aggregated for purposes of meeting the qualified carbon capture threshold amounts for qualified facilities. Commenters recommended various ways to aggregate including allowing aggregation for facilities owned within the same affiliated group or allowing aggregation based on existing ''single project'' factors used in the 45Q beginning of construction guidance. Such guidance allows multiple facilities to be treated as a single facility for purposes of beginning construction if various factors are present, such as: Same ownership; same physical location; developed under single plan; and constructed under single permit.

The final regulations allow smaller carbon capture facilities to be aggregated into one project for purposes of claiming the section 45Q credit based on the facts and circumstances of each project consistent with section 8.01 of IRS Notice 2020–12, such as common ownership and location.

By providing greater clarity regarding aggregation of smaller projects to be able to claim the credit, the final regulations generate an economic gain. The Treasury Department and the IRS project that this clarity will encourage additional investment in carbon sequestration projects relative to the no-action baseline.

iv. Utilization of Qualified Carbon Oxide

Section 45Q(f)(5)(A) provides that ''utilization of qualified carbon oxide'' means (i) the fixation of such qualified carbon oxide through photosynthesis or chemosynthesis, such as through the growing of algae or bacteria; (ii) the chemical conversion of such qualified carbon oxide to a material or chemical compound in which such qualified carbon oxide is securely stored; or (iii) the use of such qualified carbon oxide for any other purpose for which a commercial market exists (with the exception of use as a tertiary injectant in a qualified enhanced oil or natural gas recovery project), as determined by the Secretary.

Section 45Q(f)(5)(B) provides a methodology to determine the amount of qualified carbon oxide utilized by the taxpayer. Such amount is equal to the metric tons of qualified carbon oxide which the taxpayer demonstrates, based upon an analysis of lifecycle greenhouse gas emissions and subject to such requirements as the Secretary, in consultation with the Secretary of Energy and the Administrator of the EPA, determines appropriate, were (i) captured and permanently isolated from the atmosphere, or (ii) displaced from being emitted into the atmosphere,

through use of a process described in section 45Q(f)(5)(A). The term ''lifecycle greenhouse gas emissions'' has the same meaning given such term under subparagraph (H) of section 211(o)(1) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)), as in effect on the date of enactment of the BBA on February 9, 2018, except that ''product'' is substituted for ''fuel'' each place it appears in such subparagraph.

The term ''lifecycle greenhouse gas emissions'' means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), related to the full product lifecycle, including all stages of product and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished product to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

Commenters proposed multiple methods for the Treasury Department and the IRS to allow for calculating ''utilization'' of qualified carbon oxide. The proposed regulations provide clarifications regarding: (i) Standards for the lifecycle analysis (LCA) of emissions that were captured or displaced for purposes of section 45Q(f)(5)(B); and (ii) the agency with responsibility to review the LCA.

The Treasury Department and the IRS have determined that the LCA must be in writing and either performed or verified by a professionally-licensed third party that uses generally-accepted standard practices of quantifying the greenhouse gas emissions of a product or process and comparing that impact to a baseline. In particular, the analysis must contain documentation consistent with the International Organization for Standardization (ISO) 14040:2006, ''Environmental management—Life cycle assessment—Principles and framework and ISO 14044:2006, ''Environmental management—Life cycle assessment—Requirements and guidelines,'' as well as a statement documenting the qualifications of the third party.

The final regulations require a taxpayer submit an LCA report to the IRS and the DOE prior to the taxpayer claiming the section 45Q credit. The LCA report will be subject to a technical review by the DOE, and the IRS will determine whether to approve the LCA.

The final regulations provide greater clarity for calculating qualified carbon oxide utilization. This enhanced clarity should increase transparency and lower compliance burden. In addition, the final regulations allow for oversight of the LCA plans by a third party, the DOE, and the IRS (in consultation with the DOE and the EPA); evaluation and approval of the plans before the taxpayer claims the credit will potentially reduce taxpayer compliance costs and IRS administrative costs. Following industry-specific standards will also increase clarity in qualifying for the section 45Q credit.

The final regulations provide an economic gain arising from enhanced clarity regarding the rules of the section 45Q credit within the context of the intent and purpose of the statute. The Treasury Department and the IRS project that this clarity will encourage additional investment in carbon oxide utilization projects relative to the no-action baseline. The Treasury Department and the IRS have not estimated this gain because no data or models are readily available to predict (i) the interpretations that taxpayers might have made in the absence of this guidance, and (ii) the effect of such guidance on the investment that taxpayers would make, relative to alternative regulatory approaches or the no-action baseline.

II. Paperwork Reduction Act

The collection of information in these final regulations for section 45Q are in §§ 1.45Q–1(e), 1.45Q–1(h)(3)(iv), 1.45Q–1(h)(2)(v), 1.45Q–2(h)(2), 1.45Q–3(d), and 1.45Q–4(c)(1).

The collection of information in § 1.45Q–1(e) is an election to have the dollar amounts applicable under § 1.45Q–1(b) apply in lieu of the dollar amounts applicable under § 1.45Q–1(d) for each metric ton of qualified carbon oxide that a taxpayer captures using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018. A new section 45Q(f)(3)(B) election must be made for each taxable year that the taxpayer wishes to allow a credit claimant to claim section 45Q credits. The election must be made on a Form 8933, *Carbon Oxide Sequestration Credit,* and applies to all metric tons of qualified carbon oxide captured by the taxpayer at the qualified facility throughout the full 12-year credit period. The IRS is contemplating making additional changes to the Form 8933 to take these final regulations into account.

The collection of information in § 1.45Q–1(h)(3)(iv) is an election that a taxpayer (electing taxpayer) eligible for the section 45Q credit may make to allow the person that disposes of the qualified carbon oxide, utilizes the qualified carbon oxide, or uses the qualified carbon oxide as a tertiary injectant to claim the credit (credit claimant). The electing taxpayer that makes the section 45Q(f)(3)(B) election must file a statement of election containing the information described in § 1.45Q–1(h)(3)(iv) with the electing taxpayer's Federal income tax return or Form 1065 for each taxable year in which the credit arises. The section 45Q(f)(3)(B) election must be made in accordance with Form 8933 no later than the time prescribed by law (including extensions) for filing the Federal income tax return for the year in which the credit arises. The election may not be filed with an amended Federal income tax return, an amended Form 1065, or an AAR, as applicable, after the prescribed date (including extensions) for filing the original Federal income tax return or Form 1065 for the year, with the exception of amended Federal income tax returns, amended Forms 1065, or AARs, as applicable, for any taxable year ending after December 31, 2017, and before taxable years beginning after the date of issuance of this final regulation. New section 45Q(f)(3)(B) elections must be made for each taxable year that the electing taxpayer wishes to allow credit claimants to claim section 45Q credits. The IRS is contemplating making additional changes to the Form 8933 to take these final regulations into account.

The collection of information in § 1.45Q–1(h)(2)(v) requires that if a taxpayer enters into a binding written contract with a third-party that physically carries out the disposal, injection, or utilization of qualified carbon oxide, the existence of each contract and the parties involved must be reported to the IRS annually on a Form 8933 by each party to the contract, regardless of the party claiming the credit. The IRS is contemplating making additional changes to the Form 8933 to take these final regulations into account.

The collection of information in § 1.45Q–2(h)(2) requires that a taxpayer that claims a section 45Q credit for qualified carbon oxide that is captured and then used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project certify such qualified enhanced oil or natural gas recovery project as required under § 1.43–3. This requires that the taxpayer obtain a petroleum engineer's certification under § 1.43–3(a)(3) for each project that must be attached to a Form 8933 and filed not later than the last date prescribed by law (including extensions) for filing the operator's or designated owner's Federal income tax return or Form 1065 for the first taxable year in which qualified

carbon oxide is injected into the reservoir. If a section 45Q credit is claimed on an amended Federal income tax return, an amended Form 1065, or an AAR, as applicable, the petroleum engineer's certification will be treated as filed timely if it is attached to a Form 8933 that is submitted with such amended federal income tax return, amended Form 1065, or AAR. With respect to a section 45Q credit that is claimed on a timely filed Federal income tax return or Form 1065 for a taxable year ending after February 9, 2018, and beginning before the date of issuance of this final regulation, for which the petroleum engineer's certification was not submitted, the petroleum engineer's certification will be treated as filed timely if it is attached to an amended Form 8933 for any taxable year ending after December 31, 2017, but not for taxable years beginning after June 2, 2020. Additionally, the taxpayer is required to provide an operator's continued certification under § 1.43–3(b)(3) for each project that must be attached to a Form 8933 and filed not later than the last date prescribed by law (including extensions) for filing the operator's or designated owner's Federal income tax return or Form 1065 for taxable years after the taxable year for which the petroleum engineer's certification is filed but not after the taxable year in which injection activity ceases and all injection wells are plugged and abandoned. The IRS is contemplating making additional changes to the Form 8933 to take these final regulations into account.

The collection of information in § 1.45Q–3(d) requires a taxpayer that claims a section 45Q credit for qualified carbon oxide that is captured and then used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project to certify the volume of carbon oxide claimed for purposes of section 45Q. A taxpayer that reported volumes of carbon oxide to the EPA pursuant to subpart RR may self-certify the volume of carbon oxide claimed for purposes of section 45Q. Alternatively, if the taxpayer determined volumes pursuant to CSA/ANSI ISO 27916:2019, a taxpayer may prepare documentation as outlined in CSA/ANSI ISO 27916:2019 internally, but such documentation must be provided to a qualified independent engineer or geologist, who then must certify that the documentation provided, including the mass balance calculations as well as information regarding monitoring and containment assurance is accurate and complete. Taxpayers that capture carbon oxide giving rise to the section 45Q credit must file Form 8933 with a timely filed tax return, including extensions. Taxpayers that dispose of, inject, or utilize qualified carbon oxide must also file Form 8933 with a timely filed Federal income tax return or Form 1065, including extensions. The IRS is contemplating making additional changes to the Form 8933 to take these regulations into account.

The collection of information in § 1.45Q–4(c)(1) requires a taxpayer that utilizes qualified carbon oxide to measure the amount of carbon oxide captured and utilized through a combination of direct measurement and life cycle analysis (LCA). The measurement and written LCA report must be performed by or verified by an independent third-party. The report must contain documentation consistent with the International Organization for Standardization (ISO) 14040:2006, ''Environmental management—Life cycle assessment—Principles and framework'' and ISO 14044:2006, ''Environmental management—Life cycle assessment—Requirements and guidelines,'' as well as a statement documenting the qualifications of the third-party, including proof of appropriate professional license or foreign equivalent, and an affidavit from the third party stating that it is independent from the taxpayer. The taxpayer must submit the written LCA report to the IRS and the DOE. The LCA report will be subject to a technical review by the DOE, and the IRS will determine whether to approve the LCA.

For purposes of the Paperwork Reduction Act of 1995 (51087 U.S.C. 3507(d)) (PRA), the reporting burden associated with proposed §§ 1.45Q–1(e), 1.45Q–1(h)(3)(iv), 1.45Q–1(h)(2)(v), 1.45Q–2(h)(2), 1.45Q–3(d), and 1.45Q–4(c)(1) will be reflected in the IRS Paperwork Reduction Act Submission for the Form 8933 (OMB control numbers 1545–0123 and 1545–2132). The IRS is anticipating making revisions to Form 8933 to take these final regulations into account. When available, drafts of IRS forms are posted for comment at *www.irs.gov/draftforms.*

The current status of the Paperwork Reduction Act submissions related to the section 45Q credit and the tax forms that will be revised as a result of the information collections in the section 45Q regulations is provided in the following table. The section 45Q provisions are included in aggregated burden estimates for the OMB control numbers listed later which, in the case of 1545–0123, represents a total estimated burden time, including all other related forms and schedules for corporations, of 3.344 billion hours and total estimated monetized costs of $61.558 billion ($2019). The burden estimates provided in the OMB control numbers are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and will in the future include but not isolate the estimated burden of only the section 45Q requirements. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the final regulations. No burden estimates specific to the final regulations are currently available. The Treasury Department has not estimated the burden, including that of any new information collections, related to the requirements under the final regulations. Those estimates would capture both changes made to section 45Q by the BBA and those that arise out of discretionary authority exercised in the final regulations. The Treasury Department and the IRS request comments on all aspects of information collection burdens related to the final regulations, including estimates for how much time it would take to comply with the paperwork burdens described earlier for each relevant form and ways for the IRS to minimize the paperwork burden.

When available, drafts of IRS forms are posted for comment at *www.irs.gov/draftforms.* Forms will not be finalized until after they have been approved by OMB under the PRA.

Form	Type of filer	OMB No.(s)	Status
Form 8933	Business	1545–2132	Sixty-day notice published in the **Federal Register** on 10/21/19 (84 FR 56283). Public comment period closed on 12/20/19. Thirty-day notice published in the **Federal Register** on 1/31/20 (85 FR 5776). Public comment period closed on 3/2/20. OIRA approval is pending.

Form	Type of filer	OMB No.(s)	Status
Form 8933	Business (NEW Model).	1545–0123	Sixty-day notice published in the **Federal Register** on 9/30/19 (84 FR 51718). Public Comment period closed on 11/29/19. Thirty-day notice published in the **Federal Register** on 12/19/19 (84 FR 69825). Public Comment period closed on 1/21/20. Approved by OIRA on 1/30/20.
	Link: *https://hs--www--federalregister--gov.tickly.io/documents/2019/10/21/2019-22844/proposed-collection-comment-request-for-form-8933*		

III. Regulatory Flexibility Act

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA). Although a substantial number of small entities may be affected, the economic impact of this rule is unlikely to be significant.

The RFA imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. Therefore, the Treasury Department and the IRS presented an IRFA in connection with the proposed rule in order to invite comments on both the number of entities affected and the economic impact on small entities. No comments were received specific to these areas of inquiry. In the absence of comments, this final regulatory flexibility analysis (FRFA) is presented with the final rule.

In addition, pursuant to section 7805(f) of the Code, the proposed rule preceding this final rule was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

1. Need for and Objectives of the Rule

The final regulations will provide greater clarity to taxpayers for purposes of claiming the section 45Q credit for the capture and disposal, injection, or utilization of qualified carbon oxide. The final rule is expected to encourage taxpayers to invest in carbon capture technologies. Thus, the Treasury Department and the IRS intend and expect that the final rule will deliver benefits across the economy that will beneficially impact various industries and reduce emissions of carbon oxides that would otherwise be released into the atmosphere as industrial emission of greenhouse gasses or lead to such release.

2. Affected Small Entities

The Small Business Administration estimates in its 2018 Small Business Profile that 99.9 percent of United States businesses meet its definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this final regulation and in this FRFA, these rules may affect a variety of different businesses across serval different industries.

The section 45Q credit incentivizes three different categories of activities related to captured carbon oxide. First, the section 45Q credit is available to taxpayers who capture carbon oxide and dispose of it in secure geological storage. This would occur if it were injected into a geological formation, such as a deep saline formation, an oil and gas reservoir, or an unminable coal seam. The taxpayer claiming the credit for carbon oxide that is securely stored can be either the taxpayer who owns the capture equipment, or if an election is made, the taxpayer who disposes of the carbon oxide.

Second, the section 45Q credit is also available for carbon oxide captured and used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of in secure geological storage. The taxpayer claiming the credit for carbon oxide that is used as a tertiary injectant in enhanced oil recovery projects can be either the taxpayer who owns the capture equipment, or if an election is made, the taxpayer who uses the carbon oxide as a tertiary injectant in a qualified enhanced oil or natural gas recovery project.

And third, the section 45Q credit is available for carbon oxide ''utilized'' by fixing it through photosynthesis or chemosynthesis, converted to a material or chemical compound in which it is securely stored, or used for any other purpose for which a commercial market exists. The taxpayer claiming the credit for utilization of carbon oxide can be either the taxpayer who owns the carbon capture equipment, or if an election is made, the taxpayer who utilizes the carbon oxide.

Because the potential credit claimants in all three of these scenarios can vary, including potential tax equity investors from the financial services sector as credit claimants, it is difficult to estimate at this time the impact of the final rule, if any, on small businesses.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses when taxpayers start to claim the section 45Q credit using the guidance and procedures provided in these final regulations.

3. Issues Raised by Commenters

As previously noted, no comments were received specifically related to the impact of the proposed rule on small entities or on the number of potentially impacted entities. The preamble to this final rule describes in detail the various technical issues raised by commenters in response to the proposed rule and further describes the ways in which the final rule is responsive to comments.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The final regulations will allow taxpayers to plan investments and transactions based on the ability to claim the section 45Q credit. The increased use of the section 45Q credit may lead to increased investment in infrastructure to transport carbon dioxide, and increased development of carbon capture technologies. In addition, the increased use of the section 45Q credit will incentivize the development of technologies for utilization of carbon oxide. The recordkeeping and reporting requirements will increase for taxpayers that claim the section 45Q credit. This includes costs associated with the taxpayer filing the Form 8933, as well as required election statements and maintaining records to substantiate

carbon capture of carbon oxide, disposal in secure geological storage, use as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposal in secure geological storage, or utilization. Each taxpayer will be required to file a separate Form 8933 for each year that a section 45Q credit is claimed or that an election is made with respect to a section 45Q credit. Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

5. Alternatives Considered

As described in more detail in the Regulatory Impact Analysis of this preamble, the Treasury Department and the IRS considered alternatives to the final regulations. For example, in providing rules related to recapture of section 45Q credits the Treasury Department and the IRS considered, as suggested by commenters, whether a shorter recapture period was more appropriate given the available evidence regarding the secure storage of carbon oxide. In addition, in providing rules related to how to demonstrate secure geological storage in the case of tertiary injection and disposal through secure geological storage, the Treasury Department and the IRS considered whether to (i) require compliance with subpart RR, (ii) allow use of subpart RR or CSA/ANSI ISO 27916:19, or (iii) other alternatives to subpart RR including use of state programs. Commenters consistently recommended CSA/ANSI ISO 27916:19 as a potential alternative to subpart RR. The Treasury Department and the IRS, in consultation with the DOE, the EPA and the Interior Department, agreed that, in the case of tertiary injection and disposal through secure geological storage, allowing the use of subpart RR or CSA/ANSI ISO 27916:19 would sufficiently demonstrate secure geological storage for purposes of the statutory requirement, without creating or imposing undue burdens on taxpayers.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2019, that threshold is approximately $154 million. These final regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

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

VI. Congressional Review Act

The Administrator of OIRA has determined that this is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*) (CRA). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**.

Notwithstanding this requirement, section 808(2) of the CRA allows agencies to dispense with the requirements of section 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines. Pursuant to section 808(2) of the CRA, the Treasury Department and the IRS find, for good cause, that a 60-day delay in the effective date is unnecessary and contrary to the public interest.

Following the amendments to section 45Q under the BBA, the Treasury Department and the IRS published the proposed regulations to provide certainty to taxpayers. In particular, as demonstrated by the wide variety of public comments in response to the proposed regulations, taxpayers and other stakeholders continue to express concerns about the uncertainty regarding the proper application of the statutory rules under section 45Q. This uncertainty extends to the application of a number of important provisions in section 45Q requiring determinations to be made by the Secretary, in consultation with the Administrator of the EPA, the Secretary of Energy, and the Secretary of the Interior, intended to provide certainty for taxpayers embarking on highly capital intensive projects intended to qualify for section 45Q credits. Certainty with respect to these provisions is essential so that taxpayers can accurately predict the economic return from making particular investments and make informed business decisions. Consistent with Executive Order 13924 (May 19, 2020) and bipartisan letters from numerous Members of Congress urging expeditious publication of these final regulations, the Treasury Department and the IRS have therefore determined that an expedited effective date of the final regulations would provide needed guidance on what the law requires for businesses to begin job-generating construction of capital intensive projects qualifying for section 45Q credits during a time of economic uncertainty and distress. See 85 FR 31353–4. Accordingly, the Treasury Department and the IRS have determined that the rules in this Treasury decision will take effect on the date of filing for public inspection in the **Federal Register**.

Statement of Availability for IRS Documents

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

Drafting Information

The principal authors of these final regulations are Maggie Stehn and Jennifer Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries) and Julie Holmes Chapel of the Office of Associate Chief Counsel (Large Business & International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

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

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Sections 1.45Q–1, 1.45Q–2, 1.45Q–3, 1.45Q–4, and 1.45Q–5 also issued under 26 U.S.C. 45Q(h).

Section 1.45Q–3 also issued under 26 U.S.C. 45Q(f)(2).

Section 1.45Q–4 also issued under 26 U.S.C. 45Q(f)(5).

Section 1.45Q–5 also issued under 26 U.S.C. 45Q(f)(4).

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Par. 2. Sections 1.45Q–0, 1.45Q–1, 1.45Q–2, 1.45Q–3, 1.45Q–4, and 1.45Q–5 are added to read as follows:

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§ 1.45Q–1 Credit for Carbon Oxide Sequestration.

(a) *In general.* For purposes of section 38 of the Internal Revenue Code (Code), the carbon oxide sequestration credit is determined under section 45Q of the Code and this section (section 45Q credit). Generally, the amount of the section 45Q credit and the party that is

eligible to claim the credit depend on whether the taxpayer captures qualified carbon oxide using carbon capture equipment originally placed in service at a qualified facility before February 9, 2018, or on or after February 9, 2018, and whether the taxpayer disposes of the qualified carbon oxide in secure geological storage without using it as a tertiary injectant in a qualified enhanced oil or natural gas recovery project (disposal), uses it as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposes of it in secure geological storage (injection), or utilizes it in a manner described in section 45Q(f)(5) and § 1.45Q–4 (utilization). The section 45Q credit applies only with respect to qualified carbon oxide the capture and disposal, injection, or utilization of which is within the United States (within the meaning of section 638(1) of the Code) or a possession of the United States (within the meaning of section 638(2)).

(b) *Credit amount for carbon capture equipment originally placed in service before February 9, 2018—(1) In general.* For carbon capture equipment originally placed in service at a qualified facility before February 9, 2018, the amount of credit determined under section 45Q(a) and this section is the sum of—

(i) $20 per metric ton of qualified carbon oxide that is—

(A) Captured by the taxpayer at the qualified facility and disposed of by the taxpayer in secure geological storage, and

(B) Not used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project or utilized by the taxpayer in a manner described in section 45Q(f)(5) and § 1.45Q–4, and

(ii) $10 per metric ton of qualified carbon oxide that is—

(A) Captured by the taxpayer at the qualified facility and used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project, and disposed of by the taxpayer in secure geological storage, or

(B) Captured by the taxpayer at the qualified facility and utilized by the taxpayer in a manner described in section 45Q(f)(5) and § 1.45Q–4.

(2) *Inflation adjustment.* In the case of any taxable year beginning in a calendar year after 2009, there is substituted for each dollar amount contained in paragraphs (b)(1)(i) and (ii) of this section an amount equal to the product of—

(i) Such dollar amount, multiplied by

(ii) The inflation adjustment factor for such calendar year determined under section 43(b)(3)(B) for such calendar year, determined by substituting ''2008'' for ''1990.''

(c) *Credit amount for carbon capture equipment originally placed in service on or after February 9, 2018.* For carbon capture equipment originally placed in service at a qualified facility on or after February 9, 2018, the amount of credit determined under section 45Q(a)(3) and (4) and this section is the sum of—

(1) The applicable dollar amount (as determined under paragraph (d)(1) and (2) of this section) per metric ton of qualified carbon oxide that is captured during the 12-year period beginning on the date the equipment was originally placed in service, and is—

(i) Disposed of by the taxpayer in secure geological storage, and

(ii) Not used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project or utilized by the taxpayer in a manner described in section 45Q(f)(5) and § 1.45Q–4; and

(2) The applicable dollar amount (as determined under paragraph (d)(3) and (4) of this section) per metric ton of qualified carbon oxide that is captured during the 12-year period beginning on the date the equipment was originally placed in service and is—

(i) Used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of by the taxpayer in secure geological storage, or

(ii) Utilized by the taxpayer in a manner described in section 45Q(f)(5) and § 1.45Q–4.

(d) *Applicable dollar amount.* In general, the applicable dollar amount depends on whether section 45Q(a)(3) and paragraph (c)(1) of this section applies or section 45Q(a)(4) and paragraph (c)(2) of this section applies, and the calendar year in which the taxable year begins.

(1) *Applicable dollar amount for any taxable year beginning in a calendar year after 2016 and before 2027 for qualified carbon oxide not used as a tertiary injectant or utilized.* For purposes of section 45Q(a)(3) and paragraph (c)(1) of this section, the applicable dollar amount for each taxable year beginning in a calendar year after 2016 and before 2027 is:

TABLE 1 TO PARAGRAPH (d)(1)

Year	Applicable dollar amount
2017	$22.66
2018	25.70
2019	28.74
2020	31.77
2021	34.81

TABLE 1 TO PARAGRAPH (d)(1)—Continued

Year	Applicable dollar amount
2022	37.85
2023	40.89
2024	43.92
2025	46.96
2026	50.00

(2) *Applicable dollar amount for any taxable year beginning in a calendar year after 2026 for qualified carbon oxide not used as a tertiary injectant or utilized.* For purposes of section 45Q(a)(3) and paragraph (c)(1) of this section, the applicable dollar amount for any taxable year beginning in any calendar year after 2026 is an amount equal to the product of $50 and the inflation adjustment factor for the calendar year determined under section 43(b)(3)(B) for the calendar year, determined by substituting ''2025'' for ''1990.''

(3) *Applicable dollar amount for any taxable year beginning in a calendar year after 2016 and before 2027 for qualified carbon oxide used as a tertiary injectant or utilized.* For purposes of section 45Q(a)(4) and paragraph (c)(2) of this section, the applicable dollar amount for each taxable year beginning in a calendar year after 2016 and before 2027 is:

TABLE 2 TO PARAGRAPH (d)(3)

Year	Applicable dollar amount
2017	$12.83
2018	15.29
2019	17.76
2020	20.22
2021	22.68
2022	25.15
2023	27.61
2024	30.07
2025	32.54
2026	35.00

(4) *Applicable dollar amount for any taxable year beginning in a calendar year after 2026 for qualified carbon oxide used as a tertiary injectant or utilized.* For purposes of section 45Q(a)(4) and paragraph (c)(2) of this section, the applicable dollar amount for any taxable year beginning in any calendar year after 2026, is an amount equal to the product of $35 and the inflation adjustment factor for such calendar year determined under section 43(b)(3)(B) for such calendar year, determined by substituting ''2025'' for ''1990.''

(e) *Election to apply the $10 and $20 credit amounts in lieu of the applicable dollar amounts.* For purposes of determining the carbon oxide sequestration credit under this section, a taxpayer may elect to have the dollar amounts applicable under section 45Q(a)(1) or (2) and paragraph (b) of this section apply in lieu of the dollar amounts applicable under section 45Q(a)(3) or (4) and paragraph (d) of this section for each metric ton of qualified carbon oxide which is captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018. The election must be made on a *Form 8933* (as defined in § 1.45Q–2(j)), and applies to all metric tons of qualified carbon oxide captured by the taxpayer using carbon capture equipment which is originally placed in service at the qualified facility throughout the full 12-year credit period.

(f) *Application of section 45Q for certain carbon capture equipment placed in service before February 9, 2018.* In the case of any carbon capture equipment placed in service before February 9, 2018, the credits under section 45Q(a)(1) and (2) and paragraph (b)(1)(i) and (ii) of this section apply with respect to qualified carbon oxide captured using such equipment before the end of the calendar year in which the Secretary of the Treasury or his delegate, in consultation with the Administrator of the Environmental Protection Agency (EPA), certifies that, during the period beginning after October 3, 2008, a total of 75,000,000 metric tons of qualified carbon oxide have been taken into account in accordance with section 45Q(a), as in effect on February 8, 2018, and section 45Q(a)(1) and (2). In general, a taxpayer may not claim credits under section 45Q(a)(1) and (2) in taxable years after the year in which the 75,000,000 metric ton limit is certified with respect to carbon capture equipment placed in service before February 9, 2018. However, see § 1.45Q–2(g)(4) regarding the election for applicable facilities to treat certain carbon capture equipment as having been placed in service on February 9, 2018 (section 45Q(f)(6) election).

(g) *Installation of additional carbon capture equipment.* In general, the credit amounts for property placed in service before February 9, 2018, apply to a qualified facility at which carbon capture equipment was placed in service before February 9, 2018, subject to the limitations under paragraph (f) of this section. The same qualified facility may place additional carbon capture equipment in service on or after February 9, 2018. The additional carbon capture equipment is eligible to qualify for the section 45Q credit amounts for equipment placed in service on or after February 9, 2018.

(1) *Allocation of section 45Q credits for facilities installing additional carbon capture equipment.* In the case of a qualified facility placed in service before February 9, 2018, for which additional carbon capture equipment is placed in service on or after February 9, 2018, the amount of qualified carbon oxide which is captured by the taxpayer is equal to—

(i) For purposes of section 45Q(a)(1)(A) and (2)(A), and paragraphs (b)(1)(i) and (ii) of this section, the lesser of the total amount of qualified carbon oxide captured at such facility for the taxable year, or the total amount of the carbon dioxide capture capacity of the carbon capture equipment in service at such facility on February 8, 2018, and

(ii) For purposes of section 45Q(a)(3)(A) and (4)(A), and paragraphs (c)(1) and (2) of this section, an amount (not less than zero) equal to the excess of the total amount of qualified carbon oxide captured at such facility for the taxable year, over the total amount of the carbon dioxide capture capacity of the carbon capture equipment in service at such facility on February 8, 2018.

(2) *Additional carbon capture equipment.* A physical modification or equipment addition that results in an increase in the carbon dioxide capture capacity of existing carbon capture equipment constitutes the installation of additional carbon capture equipment. Increasing the amount of carbon dioxide captured without physically modifying existing carbon capture equipment or adding new equipment, for example, by merely operating the existing carbon capture equipment above the carbon dioxide capture capacity, does not constitute the installation of additional carbon capture equipment. For purposes of this section, the term *carbon dioxide capture capacity* means capture design capacity. Section 45Q credits attributable to qualified carbon oxide captured by additional carbon capture equipment that is placed in service on or after February 9, 2018, are not subject to the 75,000,000 metric ton limitation described in section 45Q(g) and paragraph (f) of this section.

(3) *New carbon capture equipment.* A physical modification or equipment addition with a cost that satisfies the 80/20 Rule provided in § 1.45Q–2(g)(5) constitutes the installation of new carbon capture equipment rather than the installation of additional carbon capture equipment.

(4) *Examples.* The following examples illustrate the rules of this paragraph (g):

(i) *Example 1.* Taxpayer X owns qualified facility QF. In 2017, X placed in service three units of carbon capture equipment—CC1, CC2, and CC3—to capture carbon dioxide emitted by QF. Each of CC1, CC2, and CC3 are capable of capturing 50,000 metric tons of carbon dioxide. In 2017, X entered into a binding written contract with Y to provide 80,000 metric tons of carbon dioxide annually for Y to dispose of in secure geological storage. X operates CC1 and CC2 to capture carbon dioxide pursuant to the binding written contract with Y, leaving CC3 idle. In 2020, X enters into a binding written contract with Z to provide 40,000 metric tons of carbon dioxide annually for Z to dispose of in secure geological storage. X operates CC3 to capture carbon dioxide pursuant to the binding written contract with Z. CC3 is not additional carbon capture equipment under paragraph (g)(2) of this section simply because it began operating CC3 in 2020. X merely increased the amount of carbon dioxide captured by existing carbon capture equipment. As a result, any section 45Q credits attributable to the carbon dioxide captured by CC3 and disposed of by Z are calculated under section 45Q(a)(1) and paragraph (b)(1)(i) of this section, and are subject to the 75,000,000 metric ton limitation described in section 45Q(g) and paragraph (f) of this section.

(ii) *Example 2.* Assume the same facts as in Example 1, except that in 2019, X physically modified CC3 to enable CC3 to capture 100,000 metric tons of carbon dioxide. The physical modification to upgrade CC3 does not satisfy the 80/20 Rule in § 1.45Q–2(g)(5). In 2020 X enters into a binding written contract with Z to provide 80,000 metric tons of carbon dioxide annually for Z to dispose of in secure geological storage. X operates CC3 to capture carbon dioxide pursuant to the binding written contract with Z. Because the physical modification to upgrade CC3 does not satisfy the 80/20 Rule, the physical modification to upgrade CC3 is considered the installation of additional carbon capture equipment under paragraph (g)(2) of this section, rather than new carbon capture equipment under paragraph (g)(3) of this section. As a result, any section 45Q credits attributable to the first 50,000 metric tons of carbon dioxide captured by CC3 and disposed of by Z are calculated under section 45Q(a)(1) and paragraph (b)(1)(i) of this section, and are subject to the 75,000,000 metric ton limitation described in section 45Q(g) and paragraph (f) of this section. Any section 45Q credits attributable to

additional carbon dioxide captured by CC3 and disposed of by Z in excess of those first 50,000 metric tons are calculated under section 45Q(a)(4) and paragraph (c)(2) of this section, and are not subject to the 75,000,000 metric ton limitation described in section 45Q(g) and paragraph (f) of this section.

(iii) *Example 3.* Assume the same facts as in Example 2, except that the physical modification to CC3 satisfies the 80/20 Rule in § 1.45Q–2(g)(5). The physical modification to CC3 is considered the installation of new carbon capture equipment under paragraph (g)(3) of this section. As a result, any section 45Q credits attributable to carbon dioxide captured by CC3 and disposed of by Z are calculated under section 45Q(a)(4) and paragraph (c)(2) of this section, and are not subject to the 75,000,000 metric ton limitation described in section 45Q(g) and paragraph (f) of this section.

(h) *Eligibility for the section 45Q credit.* The following rules determine who may claim the section 45Q credit.

(1) *Person to whom the section 45Q credit is attributable.* In general, the person to whom the credit is attributable is the person who may claim the credit. Except as provided in paragraph (h)(3) of this section, the section 45Q credit is attributable to the following persons—

(i) *Equipment placed in service before February 9, 2018.* In the case of qualified carbon oxide captured using carbon capture equipment that is originally placed in service at a qualified facility before February 9, 2018, the section 45Q credit is attributable to the person that captures and physically or contractually ensures the disposal, injection, or utilization of such qualified carbon oxide.

(ii) *Equipment placed in service on or after February 9, 2018.* In the case of qualified carbon oxide captured using carbon capture equipment that is originally placed in service at a qualified facility on or after February 9, 2018, the section 45Q credit is attributable to the person that owns the carbon capture equipment and physically or contractually ensures the capture and disposal, injection, or utilization of such qualified carbon oxide. For each single process train of carbon capture equipment (as described in § 1.45Q–2(c)(3)), only one taxpayer will be considered the person to whom the credit is attributable under this paragraph (h)(1)(ii). That person will be the taxpayer who either physically ensures the capture and disposal, injection, or utilization of such qualified carbon oxide or contracts with others to capture and dispose, inject, or utilize such qualified carbon oxide.

(iii) *Reporting.* The taxpayer described in this paragraph (h)(1) as eligible to claim the section 45Q credit must claim the credit on a *Form 8933,* ''Carbon Dioxide Sequestration Credit,'' with the taxpayer's Federal income tax return or *Form 1065,* ''U.S. Return of Partnership Income,'' for each taxable year for which the taxpayer is eligible. The taxpayer must provide the name and location of the qualified facilities at which the qualified carbon oxide was captured. If the taxpayer is claiming the section 45Q credit on an amended Federal income tax return, an amended *Form 1065,* or an administrative adjustment request under section 6227 (AAR), as applicable, the taxpayer must state AMENDED RETURN FOR SECTION 45Q CREDIT at the top of the amended Federal income tax return, the amended *Form 1065,* or the AAR, as applicable. The amended Federal income tax return or the amended *Form 1065* must be filed, in any event, not later than the applicable period of limitations on filing an amended Federal income tax return or *Form 1065* is being filed. A BBA partnership may make a late election by filing an AAR on or before October 15, 2021, but in any event, not later than the period of limitations on filing an AAR under section 6227(c).

(2) *Contractually ensuring capture and disposal, injection, or utilization of qualified carbon oxide.* In the case of qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility on or after February 9, 2018, a taxpayer is not required to physically carry out the capture and disposal, injection, or utilization of qualified carbon oxide to claim the section 45Q credit if the taxpayer contractually ensures in a binding written contract that the party that physically carries out the capture, disposal, injection, or utilization of the qualified carbon oxide does so in the manner required under section 45Q, this section and §§ 1.45Q–2, 1.45Q–3, 1.45Q–4, and 1.45Q–5. A taxpayer may enter into a binding written contract with a general contractor that hires subcontractors to physically carry out the capture, disposal, injection, or utilization of the qualified carbon oxide, but the contract must bind the subcontractors to the requirements of this paragraph (h)(2). In the case of qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility before February 9, 2018, a taxpayer that contractually ensures the capture of the qualified carbon oxide is not eligible for the section 45Q credit. However, the taxpayer is not required to physically carry out the disposal, injection, or utilization of qualified carbon oxide to claim the section 45Q credit if the taxpayer contractually ensures in a binding written contract that the party that physically carries out the disposal, injection, or utilization of the qualified carbon oxide does so in the manner required under section 45Q, this section, and §§ 1.45Q–2, 1.45Q–3, 1.45Q–4, and 1.45Q–5.

(i) *Binding written contract.* A written contract is binding only if it is enforceable under State law against both the taxpayer and the party that physically carries out the capture, disposal, injection, or utilization of the qualified carbon oxide, or a predecessor or successor of either, and does not limit damages to a specified amount (for example, by use of a liquidated damages provision). For this purpose, a contractual provision that limits damages to an amount equal to at least five percent of the total contract price will not be treated as limiting damages to a specified amount. For additional guidance regarding the definition of a binding written contract, see § 1.168(k)–1(b)(4)(ii)(A)–(D).

(ii) *Multiple binding written contracts permitted.* A taxpayer may enter into multiple binding written contracts with multiple parties for the capture, disposal, injection, or utilization of qualified carbon oxide. A party that physically carries out the capture, disposal, injection, or utilization of qualified carbon oxide may enter into multiple binding written contracts with multiple parties that own carbon capture equipment or capture or contractually ensure the capture of qualified carbon oxide.

(iii) *Contract provisions.* Contracts ensuring the capture, disposal, injection, or utilization of qualified carbon oxide—

(A) Must include commercially reasonable terms and provide for enforcement of the party's obligation to perform the capture, disposal, injection, or utilization of the qualified carbon oxide;

(B) May, but are not required to, include long-term liability provisions, indemnity provisions, penalties for breach of contract, or liquidated damages provisions;

(C) May, but are not required to, include information including how many metric tons of qualified carbon oxide the parties agree to dispose of, inject, or utilize;

(D) May, but are not required to, include minimum quantities that the parties agree to dispose of, inject, or utilize;

(E) Must, in the case of qualified carbon oxide that is intended to be disposed of in secure geological storage and not used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project, obligate the disposing party to comply with §§ 1.45Q–3(b)(1) and (c), and, in the case of a recapture event, promptly inform the capturing party of all information that is pertinent to the recapture (*e.g.,* location of leak, leaked amount of qualified carbon oxide, dollar value of section 45Q credit attributable to leaked qualified carbon oxide);

(F) Must, for qualified carbon oxide that is intended to be used as a tertiary injectant in a qualified enhanced oil or natural gas recovery, obligate the disposing party to comply with § 1.45Q–3(b)(2) and (c), and in the case of a recapture event, promptly inform the capturing party of all information that is pertinent to recapture of the section 45Q credit as listed in § 1.45Q–5; and

(G) Must, for qualified carbon oxide that is intended to be utilized in a manner specified in § 1.45Q–4, obligate the utilizing party to comply with § 1.45Q–4.

(iv) *Pre-existing contracts.* If a taxpayer entered into a contract for the capture, disposal, injection, or utilization of qualified carbon oxide prior to January 13, 2021, and that contract does not satisfy all of the requirements of this paragraph (h)(2), the taxpayer must amend its existing contract or execute a new contract that satisfies all of the requirements of this paragraph (h)(2) by July 12, 2021.

(v) *Reporting of contract information.* The existence of each contract and the parties involved must be reported to the IRS annually. Each party to a contract must complete a signed *Form 8933* (as defined in § 1.45–2(j)) and provide information required by the instructions to *Form 8933.* The party that contracts with the taxpayer claiming the credit must also provide that taxpayer with a signed *Form 8933* in accordance with the instructions to *Form 8933.* The taxpayer claiming the credit must attach and file all other signed *Forms 8933* received by each other party to the contract to its own signed *Form 8933.* Failure of the taxpayer claiming the credit to satisfy this reporting requirement in a taxable year will result in the inability of that taxpayer to claim the credit with respect to any qualified carbon oxide that is disposed of, injected, or utilized in that taxable year pursuant to that particular contract. In addition to any information stated as required on *Form 8933,* the report must include the following information—

(A) The name and taxpayer identification number of the taxpayer to whom the credit is attributable;

(B) The name and taxpayer identification number of each party with whom the taxpayer has entered into a contract to ensure the disposal, injection, or utilization of qualified carbon oxide;

(C) The date each contract to ensure the disposal, injection, or utilization of qualified carbon oxide was entered into;

(D) The number of metric tons of qualified carbon oxide each contracting party disposes of, injects, or utilizes on behalf of the contracting taxpayer each taxable year for reporting to the IRS; and

(E) For contracts for the disposal of qualified carbon oxide in secure geological storage or the use of qualified carbon oxide as a tertiary injectant in enhanced oil or natural gas recovery, the name of the operator, the field, unit, and reservoir, location by county and state, and identification number assigned to the facility by the EPA's electronic Greenhouse Gas Reporting Tool (e-GGRT ID number) for submission of the facility's 40 CFR part 98 annual reports.

(vi) *Relationship with election to allow section 45Q credit.* A taxpayer does not elect to allow all or a portion of the credit to any of the contracting parties merely by contracting with that party to ensure the disposal, injection, or utilization of qualified carbon oxide. Any election to allow all or a portion of the credit to be claimed by another party must be made separately pursuant to paragraph (h)(3) of this section.

(3) *Election to allow the section 45Q credit to another taxpayer.* The taxpayer described in paragraph (h)(1) of this section as the person to whom the section 45Q credit is attributable (electing taxpayer) may elect to allow the person that enters into a contract with the electing taxpayer to dispose of the qualified carbon oxide (disposer), utilize the qualified carbon oxide (utilizer), or use the qualified carbon oxide as a tertiary injectant (injector) to claim the credit (credit claimant) (section 45Q(f)(3)(B) election). However, the electing taxpayer may not elect or otherwise allow the section 45Q credit to a contractor or subcontractor that physically captures carbon oxide on behalf of the taxpayer. For purposes of this paragraph (h)(3), the disposer or injector that is eligible to be a credit claimant is the party that obtains the permit to dispose of the qualified carbon oxide in secure geological storage. In the case of an injector that is itself a joint venture (not a federal tax partnership), only those taxpayers that hold a working interest in the joint venture may be credit claimants. A credit claimant may not allow the section 45Q credit to a subcontractor that performs the disposal, utilization, or injection for the credit claimant. The electing taxpayer may not claim any section 45Q credits that are allowable to a credit claimant. An electing taxpayer may elect to allow a credit claimant to claim the full amount or a partial amount of section 45Q credits arising during the taxable year. An electing taxpayer may elect to allow a single credit claimant or multiple credit claimants to claim section 45Q credits in the same taxable year. If an electing taxpayer elects to allow multiple credit claimants to claim section 45Q credits, the maximum amount of section 45Q credits allowable to each credit claimant is proportional to the amount of qualified carbon oxide disposed of, utilized, or used as a tertiary injectant by the credit claimant. A credit claimant may receive allowances of section 45Q credits from multiple electing taxpayers in the same taxable year. In the case of an electing taxpayer with multiple qualified facilities, the electing taxpayer must make a separate election for each qualified facility.

(i) *Example.* Electing Taxpayer, E, captures 1,000,000 metric tons of qualified carbon oxide with carbon capture equipment that was placed in service in 2020. In 2021, E contracts with two companies, A and B, for the disposal of the qualified carbon oxide. E is eligible for a section 45Q credit at a rate of $22.68 per metric ton, for a total section 45Q credit of $22,680,000. E contractually ensures that A will dispose of 300,000 metric tons of qualified carbon oxide and that B will dispose of 700,000 metric tons of qualified carbon oxide. E may make a section 45Q(f)(3)(B) election to allow up to $6,804,000 of section 45Q credit to A and up to $15,876,000 of section 45Q credit to B, equal to the value of the number of metric tons each party has contracted to ensure disposal, multiplied by the credit value of the metric tons disposed of.

(ii) *Time and manner of making election.* The electing taxpayer makes a section 45Q(f)(3)(B) election by filing a statement of election containing the information described in paragraph (h)(3)(iv) of this section with the taxpayer's Federal income tax return or *Form 1065* for each taxable year in which the credit arises. The section 45Q(f)(3)(B) election must be made in accordance with *Form 8933* no later than the time prescribed by law (including extensions) for filing the

Federal income tax return or *Form 1065* for the year in which the credit arises. The election may not be filed with an amended Federal income tax return, an amended *Form 1065,* or an AAR, as applicable, after the prescribed date (including extensions) for filing the original Federal income tax return or *Form 1065* for the year, with the exception of amended Federal income tax returns, amended *Forms 1065,* or AARs, as applicable, for any taxable year ending after February 9, 2018, and beginning on or before January 13, 2021. The amended Federal income tax return or the amended *Form 1065* must be filed, in any event, not later than the applicable period of limitations on assessment for the taxable year for which the amended Federal income tax return or *Form 1065* is being filed. A BBA partnership may make a late election by filing an AAR on or before October 15, 2021, but in any event, not later than the period of limitations on filing an AAR under section 6227(c).

(iii) *Annual election.* A section 45(Q)(f)(3)(B) election is only effective for the taxable year for which it is made. A new section 45Q(f)(3)(B) election must be made for each taxable year for which an electing taxpayer wishes to allow section 45Q credits to a credit claimant.

(iv) *Required information.* For the section 45Q(f)(3)(B) election to be valid under paragraph (h)(3)(ii) of this section, the election statement of the electing taxpayer must be made on *Form 8933* and must indicate that an election is being made under section 45Q(f)(3)(B). The electing taxpayer must provide each credit claimant with a copy of the electing taxpayer's *Form 8933.* The electing taxpayer must, in addition to any information required on *Form 8933* set forth the following information—

(A) The electing taxpayer's name, address, taxpayer identification number, location, and e-GGRT ID number(s) (if available) of each qualified facility where qualified carbon oxide was captured;

(B) The full amount of credit attributable to the taxpayer prior to the election and the corresponding metric tons of qualified carbon oxide;

(C) The name, address, and taxpayer identification number of each credit claimant, and the name and location and e-GGRT ID number(s) (if available) of:

(*i*) Each secure geological storage site where the qualified carbon oxide is disposed of or injected, or

(*ii*) Each site where the qualified carbon oxide is utilized;

(D) The dollar amount of section 45Q credits the taxpayer is allowing each credit claimant to claim and the corresponding metric tons of qualified carbon oxide; and

(E) The dollar amount of section 45Q credits retained by the electing taxpayer and the corresponding metric tons of qualified carbon oxide.

(v) *Requirements for section 45Q credit claimant.* For a section 45Q(f)(3)(B) election to be valid, the section 45Q credit claimant must include the following information on *Form 8933*—

(A) The name, address, taxpayer identification number of the credit claimant;

(B) The name, address, and taxpayer identification number of each taxpayer making an election under section 45Q(f)(3)(B) to allow the credit to the credit claimant;

(C) The name and location and e-GGRT ID number(s) (if available) of each qualified facility where qualified carbon oxide was captured;

(D) The name and location and e-GGRT ID number(s) (if available) of:

(*i*) Each secure geological storage site where the qualified carbon oxide is disposed of or injected, or

(*ii*) Each site where the qualified carbon oxide is utilized.

(E) The full dollar amount of section 45Q credits attributable to each electing taxpayer prior to the election and the corresponding metric tons of qualified carbon oxide;

(F) The dollar amount of section 45Q credits that each electing taxpayer is allowing the credit claimant to claim and the corresponding metric tons of qualified carbon oxide; and

(G) A copy of the electing taxpayer's *Form 8933.* The credit claimant must include this *Form 8933* with its timely filed Federal income tax return or *Form 106*5 (including extensions). The election may not be filed with an amended Federal income tax return, an amended *Form 1065,* or an AAR, as applicable, after the prescribed date (including extensions) for filing the original Federal income tax return or *Form 1065* for the year, with the exception of amended Federal income tax returns, amended *Forms 1065,* or AARs, as applicable, for any taxable year ending after February 9, 2018, and beginning on or before January 13, 2021. The amended Federal income tax return or the amended *Form 1065* must be filed, in any event, not later than the applicable period of limitations on filing an amended Federal income tax return or *Form 1065.* In the case of a BBA partnership, the BBA partnership may make a late election by filing an AAR on or before October 15, 2021, but in any event, not later than the period of limitations on filing an AAR under section 6227(c).

(vi) *Failure to satisfy reporting requirements.* With respect to any section 45Q(f)(3)(B) election, the failure of an electing taxpayer or a credit claimant to satisfy the requirements in paragraph (h)(3)(iv) or (v) in a taxable year will result in the inability to claim the credit with respect to any qualified carbon oxide that is disposed of, injected, or utilized in that taxable year pursuant to that particular election.

(i) *Applicability date.* This section applies to taxable years beginning on or after January 13, 2021. Taxpayers may choose to apply this section for taxable years beginning on or after January 1, 2018, provided the taxpayer applies this section and §§ 1.45Q–2, 1.45Q–3, 1.45Q–4, and 1.45Q–5 in their entirety and in a consistent manner.

§ 1.45Q–2 Definitions for Purposes of §§ 1.45Q–1 through 1.45Q–5.

(a) *Qualified carbon oxide.* The term *qualified carbon oxide* means—

(1) Any carbon dioxide which—

(i) Is captured from an industrial source by carbon capture equipment which is originally placed in service before February 9, 2018,

(ii) Would otherwise be released into the atmosphere as industrial emission of greenhouse gas or lead to such release, and

(iii) Is measured at the source of capture and verified at the point of disposal, injection, or utilization; or

(2) Any carbon dioxide or other carbon oxide which—

(i) Is captured from an industrial source by carbon capture equipment which is originally placed in service on or after February 9, 2018,

(ii) Would otherwise be released into the atmosphere as industrial emission of greenhouse gas or lead to such release, and

(iii) Is measured at the source of capture and verified at the point of disposal, injection, or utilization; or

(3) In the case of a direct air capture facility, any carbon dioxide that is captured directly from the ambient air and is measured at the source of capture and verified at the point of disposal, injection, or utilization.

(b) *Recycled carbon oxide.* The term qualified carbon oxide includes the initial deposit of captured carbon oxide used as a tertiary injectant. Qualified carbon oxide does not include carbon oxide that is recaptured, recycled, and re-injected as part of the enhanced oil or natural gas recovery process.

(c) *Carbon capture equipment.* In general, *carbon capture equipment*

includes all components of property that are used to capture or process carbon oxide until the carbon oxide is transported for disposal, injection, or utilization. Except as described in paragraph (c)(2) of this section, carbon capture equipment generally does not include components of property used for transporting qualified carbon oxide for disposal, injection, or utilization. Carbon capture equipment that is originally placed in service at a qualified facility on or after February 9, 2018, may be owned by a taxpayer other than the taxpayer that owns the industrial facility at which the carbon capture equipment is placed in service.

(1) *Use of carbon capture equipment.* Carbon capture equipment is equipment used for the purpose of—

(i) Separating, purifying, drying, and/or capturing carbon oxide that would otherwise be released into the atmosphere from an industrial facility;

(ii) Removing carbon oxide from the atmosphere via direct air capture; or

(iii) Compressing or otherwise increasing the pressure of carbon oxide.

(2) *Carbon capture equipment components.* Carbon capture equipment generally includes components of property necessary to compress, treat, process, liquefy, pump or perform some other physical action to capture qualified carbon oxide. For purposes of this paragraph (c), carbon capture equipment includes a system of gathering and distribution lines that collect carbon oxide captured from a qualified facility or multiple qualified facilities that constitute a single project (as described in section 8.01 of Notice 2020–12, 2020–11 I.R.B. 495 (see § 601.601(d)(1) and (2)(ii) of this chapter)) for the purpose of transporting that carbon oxide away from the qualified facility or single project to a pipeline used to transport carbon oxide to or from one or more taxpayers and projects.

(3) *Single process train.* All components that make up an independently functioning process train capable of capturing, processing, and preparing carbon oxide for transport will be treated as a single unit of carbon capture equipment.

(d) *Industrial facility.* An *industrial facility* is a facility, including an electricity generating facility, that produces a carbon oxide stream from a fuel combustion source or fuel cell, a manufacturing process, or a fugitive carbon oxide emission source that, absent capture and disposal, injection, or utilization, would otherwise be released into the atmosphere as industrial emission of greenhouse gas or lead to such release.

(1) *Exclusion.* An industrial facility does not include a facility that produces carbon dioxide from carbon dioxide production wells at natural carbon dioxide-bearing formations or a naturally occurring subsurface spring. For purposes of section 45Q, a carbon dioxide production well at natural carbon dioxide-bearing formations or a naturally occurring subsurface spring means a well that contains 90 percent or greater carbon dioxide by volume (90 percent test).

(2) *Exception for wells at natural carbon dioxide-bearing formations or a naturally occurring subsurface spring that contain a product other than carbon dioxide.* A well meeting the 90 percent test will not be treated as a carbon dioxide production well at natural carbon dioxide-bearing formations or a naturally occurring subsurface spring if:

(i) The deposit contains a product, other than carbon oxide, that is commercially viable to extract and sell without taking into account the availability of a commercial market for the carbon oxide that is extracted or any section 45Q tax credit that might be available;

(ii) The taxpayer provides an attestation to paragraph (d)(2)(i) of this section from an independent registered engineer with experience in feasibility studies for extraction of gases from the subsurface;

(iii) A direct air capture facility (defined in section 45Q(e)(1)(A)) is not used to capture carbon oxide from the gas stream; and

(iv) Any carbon oxide extracted from the deposit is used as tertiary injectant in an enhanced oil or natural gas recovery project or as feedstock of a utilization project.

(2) *Industrial source.* An *industrial source* is an emission of carbon oxide from an industrial facility.

(3) *Manufacturing process.* A *manufacturing process* is a process involving the manufacture of one or more products, other than carbon oxide, that are intended to be sold at a profit, or are used for a commercial purpose (other than producing carbon oxide). All facts and circumstances with respect to the process and products are to be taken into account.

(4) *Examples.* The following examples illustrate the rules of paragraph (d) of this section:

(i) *Example 1.* A natural underground reservoir contains a gas that is comprised of 50 percent carbon dioxide and 50 percent methane by volume. The raw gas is not usable without the application of a separation process to create two gases that are primarily carbon dioxide and methane. Taxpayer B constructs processing equipment that separates the raw gas into carbon oxide and methane. The carbon dioxide is sold to a third party for use in a qualified enhanced oil recovery project. Some of the methane is used as fuel to power the processing equipment. The remainder of the methane is injected into the reservoir. The injection will increase the ultimate recovery of carbon dioxide. The injected methane can be produced later from the reservoir. At the end of the taxable year Taxpayer B has not secured a contract to sell methane and does not have any plans to use the methane for a commercial purpose other than producing carbon oxide. Because carbon dioxide is the only product manufactured that is intended to be sold at a profit or used for a commercial purpose, the separation process applied to the gases is not a manufacturing process within the meaning of paragraph (d)(3) of this section. The carbon dioxide captured by the process is not qualified carbon oxide.

(ii) *Example 2.* (A) A natural underground reservoir contains a gas that is comprised of 95 percent carbon dioxide and 5 percent helium by volume. The raw gas is not usable without the application of a separation process to create two gases that are primarily carbon dioxide and helium. Taxpayer C determines that the extraction of helium is economically viable even if there were no commercial market for carbon dioxide or any section 45Q credit. An independent registered engineer attests to Taxpayer C's determination. Taxpayer C constructs processing equipment that separates the raw gas into carbon dioxide and helium. The helium is sold to various customers for use in commercial and industrial applications. The carbon dioxide is sold to a third party for use in a qualified enhanced oil recovery project. Any carbon dioxide which the third party cannot accept is returned to the reservoir or vented in accordance with applicable permits.

(B) Because the extraction of helium is economically viable even if there were no commercial market for carbon dioxide or any section 45Q credit, the reservoir will not be considered a natural carbon dioxide-bearing formation or a naturally occurring subsurface spring within the meaning of paragraph (d)(1) and the separation process applied to the gases is a manufacturing process within the meaning of paragraph (d)(3). Taxpayer C may claim the section 45Q credit with respect to the carbon dioxide sold to the third party and which the third party uses in a qualified enhanced oil

recovery project during the taxable year. Taxpayer C may not claim the section 45Q credit with respect to the carbon dioxide that is returned to the reservoir or vented.

(e) *Electricity generating facility.* An *electricity generating facility* is a facility described in section 45Q(d)(2)(A) or (B) of the Internal Revenue Code (Code) that is subject to depreciation under MACRS Asset Class 49.11 (Electric Utility Hydraulic Production Plant), 49.12 (Electric Utility Nuclear Production Plant), 49.13 (Electric Utility Steam Production Plant), or 49.15 (Electric Utility Combustion Turbine Production Plant).

(f) *Direct air capture facility.* A *direct air capture facility* means any facility that uses carbon capture equipment to capture carbon oxide directly from the ambient air. It does not include any facility that captures carbon dioxide (1) that is deliberately released from naturally occurring subsurface springs or (2) using natural photosynthesis.

(g) *Qualified facility.* A *qualified facility* means any industrial facility or direct air capture facility, the construction of which begins before January 1, 2026, and either at which construction of carbon capture equipment begins before that date, or the original planning and design for which includes installation of carbon capture equipment, and at which carbon capture equipment is placed in service that captures the requisite annual thresholds of carbon oxide described in paragraph (g)(1) of this section. See Notice 2020–12 (see § 601.601(d)(1) and (2)(ii) of this chapter), for guidance on the determination of when construction has begun on a qualified facility or on carbon capture equipment. For purposes of whether a facility satisfies the requisite annual carbon oxide capture thresholds described in paragraph (g)(1) of this section, a taxpayer may apply the rules of section 8.01 of Notice 2020–12 (see § 601.601(d)(1) and (2)(ii) of this chapter) to treat multiple facilities as a single facility.

(1) *Emissions and capture requirements.* The carbon capture equipment placed in service at the qualified facility must capture—

(i) In the case of a facility, other than a direct air capture facility, which emits not more than 500,000 metric tons of carbon oxide into the atmosphere during the taxable year, at least 25,000 metric tons of qualified carbon oxide during the taxable year which is utilized in a manner consistent with section 45Q(f)(5) and § 1.45Q–4 (section 45Q(d)(2)(A) facility);

(ii) In the case of an electricity generating facility which is not a section 45Q(d)(2)(A) facility (section 45Q(d)(2)(B) facility), not less than 500,000 metric tons of qualified carbon oxide during the taxable year; and

(iii) In the case of a direct air capture facility or other facility that is not a section 45Q(d)(2)(A) facility or a section 45Q(d)(2)(B) facility, at least 100,000 metric tons of qualified carbon oxide during the taxable year.

(2) *Examples.* The following examples illustrate the rules of paragraph (g) of this section:

(i) *Example 1.* During the taxable year, an ethanol plant emits 200,000 metric tons of carbon dioxide. Carbon capture equipment located at the facility captures 35,000 metric tons of carbon dioxide, all of which are utilized in a manner consistent with section 45Q(f)(5) and § 1.45Q–4. The ethanol plant is a qualified facility under section 45Q(d)(2)(C) and § 1.45Q–2(g)(1)(i) during the taxable year because it met the requirement to capture at least 25,000 metric tons of qualified carbon oxide during the taxable year which were utilized in a manner consistent with section 45Q(f)(5) and § 1.45Q–4.

(ii) *Example 2.* During the taxable year, an electricity generating facility emits 600,000 metric tons of carbon dioxide. Carbon capture equipment located at the facility captures a total of 450,000 metric tons of carbon dioxide. 50,000 metric tons of the captured carbon dioxide are utilized in a manner consistent with section 45Q(f)(5) and § 1.45Q–4, and 400,000 metric tons of the carbon dioxide are disposed of in secure geological storage. The electricity generating facility is not a qualified facility under section 45Q(d)(2)(B) during the taxable year because it did not capture at least 500,000 metric tons of qualified carbon oxide during the taxable year. Further, because the electricity generating facility emitted greater than 500,000 metric tons of carbon dioxide during the taxable year, but only captured 450,000 metric tons, it is not a qualified facility under section 45Q(d)(2)(A) and § 1.45Q–2(g)(1)(ii).

(iii) *Example 3.* During the taxable year, a cement manufacturing plant emits 110,000 metric tons of carbon dioxide. Carbon capture equipment located at the plant captures 100,000 metric tons of carbon dioxide. 10,000 metric tons of the amount captured are utilized in a manner consistent with section 45Q(f)(5) and § 1.45Q–4, and 90,000 metric tons of carbon dioxide, are disposed of in secure geological storage. The cement manufacturing plant is a qualified facility during the taxable year because the carbon capture equipment located at the plant met the requirement under section 45Q(d)(2)(C) and § 1.45Q–2(g)(1)(i) to capture at least 100,000 metric tons of qualified carbon oxide during the taxable year.

(iv) *Example 4.* Taxpayer X owns and operates three natural gas processing facilities (A, B, and C) that separate carbon dioxide from natural gas. A, B, and C are all located within several miles of each other. X installed carbon capture equipment by A, B, and C. Carbon dioxide captured by A, B, and C is collected via a single system of gathering and distribution lines for delivery to a transportation pipeline. X contracts with third-party Z for the use of carbon dioxide captured by A, B, and C as a tertiary injectant pursuant to a single contract. During the taxable year, equipment at A captures 30,000 metric tons of carbon dioxide, equipment at B captures 40,000 metric tons of carbon dioxide, and equipment at C captures 50,000 tons of carbon dioxide. All other factors listed in the single project rule in section 8.01 of Notice 2020–12 support the conclusion that A, B and C are a single facility. X may treat A, B, and C as a single facility under the rules of section 8.01 of Notice 2020–12 for purposes of determining whether the requirement under section 45Q(d)(2)(C) and § 1.45Q–2(g)(1)(i), to capture at least 100,000 metric tons of qualified carbon oxide during the taxable year is satisfied. If X treats A, B, and C as a single facility, the minimum capture requirement will be satisfied for the taxable year.

(3) *Annualization of first-year and last-year qualified carbon oxide emission and/or capture amounts*—(i) *In general.* For both the taxable year in which carbon capture equipment is placed in service at a qualified facility and the taxable year in which the 12-year period described in sections 45Q(a)(3)(A) and (4)(A) and § 1.45Q–1(c)(1) and (2) ends, annualization of the amount of qualified carbon oxide emitted and captured (or captured directly from the ambient air in the case of a direct air capture facility) is permitted to determine if the threshold requirements under paragraph (g)(1) of this section are satisfied. Such annualization may result in a facility being deemed to satisfy the threshold requirements under paragraph (g)(1) of this section for the year and may permit a taxpayer to claim section 45Q credits even though the amount of qualified carbon oxide emitted or captured in the first year or last year of the 12-year period is less than the threshold requirements under paragraph (g)(1) of this section.

(ii) *Calculation.* Annualization is only available for the taxable year in which

the carbon capture equipment is placed in service at the qualified facility and the taxable year in which the 12-year period described in sections 45Q(a)(3)(A) and (4)(A) and § 1.45Q–1(c)(1) and (2) ends. Annualized amounts must be calculated by—

(A) Determining the amount of qualified carbon oxide emitted and captured (or captured directly from the ambient air in the case of a direct air capture facility) during the taxable year in which the carbon capture equipment was placed in service at the qualified facility or the taxable year in which the 12-year period described in sections 45Q(a)(3)(A) and (4)(A) and § 1.45Q–1(c)(1) and (2) ends,

(B) Dividing the amount of qualified carbon determined under paragraph (g)(3)(ii)(A) of this section by the number of days in the period either (I) beginning with the date on which the carbon capture equipment was placed in service at the qualified facility and ending with the last day of the taxable year containing that date, or (II) beginning with the first day of the taxable year in which the 12-year period described in sections 45Q(a)(3)(A) and (4)(A) and § 1.45Q–1(c)(1) and (2) ends and ending with the last day of that 12-year period; and

(C) Multiplying by 365.

(iii) *Consequences.* If the annualized amounts of qualified carbon oxide emitted and captured (or captured directly from the ambient air in the case of a direct air capture facility) as calculated under this formula meet the threshold requirements under paragraph (g)(1) of this section, the threshold requirements under paragraph (g)(1) of this section are deemed satisfied for the taxable year in which the carbon capture equipment was placed in service at the qualified facility or the taxable year in which the 12-year period described in sections 45Q(a)(3)(A) and (4)(A) and § 1.45Q–1(c)(1) and (2) ends. The taxpayer may be eligible for a section 45Q credit for that taxable year but must calculate the credit based on actual amounts of qualified carbon oxide captured and disposed of, injected, or utilized during the taxable year.

(4) *Election for applicable facilities.* In the case of an applicable facility, for any taxable year during which such facility captures not less than 500,000 metric tons of qualified carbon oxide, the taxpayer described in section 45Q(f)(3)(A)(ii) and § 1.45Q–1(h)(1)(ii) (that is, the person that owns the carbon capture equipment and physically or contractually ensures the capture and disposal, injection or utilization of such qualified carbon oxide), may elect to have such facility, and any carbon capture equipment placed in service at such facility, deemed as having been placed in service on February 9, 2018 (section 45Q(f)(6) election). For purposes of whether a facility satisfies the 500,000 metric ton qualified carbon oxide capture threshold, a taxpayer may apply the rules of section 8.01 of Notice 2020–12 to treat multiple facilities as a single facility.

(i) *Applicable facility.* An applicable facility means a qualified facility described in section 45Q(f)(6)(B) and § 1.45Q–2(g) that was placed in service before February 9, 2018, for which no taxpayer claimed a section 45Q credit for qualified carbon oxide captured at the facility for any taxable year ending before February 9, 2018.

(ii) *Time and manner of making election.* The taxpayer described § 1.45Q–1(h)(1) makes a section 45Q(f)(6) election by filing a statement of election with the taxpayer's income tax return for each taxable year in which the credit arises. The section 45Q(f)(6) election must be made in accordance with *Form 8933* filed with the taxpayer's Federal income tax return for each taxable year in which the taxpayer makes the section 45Q(f)(6) election. The statement of election must, in addition to any information required on *Form 8933,* set forth the electing taxpayer's name, address, taxpayer identification number, location, and e-GGRT ID number(s) (if available) of the applicable facility.

(iii) *Retroactive credit revocations.* A taxpayer may not file an amended Federal income tax return, an amended *Form 1065,* or an AAR, as applicable, for any taxable year ending before February 9, 2018, to revoke a prior claim of section 45Q credits.

(5) *Retrofitted qualified facility or carbon capture equipment (80/20 Rule).* A qualified facility or carbon capture equipment may qualify as originally placed in service even if it contains some used components of property, provided the fair market value of the used components of property is not more than 20 percent of the qualified facility or carbon capture equipment's total value (that is, the cost of the new components of property plus the value of the used components of property) (80/20 Rule). In determining the value of the used components of property as compared to the new components, the general principles of Revenue Ruling 94–31 (see § 601.601(d)(2)(i)(a) and (ii) of this chapter), will apply. The relevant unit of retrofitted carbon capture equipment for purposes of the 80/20 Rule is an independently functioning process train. For purposes of the 80/20 Rule, the cost of a new qualified facility or carbon capture equipment includes all properly capitalized costs of the new qualified facility or carbon capture equipment. Solely for purposes of the 80/20 Rule, properly capitalized costs of a new qualified facility or carbon capture equipment may, at the option of the taxpayer, include the cost of new equipment for a pipeline (the cost of equipment for a new pipeline, not equipment used to repair an existing pipeline) owned and used exclusively by that taxpayer to transport carbon oxides captured by that taxpayer's qualified facility or carbon capture equipment that would otherwise be emitted into the atmosphere.

(h) *Qualified enhanced oil or natural gas recovery project.* The term *qualified enhanced oil or natural gas recovery project* has the same meaning as a qualified enhanced oil recovery project under section 43(c)(2) of the Code and § 1.43–2, by substituting crude oil or natural gas for crude oil in section 43(c)(2)(A)(i) and §§ 1.43–2 and 1.43–3.

(1) *Application of §§ 1.43–2 and 1.43–3.* For purposes of applying §§ 1.43–2 and 1.43–3 with respect to a qualified enhanced oil or natural gas recovery project, the term enhanced oil or natural gas recovery is substituted for enhanced oil recovery, and the term oil or natural gas is substituted for oil.

(2) *Required certification.* The qualified enhanced oil or natural gas recovery project must be certified under § 1.43–3, even if no credit related to enhanced oil or natural gas recovery is claimed for the taxable year. For purposes of a natural gas project—

(i) The petroleum engineer's certification under § 1.43–3(a)(3) and the operator's continued certification of a project under § 1.43–3(b)(3) must include an additional statement that the certification is for purposes of the section 45Q carbon oxide sequestration tax credit;

(ii) The petroleum engineer's certification must be attached to a *Form 8933* and filed not later than the last date prescribed by law (including extensions) for filing the operator's or designated owner's Federal income tax return or *Form 1065* for the first taxable year in which qualified carbon oxide is injected into the reservoir; and

(iii) The operator's continued certification of a project must be attached to a *Form 8933* and filed not later than the last date prescribed by law (including extensions) for filing the operator's or designated owner's Federal income tax return or *Form 1065* for taxable years after the taxable year for which the petroleum engineer's certification is filed but not after the

taxable year in which injection activity ceases and all injection wells are plugged and abandoned.

(3) *Natural gas.* Natural gas has the same meaning as under section 613A(e)(2) of the Code.

(4) *Timely filing of petroleum engineer's certification.* For purposes of this paragraph (h), if a section 45Q credit is claimed on an amended Federal income tax return, an amended *Form 1065,* or an AAR, as applicable, the petroleum engineer's certification for a natural gas project will be treated as filed timely if it is attached to a *Form 8933* that is submitted with such amended Federal income tax return, amended *Form 1065,* or AAR. With respect to a section 45Q credit that is claimed on a timely filed Federal income tax return or *Form 1065* for a taxable year ending after December 31, 2017, and beginning on or before January 13, 2021, for which the petroleum engineer's certification for a natural gas project was not submitted, the petroleum engineer's certification for a natural gas project will be treated as filed timely if it is attached to an amended *Form 8933* for such taxable year.

(5) *Carbon oxide injected in oil reservoir.* Carbon oxide that is injected into an oil reservoir that is not a qualified enhanced oil recovery project under section 43(c)(2) due to circumstances such as the first injection of a tertiary injectant occurring before 1991, or because a petroleum engineer's certification was not timely filed, cannot be treated as qualified carbon oxide, disposed of in secure geological storage, or utilized in a manner described in section 45Q(f)(5). This rule will not apply to an oil reservoir if—

(i) The reservoir has permanently ceased oil production;

(ii) The operator has obtained an Underground Injection Control Class VI permit; and

(iii) The operator complies with 40 CFR part 98 subpart RR.

(6) *Tertiary Injectant.* For purposes of section 45Q, a tertiary injectant is qualified carbon oxide that is injected into and stored in a qualified enhanced oil or natural gas recovery project and contributes to the extraction of crude oil or natural gas. The term *tertiary injectant* has the same meaning as used in section 193(b)(1) of the Code.

(i) *Section 45Q credit.* The term *section 45Q credit* means the carbon oxide sequestration credit determined under section 45Q of the Internal Revenue Code and § 1.45Q–1.

(j) *Form 8933.* The term *Form 8933* means Form 8933, Carbon Oxide Sequestration Credit, any successor form(s), pursuant to instructions to any of the foregoing (see § 601.602 of this chapter), or other guidance. This definition of Form 8933 applies to this section and to §§ 1.45Q–1, 1.45Q–3, 1.45Q–4, and 1.45Q–5.

(k) *Applicability date.* This section applies to taxable years beginning on or after January 13, 2021. Taxpayers may choose to apply this section for taxable years beginning on or after January 1, 2018, provided the taxpayer applies this section and §§ 1.45Q–1, 1.45Q–3, 1.45Q–4, and 1.45Q–5 in their entirety and in a consistent manner.

§ 1.45Q–3 Secure Geological Storage.

(a) *In general.* To qualify for the section 45Q credit, a taxpayer must either physically or contractually dispose of captured qualified carbon oxide in secure geological storage in the manner provided in paragraph (b) of this section, or utilize qualified carbon oxide in a manner conforming with section 45Q(f)(5) of the Internal Revenue Code and § 1.45Q–4. Secure geological storage includes, but is not limited to, storage at deep saline formations, oil and gas reservoirs, and unminable coal seams.

(b) *Requirements for secure geological storage.* For purposes of the section 45Q credit, qualified carbon oxide is considered disposed of by the taxpayer in secure geological storage such that the qualified carbon oxide does not escape into the atmosphere if the qualified carbon oxide is—

(1) Injected into a well that

(i) Complies with applicable Underground Injection Control or other regulations, located onshore or offshore under submerged lands within the territorial jurisdiction of States or federal waters, and

(ii) Is not used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project, in compliance with applicable requirements under 40 CFR part 98 subpart RR; or

(2) Injected into a well that

(i) Complies with applicable Underground Injection Control or other regulations, is located onshore or offshore under submerged lands within the territorial jurisdiction of States or federal waters, and

(ii) Is used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and stored in compliance with applicable requirements under 40 CFR part 98 subpart RR, or the International Organization for Standardization (ISO) standards endorsed by the American National Standards Institute (ANSI) under CSA/ANSI ISO 27916:2019, Carbon dioxide capture, transportation and geological storage—Carbon dioxide storage using enhanced oil recovery (CO_2-EOR) (CSA/ANSI ISO 27916:2019).

(c) *Documentation.* Documentation must be filed in accordance with *Form 8933.*

(d) *Certification.* For qualified enhanced oil or natural gas recovery projects in which the taxpayer reported volumes of carbon oxide to the Environmental Protection Agency pursuant to 40 CFR part 98 subpart RR, the taxpayer may self-certify the volume of qualified carbon oxide claimed for purposes of section 45Q. For qualified enhanced oil or natural gas recovery projects in which the taxpayer determined volumes pursuant to CSA/ANSI ISO 27916:2019, a taxpayer may prepare documentation as outlined in CSA/ANSI ISO 27916:2019 internally, but all such documentation must be provided to a qualified independent engineer or geologist, who then must certify that the documentation provided, including the mass balance calculations as well as information regarding monitoring and containment assurance, is accurate and complete. The qualified independent engineer or geologist certifying a project must be duly registered or certified in any State. The certification must contain an affidavit from the certifying engineer or geologist stating that he or she is independent from the taxpayer (and if a section 45Q(f)(3)(B) election has been made, the affidavit must state that he or she is independent from both the electing taxpayer and the credit claimant). Certifications must be made annually and under penalties of perjury. For any leaked amount of qualified carbon oxide (as defined in § 1.45Q–5(c)) that is determined pursuant to CSA/ANSI ISO 27916:2019, the certification must also include a statement that the quantity was determined in accordance with sound engineering principles. Taxpayers that capture qualified carbon oxide giving rise to the section 45Q credit must file *Form 8933* with a timely filed Federal income tax return or *Form 1065,* including extensions or for the purpose of this rule, amendments to Federal income tax returns, *Forms 1065,* or on AARs, as applicable. Taxpayers that dispose of, inject, or utilize qualified carbon oxide must also file *Form 8933* with a timely filed Federal income tax return or *Form 1065,* including extensions or for the purpose of this rule, amendments to Federal income tax returns, *Forms 1065,* or on AARs, as applicable. If the volume of carbon oxide certified and reported is a negative amount, see § 1.45Q–5 for rules regarding recapture.

(e) *Failure to submit complete documentation or certification.* No section 45Q credit is allowed for any taxable year for which the taxpayer (including credit claimants) has failed to timely submit complete documentation and certification that is required by this regulation or *Form 8933.* The credit will be allowed only for a taxable year for which complete documentation and certification has been timely submitted. Certifications for each taxable year must be submitted by the due date of the federal income tax return or *Form 1065* on which the section 45Q credit is claimed, including extensions. However, if a section 45Q credit is claimed on an amended Federal income tax return, an amended *Form 1065,* or an AAR, as applicable, certifications may also be submitted with such amended Federal income tax return, amended *Form 1065,* or AAR. Further, if a section 45Q credit was claimed on a timely filed Federal income tax return or *Form 1065* for a taxable year ending on or after January 1, 2018, and beginning on or before January 13, 2021, for which certifications were not submitted, such certifications may be submitted with a timely filed amended Federal income tax return, an amended *Form 1065,* or an AAR, as applicable, for such taxable year.

(f) *Applicability date.* This section applies to taxable years beginning on or after January 13, 2021. Taxpayers may choose to apply this section for taxable years beginning on or after January 1, 2018, provided the taxpayer applies this section and §§ 1.45Q–1, 1.45Q–2, 1.45Q–4, and 1.45Q–5 in their entirety and in a consistent manner.

§ 1.45Q–4 Utilization of Qualified Carbon Oxide.

(a) *In general.* For purposes of this section, *utilization of qualified carbon oxide* means—

(1) The fixation of such qualified carbon oxide through photosynthesis or chemosynthesis, such as through the growing of algae or bacteria,

(2) The chemical conversion of such qualified carbon oxide to a material or chemical compound in which such qualified carbon oxide is securely stored, or

(3) The use of such qualified carbon oxide for any other purpose for which a commercial market exists (with the exception of use as a tertiary injectant in a qualified enhanced oil or natural gas recovery project), as described in paragraph (d) of this section.

(b) *Amount utilized*—(1) *In general.* For purposes of § 1.45Q–1(b) (ii) and (c)(2)(ii), the amount of qualified carbon oxide utilized by the taxpayer is equal to the metric tons of qualified carbon oxide which the taxpayer demonstrates, based upon an analysis of lifecycle greenhouse gas emissions (LCA), were—

(i) Captured and permanently isolated from the atmosphere through use of a process described in paragraph (a) of this section, or

(ii) Displaced from being emitted into the atmosphere through use of a process described in paragraph (a) of this section.

(2) *Limitation.* The amount determined under paragraph (b)(1) of this section cannot exceed the amount of qualified carbon oxide measured at the source of capture.

(c) *Lifecycle greenhouse gas emissions and lifecycle analysis (LCA)*—(1) *In general.* For purposes of paragraph (b) of this section, the term lifecycle greenhouse gas emissions means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes) related to the full product lifecycle, including all stages of product and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished product to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential according to Table A–1 of 40 CFR part 98 subpart A. Such emissions are expressed in carbon dioxide equivalent (CO_2-e).

(2) *LCA verification.* The taxpayer verifies the amount of qualified carbon oxide utilized through an LCA. The LCA must demonstrate that the proposed process results in a net reduction of carbon dioxide equivalents when compared to a comparison system. The results of the LCA must be documented in a written LCA report.

(3) *Standards of adequate lifecycle analysis.* The LCA report must be prepared in conformity with and contain documentation that conforms with International Organization for Standardization (ISO) 14040:2006, *Environmental management—Life cycle assessment—Principles and framework and ISO 14044:2006, Environmental management—Life cycle assessment—Requirements and guidelines.* The LCA may consist of direct and indirect data in conformity with ISO 14040:2006 and 14044:2006.

(4) *Third-party independent review of LCA.* The LCA report must be performed or verified by an independent third party. The LCA report must provide a statement documenting the qualifications of the independent third party, including proof of appropriate U.S. or foreign professional license, an affidavit from the third party stating that it is independent from the taxpayer (if a section 45Q(f)(3)(B) election has been made, the affidavit must state that the third party is independent from both the electing taxpayer and the credit claimant), and the statement must be made under penalties of perjury. If an independent third-party review is conducted, then it must include an assessment of the model and supporting data.

(5) *Submission of the LCA.* The taxpayer must submit the LCA report and third-party independent statement required by paragraph (c) of this section to the IRS and the Department of Energy. The taxpayer must also submit the model if the LCA is not verified by an independent third-party review.

(6) *LCA review.* The LCA report will be subject to a technical review by the DOE. The IRS will determine whether to approve the LCA and will notify the taxpayer. The taxpayer must receive approval of its LCA prior to claiming the section 45Q credits for such taxable year on any federal income tax return. In addition to receiving approval of its LCA, the taxpayer must satisfy all other requirements of section 45Q and §§ 1.45Q–1, 1.45Q–2, and this section in order to be eligible to claim section 45Q credits.

(d) *Commercial market.* A commercial market means a market in which a product, process, or service that utilizes carbon oxide is sold or transacted on commercial terms. A taxpayer must submit a statement attached to its *Form 8933* substantiating that a commercial market exists for its particular product, process, or service.

(e) *Applicability date.* This section applies to taxable years beginning on or after January 13, 2021. Taxpayers may choose to apply this section for taxable years beginning on or after January 1, 2018, provided the taxpayer applies this section and §§ 1.45Q–1, 1.45Q–2, 1.45Q–3, and 1.45Q–5 in their entirety and in a consistent manner.

§ 1.45Q–5 Recapture of Credit.

(a) *Recapture event.* A recapture event occurs when qualified carbon oxide for which a section 45Q credit has been previously claimed ceases to be disposed of in secure geological storage (as described in § 1.45Q–3(b)), or used as a tertiary injectant during the recapture period. Recapture events are determined separately for each project involving the disposal or use of qualified carbon oxide as a tertiary injectant. A recapture event does not occur if some portion of qualified

carbon oxide disposed of in the current year does not remain in secure storage at the end of the year. The amount of such carbon oxide that is securely stored in the current year is determined according to the applicable requirements of 40 CFR part 98 subpart RR or CSA/ANSI ISO 27916:2019.

(b) *Ceases to be disposed of in secure geological storage or used as a tertiary injectant.* Qualified carbon oxide for which a section 45Q credit has been previously claimed ceases to be disposed of in secure geological storage (as described in § 1.45Q–3(b)), or used as a tertiary injectant, if the leaked amount of qualified carbon oxide in the taxable year exceeds the amount of qualified carbon oxide securely stored in that same taxable year.

(c) *Leaked amount of qualified carbon oxide.* When a taxpayer that claimed a section 45Q credit with respect to qualified carbon oxide stored at a secure storage site, operator of the secure storage site, or regulatory agency with jurisdiction over the site determines that the qualified carbon oxide that was disposed of in secure geological storage has leaked to the atmosphere, the taxpayer or the party with whom the taxpayer contracted to ensure the secure geological storage of the qualified carbon oxide must quantify the metric tons of qualified carbon oxide that has leaked to the atmosphere pursuant to the requirements of 40 CFR part 98 subpart RR or CSA/ANSI ISO 27916:2019. The quantity determined pursuant to CSA/ANSI ISO 27916:2019 must be certified by a qualified independent engineer or geologist, including a statement that the quantity was determined in accordance with sound engineering principles in the same manner as required in § 1.45Q–3. The IRS will consider all available facts and circumstances, and may consult with the relevant regulatory agency with jurisdiction over such site, in verifying the amount of qualified carbon oxide that has leaked to the atmosphere. The verified amount is the leaked amount of qualified carbon oxide.

(d) *Qualified carbon oxide subject to recapture.* The quantity of recaptured qualified carbon oxide (in metric tons) subject to recapture is the amount by which the leaked amount of qualified carbon oxide exceeds the amount of qualified carbon oxide securely stored in the taxable year. The leaked amount of qualified carbon oxide shall be subtracted from the amount of qualified carbon oxide that is securely stored in the taxable year. If the leaked amount does not exceed the amount of qualified carbon oxide that is securely stored in the taxable year, then the taxpayer is entitled to a credit equal to the amount of qualified carbon oxide securely stored less the leaked amount in the taxable year, multiplied by the appropriate statutory credit rate.

(e) *Recapture amount.* The recapture amount is equal to the product of the quantity of recaptured qualified carbon oxide (in metric tons) subject to recapture and the appropriate statutory credit rate.

(f) *Recapture period.* The recapture period begins on the date of first injection of qualified carbon oxide for disposal in secure geological storage or use as a tertiary injectant for which a section 45Q credit was claimed. The recapture period ends on the earlier of three years after the last taxable year in which the taxpayer claimed a section 45Q credit or was eligible to claim a credit that it elected to carry forward or the date monitoring ends under the requirements of the standards described in § 1.45Q–3(b)(1) or (2).

(g) *Application of recapture*—(1) *In general.* Any recapture amount must be taken into account in the taxable year in which it is identified and reported. If the leaked amount of qualified carbon oxide does not exceed the amount of qualified carbon oxide securely stored in the taxable year reported, there is no recapture amount and no further adjustments to prior taxable years are needed. If the leaked amount of qualified carbon oxide does exceed the amount of qualified carbon oxide securely stored in the taxable year reported, then the taxpayer must add the recapture amount to the amount of tax due in the taxable year in which the recapture event occurs.

(2) *Calculation.* Recapture amounts are calculated on a last-in-first-out basis (LIFO), such that the leaked amount of qualified carbon oxide that exceeds the amount of qualified carbon oxide securely stored in the current taxable year will be deemed attributable first to the prior taxable year, then to taxable year before that, and then up to a maximum of the third preceding year.

(3) *Multiple units.* In the event of a recapture event in which the leaked amount of qualified carbon oxide had been captured from multiple units of carbon capture equipment that were not under common ownership, the recapture amount must be allocated on a pro rata basis among the multiple units of carbon capture equipment. All taxpayers that claimed a section 45Q credit with respect to one or more of such units of carbon capture equipment are responsible for adding the recapture amount to their amount of tax due in the taxable year in which the recapture event occurs.

(4) *Multiple taxpayers*—(i) *In general.* In the event of a recapture event involving a leaked amount of qualified carbon oxide that is deemed attributable to qualified carbon oxide for which multiple taxpayers claimed section 45Q credits (for example, if ownership of the carbon capture equipment was transferred, or if a taxpayer made an election under section 45Q(f)(3)(B) to allow one or more credit claimants to claim a portion of the section 45Q credit), the recapture amount must be allocated on a pro rata basis among the taxpayers that claimed the section 45Q credits.

(ii) *Partnerships*—(A) *General rule.* For purposes of paragraph (g)(4)(i) of this section, if a partnership is one of the multiple taxpayers that claimed section 45Q credit amounts, the partnership and not its partners will be the taxpayer to which the pro rata recapture amount must be allocated. The partnership must allocate its pro rata recapture amount among its partners under § 1.704–1(b)(4)(ii).

(B) *Terminated partnerships.* If a partnership described in paragraph (g)(4)(ii)(A) of this section terminates under section 708(b)(1) prior to a recapture event, the partners of that terminated partnership at the time the section 45Q credit was claimed will be the taxpayers to which the pro rata recapture amount must be allocated.

(5) *Reporting.* If a recapture event occurs during a project's recapture period, any taxpayer that claimed a section 45Q credit for that project must report the following information on a *Form 8933* filed with that taxpayer's Federal income tax return or *Form 1065* for the taxable year for which the recapture event occurred—

(A) The recapture amount (as defined in § 1.45Q–5(e));

(B) The leaked amount of qualified carbon oxide (in metric tons) (as defined in § 1.45Q–5(c));

(C) The statutory credit rate(s) at which the section 45Q credits were previously calculated; and

(D) A statement that describes how the taxpayer became aware of the recapture event, how the leaked amount was determined, and the identity and involvement of any regulatory agencies.

(6) *Examples.* The following examples illustrate the principles of this paragraph (g):

(i) *Example 1.* (A) A owns direct air capture Facility X. No other taxpayer has owned Facility X, and A has never allowed another taxpayer to claim any section 45Q credits with respect to qualified carbon oxide captured by Facility X. Facility X captured 100,000 metric tons of carbon dioxide in each of

2021, 2022, and 2023. All captured carbon dioxide was sold to B for use a tertiary injectant in a qualified enhanced oil recovery project. B provided contractual assurance that the carbon dioxide would be disposed of in secure geological storage. A claimed section 45Q credit amounts of $2,268,000 in 2021, $2,515,000 in 2022, and $2,761,000 in 2023 using the statutory rates in § 1.45Q–1(d)(3). In 2024, A captured and sold another 100,000 metric tons of carbon dioxide to B, which B used as a tertiary injectant in a qualified enhanced oil recovery project. In late 2024, B determined that 10,000 metric tons of qualified carbon dioxide injected during 2021 had leaked from the containment area of the reservoir and were released into the atmosphere.

(B) Because the leakage determined in 2024 (10,000 metric tons) did not exceed the presumed amount stored in 2024 (100,000 metric tons), a recapture event did not occur in 2024. B's actual storage in 2024 is 90,000 metric tons of qualified carbon oxide. A's section 45Q credit for 2024 is $2,706,300 (net 90,000 metric tons of qualified carbon oxide captured, disposed of in secure geological storage, and used as a tertiary injectant multiplied by the statutory credit rate for 2024 of $30.07).

(ii) *Example 2.* (A) Assume same facts as in Example 1. Additionally, in 2025, B determines that 190,000 metric tons of qualified carbon dioxide injected in 2021 and 2022 had leaked and were released into the atmosphere. No injection of carbon dioxide takes place in 2025.

(B) Because the leakage determined in 2025 (190,000 metric tons) exceeds the amount stored in 2025 (0 metric tons), a recapture event occurred in 2025. A's credit for 2025 is $0 because the net amount of carbon dioxide captured, disposed of in secure geological storage, and used as a tertiary injectant in 2025 was 0 metric tons. The 2025 recapture amount is calculated by multiplying the 190,000 metric tons of recaptured qualified carbon oxide by the appropriate statutory credit rate using the LIFO method. The first 90,000 metric tons of recaptured qualified carbon oxide is deemed attributable to 2024, and is recaptured at the 2024 statutory rate of $30.07 per metric ton. The remaining 100,000 metric tons of recaptured qualified carbon oxide are deemed attributable to 2023. The credits attributable to 2023 are recaptured at the 2023 statutory rate of $27.61 per metric ton. Thus, the total recapture amount is $5,467,300, and is added to A's tax due for 2025.

(iii) *Example 3.* (A) Assume the same facts as in Example 2, except that A sells Facility X to C on January 1, 2024. C sells 100,000 metric tons of carbon dioxide captured by Facility X to B for use as a tertiary injectant in a qualified enhanced oil recovery project. C claims a section 45Q credit in 2024 of $2,706,300 (net 90,000 metric tons of qualified carbon oxide captured, disposed of in secure geological storage, and used as a tertiary injectant multiplied by the statutory credit rate for 2024 of $30.07).

(B) The total recapture amount in 2025 is the same $5,467,300 as in Example 2, but is allocated between A and C. The first 90,000 metric tons of recaptured qualified carbon oxide are deemed attributable to 2024. The credits that are attributable to 2024 are recaptured at the 2024 statutory rate of $30.07 per ton (for a recapture amount of $2,706,300). Because C claimed that amount of section 45Q credit in 2024, a recapture amount of $2,706,300 is added to C's tax due for 2025. The remaining 100,000 metric tons of recaptured qualified carbon oxide are deemed attributable to 2023. The credits that are attributable to 2023 are recaptured at the 2023 statutory rate of $27.61 per ton (for a recapture amount of $2,761,000). Because A claimed that amount of section 45Q credit in 2023, a recapture amount of $2,761,000 is added to A's tax due for 2025.

(iv) *Example 4.* (A) Assume the same facts as in Example 2, except that in 2023, A made a section 45Q(f)(3)(B) election to allow B to claim one-half of the section 45Q credit for 2023. A and B each claimed $1,380,500 of section 45Q credit in 2023 (50,000 metric tons each multiplied by the 2023 statutory rate of $27.61).

(B) The total recapture amount in 2025 is the same $5,467,300 as in Example 2, but is allocated among A and B. The first 90,000 metric tons of recaptured qualified carbon oxide is deemed attributable to 2024. The section 45Q credit amounts attributable to 2024 are recaptured at the 2024 statutory rate of $30.07 per ton (for a recapture amount of $2,706,300). Because A claimed that amount of section 45Q credit in 2024, $2,706,300 is added to A's tax due for 2025. The remaining 100,000 metric tons of recaptured qualified carbon oxide is deemed attributable to 2023. The section 45Q credit amounts attributable to 2023 are recaptured at the 2023 statutory rate of $27.61 per ton (for a recapture amount of $2,761,000). Because A and B each claimed half of that amount ($1,380,500) of section 45Q credit in 2023, $1,380,500 is added to both A's and B's tax due for 2025. Thus, a recapture amount of $4,086,800 is added to A's tax due for 2025, and a recapture amount of $1,380,500 is added to B's tax due for 2025.

(v) *Example 5.* (A) Assume the same facts as in Example 2, except that the 100,000 metric tons of carbon dioxide sold to B in 2021, 2022, 2023, and 2024 for use as a tertiary injectant in a qualified enhanced oil recovery project were captured equally (50,000 metric tons per year) from qualified facilities owned by J and K. Neither J nor K made a section 45Q(f)(3)(B) election to allow B to claim the credit.

(B) Because the leakage determined in 2024 (10,000 metric tons) did not exceed the presumed amount stored in 2024 (100,000 metric tons) a recapture event did not occur in 2024. The total amount of section 45Q credit for 2024 is $2,706,300 (net 90,000 metric tons of qualified carbon oxide captured, disposed of in secure geological storage, and used as a tertiary injectant multiplied by the statutory credit rate for 2024 of $30.07). J and K may each claim half of this amount of section 45Q credit ($1,353,150) in 2024.

(C) The total recapture amount in 2025 is the same $5,467,300 as in Example 2, but is allocated between J and K. The section 45Q credit amounts relating to the first 90,000 metric tons of recaptured qualified carbon oxide are deemed attributable to 2024 and are recaptured at the 2024 statutory rate of $30.07 per ton (for a recapture amount of $2,706,300). Because J and K each claimed half of that amount ($1,353,150) of section 45Q credit in 2024, $1,353,150 is added to both J's and K's tax due for 2025. The section 45Q credit amounts relating to the remaining 100,000 metric tons of recaptured qualified carbon oxide are deemed attributable to 2023 and are recaptured at the 2023 statutory rate of $27.61 per ton (for a recapture amount of $2,761,000). Because J and K each claimed half of that amount ($1,380,500) of section 45Q credit in 2023, an additional $1,380,500 is added to both J's and Ks tax due for 2025. Thus, a total recapture amount of $2,733,650 is added to both J's and K's tax due for 2025.

(vi) *Example 6.* (A) M owns Industrial Facility Z. No other taxpayer has ever owned Z, and M has never allowed another taxpayer to claim any section 45Q credits with respect to qualified carbon oxide captured from Z. M captured 1,000,000 metric tons of carbon dioxide annually in each of 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, and 2025. All captured carbon dioxide was sold to N for use a

tertiary injectant in a qualified enhanced oil recovery project. N provided contractual assurance that the carbon dioxide would be sequestered in secure geological storage. M claimed section 45Q credit amounts of $12,830,000 in 2017, $15,209,000 in 2018, $17,760,000 in 2019, $20,220,000 in 2020, $22,680,000 in 2021, $25,150,000 in 2022, $27,610,000 in 2023, $30,070,000 in 2024, and $32,540,000 in 2025 using the statutory rates in § 1.45Q–1(d)(3). No injection of carbon oxides takes place in 2026. In 2026, N determined that 6,200,000 metric tons of qualified carbon dioxide previously injected had leaked from the containment area of the reservoir and were released into the atmosphere.

(B) Because the leakage determined in 2025 (6,200,000 metric tons) exceed the amount stored in 2026 (0 metric tons) a recapture event occurred in 2026. A's credit for 2026 is $0 because the net amount of carbon dioxide captured and used as a tertiary injectant in 2026 was 0 metric tons. The 2026 recapture amount is calculated by multiplying the 6,200,000 metric tons of recaptured qualified carbon oxide by the appropriate statutory credit rate using the LIFO method. The first 1,000,000 metric tons of recaptured qualified carbon oxide is deemed attributable to 2025, and is recaptured at the 2025 statutory rate of $32.54 per metric ton. The next 1,000,000 metric tons of recaptured qualified carbon oxide is deemed attributable to 2024, and is recaptured at the 2024 statutory rate of $30.07 per metric ton. The next 1,000,000 metric tons of recaptured qualified carbon oxide is deemed attributable to 2023, and is recaptured at the 2023 statutory rate of $27.16 per metric ton. The remaining 3,200,000 metric tons are not subject to recapture because of the three-year lookback limit in § 1.45Q–1(g)(2). Thus, the total recapture amount is $89,770,000, and is added to A's tax due for 2026.

(h) *Recapture in the event of deliberate removal from storage*—(1) *In general.* If qualified carbon oxide for which a credit has been claimed is deliberately removed from a secure geological storage site, then a recapture event would occur in the year in which the qualified carbon oxide is removed from the storage site pursuant to § 1.45Q–5(a).

(2) *Recycled qualified carbon oxide.* If qualified carbon oxide for which a credit has been claimed is recaptured, recycled, and reinjected as part of the enhanced oil and natural gas recovery project, that qualified carbon oxide will be considered recycled carbon oxide under section 45Q(c)(2). If recycled carbon oxide is reinjected into the same qualified enhanced oil or natural gas recovery project it was originally injected into, it will not be considered deliberately removed from a secure geological storage site for purposes of paragraph (h)(1) of this section. If recycled carbon oxide is reinjected into a different qualified enhanced oil or natural gas recovery project from the one it was initially injected into, or used for any other purpose, that qualified carbon oxide will be considered deliberately removed from a secure geological storage site for purposes of paragraph (h)(1) of this section.

(i) *Limited exceptions.* A recapture event is not triggered in the event of a loss of containment of qualified carbon oxide resulting from actions not related to the selection, operation, or maintenance of the storage facility, such as volcanic activity or terrorist attack.

(j) *Applicability date.* This section applies to taxable years beginning on or after January 13, 2021. Taxpayers may choose to apply this section for taxable years beginning on or after January 1, 2018, provided the taxpayer applies this section and §§ 1.45Q–1, 1.45Q–2, 1.45Q–3, and 1.45Q–4 in their entirety and in a consistent manner.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: December 31, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

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Part X

Department of Energy

10 CFR Parts 430 and 431

Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

RIN 1904–AE39

Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of final interpretive rule.

SUMMARY: In response to a petition for rulemaking submitted on October 18, 2018 (Gas Industry Petition), the Department of Energy (DOE or the Department) published that petition in the **Federal Register** on November 1, 2018, for public review and input. DOE subsequently published in the **Federal Register** a proposed interpretive rule on July 11, 2019, and a supplemental notice of proposed interpretive rule on September 24, 2020. After carefully considering the public comments on its proposals, DOE has decided to issue a final interpretive rule determining that, in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) constitute a performance-related ''feature'' under the Energy Policy and Conservation Act (EPCA) that cannot be eliminated through adoption of an energy conservation standard. In light of this final interpretation, published elsewhere in this issue of the **Federal Register**, DOE withdraws its March 12, 2015 proposed rule and September 23, 2016 supplemental proposed rule for energy conservation standards for non-weatherized gas furnace and mobile home gas furnaces, as well as its May 31, 2016 proposed rule for energy conservation standards for commercial water heating equipment.

DATES: This final interpretive rule is effective January 15, 2021.

ADDRESSES: The docket, which includes **Federal Register** notices, public comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *http://www.regulations.gov/docket?D=EERE-2018-BT-STD-0018.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 586–6636 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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I. Background

On October 18, 2018, the Department received a petition for rulemaking submitted by the American Public Gas Association (APGA), Spire, Inc., the Natural Gas Supply Association (NGSA), the American Gas Association (AGA), and the National Propane Gas Association (NPGA), collectively referred to as the ''Gas Industry Petitioners,'' asking DOE to: (1) Issue an interpretive rule stating that DOE's proposed energy conservation standards for residential furnaces [1] and commercial water heaters [2] would result in the unavailability of ''performance characteristics'' within the meaning of the Energy Policy and Conservation Act [3] (EPCA; 42 U.S.C. 6291 *et seq.*), as amended (*i.e.,* by setting standards which can only be met by products/equipment using condensing combustion technology and thereby precluding the distribution in commerce of products/equipment using non-condensing combustion technology) and (2) withdraw the proposed energy conservation standards for residential furnaces [4] and commercial water heaters [5] based upon such findings. DOE published the petition in the **Federal Register** on November 1, 2018 (83 FR 54883) and requested public comment, with a comment period scheduled to close on January 30, 2019. DOE received two requests from interested parties seeking an extension of the comment period in order to develop additional data relevant to the petition. DOE

[1] The Gas Industry Petitioners refer to a notice of proposed rulemaking for residential non-weatherized gas furnaces and mobile home furnaces published in the **Federal Register** on March 12, 2015 (80 FR 13120), as well as a supplemental notice of proposed rulemaking published in the **Federal Register** on September 23, 2016 (81 FR 65720). These DOE proposals may be found in the docket at Docket No. EERE–2014–BT–STD–0031–0032 and Docket No. EERE–2014–BT–STD–0031–0230, respectively.

[2] The Gas Industry Petitioners refer to a notice of proposed rulemaking for commercial water heating equipment published in the **Federal Register** on May 31, 2016 (81 FR 34440). This DOE proposal may be found in the docket at Docket No. EERE–2014–BT–STD–0042–0018.

[3] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

[4] Standards for non-weatherized residential furnaces were published in a notice of proposed rulemaking at 80 FR 13120 (March 12, 2015) (Docket No. EERE–2014–BT–STD–0031–0032) and in a supplemental notice of proposed rulemaking at 81 FR 65720 (Sept. 23, 2016) (Docket No. EERE–2014–BT–STD–0031–0230).

[5] Standards for commercial water heating equipment were published in a notice of proposed rulemaking at 81 FR 34440 (May 31, 2016) (Docket No. EERE–2014–BT–STD–0042).

granted those requests through publication in the **Federal Register** of a notice extending the comment period on the notice of petition for rulemaking until March 1, 2019. 84 FR 449 (Jan. 29, 2019).

The 90-day public comment period, including the 30-day extension to submit comments, invited public input in order to better understand stakeholder perspectives and increase transparency around a complex issue involving DOE's legal authority. DOE received comments from a variety of stakeholders, including representatives from gas industry associations, appliance manufacturers, the manufactured housing industry, efficiency advocates, consumer advocates, State organizations and Attorneys General, and individuals (mostly form letter comments). In general, the gas industry associations and the manufactured housing industry supported the petition, and the advocates and State officials opposed it. Furnace and water heater manufacturer reactions to the petition were generally mixed.

After carefully considering the comments on the petition, DOE published a notice of proposed interpretive rule in the **Federal Register** on July 11, 2019, to provide the public additional information about DOE's tentative interpretation of EPCA's ''features'' provision [6] in the context of condensing vs. non-condensing furnaces and water heaters, as informed by public comments. 84 FR 22011. The proposed interpretive rule tentatively determined that, in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) may constitute a performance-related ''feature'' under EPCA that cannot be eliminated through adoption of an energy conservation standard. If such interpretation were to be finalized, DOE anticipated that in future rulemakings for affected products/equipment, it would suffice to consider setting product/equipment classes based upon the key distinction of the appliance's utilization of condensing or non-condensing technology. (The proposed interpretive rule, in which DOE responded to comments on the notice of petition for rulemaking, is discussed in further detail in section II.D of this document.) Once again, DOE received comments from a variety of stakeholders, including representatives from gas industry associations, the housing industry, appliance manufacturers, utilities, environmental and efficiency advocates, consumer advocates, State organizations and Attorneys General, and individuals. Consistent with the opinions expressed in response to the petition, in general, the gas industry associations, the housing industry, and most manufacturers supported the proposed interpretive rule, and the advocates and State officials opposed it. Specifically, DOE received comments on the proposed interpretive rule from:

TABLE I.1—ENTITIES SUBMITTING WRITTEN COMMENT ON THE PROPOSED INTERPRETIVE RULE

Commenter	Affiliation
Advocates Joint Comment: ▪ Appliance Standards Awareness Project (ASAP). ▪ Alliance to Save Energy (ASE). ▪ American Council for an Energy-Efficient Economy (ACEEE). ▪ Consumer Federation of America (CFA). ▪ National Consumer Law Center (NCLC).	Energy Efficiency and Consumer Advocates.
Air-Conditioning, Heating & Refrigeration Institute (AHRI).	Trade Association.
A.O. Smith Corporation (A.O. Smith).	Industry.
Attorneys General Joint Comment (AGs Joint Comment): ▪ State of New York. ▪ State of California. ▪ State of Colorado. ▪ District of Columbia. ▪ State of Illinois. ▪ State of Maine. ▪ State of Maryland. ▪ Commonwealth of Massachusetts. ▪ State of Minnesota. ▪ State of New Jersey. ▪ State of Oregon. ▪ State of Vermont. ▪ State of Washington. ▪ Corporation Counsel of the City of New York.	State/Local Governments.
Bradford White Corporation (BWC).	Industry.
Burnham Holdings, Inc. (BHI).	Industry.
California Energy Commission (CEC).	State Government.
California Investor-Owned Utilities (CA IOUs): ▪ Pacific Gas and Electric Co. (PG&E). ▪ San Diego Gas and Electric (SDG&E. ▪ Southern California Edison (SCE).	Utilities.
Carrier Corporation (Carrier).	Industry.
Ceres BICEP Network (Ceres).	Business Coalition.
Consumer Federation of America and National Consumer Law Center (CFA/NCLC).	Consumer Advocates.
Crown Boiler Company (Crown Boiler).	Industry.
Environmentalists Joint Comment: ▪ Natural Resources Defense Council (NRDC). ▪ Sierra Club. ▪ Earthjustice.	Environmental Advocates.

[6] *See* 42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); and as applicable in certain cases through 42 U.S.C. 6316(a)).

TABLE I.1—ENTITIES SUBMITTING WRITTEN COMMENT ON THE PROPOSED INTERPRETIVE RULE—Continued

Commenter	Affiliation
Lennox International, Inc. (Lennox).	Industry.
Weil-McLain.	Industry.
Anonymous.	Unaffiliated.
Anonymous.	Unaffiliated.
Sarah G.	Unaffiliated.
Kathy McCardwell.	Unaffiliated.
Elizabeth Reed.	Unaffiliated.
Suzanne Sorkin.	Unaffiliated.
Laura Woods.	Unaffiliated.

In the course of considering the public comments on its proposed interpretation, comments from U.S. Boiler, BHI, and Crown Boiler presented DOE with an alternative approach that did not focus on ''non-condensing'' technology as the performance-related feature. While the commenters suggesting this alternative were generally supportive of the proposed interpretation, they expressed concern that unless subsequent DOE rulemakings implement the interpretation through product/equipment classes focused on venting compatibility (particularly preservation of Category I venting), many of the same problems identified in the Gas Industry Petition may still arise. In order to gather further information and comment on this specific issue, DOE published a supplemental notice of proposed interpretation in the **Federal Register** on September 24, 2020 (the September 2020 SNOPIR), which proposed alternative approaches to product/equipment class setting in this context. 85 FR 60090. (The supplemental proposed interpretive rule is discussed in further detail in section II.E of this document.)

In response to its supplemental proposed interpretive rule, DOE received comments from:

TABLE I.2—ENTITIES SUBMITTING WRITTEN COMMENT ON THE SUPPLEMENTAL PROPOSED INTERPRETIVE RULE

Commenter	Affiliation
Advocates Joint Comment II ▪ Appliance Standards Awareness Project (ASAP) ▪ American Council for an Energy-Efficient Economy (ACEEE) ▪ Consumer Federation of America (CFA) ▪ National Consumer Law Center (NCLC)	Energy Efficiency and Consumer Advocates.
Air-Conditioning, Heating & Refrigeration Institute (AHRI)	Trade Association.
A.O. Smith Corporation (A.O. Smith)	Industry.
Attorneys General Joint Comment (AGs Joint Comment II) ▪ State of New York ▪ State of California ▪ State of Colorado ▪ District of Columbia ▪ State of Illinois ▪ State of Maine ▪ State of Maryland ▪ Commonwealth of Massachusetts ▪ State of Minnesota ▪ State of Nevada ▪ State of Oregon ▪ State of Vermont ▪ State of Washington ▪ Corporation Counsel of the City of New York	State/Local Governments.
Bradford White Corporation (BWC)	Industry.
California Investor-Owned Utilities (CA IOUs) ▪ Pacific Gas and Electric Co. (PG&E) ▪ San Diego Gas and Electric (SDG&E) ▪ Southern California Edison (SCE)	Utilities.
Carrier Corporation (Carrier)	Industry.
Crown Boiler Company (Crown Boiler)	Industry.
Electrify Now	Energy Efficiency and Environmental Advocates.
Lennox International, Inc. (Lennox)	Industry.
Mortex Products, Inc. (Mortex)	Industry.

TABLE I.2—ENTITIES SUBMITTING WRITTEN COMMENT ON THE SUPPLEMENTAL PROPOSED INTERPRETIVE RULE—Continued

Commenter	Affiliation
Natural Resources Defense Council (NRDC)	Environmental Advocate.
Nortek Global HVAC (Nortek)	Industry.
Northwest Energy Efficiency Alliance (NEEA)	Energy Efficiency Advocates.
Petitioners *et al.* Joint Comment II ▪ Spire, Inc. ▪ Spire Missouri, Inc. ▪ American Public Gas Association (APGA) ▪ American Gas Association (AGA) ▪ National Propane Gas Association (NPGA) ▪ National Gas Supply Association (NGSA) ▪ National Association of Home Builders (NAHB) ▪ Plumbing-Heating-Cooling Contractors National Association	Utilities, Trade Associations.
U.S. Boiler Company (USB)	Industry.
Anonymous	Unaffiliated.
Lee Hannah	Unaffiliated.

All comments—on both the proposed interpretive rule and the supplemental proposed interpretive rule—were carefully and fully considered by DOE. Informed by these comments and reconsideration of the substantial evidence in the relevant rulemaking dockets, the Department is issuing this final interpretive rule to state DOE's interpretation of EPCA's ''features'' provision in the context of condensing vs. non-condensing furnaces, water heaters, and similarly-situated covered products/equipment (and associated venting). The following sections of this final interpretive rule set forth the relevant legal authority, describe the Department's historical interpretation of EPCA's ''features'' provision as applied to condensing vs. non-condensing products/equipment, provide summary of and responses to comments received on both the proposed interpretive rule and supplemental proposed interpretive rule, and recite DOE's revised interpretation of the relevant statutory provision.

Through this final interpretive rule, DOE is not making any changes to its existing regulations in the Code of Federal Regulations (CFR) or policies regarding individual appliance standards rulemakings, and it cannot and will not take any enforcement action pursuant to its revised interpretation until after the effective date of a final legislative rule, published in the **Federal Register**, amending the applicable product/equipment classes and energy conservation standards, as necessary. Consequently, this final interpretive rule does not change or revise any current policies or legal requirements with respect to residential furnaces, commercial water heaters, or similarly-situated covered products/equipment. Decisions about how this interpretation will apply to existing products/equipment utilizing condensing/non-condensing technologies will be the subject of subsequent actions.

II. Summary Description

A. Relevant Statutory Provisions

In this final interpretive rule, DOE explains its historical interpretation regarding the evaluation of what constitutes a product ''feature'' which cannot be eliminated under EPCA, specifically in the context of residential furnaces and commercial water heaters. For covered consumer products, the key statutory provision at issue can be found at 42 U.S.C. 6295(o)(4), which provides that the Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding.

Where the Secretary finds such ''performance characteristics (including reliability), features, sizes, capacities, and volumes'' (collectively referred to hereafter as ''features'') to exist, the statute provides a remedy at 42 U.S.C. 6295(q)(1), which states that a rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group—(A) consume a different kind of energy from that consumed by other covered products within such group (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class). In making a determination under 42 U.S.C. 6295(q)(1) concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate.

These provisions also apply to covered non-ASHRAE[7] commercial and industrial equipment through the crosswalk provision at 42 U.S.C.

[7] ''ASHRAE'' refers to the American Society of Heating, Refrigerating and Air-Conditioning Engineers.

6316(a). (Under the statute, ''ASHRAE equipment'' refers to small commercial package air conditioning and heating equipment, large commercial package air conditioning and heating equipment, very large commercial package air conditioning and heating equipment, packaged terminal air conditioners (PTACs), packaged terminal heat pumps (PTHPs), warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, or unfired hot water storage tanks, which are addressed by ASHRAE in ASHRAE Standard 90.1, *Energy Standard for Buildings Except Low-Rise Residential Buildings*.)

ASHRAE equipment has its own separate statutory scheme under EPCA, with the default situation being that DOE must adopt the level set forth in ASHRAE Standard 90.1 unless the Department has clear and convincing evidence to adopt a more-stringent standard (*see* 42 U.S.C. 6313(a)(6)). Under 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa), there is a similar ''features'' provision which states, ''The Secretary may not prescribe an amended standard under this subparagraph if the Secretary finds (and publishes the finding) that interested persons have established by a preponderance of the evidence that a standard is likely to result in the unavailability in the United States in any product type (or class) of performance characteristics (including reliability, features, sizes, capacities, and volumes) that are substantially the same as those generally available in the United States at the time of the finding of the Secretary.'' However, it is noted that this provision contains the specific limitation that it applies to an amended standard prescribed *under this subparagraph* (*i.e.,* when DOE is acting under its authority to set a more-stringent standard). There is no companion ''features'' provision under 42 U.S.C. 6313(a)(6)(A), which is the provision that would apply when DOE is adopting the levels set by ASHRAE. Congress was clearly aware of the features issue, and it chose to act in the context of DOE standard setting, but not ASHRAE standard setting. There is likewise no companion provision to 42 U.S.C. 6295(q)(1) for ASHRAE equipment.

B. DOE's Historical Interpretation

With this statutory background in mind, in the March 12, 2015 notice of proposed rulemaking (NOPR) for energy conservation standards for residential furnaces, DOE set forth in detail its rationale for why it did not considering the venting of non-condensing furnaces to constitute a product ''feature'' under 42 U.S.C. 6295(o)(4). 80 FR 13120, 13137–13138.

As discussed previously, when evaluating and establishing energy conservation standards, the statute requires DOE to divide covered products into product classes by the type of energy used, by capacity, or by other performance-related features that justify a different standard. In making a determination regarding whether a performance-related feature justifies a different standard, DOE must consider factors such as the utility to the consumer of the feature and other factors DOE determines are appropriate. (42 U.S.C. 6295(q)) Historically, DOE has viewed utility as an aspect of the product that is accessible to the layperson and is based on user operation, rather than performing a theoretical function. This interpretation has been implemented consistently in DOE's previous rulemakings by determining utility through the value the item brings to the consumer, rather than through analyzing more complicated design features, or costs that anyone, including the consumer, manufacturer, installer, or utility companies may bear. DOE reasoned that this approach is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)(A)–(B) and (3)).

Under EPCA, DOE has typically addressed consumer utility by establishing separate product classes or otherwise taken action when a consumer may value a product feature based on the consumer's everyday needs. For instance, DOE determined that it would be impermissible in light of 42 U.S.C. 6295(o)(4) to include elimination of oven door windows as a technology option to improve the energy efficiency of cooking products.[8] DOE reached this conclusion based upon how consumers typically use the product: Peering through the oven window to judge if an item is finished cooking, as opposed to checking the timer and/or indicator light or simply opening the oven door (which could waste more energy) to see if the item is finished cooking. DOE has also determined that consumers may value other qualities such as ability to self-clean,[9] size,[10] and configuration.[11] This determination, however, can change depending on technological developments and shifts in consumer behavior/preferences, and it is conceivable that certain products may disappear from the market entirely due to shifting consumer demand. DOE stated that it has determined such value on a case-by-case basis through its own research, as well as public comments received.

DOE offered a cautionary note that disparate products may have very different consumer utilities, thereby making direct comparisons difficult and potentially misleading. For instance, in a 2011 rulemaking, DOE created separate product classes for vented and ventless residential clothes dryers based on DOE's recognition of the ''unique utility'' that ventless clothes dryers offer to consumers. 76 FR 22454, 22485 (April 21, 2011). This utility could be characterized as the ability to have a clothes dryer in a living area where vents are impossible to install (*e.g.,* an apartment in a high-rise building). As explained in that April 2011 direct final rule technical support document, ventless dryers can be installed in locations where venting dryers would be precluded due to venting restrictions.

But in another rulemaking regarding water heaters, DOE found that water heaters that utilize heat pump technology did not need to be put in a separate product class from conventional types of hot water heaters that utilize electric resistance technology, even though water heaters utilizing heat pumps require the additional installation of a condensate drain that a hot water heater utilizing electric resistance technology does not require. 74 FR 65852, 65871 (Dec. 11, 2009). DOE found that regardless of these installation factors, the heat pump water heater and the conventional water heater still had the same utility to the consumer: Providing hot water. *Id.* In both cases, DOE made its finding based on consumer type and utility type, rather than technology utilized that impacts product efficiency.

In its March 2015 energy conservation standards rulemaking proposal for residential furnaces, DOE expressed concern that tying the concept of ''feature'' to a specific technology would

[8] 63 FR 48038, 48041 (Sept. 8, 1998).

[9] 73 FR 62034, 62048 (Oct. 17, 2008) (separating standard ovens and self-cleaning ovens into different product classes).

[10] 77 FR 32307, 32319 (May 31, 2012) (creating a separate product class for compact front-loading residential clothes washers).

[11] 75 FR 59469, 59487 (Sept. 27, 2010) (creating a separate product class for refrigerators with bottom-mounted freezers).

effectively lock-in the currently existing technology as the ceiling for product efficiency and eliminate DOE's ability to address technological advances that could yield significant consumer benefits in the form of lower energy costs while providing the same functionality for the consumer. DOE stated that it was very concerned that determining features solely on product technology could undermine the Department's Appliance Standards Program. DOE reasoned that if it is required to maintain separate product classes to preserve less-efficient technologies, future advancements in the energy efficiency of covered products would become largely voluntary, an outcome which seems inimical to Congress's purposes and goals in enacting EPCA. 80 FR 13120, 13138 (Mar. 12, 2015).

Turning to the product at issue in that 2015 furnaces rulemaking, DOE noted that residential furnaces are currently divided into several product classes. For example, furnaces are separated into product classes based on their fuel source (gas, oil, or electricity), which is required by statute. In the most recent rulemaking for that covered product, DOE analyzed only two product classes for residential furnaces: (1) Non-weatherized gas-fired furnaces (NWGFs) and (2) mobile home gas-fired furnaces (MHGFs). DOE did not additionally separate NWGFs and MHGFs into condensing and noncondensing product classes. *Id.*

In that 2015 furnaces rulemaking, DOE tentatively concluded that the methods by which a furnace is vented did not provide any separate performance-related impacts, and, therefore, that DOE had no statutory basis for defining a separate class based on venting and drainage characteristics. DOE reasoned that NWGF and MHGF venting methods did not provide unique utility to consumers beyond the basic function of providing heat, which all furnaces perform. Using this logic, the possibility that installing a non-condensing furnace may be less costly than a condensing furnace due to the difference in venting methods did not justify separating the two types of NWGFs into different product classes. Unlike the consumers of ventless dryers, which DOE had determined to be a performance-related feature based on the impossibility of venting in certain circumstances (*e.g.,* high-rise apartments), DOE reasoned that consumers of condensing NWGFs are homeowners that may either use their existing venting or have a feasible alternative to obtain heat. In other words, homeowners would still be able to obtain heat regardless of the venting. In contrast, DOE reasoned that a resident of a high-rise apartment or condominium building that is not architecturally designed to accommodate vented clothes dryers would have no option in terms of installing and enjoying the utility of a dryer in their home unless he or she used a ventless dryer. *Id.*

As explained previously, DOE's conclusion in the March 12, 2015 NOPR was that the utility of a furnace involves providing heat to a consumer. DOE reasoned that such utility is provided by any type of furnace, but to the extent that a consumer has a preference for a particular fuel type (*e.g.,* gas), improvements in venting technology may eventually allow a consumer to obtain the efficiency of a condensing furnace using the existing venting in a residence by sharing venting space with water heaters. DOE postulated that this update in technology would significantly reduce the cost burden associated with installing condensing furnaces and reduce potential instances of ''orphaned'' water heaters, where the furnace and water heater can no longer share the same venting (due to the furnace being a Category IV, condensing product and the water heater being a Category I, noncondensing product). In other words, when mature, this technology could allow consumers to switch from a non-condensing furnace to a condensing furnace in a greater variety of applications, such as urban row houses. For more information, interested parties were asked to consult appendix 8L of the NOPR TSD. *Id.*

C. The Gas Industry Petition

As noted previously, on October 18, 2018, DOE received a petition from the Gas Industry Petitioners asking DOE to: (1) Issue an interpretive rule stating that DOE's proposed energy conservation standards for residential furnaces and commercial water heaters would result in the unavailability of ''performance characteristics'' within the meaning of the Energy Policy and Conservation Act, as amended (*i.e.,* by setting standards which can only be met by products/equipment using condensing combustion technology) and (2) withdraw the proposed energy conservation standards for residential furnaces and commercial water heaters based upon such findings. In their petition, the Gas Industry Petitioners argue that DOE misinterpreted its mandate under section 325(o)(4) of EPCA by failing to consider as a ''feature'' of the subject residential furnaces and commercial water heating equipment the compatibility of a product/equipment with conventional atmospheric venting systems, the ability to operate without generating liquid condensate requiring disposal via a plumbing connection, and the ability to operate with other commonly vented appliances. Consequently, the Gas Industry Petitioners assert that DOE's proposals would make unavailable non-condensing products/equipment with such features, which currently exist in the marketplace, in contravention of the statute. The petition makes a number of technical, legal, and economic arguments in favor of its suggested interpretation, and it points to DOE's past precedent related to space constraints and differences in available electrical power supply (and associated installation costs) as supporting its call to find that non-condensing technology amounts to a performance-related ''feature.'' Based upon these arguments, the Gas Industry Petitioners concluded that DOE should issue an interpretive rule treating non-condensing technology as a ''feature'' under EPCA, withdraw its rulemaking proposals for both residential furnaces and commercial water heaters, and proceed on the basis of this revised interpretation.

D. DOE's Proposed Interpretive Rule

As discussed in section I of this document, DOE published a notice of proposed interpretive rule in the **Federal Register** on July 11, 2019. 84 FR 33011. The substance of that proposed interpretation (summarized in the following paragraphs) was presented in that document. 84 FR 33011, 33020–33021 (July 11, 2019).

In its proposed interpretive rule, the Department noted that in consideration of public comments and other information received on the Gas Industry Petition, DOE proposed to revise its interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technology used in furnaces, water heating equipment, and similarly-situated appliances (where permitted by EPCA). Based on those comments and for the reasons set forth fully in that document, DOE proposed to interpret prospectively the statute to provide that adoption of energy conservation standards that would limit the market to natural gas, propane gas and/or oil-fired furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) that use condensing combustion technology would result in the unavailability of a performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as

applicable in certain cases through 42 U.S.C. 6316(a)).

As explained in the proposed interpretive rule, the statute accords the Secretary of Energy considerable discretion in terms of determining whether a performance characteristic of a covered product/equipment amounts to a performance-related feature which cannot be eliminated through adoption of an energy conservation standard. DOE stated that it has taken the opportunity presented by the Gas Industry Petition to reconsider its historical interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technologies used by certain gas appliances. A number of factors convinced DOE to propose a revision to its interpretation.

First, DOE acknowledged that it has, in the past, taken space constraints and similar limitations into account when setting product classes (*e.g.,* PTACs, ventless clothes dryers). For example, DOE was sensitive to the costs associated with requiring expensive building modifications when it decided to set separate equipment classes for standard size PTACs and non-standard size PTACs. 73 FR 58772, 58782 (Oct. 7, 2008). DOE stated that it expects that similar expenses would occur here, if DOE were to hold to its historical interpretation, at least for some subset of installations. Although limited data were provided to address the actual costs that consumers and commercial customers would face to modify their existing category I venting, there is little doubt that some number of such installations would be quite costly. These more complicated/costly installations are documented as part of DOE's analysis of the venting costs for residential furnaces, which considered potential venting modifications that could be required when replacing an existing category I furnace with a condensing (category IV) furnace (*see* appendix 8D of the 2016 SNOPR TSD for further details).

Second, DOE stated that it has in the past focused on the consumer's interaction with the product/equipment in deciding whether a performance feature is at issue. In the context of residential furnaces and commercial water heaters, DOE has focused on the primary function of the appliance (*e.g.,* providing heat to a home or potable hot water) in establishing the nexus to the consumer. In the past, DOE opined that consumers were only interested in obtaining heat or hot water from the appliance, so they would not care about the mechanism for generating that end product. However, commenters have made clear that in at least some cases, the physical changes associated with a condensing appliance may change a home's aesthetics (*e.g.,* by adding new venting into the living space or decreasing closet or other storage space), thereby impacting consumer utility even under DOE's prior approach.

Third, DOE noted that it has been the Department's policy to remain neutral regarding competing energy sources in the marketplace. As certain commenters have pointed out, and as DOE's own analyses have shown, some enhanced level of fuel switching is likely to accompany standard setting using DOE's prior interpretation. Many consumers who are currently gas customers may show a preference for that fuel type and would be negatively impacted by a standard that requires the purchase of a condensing unit to the extent they feel compelled to change to a different fuel type. DOE explained that it seeks neither to determine winners and losers in the marketplace nor to limit consumer choice.

Finally, DOE stated that it is very concerned about ensuring energy affordability, particularly for persons with low incomes. Although energy efficiency improvements may pay for themselves over time, there is typically a significant increase in upfront costs associated with furnaces and water heaters using condensing technology. For consumers with difficult installation situations (*e.g.,* inner-city row houses), there would be the added cost of potentially extensive venting modifications. In certain cases, commenters have argued that accommodating condensing products may not even be possible. Although DOE continues to believe that costs are properly addressed in the economic analysis portion of its rulemakings, it stated that it remains cognizant of such issues. DOE stated that it has tentatively concluded that the other reasons discussed immediately above are sufficient in and of themselves to justify the Department's proposed change in interpretation, but it acknowledged these cost impacts in order to be fully transparent in terms of the agency's thinking.

The agency reasoned that creating separate product classes for condensing and non-condensing furnaces, water heaters, and similarly-situated products/equipment (where permitted by EPCA) would prevent many of these potential problems. Although DOE's proposed revised approach may have some impact on overall energy saving potential as a result of establishing separate product/equipment classes, the Department noted that that is not the touchstone of EPCA's ''features'' provision; through that provision, Congress expressed its will that certain product utilities will take priority over additional energy-saving measures. (For example, DOE did not eliminate the oven window which consumers found useful.) With that said, DOE expressed its belief that any potentially negative programmatic impacts of its revised interpretation are likely to be limited. DOE reasoned that the proposed interpretation would be likely to impact only a limited set of appliances, and DOE noted that market trends have favored the growing reach of condensing furnaces, even as non-condensing alternatives have remained available. DOE stated that it has every reason to believe that such trends will continue.

DOE sought to clarify the limitations of its proposed revised interpretation, based upon the existing statutory provisions. As noted, additional, subsequent DOE action would be required before the interpretation in the proposed interpretive rule could be implemented. The proposed interpretive rule, even once finalized, would not alter the Department's current regulations. DOE anticipates continued engagement and productive involvement of members of the public and the regulated community in subsequent activities that may follow this interpretation.

As discussed in the proposed interpretive rule, DOE decided to grant the Gas Industry Petition to the extent that it proposed to prospectively interpret the statute to provide that adoption of energy conservation standards that would limit the market of natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) to appliances that use condensing combustion technology would result in the unavailability of a performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). The proposal clarified that such interpretation would apply to all applicable residential products, non-ASHRAE commercial equipment, and ASHRAE equipment where DOE adopts a level more stringent than the ASHRAE level.

DOE stated in the 2019 proposed interpretive rule that it is denying the Gas Industry Petition as it pertains to those rulemakings where ASHRAE sets standard levels that trigger DOE to consider and adopt those level (unless DOE finds clear and convincing evidence to adopt more-stringent levels), due to lack of authority. DOE

also denied the Gas Industry Petition's request for DOE to withdraw the proposed rules for residential furnaces and commercial water heaters as unnecessary. DOE stated that if the interpretive rule were to be finalized, it would anticipate developing supplemental notices of proposed rulemaking (SNOPRs) that would implement the new legal interpretation for those two rulemakings that were the subject of the petition for rulemaking.

E. DOE's Supplemental Proposed Interpretive Rule

As noted in section I of this document, DOE published a notice of supplemental proposed interpretive rule in the **Federal Register** on September 24, 2020. 85 FR 60090. DOE's supplemental proposal was designed to gather further information in response to comments from U.S. Boiler, BHI, and Crown Boiler, suggesting an alternative approach that did not focus on ''non-condensing'' technology as the performance-related feature. While the commenters suggesting this alternative were generally supportive of the proposed revised interpretation, they expressed concern that unless subsequent DOE rulemakings implement the interpretation through product/equipment classes focused on venting compatibility (particularly preservation of Category I venting), many of the same problems identified in the Gas Industry Petition may still arise. (USB, No. 78 at pp. 1–2; BHI, No. 83 at pp. 1–2; Crown Boiler, No. 79 at pp. 1–2) In order to gather further information and comment on this issue, DOE proposed alternative approaches to product/equipment class setting in this context, as explained in the September 24, 2020 notice of supplemental proposed interpretation at 85 FR 60090, 60094–60095, and as summarized in the following paragraphs.

In the supplemental proposed interpretive rule, DOE initially responded to these comments from USB, BHI, and Crown Boiler by noting that, while separate from the product/equipment, the venting system is inextricably linked to the design of the appliance. Because the venting system is a separate component from the product, DOE initially sought to focus on non-condensing operation as the performance-related characteristic of the appliance itself. However, after further considering these commenters' concerns, DOE stated its intention to explore whether interpreting non-condensing operation to be a feature might still result in a reduction of utility for certain consumers, because some non-condensing appliances require connection to venting systems other than Category I and may result in many of the installation issues that DOE seeks to address through this interpretive rulemaking.

As a result, in the supplemental proposed interpretation, DOE further considered what constitutes a ''feature'' or ''performance-related characteristic'' under EPCA, and in particular, whether such feature might be based on venting system compatibility of the appliance. Because the most significant concerns regarding venting system compatibility involve use of gas appliances that are not compatible with Category I venting in place of gas appliances that are compatible with Category I venting, DOE considered whether compatibility with Category I venting should be a protected feature under EPCA. Moreover, DOE also considered whether *any* impact to venting system compatibility resulting from increasing product or equipment efficiency standards would cause the aforementioned issues. For example, it is conceivable that if a more-stringent standard results in an appliance compatible with Category III venting systems being replaced with an appliance that is only compatible with Category IV venting systems, many of the same issues might arise as have been identified for the replacement of appliances compatible with Category I venting systems. Thus, compatibility with venting systems of any type could conceivably be a feature that consumers desire and which DOE must consider when evaluating more-stringent standards. Under such an interpretation, compatibility with each existing venting technology would be a feature under EPCA that could require separate classes based on compatibility with venting systems for each venting category, and uncategorized venting systems could also require separate classes.

DOE noted that the first approach (*i.e.,* considering only Category I venting compatibility as a performance-related feature) has the benefit of potentially simplifying the regulatory scheme in comparison to the latter approach, which could require classification of appliances in each venting category separately. The first approach would result in more streamlined regulations and product/equipment classes for gas appliances, as compared to the latter approach, while resolving the most significant issues involved with venting system compatibility. The latter approach potentially would address more comprehensively possible issues related to the compatibility of an appliance with venting systems, but it would make the regulatory scheme more complex and could result in elevated compliance burdens, as the number of product/equipment classes for vented appliances could increase greatly (*e.g.,* each current class of gas appliance could require further segmentation by each of the four categories of venting and also could need to account for gas appliances that are compatible with uncategorized venting systems). DOE stated that both approaches would have the benefit of not limiting the Department to consideration of the combustion technology that provides the function of the appliance (*e.g.,* condensing, non-condensing), about which some commenters have expressed concerns. Instead, DOE's focus would be to ensure compatibility with existing venting, thereby allowing DOE to be responsive to potential future technological advances in venting system compatibility.

Based on these considerations, DOE stated that it was considering an alternative interpretation (with two potential variations), in addition to the interpretation proposed in the July 2019 notice of proposed interpretive rule. As discussed previously, the July 2019 notice of proposed interpretive rule proposed that adoption of energy conservation standards that would limit the market to natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) that use condensing combustion technology would result in the unavailability of a performance-related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). In the notice of supplemental proposed interpretation, DOE also proposed an interpretation that an appliance's compatibility with a venting system is a performance-related characteristic of that appliance under EPCA. Specifically, DOE stated that it is also considering an interpretation that, based on current appliance/venting system compatibility limitations, the adoption of energy conservation standards that would limit the market to natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) that are incompatible with any existing venting systems available on the market would result in the unavailability of a performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). DOE stated that it considered limiting its proposal to

include only that compatibility with Category I venting systems is a feature, as suggested by the commenters, and seeks comment on doing so. In addition, DOE indicated that it is considering a broader approach taking into consideration all venting categories since concerns similar to those that gave rise to the petition could conceivably occur for appliances that are compatible with venting systems other than Category I. The Department noted that after examining the totality of public comments on this issue and the potential approaches, it will consider adopting either of these alternative or the original proposed approach, as appropriate, in its final interpretation.

The comment period on the September 24, 2020 supplemental proposed interpretive rule was originally scheduled to end on October 26, 2020. However, on September 25, 2020 and October 6, 2020, DOE received two requests for extension of the comment period (from A.O. Smith and Lennox, respectively), asserting that additional time is needed because the supplemental proposed interpretive rule addresses multiple product types and raises complex issues. On September 29, 2020, DOE received a comment from the submitters of the Gas Industry Petition seeking prompt action on their petition. Balancing these competing requests, DOE determined it appropriate to extend the public comment period on the supplemental proposed interpretive rule until November 9, 2020. Notification of the extension of the public comment period was published in the **Federal Register** on October 22, 2020. 85 FR 67312.

III. Response to Comments

DOE received a number of comments with divergent views on the Department's proposed interpretive rule and supplemental proposed interpretive rule related to the Gas Industry Petition, with some supporting the proposal and others in opposition.[12] Comments from gas industry associations, certain trade associations, and some individual manufacturers generally expressed support for the proposed interpretive rule. Comments from environmental and efficiency advocacy organizations, consumer advocacy organizations, other manufacturers, certain States and Attorneys General, and a few members of the public generally opposed it. The following sections of this final interpretive rule summarize the comments received on the proposed interpretive rule and supplemental proposed interpretive rule and provide DOE's responses to those comments. Then, consistent with its statutory authority and after considering the comments received along with all other available information, DOE sets forth its final interpretation. To aid in organizing the comments, this section categorizes public comments on the proposed interpretive rule and supplemental proposed interpretive rule in terms of legal authority, economic issues, analytical matters, and other related issues.

A. Legal Authority

As DOE explained in section II.B of this document, for the purposes of EPCA, DOE has in prior instances considered product/equipment ''features'' in the context of a consumer's interaction with the appliance in question. With the submission of the Gas Industry Petition, DOE had the opportunity to re-evaluate its prior interpretation and to seek public input to further inform the agency's consideration, particularly in regards to its technical implications, as well as the needs of consumers (including those with low incomes). While DOE continues to embrace the concept of a ''feature'' being tied to a consumer's interaction with an appliance, the Department has come to see that it has been too narrow in its focus on what constitutes such consumer interaction with residential furnaces, commercial water heaters, and similarly-situated products/equipment that utilize non-condensing technology (and associated Category I venting). For the reasons explained subsequently, in future rulemakings, DOE will carefully examine the range of consumer impacts (based upon the record evidence in a given rulemaking) and may establish separate product/equipment classes for appliances using non-condensing technology (and associated venting), consistent with this final interpretive rule.

DOE is issuing this interpretation as an interpretive rule within the meaning of the Administrative Procedure Act. 5 U.S.C. 551(4); 5 U.S.C. 553(b)(A). In issuing its proposed interpretation, DOE solicited public comment regarding the Department's views on a specific legal question: Whether non-condensing technology (and associated venting) constitutes a performance-related ''feature'' under 42 U.S.C. 6295(o)(4),[13] as could support a separate product/equipment class under 42 U.S.C. 6295(q)(1),[14] including the authority that Congress conferred on DOE through those provisions.

1. Legal Authority To Set Separate Product/Equipment Classes Based Upon Condensing and Non-Condensing Technologies

As discussed, the Gas Industry Petition raised the issue of whether non-condensing technology, including associated venting, constitutes a ''performance characteristic'' or ''feature'' under 42 U.S.C. 6295(o)(4), and if it is, whether it justifies a separate product/equipment class under 42 U.S.C. 6295(q)(1). Not unlike the submissions on the notice of petition, commenters on the proposed interpretive rule expressed strongly held but conflicting views regarding DOE's legal authority to determine non-condensing technology used in furnaces and water heaters, including the associated venting, to be a ''performance characteristic'' or ''feature'' within the meaning of the statute, and whether as a ''performance characteristic'' or ''feature'' it would justify a separate product/equipment class and energy conservation standard.

a. Comments Supporting the Proposed Interpretation

A number of commenters expressed support for DOE's proposed interpretive rule and recommended that the Department take action to finalize its interpretation along the lines proposed. (Petitioners *et al.* Joint Comment, No. 80 at p. 2; Weil-McLain, No. 86 at p. 1; AHRI, No. 91 at p. 1; Carrier, No. 92 at p. 1; BHI, No. 83 at pp. 1–2; USB, No. 78 at p. 1; BWC, No. 77 at pp. 1–2; Nortek, No. 71 at p. 1; Mortex, No. 72 at p. 1) Crown Boiler and USB stated that adoption of an energy conservation standard at levels requiring the use of condensing technology would result in the unavailability of a performance-related feature under EPCA. (Crown Boiler, No. 79 at p. 1; USB, No. 78 at p. 1)

Several commenters argued that DOE's proposed interpretive rule would enhance consumer choice. (Mortex, No. 72 at p. 1; Carrier, No. 92 at p. 1; Nortek,

[12] DOE notes that it received two comments which appear to relate to a separate DOE rulemaking for revisions to the Department's waiver/interim waiver process for test procedures (Docket No. EERE–2019–BT–NOA–0011). Apparently, these comments were either submitted or posted to the wrong docket. DOE has referred these comments to staff of the Appliance Standards Program for placement in the correct docket.

[13] For non-ASHRAE equipment, the ''features'' provision at 42 U.S.C. 6295(o)(4) is applicable through 42 U.S.C. 6316(a); for ASHRAE equipment where DOE is setting more-stringent standards, the ''features'' provision at 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) applies.

[14] For non-ASHRAE equipment, the class provision at 42 U.S.C. 6295(q)(1) is applicable through 42 U.S.C. 6316(a).

No. 71 at p. 1) Other commenters found that DOE's proposed interpretation offers greater consumer utility, particularly in those applications where venting represents a significant challenge. (AHRI, No. 91 at p. 1) Regarding residential furnaces, AHRI argued that in some applications, conversion to use of venting compatible with condensing systems would create problems that cannot be ''simplistically rolled into an economic analysis.'' More specifically, the trade association argued that a separate product class would assist consumers who require like-for-like replacement of their existing furnace due to size or drainage constraints or water heater co-venting (a point echoed by Nortek, No. 71 at pp. 1–2, and Carrier, No. 92 at p. 1). According to AHRI, ''EPCA prohibits eliminating product utility precisely to prevent the disproportionate harm to a subset of unlucky consumers.'' (AHRI, No. 91 at p. 2) Making the same point, Nortek reasoned that because consumers are already moving in the direction of condensing furnaces, banning non-condensing furnaces is not necessary and would only serve to disproportionately harm those consumers for whom venting changes would be difficult or impossible. (Nortek, No. 71 at pp. 1–2)

Regarding commercial water heaters, AHRI argued that Commercial Buildings Energy Consumption Survey (CBECS) data suggest that over half of commercial buildings were constructed prior to the introduction of condensing venting requirements, which means that many of these commercial buildings face the same venting challenges as some residences. AHRI pointed to examples where mechanical rooms are built into the core of the building (thereby preventing the side-wall venting sometimes required by condensing equipment), so such building owners would be forced to either switch fuels or to use up valuable retail, restaurant, or office space for an enlarged or relocated mechanical room to accommodate new drainage or different venting configurations. Especially since there is already a market trend toward condensing commercial water heaters, AHRI argued that it is neither necessary nor advisable to require condensing equipment in all applications. Instead, the commenter stated that establishment of a separate class for non-condensing equipment would preserve the ability of commercial consumers facing difficult installation situations to make like-for-like replacements and to avert the need to reconstruct a mechanical room, add unsightly piping, or switch to an electric water heater, all without impacting the overall trend toward installation of more-efficient condensing water heaters. (AHRI, No. 91 at p. 3)

Regarding residential and commercial boilers, AHRI noted that DOE's proposed interpretation provides an important safety measure for gas-fired products/equipment that assures safer use and installation. More specifically, AHRI commented that gas-fired boilers are not simply divided into condensing and non-condensing models but are split into four different categories based on venting type (Category I–IV). AHRI stated that Category I venting is at the crux of DOE's proposed interpretation, because that is the type of venting which is difficult to substitute for another type once installed. The commenter added that a minimum energy conservation standard that ''pushes the efficiency envelope'' may cause nominally non-condensing equipment to become incompatible with Category I venting and could result in the unsafe installation or use of misapplied equipment. AHRI stressed that safety of venting is unquestionably a performance-related feature. Once again, AHRI stated that the boilers market in new construction is trending toward condensing equipment and venting, so the performance feature of Category I venting is most necessary for the replacement market. The commenter also suggested that further increases in the minimum energy conservation standards for boilers should be examined carefully, because those standards are already near the level where venting challenges similar to those for condensing equipment could arise. (AHRI, No. 91 at pp. 4–5) Mortex made similar arguments in the context of furnaces, suggesting that DOE's proposed interpretation would promote flexibility and safety by not forcing an upgrade to a condensing furnaces in some applications where non-condensing venting remains the best choice. (Mortex, No. 72 at p. 1)

The Petitioners *et al.* Joint Comment asserted that energy conservation standards that would make atmospherically-vented products unavailable to consumers would do more to promote electrification (*i.e.,* a shift to electric appliances) than to promote the efficiency of gas products, because many consumers would feel that they have no choice but to give up their gas appliances in favor of electric alternatives. These commenters characterized the situation as one where the imposition of a standard that effectively bans atmospherically-vented gas appliances would result not in the sale of an increased number of more efficient gas products, but in the sale of fewer gas products overall. The Gas Industry Petitioners argued that they are not opposed to condensing technology generally or market trends favoring such technology, nor are they seeking to create missed opportunities for consumers, businesses, and governments, as some of their opponents have claimed. Instead, these commenters stated that they are simply making the case that condensing products are not suitable for all installations and that it is the opponents of the petition who are the ones seeking to deny consumers the products which best serve their needs. (Petitioners *et al.* Joint Comment, No. 80 at pp. 3–4)

Regarding the consumer utility of atmospherically-vented appliances, the Petitioners *et al.* Joint Comment stated that for some consumers, the consumer utility provided by the proposed interpretive rule would be the same utility as DOE found with ventless clothes dryers (*i.e.,* the ability to have the product installed at all). The comment argued that for other consumers, the utility may be similar to that found for ''space-constrained'' appliances (*i.e.,* the ability to have the product fit without the need for building modifications). For yet other consumers, the comment stated that the utility may be preventing the need to scrap another perfectly good appliance (*e.g.,* an orphaned water heater). The Petitioners *et al.* Joint Comment added that other consumers may find utility in an appliance which obviates the need for undesirable building modifications (*e.g.,* sacrifice of an existing interior living space, balcony, or window—concerns which can also arise in the context of new construction.[15]) These commenters concluded that there is no basis for characterizing these losses of utility as a mere matter of cost, rather than performance-related characteristics under EPCA's ''features'' provision. (Petitioners *et al.* Joint Comment, No. 80 at pp. 10–11)

Pointing to EPCA's statutory standards for direct heating equipment which are differentiated ''principally in their manner of installation,'' the Petitioners *et al.* Joint Comment argued that ''it is absurd to suggest that Congress intended to ensure the continued availability of products with sizes—but not products with venting or

[15] The Petitioners *et al.* Joint Comment provided a figure depicting multi-family housing and stated that a building design using atmospherically-vented products eliminates the need for vent-studded columns of vertically-stacked utility spaces along the outside wall of the building, as well as the resulting loss of available window or balcony space.

other performance characteristics—needed to 'fit in standard building spaces' without the need for building modifications.'' (Petitioners *et al.* Joint Comment, No. 80 at p. 12) Applying this principle in the present context, the Petitioners *et al.* Joint Comment stated that condensing products are at least typically larger than comparable atmospherically-vented products, and that even small differences can have significant practical impacts, such as cases where a furnace and air handler must fit inside a confined space with required clearance on all sides. (Petitioners *et al.* Joint Comment, No. 80 at p. 13) Along these same lines, BWC opined that because condensing technology generally requires greater surface area, the size of the product/equipment is likely to increase, and this can cause issues related to size and aesthetics within the home or business. The commenter suggested that this could pose real world problems, such as with mechanical rooms that are no longer large enough to house an appliance using condensing technology. BWC added that the issue of aesthetic impacts also extends to commercial applications, not just residential ones, with the commenter arguing that venting running through the finished space of a school, office building, or hospital could likewise be a significant detriment to their usable space. (BWC, No. 77 at pp. 1–2)

Although USB generally agreed with DOE's revised interpretation, the commenter argued that DOE has erred in focusing on ''non-condensing'' technology as the performance-related feature, suggesting that the agency should instead focus on Category I venting. According to USB, Category II, III, and IV (as well as non-categorized direct vent furnaces and boilers) are currently available using non-condensing technology, but many of the same problems may arise. USB stated that non-condensing Category II, III, and IV appliances generally share the same venting consumer utility issues as condensing appliances and equipment, and that they can theoretically operate at higher efficiencies than Category I. However, the commenter argued that elimination of models using Category I venting (under a standard level that could only be met by products/equipment using Category II, III, or IV venting) would create the same problems which DOE has sought to address through its revised interpretation. USB commented that vent categorization has been recognized for over 20 years by manufacturers, utilities, and code enforcement officials as the best way to determine how to safely vent appliances. (USB, No. 78 at pp. 1–2) BHI made essentially identical arguments to those raised by USB, and Crown Boiler offered a similar comment that DOE should focus product classes based upon type of venting used, rather than the use of condensing or non-condensing technology. (BHI, No. 83 at pp. 1–2; Crown Boiler, No. 79 at pp. 1–2)

AHRI also made the point that DOE has already established product classes which are differentiated based upon the features of condensing and non-condensing products—specifically in the context of furnace fan standards (*i.e.,* fan efficiency rating (FER); *see* 10 CFR 430.32(y)). The furnace fan product classes are distinguished by: (1) Fuel type; (2) whether the furnace is weatherized, and (3) whether its heat exchanger condenses the flue gases to water (*i.e.,* condensing/non-condensing). (AHRI, No. 91 at p. 2; similar point made by Carrier, No. 92 at p. 2 and Nortek, No. 71 at p. 2)

In response, DOE would start by reiterating that it is the Department's position to remain neutral in terms of the available fuel sources. Obviously, whenever the agency takes regulatory action, there is the potential for market shifts based upon consumer reaction, but DOE acts in keeping with the statute, which is at the core of this market neutrality principle. In other words, following the statute where it leads is not only the proper approach from a legal standpoint, but it helps ensure fair and unbiased treatment to all market participants, with impacts deemed as favorable or unfavorable arguably balancing out over time. Thus, in line with this principle, DOE rejects the arguments of certain commenters (*e.g.,* Lennox, No. 87 at p. 1; Ceres, No. 69 at p. 2 (discussed respectively at sections III.A.1.b.v and III.B.1.b of this document)) that the Department is favoring the gas industry through its revised interpretation. DOE is making an informed determination applying the law to the facts presented and in light of the competing, well-argued comments from interested parties.

As stated previously, DOE has decided to revise its prior interpretation of whether non-condensing technology (and associated venting) constitutes a ''feature'' under EPCA, concluding that products/equipment with such characteristics can be deemed as having a protected feature where supported by available evidence in the context of individual standards rulemakings. The reasons for the Department's change in position largely arise from a reevaluation of the arguments made in these comments and new information presented by the Petitioners, as well as evidence already contained in existing rulemaking dockets (*e.g.,* residential furnaces, commercial water heaters). As explained in the paragraphs that follow, DOE has come to understand that such models offer distinct consumer utility beyond their primary function of providing warm air or hot water, particularly in difficult installation situations. Their continued availability would also be expected to maintain a robust level of consumer choice. DOE will touch upon each of these topics in turn.

First, DOE has come to see that a consumer's interaction with a furnace or water heaters can go beyond the appliance's primary function of providing warm air or water. If the replacement of an appliance necessitates additional piping or venting in the usable space of a home or business, major modifications to a utility room, or encroachment upon an existing window or patio, the consumer will assuredly be aware of such interaction with the appliance. Even in new construction, if a builder has to modify designs to accommodate a condensing furnace, thereby losing usable space, that builder and potential customers will perceive this difference. Thus, a consumer may reasonably prefer to retain this residential or commercial space and pay the costs associated with a less-efficient, non-condensing appliance. DOE similarly acknowledges the difficulties faced by consumers who require like-for-like replacement of their existing furnace due to size or drainage constraints or water heater co-venting. The Department also takes AHRI's point (focused on commercial water heaters), that based upon CBECS data, over half of commercial buildings were constructed prior to the introduction of condensing venting requirements, which means that many of these commercial buildings face the same venting challenges as some residences. DOE further takes note of AHRI's examples where mechanical rooms are built into the core of the building (thereby preventing the side-wall venting sometimes required by condensing equipment), so such building owners could be forced to use up valuable retail, restaurant, or office space for an enlarged or relocated mechanical room to accommodate new drainage or different venting configurations.

Although DOE does not have precise numbers in terms of the frequency of these difficult installation situations, commenters have previously provided examples of older, inner-city row

houses presenting significant re-venting issues, such as those in Philadelphia, Newark and Baltimore, of which there are many. DOE also has data in its existing rulemaking dockets related to fuel switching that may result from adoption of a standard that can only be met through use of condensing technology; DOE reasons that such estimates could serve as a proxy for those difficult installations, although other explanations are also expected to be included in that total (*e.g.,* decisions made for purely economic reasons). For example, as the CEC pointed out, the September 2016 residential furnaces SNOPR reported that at the proposed level, 7.9 percent of consumers would switch from gas furnaces to heat pumps or electric furnaces under a condensing standard (a number which could reach 16 percent at the max-tech level). 81 FR 65720, 65813 (Sept. 23, 2016). The precise number of difficult installation situations is not required for DOE to reasonably conclude that the magnitude of such occurrences would not be *de minimis.* DOE agrees with AHRI's comment that in some applications, conversion to use of venting compatible with condensing systems would create problems that cannot be ''simplistically rolled into an economic analysis'' and that ''EPCA prohibits eliminating product utility precisely to prevent the disproportionate harm to a subset of unlucky consumers.'' (AHRI, No. 91 at pp. 1–2)

DOE acknowledges that some portion of difficult installations referenced in the Petitioners *et al.* Joint Comment may involve size constraints, because as the commenters point out, condensing technology generally requires greater surface area, so the size of the product/equipment in some cases could increase. Data referenced by the Petitioners *et al.* Joint comment demonstrate that such constraints could negatively impact a home or business, such as where a mechanical room is no longer large enough to house an appliance using condensing technology, or where the running of venting lines through the finished space of a school, office building, or hospital could detrimentally impact their usable space. In this regard, this situation is analogous to that which DOE faced when setting separate classes and standards for space-constrained air conditioners and heat pumps (*see* 10 CFR 430.32(c)) and standard-size packaged terminal air conditioners and heat pumps (*see* 10 CFR 431.97(c)). A consumer's expectation to be able to obtain a replacement appliance that is compatible with existing venting is to some extent an issue of size as well. ''Size'' is also one of the bases for making a ''features'' determination under 42 U.S.C. 6295(o)(4).

As to AHRI's point that the proposed interpretation would further safety in the context of installing gas-fired residential and commercial boilers, DOE presumes that boilers (and other types of products/equipment for which both condensing and non-condensing technologies are available) can be and are being installed safely in the field by contractors and other service professionals. DOE acknowledges the safety concerns that AHRI points out, namely that boilers are generally split into four different categories based on venting type (Category I–IV), and a minimum energy conservation standard that ''pushes the efficiency envelope'' may cause nominally non-condensing equipment to become incompatible with Category I venting and could result in the unsafe installation or use of misapplied equipment. Deterioration of venting due to corrosive condensate could allow carbon monoxide to enter the inhabited space, thereby presenting a safety risk. However, the Department is aware of no substantial evidence to suggest that installers are improperly installing condensing appliances and thereby triggering associated safety concerns. However, DOE agrees with AHRI and Mortex that DOE's proposed interpretation might prevent rare cases of contractor error.

In response to AHRI, DOE acknowledges that existing furnace fan standards already establish product classes which are differentiated based, in part, upon the use of condensing or non-condensing technology (*i.e.,* fan efficiency rating (FER); *see* 10 CFR 430.32(y)). Specifically, the furnace fan product classes are distinguished by: (1) Fuel type; (2) whether the furnace is weatherized, and (3) whether its heat exchanger condenses the flue gases to water (*i.e.,* condensing/non-condensing). There was no objection among public commenters about the inclusion of a condensing/non-condensing criteria in the furnace fans class designations at the time of the furnace fans final rule.[16]

As discussed previously, the comments submitted by USB, BHI, and Crown Boiler on the July 2019 proposed interpretive rule, while generally supportive, raised questions as to whether DOE's proposed approach could be successfully implemented as initially drafted. These commenters argued that because DOE's proposed interpretation focused on the distinction between an appliance's use of condensing versus non-condensing technology, the same installation challenges may still arise unless DOE took steps to maintain compatibility with a product's intended venting (particularly Category I venting). DOE was interested in the views of other interested parties on the thoughts expressed by USB, BHI, and Crown Boiler, because the Department does not wish to adopt an interpretation that would not be workable in practice and that would ultimately leave the problem raised in the Gas Industry Petition unresolved. Consequently, DOE proceeded to issue the September 2020 SNOPIR, which is more fully discussed in section II.E of this document, in order to receive public input on this topic. In short, in the September 2020 SNOPIR, DOE presented two alternative approaches to implementing its proposed interpretation (*i.e.,* regarding how to set product/equipment classes for the appliances impacted by this interpretation). One alternative was to maintain compatibility with all existing venting types intended for the covered appliance. The other alternative was to ensure compatibility with Category I venting, the type most commonly associated with non-condensing products/equipment. DOE also noted that, depending upon the input received, the Department might also move to adopt the approach originally presented in its July 2019 proposed interpretive rule.

DOE received 18 sets of comments in response to the September 2020 SNOPIR (*see* section I, Table I.2 of this document for a complete list of commenters on the September 2020 SNOPIR). Stakeholders that opposed DOE's July 2019 proposal tended to object to the September 2020 SNOPIR for many of the same reasons recited in their earlier comments, and any such broader, overarching objections are addressed elsewhere in this final interpretive rule. The balance of the arguments raised in comments directly addressed the issues presented in the September 2020 SNOPIR and are set forth in the paragraphs that follow. DOE appreciates the valuable insights provided by all commenters on the matter of venting compatibility initially raised by USB, BHI, and Crown Boiler.

In broad overview of the comments received on the SNOPIR, there was virtually no support for the proposed approach to maintain compatibility with all existing venting types (although one commenter did express some support as a secondary preference). There was

[16] As DOE explained in the final rule, ''DOE did not receive comment or additional information on the proposed product classes, [and] thus, DOE is not making changes to the product classes in this Final Rule.'' 79 FR 38130, 38150 (July 3, 2014).

limited support for the proposed approach to maintain compatibility with Category I venting, with two commenters favoring that approach and another naming it a secondary preference. DOE's initial proposal to establish product/equipment classes based upon the use of condensing or non-condensing technology had the broadest support of the three alternatives presented, with five commenters preferring that approach. One group of commenters (which included many of the entities filing the original Gas Industry Petition) did not express a preference for any of the three approaches presented, arguing that a proper course should be determined in the context of individual product/equipment rulemakings. Finally, as noted, there were also ten commenters who opposed DOE's July 2019 proposed interpretive rule, and that opposition extended to the September 2020 SNOPIR as well.

DOE will first address the proposed approach of establishing product/equipment classes so as to maintain appliance compatibility with all existing venting types intended for that appliance.

Crown Boiler and USB explained their rationale for why they do not support a class structure based upon ensuring compatibility with all existing venting categories (*e.g.,* Categories II and III). The commenters stated that Category II venting systems are extremely rare, mostly because of the problems associated with relying on the buoyancy of low-temperature flue gases and/or a draft inducer located at the vent system terminal for proper venting. Crown Boiler and USB added that because there is no upper efficiency limit for Category II venting, any effort to protect a class of Category II vented appliances would create a problem for DOE in determining whether a proposed standard would preclude the use of this vent system. As to Category III venting systems, Crown Boiler and USB questioned the need to explicitly act to preserve this venting option, despite its more widespread use. More specifically, the commenters argued that Category III venting systems can, in some cases, utilize Category IV venting. Also, because most Category III venting is used to vent an appliance through a side wall, Crown Boiler and USB asserted that the most problematic installation situations would not arise. Furthermore, Crown Boiler and USB argued that because Category III vent systems operate with positive pressure, they are rarely, if ever, used to vent multiple appliances (due to the risk of flue products entering the interior space from the pressurized vent system through an off-cycle appliance), so the issue of ''orphaned'' appliances should not be applicable to Category III appliances. Crown Boiler and USB acknowledged that their comments about Category III appliances are generalizations and that there may be a few instances where such appliances are difficult or impossible to reuse or replace, but they reasoned that those rare instances would not merit the additional regulatory complexity associated with guaranteeing Category III venting compatibility. (Crown Boiler, No. 103 at pp. 2–3; USB, No. 105 at pp. 1–2)

Crown Boiler and USB further argued that addressing appliances with uncategorized venting would be even more problematic. Examples include direct vent appliances and uncertified gas appliances (such as a boiler designed primarily to use fuel oil which is installed with a gas conversion burner). Crown Boiler and USB argued that because these unusual vent systems are generally replaced along with the appliance, there would be no need to preserve or reuse them, thereby making it preferable to leave them unaddressed in favor of regulatory simplicity. (Crown Boiler, No. 103 at p. 3; USB, No. 105 at p. 2)

For these reasons, Crown Boiler and USB concluded that DOE should not pursue further the proposed approach of establishing product/equipment classes so as to maintain appliance compatibility with all existing venting types intended for that appliance. (DOE notes that other commenters also provided input as to why this alternative approach should be abandoned, but their reasoning likewise extended to DOE's other alternative proposal to establish product/equipment classes so as to maintain appliance compatibility with Category I venting. Those arguments will be presented following discussion of Crown Boiler's and USB's arguments in favor of an approach to maintain Category I venting compatibility.)

Crown Boiler and USB then went on to explain why they support the proposed approach of establishing product/equipment classes to maintain appliance compatibility with Category I venting as the performance-related feature, for the reasons (largely identical) that follow.[17] These commenters stated that this approach would address their previously raised concerns regarding the matter of venting compatibility, while simplifying the interpretive rule by not advancing the more complex option of trying to ensure compatibility with all existing venting category applications. (Crown Boiler, No. 103 at p. 1; USB, No. 105 at p. 1) Crown Boiler reasoned that because American National Standards Institute (ANSI) safety standards provide a test method to ascertain the appropriate type of venting so as to ensure that the appliance in question can be vented safely, the vent category is both an essential design requirement and ''*an objective performance characteristic of the above appliance and not just of the vent system to which it is connected.*'' The commenter further noted that the vent category is found on the appliance's rating plate and in the third-party certification report. (Crown Boiler, No. 103 at p. 2 (emphasis in original))

Crown Boiler and USB added that DOE should define any gas appliance venting performance characteristics in terms of the test procedure in the appropriate ANSI safety standard, rather than the definitions in the National Fuel Gas Code, because the latter source uses vague terms such as ''excessive condensate'' and vague conditions under which such condensation might occur. Thus, as an example, Crown Boiler and USB recommended defining a Category I class of residential boilers as '' 'those boilers which have been determined to be Category I using the test method in ANSI Z21.13.' '' (Crown Boiler, No. 103 at p. 3; USB, No. 105 at p. 2)

Other commenters (who also support DOE's revised interpretation as a general matter) disagreed with Crown Boiler's and USB's position, arguing that even an approach limiting venting compatibility to Category I is too complicated and fraught with potential problems. Consequently, the commenters expressed support for DOE to adopt the approach in its original proposal, which would define the

[17] As discussed further in section III.A.4 of this document, DOE notes that in seeking clarification on the July 2019 proposed interpretive rule, Weil-McLain also suggested that the Department should make class distinctions based on an appliance's venting category (as defined in the National Fuel Gas Code NFPA 54), rather than using the terms ''condensing'' and ''non-condensing.'' The commenter pointed to what the National Fuel Gas Code refers to as Category I vented appliances, which operate with a non-positive vent static pressure and with a vent temperature which avoids excessive condensate production in the vent. Thus, Weil-McLain suggested that going forward, DOE should tie the performance-related feature to the term ''Category I Vented Appliance'' in its interpretation. (Weil-McLain, No. 86 at pp. 1–2) However, DOE points out that although Weil-McLain expressed this opinion in response to the July 2019 proposed interpretive rule, the company did not comment on the September 2020 SNOPIR where this matter was discussed in further detail. Consequently, DOE can only presume that Weil-McLain continues to maintain this position.

performance-related feature (and subsequent class setting) in terms of condensing or non-condensing operation of the subject appliance. This viewpoint was expressed by Nortek, BWC, AHRI, Mortex,[18] and Carrier. (Nortek, No. 107 at p. 1; BWC, No. 108 at p. 2; AHRI, No. 109 at pp. 1, 5; Mortex, No. 111 at p. 2; Carrier, No. 110 at p. 1) The following discussion explains these commenters' rationale for opposing a venting compatibility-based approach to defining a performance-related feature under EPCA, as well as their rationale for supporting DOE's original proposal. Commenters who generally oppose DOE's revised interpretation (*e.g.,* NRDC, A.O. Smith, Lennox, CA IOUs, Advocates Joint Comment II, and NEEA) also provided reasoning as to why it would be inadvisable to adopt the alternative approaches presented in the September 2020 SNOPIR, and these comments are summarized in the paragraphs that follow as well.

One line of argument surrounded the complexity of a regulatory framework based upon venting compatibility. Nortek, AHRI, and Lennox argued that categorization of appliances by venting system is a complex matter, and in application, it can vary for different product/equipment types, as determined according to the applicable ANSI safety standards. According to these three commenters, venting, condensate generation, and efficiency are among several factors that determine how a boiler, water heater, or furnace is designed, safety-certified, and installed. Thus, Nortek, AHRI, and Lennox stated that they do not find venting to be an inherent product feature, but rather an installation requirement that may vary depending upon the design and application of the product. (Nortek, No. 107 at p. 2; AHRI, No. 109 at p. 2; Lennox, No. 114 at p. 5)

Another line of argument involved the potential for appliances to be certified for use with multiple venting categories or ones that do not have a designated venting category. Relatedly, BWC argued that if DOE were to adopt a highly segmented class structure based upon venting compatibility, further complications would be likely to arise in terms of setting efficiency regulations for gas-fired products. For example, the commenter pointed to certain water heaters that are listed with multiple venting categories, which leaves it to a plumbing contractor's discretion to determine the most appropriate venting for a given installation situation. Because more than one efficiency requirement could apply in such cases, BWC stated that the alternative approaches presented in the September 2020 SNOPIR would not be practical, either generally or from a technical perspective. Similarly, BWC added that operational conditions for a type of appliance may affect the selection of venting category, so the installing contractor will need to be aware of and take appropriate action regarding the sizing and selection of proper vent materials. BWC also stated that the alternative approaches presented in the September 2020 SNOPIR failed to address products that do not have a venting category (*i.e.,* non-categorized products), such as ones that are direct vent or installed outdoors. (BWC, No. 108 at p. 1)

A.O. Smith stated that venting category definitions vary by appliance type, and it commented that some models can carry certification with multiple venting categories. A.O. Smith also stated that the non-condensing characterization is broader than the Category I venting certification. (A.O. Smith, No. 113 at p. 4) The CA IOUs made a similar point about gas appliances capable of being configured to work with more than one category of venting system, and they reasoned that this would make it impossible for compatibility of a product category with a specific venting system to be designated as a protected feature under EPCA. (CA IOUs, No. 117 at p. 5)

Similar to the points raised by Crown Boiler and USB, AHRI also noted that complexities that could arise from seeking to maintain venting compatibility for water heaters using Category II or Category III venting, and similar to BWC, AHRI commented as to the difficulty in classifying water heater models that can have multiple categorizations depending upon design. AHRI added that similar to water heaters, boilers may be subject to more than one venting characterization, depending upon how they are installed in the field. According to the commenter, some non-condensing boilers operate at positive vent pressure, which requires Category III venting. The trade association suggested that these concerns could lead to a regulatory structure that is not easy to understand and implement at the point of manufacture. (AHRI, No. 109 at p. 4) Carrier also stated that some boilers and water heaters can use multiple vent categories, although it noted that this is a small subset of products. (Carrier, No. 110 at p. 2)

For the reasons stated, Nortek and AHRI concluded that dividing product/equipment classes by venting categories would unnecessarily complicate the approach to class setting, and AHRI expressed concern that such an approach could have unintended consequences. (Nortek, No. 107 at p. 2; AHRI, No. 109 at pp. 2, 5) Other commenters also remarked as to the complexity surrounding a regulatory structure based on venting categories. (Carrier, No. 110 at p. 2; Lennox, No. 114 at p. 5) Carrier added that such an approach may not achieve a result different from DOE's original proposal. (Carrier, No. 110 at p. 2) Consequently, Nortek and AHRI opined that a blanket rule encompassing all gas appliances that turns on venting categories may not capture detailed technical nuances, or it may overly complicate the product classes, thereby resulting in unintended regulatory burden or market impacts. (Nortek, No. 107 at p. 2; AHRI, No. 109 at p. 2) Lennox also argued that such an approach would further segment the already unduly complicated residential furnaces product class structure in DOE's original proposal, thereby compounding the problem, and significantly increase regulatory burden without any apparent benefit to consumers or manufacturers. (Lennox, No. 114 at pp. 1, 5)

BWC advised that if DOE ultimately decides to pursue one of the alternate paths to defining the performance-related feature, as set forth in its September 2020 SNOPIR, the Department should convene a stakeholder meeting to parse out the implementation issues that may arise in the context of different types of products and to discuss how to proceed. (Nortek, No. 108 at p. 2)

A.O. Smith disagreed with the alternate approaches to the feature determination focused on venting compatibility as presented in the September 2020 SNOPIR, because venting is not applied at the point of manufacture, nor is it known what the installation circumstances may be for a given residence or commercial building. The commenter argued that EPCA grants DOE authority to regulate covered products and equipment at the point of manufacture, which does not extend to the point of installation. Thus, A.O. Smith questioned whether DOE has authority to differentiate product/equipment classes based upon categories of venting materials. (A.O. Smith, No. 113 at p. 4)

[18] If DOE's original proposed interpretation is not adopted, Mortex then expressed support for either of the two alternative interpretations presented in the September 2020 SNOPIR based on venting compatibility. Mortex stated that any of these approaches would preserve the performance-related features of its mobile home gas furnaces, which are designed for use with Category I venting systems. (Mortex, No. 111 at p. 2)

Another line of arguments suggested that the alternative approaches based upon venting compatibility set forth in the September 2020 SNOPIR may encounter problems with changing building safety codes. NRDC argued that such approaches are not feasible, practical, or necessary, stating that even current standards are not universally consistent with every type of ventilation system found in every building because of different codes and standards put in place over time. (NRDC, No. 112 at pp. 2–3) To this point, the CA IOUs argued that in many cases, safety codes may have changed by the time a gas-fired appliance needs to be replaced, so the existing venting would need to be changed, regardless of the type of venting with which the appliance may be compatible. (CA IOUs, No. 117 at p. 4)

The Advocates Joint Comment II also argued that DOE's professed intent in the September 2020 SNOPIR about maintaining venting compatibility is not achievable. These commenters stated that there are currently many situations where there are no products on the market compatible with the existing venting system due to current safety requirements. For example, the Advocates Joint Comment II pointed to DOE's own past rulemakings in explaining that the National Fuel Gas Code has lining requirements that effectively require all chimneys to be lined in order to install a new gas furnace or boiler; however, prior to 1995, building codes did not require such lining of chimneys, so homes built before 1995 would need to have their chimneys lined in order to install a new non-condensing furnace that is compatible with Category I venting. Similarly, the Advocates Joint Comment II stated that DOE's past rulemakings have found that with Type B vents, when a new non-condensing furnace or boiler that is compatible with Category I venting replaces an existing natural draft non-condensing product, in almost all cases, the vent connectors need to be replaced or the entire venting system needs to be resized. These commenters noted that DOE has traditionally accounted for such changes in its analysis of installation costs and suggested that that was the correct approach. However, the Advocates Joint Comment II argued that even if venting compatibility were to be considered a performance-related feature, the availability of products compatible with Category I venting would not necessarily ensure compatibility with existing venting systems, for the reasons explained above. (Advocates Joint Comment II, No. 118 at pp. 3–4)

Furthermore, the CA IOUs added that the concept of discrete classes of gas appliances which can be defined by compatibility with specific venting systems does not match what is occurring in the field. The CA IOUs explained that in the commercial sector, there are already venting systems that are compatible with gas-fired appliances designed for Category I–IV venting systems, and there is an ongoing trend to upgrade all commercial venting systems to those that comply with Underwriters Laboratory (UL) 1738, *Special Gas Vents,* for condensing appliances. Accordingly, the CA IOUs opined that as universal venting systems become more widespread, concerns about the compatibility of gas appliances with different venting systems will continue to become less relevant. (CA IOUs, No. 117 at p. 4)

NRDC stated that instead of pursuing the proposed approaches, DOE should consider and evaluate alternative venting technologies to solve difficult installation scenarios, both those on the market and under development. (NRDC, No. 112 at pp. 2–3) NRDC and NEEA criticized the approach in the September 2020 SNOPIR as potentially freezing venting technologies in place and limiting innovation in both venting strategies and equipment design, thereby harming consumers through higher energy costs and reduced product features. (NRDC, No. 112 at p. 3; NEEA, No. 119 at p. 3)

Beyond these technical comments focused on the merits of DOE's alternative proposals tying the performance-related feature to maintaining venting compatibility, the commenters essentially fell into three camps in terms of their recommendations for how DOE should move forward. Several commenters recommended that DOE adopt its original proposal to establish product/equipment classes on the basis of the subject gas appliance's utilization of condensing/non-condensing technology for purposes of 42 U.S.C. 6295(o)(4). This approach was favored by Nortek, BWC, AHRI, Carrier, and Mortex. (Nortek, No. 107 at p. 1; BWC, No. 108 at p. 2; AHRI, No. 109 at pp. 1, 5; Carrier, No. 110 at p. 1; Mortex, No. 111 at p. 2) Another group recommended that DOE abandon not only the approaches presented in the September 2020 SNOPIR, but the approach in the July 2019 proposed interpretive rule as well, largely based upon the legal, technical, and policy arguments raised in their earlier comments. This pathway was favored by NRDC, A.O. Smith, Lennox, the AGs Joint Comment, the CA IOUs, the Advocates Joint Comment II, and NEEA. (NRDC, No. 112 at p. 2; A.O. Smith, No. 113 at p. 2; Lennox, No. 114 at p. 1; AGs Joint Comment II, No. 115 at p. 1; CA IOUs, No. 117 at p. 1; Advocates Joint Comment II, No. 118 at p. 1; NEEA, No. 119 at p. 1) Finally, the organizations submitting the Petitioners *et al.* Joint Comment II argued that the issues of venting compatibility raised in the September 2020 SNOPIR do not need to be addressed at the present time in order to resolve the core issue of applying the ''unavailability'' provision of EPCA to the specific proposed standards for residential furnaces and commercial water heaters, as requested by the Gas Industry Petition. Instead, these commenters argued that these important issues are more appropriately addressed in the context of the development of new standards for residential furnaces, commercial water heaters, and other gas or propane-fueled products/equipment. (Petitioners *et al.* Joint Comment II, No. 116 at pp. 4, 6) The residual comments of these three groups are summarized in the paragraphs that follow.

Commenters supporting adoption of DOE's original proposal to establish product/equipment classes on the basis of the subject gas appliance's utilization of condensing/non-condensing technology made the following additional points. For furnaces currently on the market, Nortek, AHRI, and Carrier stated that they are all already divided into non-condensing/Category I and condensing/Category IV, so there is no substantive distinction between the two. Of the two, these commenters prefer categorization based upon a ''condensing/non-condensing'' distinction, because furnaces are already divided in that manner for purposes of DOE's energy conservation standards for furnace fans. (Nortek, No. 107 at pp. 2–3; AHRI, No. 109 at p. 3; Carrier, No. 110 at p. 2) Carrier also stated that it continues to believe that non-condensing operation is the key performance-related feature at issue. (Carrier, No. 110 at p. 2) AHRI opined that a ''non-condensing'' product class should be sufficient to capture all boilers requiring Category I venting, but it nonetheless encouraged DOE to explicitly incorporate the ability to use existing venting categories associated with atmospheric venting. (AHRI, No. 109 at p. 5)

Nortek and AHRI added that finalizing DOE's interpretation based upon a ''condensing/non-condensing'' distinction, as originally proposed, would not preclude the Department from considering and analyzing venting

applications when creating product/equipment classes during the course of individual energy conservation standards rulemakings, as necessary. These commenters argued that a thorough, product-specific definition and technology-focused characteristics should be evaluated to create functional product/equipment classes that might vary for different types of appliances. (Nortek, No. 107 at p. 2; AHRI, No. 109 at p. 2) Finally, AHRI stated that tolerances and operational characteristics of the product-specific test procedure must be considered in future rulemakings to ensure that any energy conservation standards are safe, functional, and cost-effective. (AHRI, No. 109 at p. 2)

Mortex cautioned that in moving forward with standard setting for revised energy conservation standards for residential gas furnaces, including mobile home gas furnaces, DOE must take into account the product class structure established for residential furnace fans manufactured on or after July 3, 2019 (codified at 10 CFR 430.32(y)). Mortex argued that pursuant to 42 U.S.C. 6295(m)(4)(B), any revised energy conservation standards for non-condensing, non-weatherized mobile home gas furnaces must not preclude the continued sale of mobile home gas furnaces containing furnace fans that comply with the new furnace fan standards, because under that provision, EPCA prohibits DOE from subjecting manufacturers to a new standard for a product with respect to which other new standards have been required during the prior 6-year period. The commenter argued that this requirement can only be met by ensuring that any revised energy conservation standards applicable to non-weatherized mobile home gas furnaces permit the continued sale of non-condensing mobile home gas furnaces. (Mortex, No. 111 at p. 2)

Commenters supporting withdrawal of DOE's July 2019 proposed interpretive rule and September 2020 SNOPIR made the following additional points. NRDC opposes and urged DOE to withdraw both the July 2019 proposed interpretive rule and the September 2020 SNOPIR, because the commenter argued that both suffer from technical and legal issues which the Department has failed to address. NRDC and Lennox renewed and reiterated many of the arguments raised in their earlier comments to this docket, because the commenters stated that those same objections apply regardless of whether the performance characteristics at issue involve the use of condensing technologies or venting compatibility. (NRDC, No. 112 at p. 2; Lennox, No. 114 at pp. 7–8) Other commenters did the same, and as mentioned previously, such arguments are addressed elsewhere in this document.

Lennox criticized DOE's September 2020 SNOPIR as being ''overtly vague and unsupported,'' and in particular, the commenter faulted the alternate approach which would consider the creation of separate product classes for any existing venting system available on the market as ambiguous and ill-defined, such that it deprives stakeholders the opportunity to comment. For example, Lennox questioned whether DOE's proposal would include specialty or unique ventilation types. (Lennox, No. 114 at pp. 1, 3, 6) Lennox also faulted DOE's proposals for making what it calls ''speculative and unsupported statements,'' such as the number and cost of problematic installations and DOE's expectation regarding limited negative programmatic impacts resulting from its proposed interpretation. Accordingly, the commenter argued that DOE's lack of analysis and supporting data once again deny stakeholders the opportunity to comment on the September 2020 SNOPIR. (Lennox, No. 114 at p. 3) Lennox added that the September 2020 SNOPIR offers no meaningful cost analysis or quantification of installation issues, so it argued that DOE has no record basis to move forward with its proposed interpretive rule. (Lennox, No. 114 at p. 4) Similarly, the CA IOUs requested that DOE quantify the potential negative impacts of its proposal in the September 2020 SNOPIR for residential furnaces, commercial water heaters, and other similarly-situated products/equipment. (CA IOUs, No. 117 at p. 4)

In addition, A.O. Smith alleged that DOE is improperly attempting to use venting categorization in the features provision as a proxy for how to consider increased installation cost in its rulemakings. Instead, the commenter argued that such installation cost considerations belong in DOE's economic analysis. (A.O. Smith, No. 113 at p. 3) Furthermore, A.O. Smith argued that DOE's proposed interpretation, if applied to maintain Category I venting, would eliminate more-efficient non-condensing products from the market, which would restrict the opportunity for incremental gains in efficiency for non-condensing appliances through Federal regulation. (A.O. Smith, No. 113 at pp. 4–5)

Commenters supporting finalization of the core ''features'' determination under EPCA and deferral of implementation issues (*e.g.,* class setting) to individual product/equipment rulemakings made the following additional points. The Petitioners *et al.* Joint Comment II argued that the issues of venting compatibility raised in the September 2020 SNOPIR do not need to be addressed at the present time in order to resolve the core issue of applying the ''unavailability'' provision of EPCA to the specific proposed standards, as requested by the Gas Industry Petition. Instead, these commenters argued that these important issues are more appropriately addressed in the context of the development of new standards for residential furnaces, commercial water heaters, and other gas or propane-fueled products/equipment. (Petitioners *et al.* Joint Comment II, No. 116 at pp. 4, 6) The Advocates Joint Comment II also stated that venting considerations for each product potentially covered by DOE's interpretation are different, so such impacts must be considered in the context of individual rulemakings, which can consider the specific circumstances of each product (although the advocates still consider venting to be a matter for DOE's economic analysis). (Advocates Joint Comment II, No. 118 at p. 5)

In conducting inquiries in these individual rulemakings, the Petitioners *et al.* Joint Comment II stated that the Department should consider product class definitions for residential products which reflect venting requirements that are established and codified under national consensus standards, and then DOE should assess the need for separate minimum efficiency standards for these classes. These commenters stated that for the subject residential furnaces and commercial water heaters, these appliances are design-certified for safety based on the venting characteristics. According to these commenters, there are four venting criteria specified in the applicable industry consensus standards for residential furnaces and commercial water heaters, as identified in ANSI Z21.47, *Gas-Fired Central Furnaces,* and ANSI Z21.10.3, *Gas-Fired Water Heaters,* respectively. The Petitioners *et al.* Joint Comment II added that the installation codes for gas furnaces—ANSI Z223.1/NFPA 54, *National Fuel Gas Code,* and the *International Fuel Gas Code*—include requirements for proper installation (*e.g.,* vent sizing, termination, and clearance requirements). The commenters surmised that these product categories would provide an appropriate starting point for DOE's technical and economic analysis to determine whether separate minimum efficiency standards are

appropriate for each equipment class. The Petitioners *et al.* Joint Comment II recommended that these issues should be addressed in individual product rulemakings under DOE's Process Rule [19] and using the most current information available. (Petitioners *et al.* Joint Comment II, No. 116 at pp. 7–8)

The Petitioners *et al.* Joint Comment II stressed that action on the Gas Industry Petition is a matter of some urgency, because litigation has been filed seeking to compel final action in a number of energy conservation standards rulemaking proceedings, including the proceedings in which proposals were issued that are the subject of the Gas Industry Petition. As a result, the Petitioners *et al.* Joint Comment II argued that DOE should clarify the situation by withdrawing its prior rulemaking proposals for residential furnace and commercial water heater energy conservation standards, because those proposals cannot not be legally finalized as proposed if the Department promulgates a final interpretive rule along the lines of that set forth in the July 2019 proposed interpretive rule. (Petitioners *et al.* Joint Comment II, No. 116 at p. 5)

In light of the above arguments, it has become apparent to DOE that its alternative proposals to establish product/equipment classes based upon maintaining venting compatibility drew little public support, and problems may arise from adopting them as an overarching approach. Support for maintaining compatibility with Category I venting was limited to only Crown Boiler and USB, and no commenter spoke in favor of an approach to maintain compatibility with all existing venting types. However, a broad cross-section of industry stakeholders with considerable technical expertise confirmed their understanding that DOE's original proposal to define the subject performance-related feature as the appliance's condensing or non-condensing operation would represent a workable approach to implementing DOE's revised interpretation.

Based upon DOE's careful review of the comments received, the Department has decided it is not appropriate to move forward with either of the two alternative approaches based upon venting compatibility presented in the September 2020 SNOPIR, but to instead adopt its original proposal presented in the July 2019 proposed interpretive rule, which focused on an appliance's condensing or non-condensing operation. Comments on the September 2020 SNOPIR have convinced the agency that its alternative proposals would have increased the complexity and regulatory burden of its regulatory framework with little benefit. Because DOE is no longer pursuing these alternative approaches, the Department finds it unnecessary to address all of the technical arguments and other contentions against making maintenance of venting compatibility a touchstone of its ''features'' determination. DOE is also persuaded by the stakeholder comments that have positively assessed the implementation potential of DOE's revised interpretation along the lines of its original proposal.

DOE agrees with the commenters who suggested that DOE should move to resolve the ''core issue'' at the heart of the Gas Industry Petition in this final interpretive rule, while reserving appliance-specific implementation issues (including class setting) for review and analysis in the context of individual product rulemakings. DOE has concluded that such an approach would best serve all parties, including manufacturers and consumers. Individual product rulemakings will have the requisite mix of interested stakeholders, technical experts, a comprehensive record with product-specific data (including a review of relevant industry consensus standards), and the full suite of analyses for class and standard setting. In that venue, DOE and interested stakeholders will be better able to address any relevant technical matters or product-specific nuances, including the tolerances and operational characteristics of test procedures mentioned by AHRI, and any lingering concerns related to the issue initially raised by USB, BHI, and Crown Boiler.

Because the approach in DOE's earlier proposals for residential furnaces and commercial water heaters are inconsistent with this final interpretation and, therefore, will require revision, DOE has decided to grant the request in the Petitioners *et al.* Joint Comment II for the withdrawal of those proposals. Published elsewhere in this issue of the **Federal Register**, DOE withdraws its March 12, 2015 proposed rule and September 23, 2016 supplemental proposed rule for energy conservation standards for non-weatherized gas furnace and mobile home gas furnaces, as well as its May 31, 2016 proposed rule for energy conservation standards for commercial water heating equipment. DOE's decision to withdraw its earlier proposals is discussed in further detail in section III.D.3 of this document.

Regarding arguments challenging the technical/legal/policy bases for the September 2020 SNOPIR, DOE found many of these comments to essentially be re-statements of their comments submitted in response to the July 2019 proposed interpretive rule, rather than specifically focused on the particulars of DOE's supplemental proposed interpretation. Accordingly, those concerns are cited and addressed elsewhere in this document.

As to Mortex's concern about the statutory prohibition on applying new standards to a covered product for which other new standards have been required within the prior six-year period (42 U.S.C. 6295(m)(4)(B)), DOE would point out that, given that requirements for furnace fans came into effect on July 3, 2019, and given the anticipated five-year lead time for amended standards for residential furnaces (including mobile home gas furnaces), it is anticipated that more than six years will have passed by the time any new furnaces standards would come into effect.

b. Comments Opposing the Proposed Interpretation

Other commenters strongly opposed and urged withdrawal of DOE's proposed revised interpretation regarding whether non-condensing technology and associated venting constitutes a ''feature'' under EPCA. (CA IOUs, No. 85 at p. 1; CFA/NCLC, No. 93 at p. 1; AGs Joint Comment, No. 82 at p. 2; NRDC, No. 94 at p. 1; Advocates Joint Comment, No. 95 at p. 1; Environmentalists Joint Comment, No. 90 at p.1: AGs Joint Comment II, No. 115 at p. 2) These commenters raised a number of arguments which are set forth and addressed in the paragraphs that follow.

i. Support for DOE's Prior Interpretation

Several commenters expressed support for DOE's prior position, as presented in past rulemaking documents published in the **Federal Register**, which concluded that non-condensing technology (and associated venting capabilities) do not merit a ''feature'' designation and the establishment of a separate product class with a different energy conservation standard. (Ceres, No. 69 at p. 3; Lennox, No. 87 at p. 4; A.O. Smith, No. 88 at p. 2; NRDC, No. 94 at pp. 4–5; CA IOUs, No. 85 at p. 3; A.O. Smith, No. 113 at p. 2; Lennox, No. 114 at pp. 6–7; AGs Joint Comment II, No. 115 at p. 2; CA IOUs, No. 117 at p. 1; NEEA, No. 119 at p. 1) In making that point, the

[19] *See* 10 CFR part 430, subpart C, appendix A, *Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment.*

AGs Joint Comment argued that DOE's proposed interpretive rule would effectively grandfather inefficient designs. (AGs Joint Comment, No. 82 at p. 3) The AGs Joint Comment pointed to and even quoted from a number of DOE's past rulemakings which articulated the rationale for finding that venting capabilities (and any related costs) are not a performance-related feature under EPCA. Specifically, these commenters cited to language contained in the [March 12,] 2015 NOPR and [September 23,] 2016 SNOPR for residential furnaces, the 2009 final rule for residential water heaters,[20] and the 2015 final rule for residential clothes dryers.[21] In short, the AGs Joint Comment (and other commenters) agreed with DOE's historic view that a furnace's or water heater's manner of venting does not provide consumers unique utility separate and apart from its basic function of providing heat or hot water. (AGs Joint Comment, No. 82 at pp. 3, 8–10; A.O. Smith, No. 88 at pp. 2, 4; NRDC, No. 94 at pp. 4–5; CA IOUs, No. 85 at pp. 2–3; NRDC, No. 112 at p. 2) NRDC added that when DOE acts to reverse a long-held interpretation, as it seeks to do with the proposed interpretation for condensing/non-condensing products/equipment, DOE has the burden of proof to clearly explain and justify its rationale. (NRDC, No. 94 at p. 3)

In response, DOE disagrees with these commenters' view that the Department's revised interpretation is inappropriate or lacking in evidentiary basis, and DOE notes that numerous other commenters on the proposed interpretive rule held a contrary opinion. As explained elsewhere in this document, the Gas Industry Petition gave DOE the opportunity to revisit its prior interpretation, and the information provided in that petition and in subsequent comments thereon caused DOE to reevaluate prior data and, ultimately, its position. These commenters cannot reasonably claim that the rulemaking dockets for residential furnaces, commercial water heaters, and other similarly-situated products/equipment are lacking in data. Because data is always subject to interpretation, it is not reasonable for these commenters to demand that a revised interpretation must rely solely upon new data. Here, the petitioners did present the Department with new arguments, perspectives, and information that were useful to DOE in reexamining its position. More specifically, the petitioners explained how the shift to energy conservation standards set at a condensing level could necessitate significant modifications to both new and existing buildings, such that interior residential or commercial space may need to be sacrificed, additional unattractive venting would need to be added, or desirable window or patio space could be lost. These new arguments demonstrate ongoing impacts that would be noticed and likely perceived negatively by consumers, and this reasoning is in addition to the other arguments and data previously submitted by the petitioners and considered by DOE during the course of various rulemakings. As noted, DOE also relied upon the significant data already in these rulemaking dockets to assess its prior interpretation as to whether non-condensing technology (and associated venting) constitutes a performance-related ''feature'' for purposes of EPCA. Based upon the totality of the information, DOE has determined that the change in interpretation reflected in this final interpretive rule is appropriate under the statute.

Regarding the assertion in the AGs Joint Comment that the revised interpretation would grandfather inefficient designs, that same argument could be ventured virtually every time a determination is made under EPCA's ''features'' provision. An oven without a window in the door would be more efficient than one that retains that feature.[22] However, the statute, by the very nature of its ''features'' provision, makes clear that efficiency will not be paramount in all situations. In fact, the words of the statute make clear that is the precise purpose of the ''features'' provision. In that provision, EPCA prohibits the Secretary from prescribing a new or amended standard (*i.e.,* imposing a standard for a product where a standard did not previously exist or increasing the stringency of an existing standard) if doing so is likely to result in the unavailability of a performance characteristic, feature, *etc.* substantially the same as those generally available in the absence of the Secretary prescribing a new or amended standard. *See* 42 U.S.C. 6295(o)(4). Thus, DOE finds this argument in the AGs Joint Comment to be contrary to the statute.

ii. Violations of Legal Standards

Related to their support of DOE's prior interpretation, a number of commenters challenged DOE's proposed interpretation on a variety of legal grounds. For example, these commenters faulted the Department's proposal as being arbitrary and capricious; contrary to law; and contrary to precedent and factually unsupported. DOE recognizes that such topics are often intertwined. However, given the rather voluminous nature of these submitted arguments, DOE has segmented the discussion into these broad categories for response in the subsections that follow.

Arbitrary & Capricious

A number of commenters characterized DOE's proposed reversal of its prior interpretation and dismissal of its prior concerns as arbitrary and capricious and an abuse of discretion, despite DOE's stated expectation that the programmatic impacts of its revised interpretation are likely to be limited (which was characterized as a claim alleged to be lacking in data and analysis). (AGs Joint Comment, No. 82 at pp. 2, 7–10; CEC, No. 89 at p. 3; AGs Joint Comment II, No. 115 at p. 2; CA IOUs, No. 117 at p. 3) The CEC predicted that without sufficient record evidence to support its decision (*i.e.,* changed interpretation), a court would overturn such agency action as arbitrary and capricious. Overall, the commenter expressed its belief that DOE's proposed interpretation is contrary to the preponderance of evidence in the record, particularly since DOE improperly conflates economic and performance characteristics. Accordingly, the CEC concluded that DOE's historical interpretation on this matter is both consistent with the evidence and reflects congressional intent to improve energy efficiency and protect human health. (CEC, No. 89 at p. 7)

DOE disagrees with these commenters' notion that the Department lacks sufficient evidence to support a revised interpretation, thereby rendering the agency vulnerable to a legal challenge claiming arbitrary and capricious action. As noted previously, the petitioners presented new information and arguments explaining how the shift to energy conservation standards set at a condensing level

[20] DOE notes that this final rule was actually published in the **Federal Register** on April 16, 2010.

[21] DOE notes that this final rule was actually published in the **Federal Register** on April 21, 2011.

[22] In its energy conservation standards rulemaking for cooking products that culminated in the September 8, 1998 final rule (63 FR 48038), DOE explained its rationale for initially considering a design option to eliminate oven door windows as a means to improve energy efficiency in the technical support document (TSD) for that rulemaking. (See Volume E, Chapter 1, Engineering Analysis, section 1.4.1, Design Options for Ovens, pp. I–22 to I–23. (Available at: *https://beta.regulations.gov/document/EERE-2006-STD-0048-0027;* (select EE–RM–90–201 COMMENT OOA2–4).

could necessitate significant modifications to both new and existing buildings, such that interior residential or commercial space may need to be sacrificed, additional unattractive venting would need to be added, or desirable window or patio space could be lost. These new arguments demonstrate ongoing impacts that would be noticed and likely perceived negatively by consumers, and this reasoning is in addition to the other arguments and data previously submitted by the petitioners and considered by DOE during the course of various rulemakings. In sum, DOE's existing rulemaking dockets are replete with evidence bearing on this matter. DOE appropriately reassessed that information in response to the submitted petition for rulemaking and, based upon the totality of the available information, came to the reasoned conclusion that its revised interpretation better comports with the statute, as explained in this document.

Contrary to Law

Other commenters characterized DOE's proposed interpretation as contrary to law. (Lennox, No. 87 at p. 4; AGs Joint Comment, No. 82 at pp. 2–3; A.O. Smith, No. 88 at p. 2; CEC, No. 89 at p. 3; NRDC, No. 94 at p. 4; A.O. Smith, No. 113 at p. 2; AGs Joint Comment II, No. 115 at p. 1) The AGs Joint Comment asserted that DOE's proposed interpretation is contrary to law under 5 U.S.C. 706(2), and that a plain reading of EPCA and review of public comments make clear that venting technology is not a performance-related feature under the statute. Consequently, these commenters reasoned that DOE cannot create a separate product class for non-condensing products on that basis which would be subject to lower efficiency requirements. (AGs Joint Comment, No. 82 at p. 7; AGs Joint Comment II, No. 115 at p. 2) Lennox added that Congress set initial energy conservation standards for residential furnaces with product classes based on capacity and fuel source, but it did not segment classes by condensing and non-condensing technology, so the commenter argued that DOE should not do so now. (Lennox, No. 87 at p. 3)

In response, DOE's proposed interpretive rule is in accordance with the pertinent statutory provisions of EPCA. As commenters acknowledged, the statute does not define the terms ''feature'' or ''performance-related feature,'' so resolution of this ambiguity is left to the agency's discretion as a matter of statutory interpretation. Over the more than 30-year life of the Appliance Standards Program, DOE has made numerous ''features'' determinations, so the Department has expertise in weighing issues of consumer utility. Size constraints and building modifications to a dwelling or business seem clearly within the bounds of product characteristics that would matter to an average consumer, and have mattered in the past to DOE without objection (*see e.g.,* 76 FR 22454, 22485 (April 21, 2011) (*discussing* ventless and compact clothes dryers); 76 FR 37408, 37446 (June 27, 2011) (*discussing* space-constrained residential central air conditioners and heat pumps)). DOE also rejects Lennox's argument that just because Congress based initial furnace standards on capacity and fuel source that modifications to that existing class structure would be forever off limits. Such argument would render the ''features'' provisions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) superfluous, so DOE declines to adopt Lennox's suggested approach. Although DOE has found the Gas Industry Petition to encompass a number of complex issues, DOE has concluded that its revised interpretation set forth in this final interpretive rule is well grounded in current law.

Lennox opined that DOE would be violating the legal standard pronounced by the Supreme Court that for an agency to change a regulatory interpretation, it must articulate a '' 'rational connection between the facts found and the choices made' '' (*citing Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983)). (Lennox, No. 87 at p. 4) Similarly, A.O. Smith's comments claim that DOE's proposed interpretation deviates from the Department's past precedent without sufficient justification, administrative record support, or reasoned explanation. The commenter stated that DOE must provide a reasonable basis for its new interpretation, but it concluded that none of the Department's justifications are reasonable. (A.O. Smith, No. 88 at p. 6) First, A.O. Smith challenged the Department's tentative findings in the proposed interpretation related to space constraints, distinguishing DOE's past regulatory actions related to PTACs and ventless clothes dryers. The commenter acknowledged that the statute does expressly recognize ''size'' as a relevant factor under EPCA's ''features'' provision (*see* 42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa)), but it argued that DOE's proposed interpretation, as it relates to commercial water heaters and similarly situated products, does not turn on size (given the wide availability of water heaters in a wide variety of diameters, heights, and footprints), but rather on condensing technology itself. (A.O. Smith, No. 88 at pp. 6–7) A.O. Smith also distinguished DOE's creation of distinct product classes for vented and ventless clothes dryers, noting that the presence or absence of vents in the residential space was a proxy for moisture removal designs (necessary to prevent mold growth and other health concerns). The commenter argued that without adequate venting or a ventless dryer option, some consumers would be unable to have a dryer at all (*e.g.,* high-rise condo residents), but that situation would not apply to commercial water heaters, because commercial settings can accommodate condensing technology. Furthermore, A.O. Smith argued that DOE has proffered no new facts or changed circumstances to support its new conclusion, but instead, the company asserted that the Department has failed to acknowledge the wide variety of vent and intake air pipes that exist and that may accommodate differing condensing water heater installations, all of which should be properly considered in DOE's economic analyses. (A.O. Smith, No. 88 at pp. 7–8, 10)

In response, DOE has articulated a rational and reasonable basis for its proposed change of interpretation. As mentioned previously, DOE's prior interpretation did not adequately account for the consumer utility of non-condensing appliances (and associated venting) in difficult installation situations. Commenters have also identified benefits related to expanded consumer choice. DOE disputes A.O. Smith's statements that the difficult installation situations examined do not pertain to size constraints, as well as its attempt to imply that alternate venting and piping would offer a panacea for the larger problem identified. Gas industry commenters provided considerable information in these regards to the residential furnaces, commercial water heaters, and other dockets, and DOE's own analyses showed that difficult installation situations exist, with many cases reflected in the Department's investigation of fuel switching. The Gas Industry Petition provided occasion for DOE to revisit its prior interpretation, and the agency has concluded that it erred in failing to consider consumer utility more broadly in this context. The Department would argue that there already was and is extensive evidence in the record bearing on this issue as would support DOE's change of course.

While DOE outlines the general factual basis and legal principles in this final interpretive rule, the Department will make a more explicit statement of the evidentiary basis for separate product/equipment classes and standards for non-condensing products/equipment in the context of a specific energy conservation standards rulemaking for each appliance impacted by this revised interpretation. Such detailed information resides in those individual rulemaking dockets and cannot be comprehensively addressed here. However, an expanded statement of the basis for regulatory action is appropriate before such rulemakings alter existing regulatory requirements.

According to A.O. Smith, DOE's proposed interpretation conflicts with the Department's statutory obligations pursuant to EPCA and would undermine the Appliance Standards Program. It argued that although EPCA does not define the term ''feature,'' DOE cannot adopt a definition that conflicts with its statutory obligations to improve energy efficiency and the statutorily-mandated process for setting new and amended standards. A.O. Smith alleged that such reinterpretation would have profound negative consequences for energy efficiency and consumer choice. More specifically, the commenter asserted that it would impose an artificial ceiling on efficiency and create a loophole by locking in an outdated and inefficient technology with no consumer benefit. According to A.O. Smith, the logical consequence of DOE's reinterpretation would be the establishment of separate standards, but because non-condensing commercial water heaters can only be made minimally more efficient than the levels in the current energy conservation standards, the commenter concluded that no further standard would likely be cost-effective, thereby leaving these products ''effectively unregulated.'' The commenter predicted that in its next commercial water heaters rulemaking, DOE would set a condensing standard of no less than 95 percent thermal efficiency, and as a result, manufacturers who are unable to meet the more-stringent standards for condensing commercial water heaters would revert to producing non-condensing models which enjoy a lower standard, all of which would have the effect of increasing condensing appliance costs and shrinking the market for high-efficiency products. (A.O. Smith, No. 88 at pp. 10–11; A.O. Smith, No. 113 at p. 5)

DOE cannot agree with the interpretation of EPCA that A.O. Smith seeks to advance, because it is inconsistent with the legal obligations set forth under the statute's ''features'' provision. The ''features'' provision was enacted by Congress to maintain important aspects of appliances' utility to consumers even if some measure of energy savings would be lost. To apply a litmus test of ''no lost energy savings'' or some vague ''fidelity to the statute'' standard would render EPCA's ''features'' provision rarely used, if not impossible to use—the very definition of ''superfluous.'' Whereas A.O. Smith accuses DOE's proposed interpretive rule of undermining the Appliance Standards Program, the commenter's suggested approach would undermine the statute by giving DOE unlimited authority to override one of the checks-and-balances Congress explicitly enacted. A.O. Smith mischaracterizes Congress's judgment to put elimination of ''performance-related features'' beyond the Department's regulatory reach as DOE's effort to create an artificial ceiling on standards or to create a loophole for inefficient technology. That is simply not the case; rather, DOE is following clear statutory direction to protect consumer utility, even if that means foregoing the potential opportunity for increased energy efficiency, and is applying facts to those words in a specific circumstance. Also, contrary to what A.O. Smith suggests, DOE's proposal would enhance consumer choice by maintaining a greater variety of appliances on the market. Nothing about creating separate product classes for condensing and non-condensing products in any way requires a consumer to purchase any particular product. As A.O. Smith recognizes, the market today consists of both condensing and non-condensing products, and consumers are perfectly free to make the choice to purchase the more efficient product when doing so fits their needs. This interpretation does nothing to change that purchasing decision.

DOE also takes issue with other of A.O. Smith's assertions. First, A.O. Smith argues that because non-condensing commercial water heaters are near the limits of their energy efficiency, they would be ''effectively unregulated.'' This is untrue both factually and in terms of what the statute requires. Non-condensing water heaters would still be subject to standards at the current levels (or higher if a subsequent rulemaking periodically reviewing existing standards determines that further technical improvements can be made to non-condensing technology as would justify an amended standard). In addition, nowhere does the statute require or establish an expectation that there shall be a never-ending cycle of increasingly more-stringent standards. Such a reading of the statute is belied by the fact that the statute expressly provides for notices of determination that standards for a product do *not* need to be amended where such standards would not result in significant energy savings, would not be technologically feasible, and/or would not be cost-effective. (42 U.S.C. 6295(m)(1)(A))

In addition, DOE does not agree with A.O. Smith's prediction that manufacturers who are unable to meet a more-stringent standard for condensing commercial water heaters would revert to producing non-condensing models which are subject to a lower standard, thereby shrinking the market for high-efficiency products. As discussed in greater detail in section III.A.3 of this document, current market trends show consumers moving strongly towards condensing products based upon their substantial demonstrated energy savings. Manufacturers have every incentive to adjust their product lines and processes in response to this market demand, even if the condensing appliances come to have their own higher standard. In the current market, consumers are already choosing to pay a premium for condensing appliances to achieve greater energy savings, and A.O. Smith has offered no rational basis supported by evidence to show this trend would reverse or that other manufacturers would rush to forego prior investment in condensing products to chase a declining market for non-condensing products. For those same reasons, A.O. Smith has failed to provide evidence demonstrating that any price increases for condensing appliances under a separate energy conservation standard would appreciably differ from price increases under a unified energy conservation standard set at a condensing level.

The Environmentalists Joint Comment argued that the Department has failed to demonstrate that a violation of EPCA would occur by adoption of an energy conservation standard that can only be met by use of condensing technology. (Environmentalists Joint Comment, No. 90 at p. 1) Along these lines, the Environmentalists Joint Comment stated that energy conservation standards that can only be met by use of condensing technology would not lead to minimal demand for gas appliances, which they assert is the legal test for DOE to take action under EPCA's ''features'' provisions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II). These commenters asserted that in order for

the features provision to come into play, a DOE standard would need to leave the market with no alternative performance characteristics, features, sizes, capacities, or volumes that are ''substantially the same'' as those that would be eliminated from the market. They opined that Congress intended DOE to balance the preservation of product utility with the energy-saving objectives of the statute. In explaining their position, the Environmentalists Joint Comment quoted from the legislative history accompanying those statutory provisions: '' 'A valid standard may entail some minor loss of characteristics, features, sizes, etc.; for this reason, the Act requires that 'substantially the same,' though not necessarily identical, characteristics or features should continue to be available.' H. Rep. 100–11 at 23 (1987).'' ''[T]he Senate Energy and Natural Resources Committee explained that, in the context of residential gas furnaces, section 325(o)(4) [42 U.S.C. 6295(o)(4)] would forbid a standard from 'being set at a level that would increase the price to the point that the product would be noncompetitive and that would result in minimal demand for the product.' S. Rpt. 100–6 at 8–9 (Jan. 30, 1987), *reprinted in* 1987 U.S.C.C.A.N. 52, 59.'' Relying on this language, the Environmentalists Joint Comment concluded that DOE's proposed interpretation is impermissible because it does not meet this test, arguing not only that the Department has failed to demonstrate that condensing standards for both residential furnaces and commercial water heaters would result in minimal demand for these types of gas appliances, but also that the record in those rulemakings establish that fuel switching would be less than 10 percent. (Environmentalists Joint Comment, No. 90 at p. 2)

The Petitioners *et al.* Joint Comment sought to refute comments suggesting that EPCA's ''features'' provision would only apply if the unavailability of the performance characteristic or feature at issue would completely destroy the market for the covered product/equipment. The Petitioners *et al.* Joint Comment argued that opponents of the Gas Industry Petition have misinterpreted the legislative history and that standards for residential furnaces which result in the unavailability of a performance characteristic would still be precluded under the statute, even if it would not fully eliminate the market for gas furnaces. (Petitioners *et al.* Joint Comment, No. 80 at pp. 18–19) Likewise, the Petitioners *et al.* Joint Comment disputed the arguments of NRDC and Earthjustice that the placement of parentheses marks in EPCA's two ''features'' provisions (42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)) indicate a substantive or material difference between those two provisions. These commenters argued that those opponents of the petition—lacking any explicit language or legislative history to show a difference between these two provisions—rely on improper, extra-statutory qualifications in an attempt to exclude atmospherically vented products from the ''features'' provisions' applicability. (Petitioners *et al.* Joint Comment, No. 80 at p. 19)

In response, DOE agrees with the Petitioners *et al.* Joint Comment that these commenters have misconstrued the application of EPCA's ''features'' provision and the relevant legislative history. While DOE agrees that adoption of an energy conservation standard may compel minor changes and modifications to an appliance without triggering the protections of the statute's ''features'' provisions, it does not seem to be a reasonable reading to bar application of the ''features'' provision and its protections, except in an extreme case where a regulation would vitiate demand for a gas-fired appliance entirely. Here, the loss of feature would not be minor, because elimination of non-condensing appliances (and the introduction of associated venting requirements) would have the significant negative consequences previously discussed for those consumers facing difficult installation situations, a subgroup which could be upwards of 10 percent of households with gas-fired furnaces (based upon fuel switching data), as one example. (81 FR 65720; Sept. 23, 2016) Furthermore, a Draconian reading requiring the potential elimination of all gas-fired appliances would once again threaten to read the ''features'' provision out of existence, as a practical matter. This cannot be what Congress intended, so DOE declines to follow this path.

The Environmentalists Joint Comment echoed the rationale in past DOE rulemakings that the consumer utility of a residential furnace is to provide heat to a dwelling and that the consumer utility of a commercial water heater is to provide hot water, functional outputs which do not change with type of venting. Along these lines, they sought to link the function of these appliances to the statutory definitions of ''furnace'' at 42 U.S.C. 6291(23) and ''storage water heater'' at 42 U.S.C. 6311(12)(A). According to the Environmentalists Joint Comment, properly installed condensing gas appliances exhibit the same or substantially the same attributes as non-condensing appliances. (Environmentalists Joint Comment, No. 90 at p. 3) Consequently, the Environmentalists Joint Comment concluded that DOE's proposed determination failed to demonstrate any performance-related features of non-condensing gas appliances that require protection from standards. (Environmentalists Joint Comment, No. 90 at p. 2)

As discussed in section III.A.1.a of this document, DOE has determined that a consumer's interaction with and utility from a non-condensing appliance can go beyond such unit's ability to provide hot air or water, particularly in difficult installation situations where eventual replacement of the appliance would necessitate structural modifications to a dwelling or business (*e.g.,* loss of usable living/retail/storage space, addition of unsightly piping or venting to the finished space, or loss of a window(s)). The Environmentalists Joint Comment seeks to tie the statutory ''features'' determination to the appliance's primary function by focusing on the statutory definitions at 42 U.S.C. 6291 and 42 U.S.C. 6311. However, DOE finds that to be an improper reading of statute. The commenters' theory ignores the fact that pursuant to 42 U.S.C. 6295(q), DOE is bound to focus on the performance-related feature, rather than the overall function of the appliance. For example, DOE has determined an oven window to be a feature, although it does nothing to actually bake the cake placed inside the oven. Similarly, DOE has determined the angle of access of a residential clothes washer to be a feature, although it does nothing to make one's clothes cleaner. Under the Environmentalists Joint Comment's theory, such features offering distinct utility to consumers would no longer deserve protection because they are not directly mentioned in a statutory definition. Such reading would render EPCA's ''features'' and class-setting provisions significantly and improperly diminished, because a feature is unlikely to ever be mentioned in such definition. If the performance-related characteristic were so uniform and ubiquitous as to be part of the general product definition, it would arguably come ''standard'' rather than being a ''feature.'' Accordingly, DOE declines to adopt this suggested reading of the statute.

Contrary to Precedent & Factually Unsupported

A number of commenters stated that DOE's proposed interpretation is

contrary to DOE precedent and factually unsupported. (Lennox, No. 87 at p. 4; AGs Joint Comment, No. 82 at p. 3; CEC, No. 89 at p. 3) NRDC asserted that DOE's justification in its proposed interpretive rule is insufficient and not supported by data or research, arguing that neither the Gas Industry Petitioners nor any other commenter provided new arguments, data, or evidence sufficient to justify a reversal of DOE's existing policy. (NRDC, No. 94 at pp. 3, 5) The AGs Joint Comment characterized DOE's proposed interpretive rule as a radical departure from DOE's historical interpretation of EPCA's ''features'' provision. They stated that DOE has already specifically addressed and rejected the arguments raised in the Gas Industry Petition in a number of rulemakings, and they added that the Department has failed to identify any valid reasons for it proposed change of position (*e.g.,* dismissing as insufficient DOE's rationales related to aesthetics, compatibility of co-vented appliances, and economic factors). (AGs Joint Comment, No. 82 at p. 7) The CEC faulted DOE for not offering any new relevant evidence, reasoning, or facts to support its proposed change of interpretation. (CEC, No. 89 at p. 5) Lennox added that DOE's proposal is not factually supported and relies on speculation, particularly with regards to the Department's tentative conclusions that new venting may change a home's aesthetics or that some consumers may have a preference for gas heating. The commenter similarly faulted DOE's cost analysis as lacking in data and speculative, even as it attacked costs as an inappropriate consideration for product class setting. (Lennox, No. 87 at p. 4; Lennox, No. 114 at p. 3)

As stated previously, DOE disagrees with these commenters' view that the Department's revised interpretation is inappropriate because it diverges from past precedent or that it is lacking in evidentiary basis. The Gas Industry Petition gave DOE the opportunity to revisit its prior interpretation, and the information provided in that petition and in subsequent comments thereon caused DOE to reevaluate prior data and, ultimately, its position. These commenters cannot reasonably claim that the rulemaking dockets for residential furnaces, commercial water heaters, and other similarly-situated products/equipment are lacking in data. Here, however, the petitioners presented the Department with new arguments, perspectives, and information that were useful to DOE in reexamining its position. However, DOE also relied upon the significant data already in these rulemaking dockets to assess its prior interpretation as to whether non-condensing technology (and associated venting) constitutes a performance-related ''feature'' for purposes of EPCA. Based upon the totality of the information, DOE has determined that the change in interpretation reflected in this final interpretive rule is appropriate under the statute.

The CA IOUs commented that product classification and performance standards should never be inoperative or superfluous, but argued that that is precisely what DOE's proposed classifications for residential furnaces and commercial water heaters would do, because a performance standard with separate levels for both condensing and non-condensing products would represent no new standards or savings, but would instead simply codify the *status quo.* (CA IOUs, No. 85 at p. 5) Reciting the statutory objectives of EPCA, the CA IOUs stated that DOE's performance standards should promote innovation and embrace new technologies and opportunities as they become cost-effective for consumers. In order to ensure that DOE does not set a precedent here regarding ''features'' that weakens the Department's ability to set effective efficiency standards, the CA IOUs urged DOE to clearly distinguish between differences that are aspects of inherent technical product design and differences that materially impact the way users interact with the products. To this end, the commenters urged DOE to establish a consistent definition of ''performance-related feature'' to guide future inquiries as to whether a given aspect of a product is a performance-related feature under EPCA. The CA IOUs supported DOE's prior interpretation that such feature would be ''accessible to the layperson and is based on user operation,'' and they further argued that the agency should limit itself to consideration of product classes currently available on the market, based upon input from industry and other stakeholders. These commenters stated that DOE should not establish new product classes based upon its own original interpretations or a determination that certain product classes should theoretically exist. (CA IOUs, No. 85 at p. 3)

In response, DOE agrees with the CA IOUs that statutory provisions should never be made inoperative or superfluous, yet that is precisely the action the CA IOUs would ask the agency to take vis-à-vis EPCA's ''features'' provision. Where DOE has determined the existence of a performance-related feature under EPCA, setting a separate product/equipment class and standard to protect such feature is precisely what the statute envisions. Such action is only ''codifying the *status quo*'' in the sense that it is protecting the feature from elimination as the statute directs. As noted elsewhere in this document, although EPCA seeks to promote energy savings, energy efficiency, and related product innovation, Congress also made a decision to protect important ''features'' by enacting the ''features'' provision, even at the expense of potential energy savings.

Regarding the CA IOUs' suggestion that DOE develop a definition for ''performance-related feature,'' DOE has concluded that it would not be feasible to do so. Given the multitude of covered products and equipment for which DOE is responsible, the Department has found the concept of ''feature'' to be very case-specific. No single definition could effectively capture the potential for features across such a broad array of consumer products and commercial equipment. That is why when assessing ''features,'' DOE developed the concept of consumer utility and how the consumer interacts with the product/equipment. DOE continues to apply that approach here in the context of non-condensing appliances (and associated venting), having determined that in cases of difficult installation requiring reconfiguration and/or loss of usable living space of a home or retail space of a business, the consumer would become very conscious of and appreciate the ability to purchase appliances with non-condensing operation. This determination is akin to DOE's prior determinations with regard to finding as features windows in oven doors and top-loading access to clothes washers. DOE has found that expanded choice would be important to such consumers, and accordingly, the Department has determined this to be a ''feature'' under the statute which may not be eliminated.

A.O. Smith opined that condensing water heaters could replace non-condensing ones in every commercial setting (*i.e.,* technically feasible); however, A.O. Smith does admit that ''there are certain circumstances where installing a condensing model may be cost-prohibitive due to significant installation costs.'' Rather than making an overly broad features determination, the commenter suggested that such costs should be addressed by ''examining subgroups of installations in DOE's economic models'' and that DOE might ''decline to set a standard for a particular subclass [of consumers], where supported by the facts and

economic analysis.'' (A.O. Smith, No. 88 at p. 3; A.O. Smith, No. 113 at p. 3)

Although DOE appreciates A.O. Smith's acknowledgment of the difficult installation situations at issue, the commenter offered no data to support its assertion that it would be technically feasible to substitute a condensing commercial water heater in all commercial applications, nor would that conclusion, if found to be true, necessarily resolve other concerns raised in the Gas Industry Petition about undesired modifications to the residential or commercial space. Moreover, the Department does not find the commenter's suggested solution to be a workable one. As those familiar with the Appliance Standards Program are aware, DOE has authority to set energy conservation standards for covered products and equipment which must be met by manufacturers before an appliance may be distributed in commerce. The Department does not regulate product use, absent specific congressional direction (*e.g.,* grid-enabled water heaters). Thus, while DOE may have the ability to analyze impacts of standards on subclasses of consumers, and may use disproportionate impacts on a subclass of individuals as a basis for determining a standard is not economically justified, DOE has no authority to set standards by subclasses of consumers. Moreover, A.O. Smith's suggestion is a false choice because DOE has no ability to ensure that products of a certain standard level are purchased by only those consumers in an intended subgroup.

The CEC stated that DOE discussed its analysis of venting costs for residential furnaces, but it ignored the significant data provided by energy efficiency advocates and others supporting DOE's prior interpretation related to features. Specifically, the CEC pointed to what it described as multiple data points demonstrating that only 1% to 5% of homes would present difficult or costly installation issues. Consequently, the CEC concluded that DOE has insufficient information to outweigh the data provided by proponents of DOE's historical interpretation. (CEC, No. 89 at p. 3)

Once again, the Petitioners *et al.* Joint Comment sought to respond to certain criticisms of opponents of the proposed interpretation. In this area, the Petitioners *et al.* Joint Comment argued that opponents of the petition seek to dismiss the substantial difference in performance characteristics offered by atmospherically vented products by making the assertion that such differences amount to nothing more than installation characteristics, a distinction which the joint comment stated is without basis. Instead, the Petitioners *et al.* Joint Comment charged that it is the opponents of the petition who are ignoring the data, adding that a study commissioned by opponents of the petition repeatedly acknowledged that installation of condensing appliances frequently presents non-economic problems for purchasers, although the report seeks to characterize them as only aesthetic concerns. Instead, the Petitioners *et al.* Joint Comment countered that a condensing standard would leave many consumers facing the need to sacrifice interior living space, a balcony, or a window simply to replace an existing gas appliance. The Petitioners *et al.* Joint Comment also faulted opponents' study for only classifying a building modification as ''significant'' if it more than doubles the total system cost of a retrofit, an unreasonable approach which masks the extent of the disruptive impacts which the Gas Industry Petition seeks to prevent. (Petitioners *et al.* Joint Comment, No. 80 at pp. 20–21)

The Petitioners *et al.* Joint Comment challenged DOE's prior rationale (to which other commenters continue to adhere) suggesting that it is possible to install condensing systems in virtually all cases, arguing that such assertions may only be true in a significant number of cases from a technical or theoretical standpoint. However, these commenters stressed that in many cases (as discussed in the petitioners' own competing experts study), such installations may not be possible from a practical perspective, raising the example where the owner of a condominium unit could not install a condensing unit without violating applicable restrictive covenants or compromising a common venting system serving other units. In other cases, the Petitioners *et al.* Joint Comment stated that a condensing standard would leave consumers with no practical gas appliance replacement option without having to accept substantial and often undesirable building modifications. According to the Petitioners *et al.* Joint Comment, this is the same logic and meaning of ''impossibility'' that DOE used in its final rule for ventless clothes dryers, so they argued that the Department should make clear a similar understanding in the context of condensing technology. (Petitioners *et al.* Joint Comment, No. 80 at pp. 21–23)

According to the Petitioners *et al.* Joint Comment, nearly half of all residential furnaces in the northern part of the country are located in finished basements; over ten percent nationwide are in apartments; many more are in townhomes, and all such installations are ones where replacement of atmospherically vented products would routinely require significant building modifications. (Petitioners *et al.* Joint Comment, No. 80 at p. 23) The Petitioners *et al.* Joint Comment reasoned that EPCA's ''features'' provisions were intended, among other things, to preserve availability of product characteristics which consumers need in order to be able to use those products without having to make significant building modifications. These commenters argued that when Congress acted through the ''features'' provisions to protect ''sizes,'' as exemplified by statutory standards set for different type of installation of direct heating equipment, it sought to ensure that products fit within '' 'standard building spaces' '' (*quoting* H.R. Rep. No. 100–11 at p. 23 (1987)). According to the Petitioners *et al.* Joint Comment, changes to existing venting to replace an atmospherically vented furnace with a condensing one would require much more significant building modifications than most other appliances, so they stated that there is no reason to believe that Congress intended to spare purchasers from the lesser types of modifications but not the greater. Based upon this overall statutory logic, the Petitioners *et al.* Joint Comment concluded that there is no basis to conclude that Congress, through inadvertent drafting or otherwise, intended to reach a contrary result. The Petitioners *et al.* Joint Comment strongly stated that arguments to the contrary are based upon abstract qualifications that are without statutory basis, have not been consistently applied, and serve only to confound an otherwise straight-forward issue of statutory interpretation. (Petitioners *et al.* Joint Comment, No. 80 at p. 24)

In response, DOE notes that the CEC points to 1% to 5% of dwellings facing difficult furnace installation situations. However, DOE differs with the commenter in terms of its assessment of the magnitude and importance of such impacts. While the CEC may regard such percentages to be *de minimis,* DOE would point out that housing units that could be potentially impacted may number in the millions.[23] Thus, DOE has found the potential for a significant loss of consumer utility were non-

[23] According to the U.S. Census Bureau, housing units in the U.S. as of July 1, 2018 numbered 138,537,078. (Available at: *https://www.census.gov/quickfacts/fact/table/US/VET605218*) (Last accessed May 6, 2020).

condensing appliances (and associated venting) to be eliminated. The parties submitting the Petitioners *et al.* Joint Comment also provided their own study, and the dockets for the residential furnaces, commercial water heaters, and other rulemakings with similarly-situated products/equipment contain a large amount of relevant data. DOE also acknowledges the arguments made by the Petitioners *et al.* Joint Comment in the preceding three paragraphs. In short, DOE reviewed all of the arguments and available information. That the agency adopted the recommendations of one set of proponents on this issue does not mean that the Department failed to consider the viewpoints and data presented in opposition to that view. Rather, in response to the petition re-raising the issue, the Department reviewed all the available data it had previously considered, assessed the new data submitted with the petition, read carefully the arguments made by all parties, and made a decision. Consequently, DOE has concluded that it has more than adequate evidentiary basis to support its changed understanding as to the consumer utility of non-condensing appliances (and associated venting).

iii. Aesthetics

A number of commenters objected to DOE's recitation of aesthetic impacts as a factor that impacts consumer utility and that supports its proposed interpretive rule. (AGs Joint Comment, No. 82 at p. 10; A.O. Smith, No. 88 at p. 9; CEC, No. 89 at p. 4; Environmentalists Joint Comment, No. 90 at p. 4; NRDC, No. 94 at pp. 7–8; Advocates Joint Comment, No. 95 at pp. 3–5) Several commenters suggested that such aesthetic concerns are theoretical, anecdotal, and unsubstantiated. (CEC, No. 89 at p. 4; A.O. Smith, No. 88 at p. 9; Environmentalists Joint Comment, No. 90 at p. 4; NRDC, No. 94 at p. 7) For example, A.O. Smith argued that there is no evidence in the record to suggest that condensing water heaters are less aesthetically pleasing or that consumers would value such consideration over the energy and cost savings associated with more-efficient products/equipment, so the commenter concluded that DOE lacks the rational basis and supporting data for such a change. (A.O. Smith, No. 88 at p. 9)

One argument presented was that Congress did not intend aesthetics to be a consideration under EPCA's ''features'' provision. The CEC argued that aesthetics are beyond DOE's statutory authority, which refers to ''performance,'' ''performance characteristics,'' or ''performance-related features.'' According to the commenter, there is no evidence that Congress deemed subjective aesthetic concerns to be relevant to product utility or that limited, vague, and unsubstantiated anecdotal evidence and theoretical concerns should be allowed to overcome DOE's well-documented evidence in the record supporting its longstanding interpretation of performance characteristics. (CEC, No. 89 at p. 4) Furthermore, the Environmentalists Joint Comment asserted that such limited aesthetic concerns would not have the broad adverse impacts on consumer utility that Congress envisioned and intended to address by drafting the ''features'' provisions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II). (Environmentalists Joint Comment, No. 90 at p. 4)

Other commenters stated that aesthetics are a highly subjective matter and, therefore, ill-suited to serve as the basis for regulatory decision making. (CEC, No. 89 at p. 4; AGs Joint Comment, No. 82 at p. 10; A.O. Smith, No. 88 at p. 9; NRDC, No. 94 at p. 8) NRDC argued that many modern appliances can and do impact how a building looks, although that does not mean they have different performance-related features. To proceed otherwise, the commenter reasoned, would cause the Appliance Standards Program to implode under a proliferation of ''features'' and separate classes. NRDC suggested that changes in aesthetics are sometimes a necessary trade-off for the benefits of new technology, as reflected in DOE's historical approach which limited the focus to the appliance's primary function when considering ''utility to the consumer,'' thereby providing an appropriate bound. (NRDC, No. 94 at pp. 7–8) A.O. Smith made a similar point, arguing that DOE's proposed aesthetic considerations are well beyond past precedent, which focused on the consumer's interaction with the appliance, and the commenter expressed the view that basing a decision on an expansive view of consumer utility related to aesthetics would have no bounds. (A.O. Smith, No. 88 at p. 9)

The CEC expressed concern that relying on subjective aesthetic concerns would weaken DOE's ability to improve energy efficiency through standards that are technologically feasible and economically justified. (CEC, No. 89 at p. 4) The AGs Joint Comment argued that DOE's consideration of aesthetics as a matter of consumer utility threatens to undermine the statutory goal of maximizing energy efficiency by creating the potential for unlimited product classes subject to lower efficiency limits in violation of EPCA. These commenters charged that DOE's proposed interpretation would effectively prioritize consumer aesthetics and the gas industry's financial interests in selling more gas over Congress's desire for national energy savings. (AGs Joint Comment, No. 82 at p. 10)

Finally, some commenters urged DOE to consider the potential for use of alternative technologies or other types of products to resolve aesthetic concerns, rather than resorting to creation of separate product/equipment classes under EPCA's ''features'' provision. The Advocates Joint Comment argued that DOE's concerns expressed in the proposed interpretation about space constraints of installing a condensing appliance (*e.g.,* by adding new venting into the living space or decreasing closet or other storage space and other limitations related to installation), aesthetics, and consumer preference for gas heating are all, at their core, economic rationales. These commenters argued that solutions exist for difficult venting situations, and that DOE has accounted for them in past rulemaking documents in the course of analyzing potential standards levels. The Advocates Joint Comment further argued that homeowners could avoid unwanted aesthetic impacts by purchasing a different (although perhaps more expensive) type of venting, using new common venting technology (*e.g.,* FasNSeal 80/90), or switching to an electric product (*e.g.,* ones using heat pump technology) which does not raise aesthetic concerns. (The commenters added that unbounded consideration of aesthetics could render standard-setting all but impossible.) (Advocates Joint Comment, No. 95 at pp. 3–4) The Environmentalists Joint Comment raised similar points. (Environmentalists Joint Comment, No. 90 at p. 4)

In response, DOE would start by clarifying that in using the term ''aesthetics'' in the proposed interpretive rule, it did not intend to imply that purely subjective considerations (*e.g.,* even the slightest change in color or shape) would justify the establishment of separate product/equipment classes. The creation of a proliferation of classes is neither desired nor expected. Instead, DOE used the term in the context of describing physical modifications to a dwelling or business that would result to a substantial degree from prescription by a standard and that physical modification would be appreciably

noticed by the consumer and impact the use of living or commercial space. For example, the Petitioners *et al.* Joint Comment provided evidence that a performance standard that can only be met by a condensing appliance could require, particularly in older row-houses, the sacrifice of a window or balcony space. The Petitioners *et al.* Joint Comment provided evidence that these design implications can arise in both replacement applications as well as new construction design. (Petitioners *et al.* Joint Comment, No. 80 at pp. 10–11) That comment also pointed to a June 2015 experts study by Shorey Consulting, Inc. (included as part of the AHRI comment to the residential furnaces docket at Docket No. EERE–2014–BT–STD–0031–0159) which provided further evidence that there are applications where it is not possible to install a condensing furnace due to existing building constraints and code limitations. Only after reviewing the Gas Industry Petition and related comments did DOE come to fully appreciate the extent of these consumer impacts and how they can transcend cost. Consequently, a reconsideration of the available evidence caused DOE to act to change its long-standing interpretation.

Contrary to the views expressed in the CEC's and environmentalists' comments, Congress included the ''features'' provision in EPCA to protect consumer utility, even at the expense of some measure of energy savings. To the extent that ''aesthetics'' equate to a substantial degree in significant alteration of a dwelling's or business's structure and that physical modification would be appreciably noticed by the consumer and impact the use of living or commercial space, DOE's review of the available evidence and information has led it to conclude that a standard level requiring such changes could eliminate a ''feature'' under EPCA. Based upon that understanding, DOE has determined that non-condensing technology (and associated venting) are one such feature, and by keeping the focus on what the agency determines to be significant potential building modifications, it would expect to keep such ''aesthetic'' considerations within appropriate bounds. DOE also reasons that this final interpretation will have the added benefit of promoting consumer choice, rather than requiring fuel switching or extensive retrofits to resolve difficult installation situations.

iv. Delay

The AGs Joint Comment [24] argued that DOE's proposed interpretive rule would unlawfully delay the adoption of efficiency standards required by EPCA, as well as delay the benefits of such mandatory energy conservation standards. (AGs Joint Comment, No. 82 at pp. 2–3; AGs Joint Comment II, No. 115 at p. 2) A.O. Smith similarly asserted that DOE's proposed interpretation would result in delay in setting standards (including for products subject to statutory deadlines). (A.O. Smith, No. 88 at p. 12) More specifically, the AGs Joint Comment argued that DOE action on the Gas Industry Petition impermissibly delays DOE's publication of final rules as required under 42 U.S.C. 6295(m)(3)(A) and 42 U.S.C. 6313(a)(6)(C)(iii)(I). The AGs commented that DOE's statutory deadlines for promulgating final residential furnace and commercial water heater standards expired in March 2017 and May 2018, respectively. According to the AGs Joint Comment, DOE's proposed interpretive rule impermissibly compounds that delay, and since those dates have already passed and the comment periods for those rulemakings have already closed, these commenters opined that DOE should have rejected the Gas Industry Petition as duplicative or untimely. The AGs Joint Comment stated that DOE cannot further delay its statutory obligations by revisiting previously rejected arguments, issuing arbitrary and capricious interpretive rulings, and engaging in supplemental rulemaking to implement an unfounded interpretation of EPCA. (AGs Joint Comment, No. 82 at pp. 5–7)

The Petitioners *et al.* Joint Comment offered several responses to the arguments of opponents of the Gas Industry Petition. On this particular point, these commenters argued that neither DOE's proceedings for residential furnaces and commercial water heaters, nor the issues presented therein, can be lawfully concluded without consideration of and response to the considerable adverse comment raised in those rulemakings. The Petitioners *et al.* Joint Comment also made the point that DOE's obligation to comply with statutory deadlines does not obviate its responsibility to consider comments and to make sure that any new standards are lawful on the merits. (Petitioners *et al.* Joint Comment, No. 80 at p. 18)

In response, DOE recognizes the statutory deadlines associated with residential furnaces, commercial water heaters, and other energy conservation standards rulemakings. Given the complex issues at play, as evidenced by the public comments in this proceeding, DOE is working diligently to bring those rulemakings to a conclusion. However, DOE agrees with the Petitioners *et al.* Joint Comment that the agency also has a legal obligation to address public comments filed in those rulemakings, as well as to consider the petition for rulemaking properly filed under 5 U.S.C. 553(e). DOE is not at liberty to pick and choose among these legal obligations. (DOE addresses elsewhere in this document the allegations in the AGs Joint Comment that the Department's proposed interpretive rule is arbitrary and capricious and based upon an improper reading of EPCA.)

v. Regulatory Burdens/Litigation/Uncertainty/Preemption

Some commenters argued that DOE's proposed interpretation would increase regulatory burdens on manufacturers. (Lennox, No. 87 at p. 1; A.O. Smith, No. 88 at pp. 11–12) Along these lines, Lennox argued that creation of separate product classes for condensing and non-condensing products would increase the regulatory burden for manufacturers, distributors, contractors, and their customers, all to appease a narrow group of gas industry interests. (Lennox, No. 87 at p. 1; Lennox, No. 114 at p. 1, 4, 7) Doing so, Lennox asserted, would add yet another rulemaking process, and it suggested that the timing of condensing and non-condensing product rulemakings could become ''split into untenably mis-aligned rulemaking cycles.'' The commenter argued that furnace regulation is already overly complicated, with separate metrics for annual fuel utilization efficiency (AFUE), standby mode and off mode power, and furnace fan efficiency. Lennox argued that the additional regulatory costs associated with a condensing/non-condensing class split would ultimately be pushed through the supply chain to the consumer, and that such action would also increase consumers' confusion as they seek to purchase an appropriate furnace product. (Lennox, No. 87 at p. 3; Lennox, No. 114 at pp. 6–7) Similarly, A.O. Smith stated that manufacturers will bear the burden of complying with multiple standards for a single covered product, thereby increasing compliance

[24] The AGs Joint Comment renewed all of the objections raised in their March 1, 2019 comments on the Gas Industry Petition. DOE notes that these comments were fully addressed in the proposed interpretive rule published in the **Federal Register** on July 11, 2019. 84 FR 33011. DOE commends the reader to consult that document for further details on both those comments and the Department's responses.

costs and regulatory burden on the industry. (A.O. Smith, No. 88 at p. 11)

A few commenters predicted that adoption of DOE's proposed interpretation would have additional negative consequences. For example, Lennox argued that DOE's proposed interpretive rule, if finalized, would trigger additional litigation, thereby creating more uncertainty for industry. (Lennox, No. 87 at p. 2; Lennox, No. 114 at p. 7) A.O. Smith also asserted that DOE's proposed interpretation would result in regulatory uncertainty for manufacturers. (A.O. Smith, No. 88 at p. 12) The CA IOUs also expressed concern about the potential for DOE's proposed interpretations to create market uncertainty for the subject appliances. (CA IOUs, No. 117 at p. 3)

A.O. Smith speculated that the proposed interpretation would result in DOE's failure to adopt energy conservation standards that appropriately reflect the maximum improvement in energy efficiency called for under the statute, and that in turn would jeopardize the preemptive effect of those standards by encouraging States to seek waivers of preemption under 42 U.S.C. 6297(d). The commenter expressed concern that manufacturers could face a burdensome and costly patchwork of State regulations, if such petitions were to be granted. (A.O. Smith, No. 88 at p. 13) In contrast, the AGs Joint Comment also expressed concern about the potential preemptive effects under 42 U.S.C. 6297, if DOE does not fulfill its statutory duty when developing and adopting energy conservation standards, particularly as regards States' renewable energy and climate policy goals. (AGs Joint Comment, No. 82 at p. 13)

After considering these comments, DOE would point out that any regulatory proceeding entails the potential for litigation and, therefore, some degree of regulatory uncertainty. If the potential for litigation (and related uncertainty) were to be a basis for DOE to not undertake regulatory action (including relevant statutory interpretations), it could completely stall the Department's rulemaking process, because cross-cutting stakeholder interests render most agency actions subject to potential legal challenge. On the other hand, failure to take regulatory action for fear of litigation would itself lead to litigation for not having completed legally required regulatory actions. At bottom, the potential for litigation is inherently part of the regulatory process.

Lennox mischaracterizes DOE's interpretive rulemaking as an effort to ''appease'' members of the gas industry. The agency is obligated to consider the merits of petitions for rulemaking properly brought before it under the statute and to take appropriate action. Further, the issues addressed in this petition for rulemaking have been presented in numerous regulatory actions DOE has conducted and continues to conduct. DOE suspects that if Lennox were to submit its own petition for rulemaking, it would view the matter very differently, and that the company would expect DOE to give the substance of its petition due consideration under the statute. The Department has acted responsibly to present the issue for public comment and to consider that comment in determining how to proceed.

DOE likewise finds Lennox's and A.O. Smith's claims of regulatory burden to be overstated. To start, this final interpretive rule does nothing to change the current regulatory landscape, even though subsequent rulemakings may establish separate product/equipment classes and energy conservation standards for non-condensing technology (and associated venting) in appropriate cases. Appliance manufacturers routinely encounter multiple performance, capacity and other technical distinctions between appliance models that could impact energy efficiency, thereby justifying different classes and standards. For example, there are currently 7 product classes for consumer furnaces (*see* 10 CFR 430.32(e)), 21 equipment classes for commercial water heaters (*see* 10 CFR 431.110), and 36 product classes for consumer water heaters (*see* 10 CFR 430.32(d)). Accounting for a limited number of additional product/equipment classes associated with condensing and non-condensing technology represents a reasonable regulatory burden. The statute does not foreclose *all* regulatory burden, but instead it requires the agency to properly analyze whether a given test procedure or energy conservation standards would be *unduly* burdensome. DOE further notes that neither AHRI nor any of the other manufacturer commenters cited regulatory burden as a significant concern in response to the proposed interpretive rule.

In response to Lennox's specific concern about regulatory burdens associated with split rulemaking cycles for the same product type, DOE notes that in its energy conservation standards rulemakings, the Department typically addresses product types in a holistic fashion for a given covered product. Having splintered rulemakings which deal with only certain product classes would likewise increase burdens on the agency, so DOE agrees that such scenarios should be avoided to the maximum extent possible. Lennox has not explained in any detail why it believes that DOE's proposed interpretation would lead to misaligned rulemaking cycles, so DOE does not find this to be a reason to alter its proposed interpretation. DOE would add here that if the Department decides to grant AHRI's October 2018 AFUE2 petition, that could potentially consolidate furnace and furnace fans rulemakings, thereby reducing regulatory burdens and the ''overcomplicated'' regulatory structure for these products mentioned by Lennox (*see* section III.D.1 of this document for further discussion).

Finally, DOE does not agree with A.O. Smith's speculation that adoption of the Department's proposed interpretation would impact the normal preemptive effects of the statute or lead to favorable consideration of a significant number of petitions for waiver of preemption under 42 U.S.C. 6297(d), potentially resulting in a patchwork of State regulations. Similarly, DOE does not agree with the AGs Joint Comment's objections to the preemptive effects of subsequent final rules adopted pursuant to a final interpretive rule. DOE will conduct future energy conservation standards rulemakings in conformity with this final interpretation and all other statutory requirements, and as such, standards resulting from those rulemakings will be entitled to their full preemptive effect under the law. EPCA does permit States to seek a waiver of Federal preemption under 42 U.S.C. 6297(d), but to obtain such a waiver, a State must show by a preponderance of the evidence that a separate State regulation is needed to meet unusual and compelling State or local energy and water interests (which must be substantially different in nature or magnitude than those prevailing in the United States generally). (42 U.S.C. 6297(d)(1)) Moreover, the statute explicitly provides that DOE may not prescribe a waiver of preemption if the Secretary finds (and publishes such finding) that interested parties have established by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding. (42 U.S.C. 6297(d)(4)) While DOE is not prejudging the outcome of a request not yet before

it, because this final interpretive rule is in essence a ''features'' determination under the statute, it is difficult to see how such waivers of preemption to which A.O. Smith alludes could be granted, so the threat of a related patchwork of State regulations seems remote, at best.

vi. Other Negative Effects of a Change in Interpretation

Several commenters raised concerns about deleterious effects that they envision would arise from DOE's proposed interpretation. For example, Ceres stated that reversing DOE's long-held position now would ''create confusion to the furnace and water heater markets, increase energy use and decrease efficiency, negate significant financial savings opportunities for consumers, and slow the transition to a more energy efficient future.'' (Ceres, No. 69 at p. 3) A.O. Smith objected to and urged rejection of DOE's proposed interpretation as contrary to sound public policy, arguing that taking a contrary position would deter innovation, limit choice in the marketplace, and deprive consumers of the benefits of reduced energy consumption and lower utility bills. (A.O. Smith, No. 88 at p. 2; A.O. Smith, No. 113 at p. 2) In comments on the September 2020 SNOPIR, the CA IOUs argued that if DOE continues to advance its current approach, it would lock in inefficient technologies that waste energy, increase consumer costs, and inhibit energy efficiency innovation. (CA IOUs, No. 117 at p. 2)

NRDC's comments [25] faulted DOE's proposed revised interpretation as unnecessary and damaging to the effectiveness of the Appliance Standards Program, arguing that it would set the stage for weaker standards that would harm consumers; similar comments were made by the CA IOUs and the Advocates Joint Comment II. (NRDC, No. 94 at p. 4; CA IOUs, No. 117 at p. 3; Advocates Joint Comment II, No. 118 at pp. 1, 2) Along these lines, the CEC argued that because the proposed interpretive rule would put a cap on energy efficiency, it would lock in additional energy costs that would disproportionately affect low-income populations. The CEC argued that these outcomes would be inconsistent with DOE's statutory mandate and the purposes of the Energy Conservation Program. (CEC, No. 89 at pp. 1–2) The AGs Joint Comment added that DOE's proposed interpretation would also undermine State and local energy policy and conservation goals. (AGs Joint Comment, No. 82 at pp. 2–3) In commenting on the September 24, 2020 supplemental proposed interpretive rule, Lee Hannah suggested generally that DOE's energy conservation standards activities have not done enough to promote energy and economic savings. (Lee Hannah, No. 99 at p. 1)

Commenters such as A.O. Smith and the Advocates Joint Comment sought to refute DOE's suggestion that its proposed interpretation would only have a limited impact and its focus on a subset of consumers (*i.e.,* low-income residential consumers), instead arguing that it would have broad and lasting effect. (A.O. Smith, No. 88 at p. 12; Advocates Joint Comment, No. 95 at p. 6) A.O. Smith emphasized that the proposal was not limited to just residential furnaces and commercial water heaters but was instead deemed applicable to ''similarly situated products/equipment.'' (A.O. Smith, No. 88 at p. 12) The Advocates Joint Comment II argued that DOE has not clearly defined the products to which the interpretive rule would apply, specifically faulting the language about ''similarly-situated products/equipment'' in DOE's proposals. The Advocates Joint Comment II stated that DOE's proposed interpretations have not explained whether such interpretations would apply to both residential and commercial gas furnaces and gas water heaters, or whether the interpretation would apply to both weatherized and non-weatherized furnaces. Therefore, these commenters claimed that it is not possible to fully evaluate the potential impacts of DOE's proposal. (Advocates Joint Comment II, No. 118 at p. 2) However, these same commenters correctly pointed out that condensing technology is available for (and thereby suggesting that DOE's interpretation would be potentially applicable to) eight categories of products/equipment regulated by DOE: Residential furnaces, commercial furnaces, residential boilers, commercial boilers, residential water heaters, commercial water heaters, direct heating equipment, and unit heaters. (Advocates Joint Comment, No. 95 at p. 6)

The Advocates Joint Comment went on to analyze what they perceived to be the potential impacts of DOE's proposed interpretation and stressed that the number of impacted products is not as important as the total potential energy savings at issue, citing the evidence of DOE's own analyses which have shown, even when accounting for market trends, that energy conservation standards set at condensing levels could save about 13 quads of energy over a 30-year analysis period and lower utility bills by more than $100 billion over the same period. (Advocates Joint Comment, No. 95 at p. 6) The Advocates Joint Comment and A.O. Smith argued that DOE's proposed interpretive rule would improperly eliminate DOE's ability to even consider future standards based upon condensing technology that would have the potential for very large energy and cost savings, thereby allowing non-condensing products/equipment to remain on the market in perpetuity. (Advocates Joint Comment, No. 95 at p. 6; A.O. Smith, No. 88 at p. 12) The Advocates Joint Comment II argued that the factors discussed in DOE's proposed interpretations appear to relate specifically to residential furnaces, and these commenters alleged that the Department has not even attempted to provide a rationale for its proposed interpretation with respect to other products, in particular commercial equipment. The Advocates Joint Comment II contended that DOE's arguments about changes to a home's aesthetics, a preference for gas appliances, and concerns about energy affordability are ''irrelevant for any commercial equipment.'' (Advocates Joint Comment II, No. 118 at pp. 2–3)

DOE must act within its statutory authority (as discussed in further detail in section II.A of this document), and DOE recognizes that Congress was mindful of achieving energy conservation while also protecting consumer utility when enacting EPCA, as evidenced by the statute's ''features'' provisions. Congress is the ultimate arbiter of sound public policy, and through EPCA's ''features'' provision, it made clear that the goal of energy savings should not trump all competing concerns. If the statute which Congress has drafted takes some potential actions off the table, DOE must operate within the parameters that Congress established, even if significant additional energy and cost savings, as suggested by the Advocates Joint Comment, could arise from ignoring those parameters. For the reasons articulated in this document, DOE's final interpretive rule has determined non-condensing technology (and associated venting) to be a ''feature'' under the statute which cannot be eliminated through adoption of energy

[25] NRDC renewed all of the objections raised in its March 1, 2019 comments on the Notice of the Gas Industry Petition, as well as all of the objections raised by the joint NRDC and Earthjustice comments filed on that same date. DOE notes that these comments were fully addressed in the proposed interpretive rule published in the **Federal Register** on July 11, 2019. 84 FR 33011. DOE commends the reader to consult that document for further details on both those comments and the Department's responses.

conservation standards. Even so, DOE has concluded that such action would not have any major detrimental effect on the Appliance Standards Program, stakeholders, or the public. With that said, DOE does not agree with the litany of negative consequences about which these commenters speculate.

As discussed in section III.A.3 of this document, market trends are moving increasingly in the direction of condensing technology, despite the fact that non-condensing appliances remain available on the market. With the potential for substantial savings on utility bills, consumers have been availing themselves of more-efficient options when doing so makes sense for them, and DOE has every reason to believe that such trends will continue. However, for difficult installation situations, consumers can make the choice for a like-for-like replacement using non-condensing technology. Since the same issues would arise for the similarly-situated appliance recited by the Advocates Joint Comment, it only makes sense for the Department to also address them at this time. Although DOE arguably could have been more explicit in reciting the types of covered products and equipment subject to its interpretation, the Department notes that submitters of the Advocates Joint Comment and others did not have difficulty in practice in homing in on the impacted appliances in framing their arguments. Furthermore, DOE finds that its interpretation (as explained more fully in the balance of this document) adequately provides a rationale for applying its interpretation to both covered consumer products and commercial equipment, although the specifics of the impacts justifying the interpretation may vary depending upon the appliance in question. Contrary to A.O. Smith, DOE views this final interpretation as maintaining consumer choice, rather than diminishing it. DOE fully expects market trends towards higher-efficiency products will continue as consumers are able to take full advantage of the range of choices available to them.

DOE does not agree with Ceres's contention that DOE's revised interpretation would create confusion in the marketplace, given that the DOE's statement is clear and that this is a mature market with sophisticated and knowledgeable actors. Furthermore, since non-condensing and condensing appliances are currently sold side-by-side on the existing market, DOE fails to see how such confusion would arise, presuming that it does not already exist. Likewise, DOE does not find credible A.O. Smith's conjecture that DOE's revised interpretation would decrease innovation. Manufacturers have every incentive to continue to innovate in this competitive market, especially given the market trend toward purchase of more-efficient appliances. Finally, DOE would note that, as always, State and local governments are welcome to pursue their own initiatives that fill any regulatory and policy space that is not preempted by Federal law.

1. Legal Authority to Set ''Small'' Furnace Product Classes

Some commenters continued to advocate for the approach proposed in DOE's September 2016 SNOPR for residential furnaces as a preferable way to resolve the concerns raised in the proposed interpretive rule (*i.e.,* by setting a differentiated standard based on capacity). Lennox argued that DOE should not move forward on its current path, but instead, the commenter stated that the Department should achieve its energy conservation goals through more tailored, alternative regulatory approaches, such as capacity-based standards to preserve non-condensing furnaces for smaller residential furnaces. (Lennox, No. 87 at pp. 1, 3, 6–7; Lennox, No. 114 at pp. 2–3, 5) Lennox recommended that DOE adopt the approach previously supported by industry to preserve non-condensing furnaces below certain kBtu/h thresholds, which would address smaller applications, including mobile homes, impacting middle- and low-income consumers. (However, the commenter clarified that the level of 55 kBtu/h specified in the September 23, 2016 SNOPR would need to be raised so as to be sufficient to preserve non-condensing furnaces in mobile home applications and other difficult installation situations.) (Lennox, No. 87 at p. 6) The CA IOUs also urged DOE to finalize the September 2016 SNOPR for residential furnaces. (CA IOUs, No. 117 at p. 2) According to the CFA/NCLC, if DOE were to adopt a two-tiered standard of 80 percent AFUE for smaller furnaces (used in smaller dwellings and warmer climates) and 92 percent AFUE for larger furnaces (used in colder climates), 89 percent of low-income consumers would benefit. Conversely, CFA/NCLC stated that millions of low-income households would face significantly higher energy bills for the useful life of the furnace if DOE were to move forward with its proposed revised interpretation. (CFA/NCLC, No. 93 at p. 2)

The AGs Joint Comment stated that DOE's recent concerns about costs are unwarranted, and in the context of the residential furnaces rulemaking, these commenters appeared to support DOE's prior efforts to establish a separate, small furnace product class and mentioned AHRI's past statement that that would be a ''reasonable solution.'' (AGs Joint Comment, No. 82 at pp. 10–11) Electrify Now also supported that prior rulemaking approach for the subject residential furnaces, as previously proposed by DOE. (Electrify Now, No. 106 at p. 1)

In response, DOE acknowledges that it has authority to create product classes for consumer products based upon capacity under 42 U.S.C. 6295(q)(1)(B), and this authority extends to non-ASHRAE commercial equipment through application of 42 U.S.C. 6316(a). DOE further recognizes that it previously proposed capacity-based standards in the September 2016 furnaces SNOPR, an approach which garnered some measure of public support. However, that proposal was opposed by the gas industry, because those commenters argued that it failed to fully and adequately resolve the problems that they had identified. After careful consideration of the Gas Industry Petition and comments thereon, DOE has come to the conclusion that a capacity-based approach is not the proper tool to address the issues raised in the petition because they would not provide a comprehensive solution in all instances where consumer utility may be impacted due to difficult installation situations. The following explains how the Department's understanding has evolved in this area.

In essence, the problem identified in the Gas Industry Petition is not one of capacity. Difficult installation situations with the potential to impact consumer utility are not cleanly separated by capacity, so seeking to advance a proposed solution based upon capacity as the distinguishing factor would be at best an indirect and imperfect way to address the problem. In that sense, the gas industry's continued opposition would be expected and understandable. Furthermore, DOE does not believe that commenters currently expressing support would likely remain in agreement were the Department to move forward with a capacity-based approach. Illustrative of this point, Lennox's comment supported DOE's previously proposed capacity-based approach for residential furnaces but also suggested that the capacity threshold of 55 kBtu/h proposed in the September 2016 SNOPR would need to be raised, an opinion expressed by other industry commenters on that SNOPR. 81 FR 65720, 65754 (Sept. 23, 2016). In contrast, environmental and advocacy

groups likewise supported the capacity-based approach but pushed for a *lower* threshold. *Id.* DOE would also note that these commenters supporting a capacity-based approach would simply be recreating the same protections for non-condensing appliances at the lower end of the capacity range to which they so strenuously objected for the reasons stated in response to the proposed interpretation (*e.g.,* locking in less-efficient technology, depriving savings to renters). Moreover, DOE's prior capacity-based proposal assumed (without explicitly stating) that small capacity furnaces would be non-condensing and large capacity furnaces would be condensing. As such, the capacity-based proposal these comments support made in the past the very distinction these same commenters so vehemently oppose now. Consequently, DOE no longer views a capacity-based approach to standards for the products/equipment at issue in this proceeding to be a viable alternative to the ''features'' determination being made in this final interpretive rule.

2. Market Trends

A number of commenters speculated as to the effect that DOE's revised interpretive rule would have on the market for residential furnaces, commercial water heaters, and similarly situated equipment. One group of commenters predicted that DOE's proposed interpretive rule would lead to significant market-related impacts with negative consequences. For example, Lennox alleged that DOE's proposed interpretation would disrupt market trends towards more-efficient condensing furnaces by creating a separate product class for non-condensing furnaces. (Lennox, No. 87 at p. 3; Lennox, No. 114 at pp. 4, 5) A.O. Smith challenged the proposed interpretation's suggestion that it would adhere to the principle of market neutrality vis-à-vis competing energy sources, arguing that by insulating non-condensing water heaters from more-stringent standards, the Department is picking winners and losers in the water heaters market at the expense of consumer benefits and savings from higher-efficiency appliances. (A.O. Smith, No. 88 at p. 9) Ceres likewise argued that by encouraging a market for non-condensing equipment, DOE's proposed interpretive rule would waste energy and resources, a result which Ceres characterized as inefficient and costly. (Ceres, No. 69 at p. 2) Lennox and A.O. Smith characterized the Gas Industry Petition (and any separate product/equipment classes arising therefrom) as a mechanism that would disrupt the market for more-efficient condensing furnaces, drive up the cost of condensing products, and potentially push many consumers out of the market for more-efficient products. (Lennox, No. 87 at p. 2; A.O. Smith, No. 88 at p. 11; Lennox, No. 114 at pp. 4, 5) More specifically, Lennox reasoned that if condensing furnaces were placed in a separate product class, ''EPCA would almost certainly mandate maximizing condensing furnace energy conservation standards to even higher levels, thereby pricing many consumers out of a more energy efficient furnace.'' (Lennox, No. 87 at p. 3; Lennox, No. 114 at p. 5)

Other commenters opined that DOE's proposed interpretive rule would have negligible impacts upon existing market trends for the appliances at issue. For example, AHRI pointed out that the market is already trending towards condensing furnaces in applications where such venting/installation constraints do not exist. According to AHRI, even with non-condensing furnaces on the market right now, this trend toward condensing furnaces currently exists, and there is no reason to think that establishment of a separate product class would hinder the existing movement of this well-functioning market. (AHRI, No. 91 at p. 2; similar points were made by Nortek, No. 71 at pp. 1–2, and Mortex, No. 72 at p. 1) Likewise, especially since there is already a market trend toward condensing commercial water heaters, AHRI argued that it is neither necessary nor advisable to require condensing equipment in all applications. Instead, the commenter stated that establishment of a separate product class for non-condensing equipment would preserve the ability of commercial consumers facing difficult installation situations to make like-for-like replacements and to avoid the need to reconstruct a mechanical room, add unsightly piping, or switch to an electric water heater, all without impacting the overall trend toward installation of more-efficient condensing water heaters. (AHRI, No. 91 at p. 3) Similarly, Carrier and Nortek reasoned that because consumers are already moving in the direction of condensing furnaces, regulatory intervention banning non-condensing furnaces is not necessary and would only serve to disproportionately harm those consumers for whom venting changes would be difficult or impossible. (Carrier, No. 92 at p. 1; Nortek, No. 71 at pp. 1–2)

BWC sought to allay DOE's concerns about the potential for locking in a less-efficient technology which could act as a ceiling on product efficiency. In BWC's experience, especially in commercial applications, it stated that the market will choose higher-efficiency products/equipment where it makes sense (*i.e.,* taking into account not only economics but other factors, such as change in utility, loss of usable space, *etc.*). (BWC, No. 77 at p. 2) Carrier largely echoed these comments that creation of separate product classes for condensing and non-condensing equipment would not hinder the market trend toward condensing products, arguing that consumers and residential new construction home builders continue to move in the direction of condensing technology, despite the availability of non-condensing appliances in the current market. (Carrier, No. 92 at p. 1)

As a third perspective, the Petitioners *et al.* Joint Comment asserted that energy conservation standards that would make atmospherically vented products unavailable to consumers would alter the market by promoting electrification (*i.e.,* a shift to electric appliances), rather than by promoting the efficiency of gas products, because it would force many consumers to feel that they have no choice but to give up their gas appliances in favor of electric alternatives. These commenters characterized the situation as one where the imposition of a standard that effectively bans atmospherically vented gas appliances would result not in the sale of an increased number of more efficient gas products, but in the sale of fewer gas products overall. The Gas Industry Petitioners argued that they are not opposed to condensing technology generally or market trends favoring such technology. Instead, these commenters stated that they are simply making the case that condensing products are not suitable for all installations and that it is the opponents of the petition who are the ones seeking to deny consumers the products which best serve their needs. (Petitioners *et al.* Joint Comment, No. 80 at pp. 3–4)

In response, DOE would first note that EPCA directs DOE to consider the potential unavailability of a ''performance characteristic'' or ''feature'' as a matter separate and apart from economic impacts or market trends. Stated simply, EPCA's ''features'' provisions make clear that while improved energy efficiency may be the overarching goal, it is not the only decisional factor in standard-setting. It is often the case that elimination of a feature would allow for a more energy-efficient product (*e.g.,* an oven window), but in drafting the statute, Congress made clear its intention to preserve consumer utility, which in some cases may necessitate the

sacrifice of potential additional energy savings. Through this final interpretation, DOE has determined that in certain cases, non-condensing technology (and associated venting) is one such feature. A.O. Smith mischaracterizes this decision as abandonment of the principle of market neutrality, when in fact it simply reflects implementation of the statutory provisions enacted by Congress.

Setting these matters aside, DOE still does not find the market trend impact envisioned by Lennox, Ceres, and A.O. Smith to be credible, but instead, the Department agrees with the assessment of AHRI, BWC, Nortek, Mortex, and Carrier as to the likely market impacts of DOE's proposed interpretive rule. While Lennox, Ceres, and A.O. Smith posit what they think might happen in the market, AHRI, BWC, Nortek, Mortex, and Carrier are pointing out what is actually happening in the market. That is, non-condensing and condensing products are competing in the market currently under DOE's existing regulations, yet the market trend towards condensing products/equipment exists nonetheless. As establishment of separate product/equipment classes for non-condensing appliances would in general reflect the *status quo,* DOE fails to see how the deleterious market trends of which Lennox, Ceres, and A.O. Smith complain would manifest, given that they have not arisen already. Instead, as AHRI, BWC, Nortek, Mortex, and Carrier suggest, consumers (both residential and commercial) make decisions based upon their own weighing of economics and other relevant factors (*e.g.,* space constraints, loss of utility). Thus, the trend toward higher-efficiency condensing appliances (even where non-condensing ones are available) suggests that the markets are working efficiently, and DOE can discern no reason why that current market trends towards condensing appliances would not continue, regardless of DOE's final interpretation. Thus, DOE expects further energy savings gains over time as the market share of condensing appliance continues to increase.

Although Lennox and A.O. Smith speculate as to the outcomes of the ongoing DOE residential furnaces rulemaking under the Department's proposed interpretation, such outcomes cannot be predicted now; the outcomes can be properly determined only after completion of the full suite of the agency's rulemaking analyses, as applied in each individual rulemaking. However, even in the abstract, DOE does not agree with the logic of Lennox and A.O. Smith. Specifically, Lennox alleges that if DOE were to establish separate product/equipment classes for condensing and non-condensing appliances, the levels for condensing models would be higher than they otherwise might be if there were to be single product/equipment class. However, amended energy conservation standards would ultimately be set at a level that results in significant conservation of energy, is technologically feasible, and is economically justified. Any determination of those future standards would be based on sound economic and technical analyses.

3. Requests for Clarification

Among the commenters supporting DOE's proposed interpretive rule, a few requested clarification (sometimes with recommendations) on specific points. For example, Weil-McLain argued that DOE would be more technically accurate to make class distinctions based on the appliance's venting category (as defined in the National Fuel Gas Code NFPA 54), rather than using the terms ''condensing'' and ''non-condensing.'' The commenter pointed to what the National Fuel Gas Code refers to as Category I vented appliances, which operate with a non-positive vent static pressure and with a vent temperature which avoids excessive condensate production in the vent. Weil-McLain argued that such venting is the type used by non-condensing appliances. Thus, Weil-McLain suggested that going forward, DOE should use the term ''Category I Vented Appliance'' in its interpretation. (Weil-McLain, No. 86 at pp. 1–2)

In response, DOE notes that this comment is similar to ones by USB, BHI, and Crown Boiler, which prompted the Department to issue its September 2020 SNOPIR to consider two alternative approaches that would have defined a performance-related feature for the subject gas appliances based upon venting compatibility (*see* section II.E of this document for further details). However, after reviewing public comments in response to its supplemental proposal, DOE ultimately decided not to adopt those alternative proposals and to instead proceed with its original proposal to define the performance-related feature as the subject appliances' condensing or non-condensing operation, for the reasons explained in section III.A.1.a of this document. Consequently, DOE declines to adopt the clarification suggested by Weil-McLain for the reasons previously discussed.

The Petitioners *et al.* Joint Comment requested that DOE clarify the language used in its proposed interpretation by concluding that standards limiting the market to products that use condensing combustion technology ''would result in the unavailability of a performance characteristic or feature,'' language which they argued would more closely track that of the statute. The Petitioners *et al.* Joint Comment also asked DOE to clarify the proposed interpretation's parenthetical ''(where permitted by EPCA)'' and its reference to 42 U.S.C. 6316(a) to make clear that it relates to the situations to which the ''features'' provisions apply under the statute, rather than being a ''features'' provision itself. (Petitioners *et al.* Joint Comment, No. 80 at p. 7)

In response, although DOE does not perceive the language in question to be unclear, the Department is restating its position so as to dispel any confusion. Through this final interpretation, DOE has concluded that a careful examination of anticipated consumer impacts and a preponderance of the record evidence show that a standard limiting the market to products/equipment that use condensing combustion technology (and associated venting) would impermissibly result in the unavailability in the United States of a performance characteristic or feature under EPCA. In future rulemakings to consider energy conservation standards regarding products/equipment for which this determination is relevant, DOE will consider establishing separate product/equipment classes for condensing and non-condensing product types and may set different standards for such classes.

Regarding the language in the proposed interpretive rule about ''(where permitted by EPCA),'' DOE was referring to the situation where DOE is triggered by ASHRAE action in amending ASHRAE Standard 90.1 and where DOE does not have clear and convincing evidence to adopt standard levels more stringent than those set by ASHRAE. Regarding DOE's reference to 42 U.S.C. 6316(a), the Petitioners *et al.* Joint Comment is correct that that is not a ''features'' provision itself, but it is instead the statutory crosswalk provision which makes the ''features'' provision at 42 U.S.C. 6295(o)(4) applicable to covered non-ASHRAE equipment.

BWC expressed concern about how ASHRAE equipment would be affected by DOE's proposed interpretation impacting EPCA's ''features'' provision. Specifically, BWC stated that DOE has not addressed the situations where DOE does not act to adopt a level more stringent than the level adopted by ASHRAE or where DOE cannot adopt

the ASHRAE level (*e.g.,* if such standards were differentiated based on new construction versus replacement installations; or if the levels were set based on the system's efficiency, rather than a single product within the system). In those cases, BWC recommended adopting a similar interpretation of the ''features'' provision as if the product were not covered by ASHRAE. (BWC, No. 77 at p. 1) Similarly, AHRI requested further clarification on how DOE's proposed interpretive rule applies to commercial equipment, particularly ASHRAE equipment rulemakings conducted pursuant to EPCA's 6-year-lookback review requirements that are not prompted by amendments to ASHRAE Standards 90.1. (AHRI, No. 91 at pp. 3–4) For water heaters, AHRI agreed with DOE that its condensing/non-condensing interpretation would not apply in situations where the Department, after being triggered by ASHRAE action amending ASHRAE Standard 90.1, adopts the same standard level set by ASHRAE. (AHRI, No. 109 at p. 3)

EPCA includes a ''features'' provision applicable to ASHRAE equipment at 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa), but that provision applies only to instances where DOE is adopting more-stringent standards either under the statute's trigger provision or 6-year-lookback provision. In those cases where DOE adopts the ASHRAE Standard 90.1 levels under 42 U.S.C. 6313(a)(6)(A)(ii)(I), there is no applicable ''features'' provision, so DOE's authority limits it to adopting the levels and classes set by ASHRAE.

B. Comments Regarding Economics-Related Issues

A number of commenters disagreed with DOE's proposed interpretive rule, because they argued that it improperly injects economic considerations into the concept of consumer utility used in the ''features'' determination. These commenters, such as A.O. Smith, argued instead that installation and other costs are to be considered as part of the economic analysis required by the statute. (A.O. Smith, No. 88 at p. 4) In responses to the September 2020 SNOPIR, NRDC and A.O. Smith added that any issues related to venting are likewise an issue of cost, not a performance-related feature, and any costs associated with upgrading venting can and should be addressed when DOE analyzes installation costs in its economic analysis. (NRDC, No. 112 at pp. 2–3; A.O. Smith, No. 113 at p. 3) The CA IOUs stated that DOE should not inappropriately conflate rulemaking analyses (*e.g.,* economic justification analyses) with a petition to create a new class of products, arguing that such approach would undermine the rulemaking process and inappropriately define economic impacts or incremental costs as performance-related features. (CA IOUs, No. 85 at pp. 3–4) However, while maintaining the position that economic considerations are inappropriate in a ''features'' determination, such commenters also sought to refute, *arguendo,* DOE's economic concerns and to show that even under the agency's proposed approach, declaring non-condensing technology (and associated venting) to be a ''feature'' is neither necessary nor justified. The following discussion first summarizes and addresses the relevant statutory arguments, followed by the specific economic arguments, along with DOE's responses.

1. Consumer Impacts

a. Legal Arguments

Several commenters objected to DOE's proposed interpretation, arguing that the Department violated the statute by improperly considering economic factors in making its ''features'' determination. For example, A.O. Smith argued that DOE's ''unprecedented'' interpretation that would tie the concept of a ''feature'' to condensing technology largely turns on installation costs. (A.O. Smith, No. 88 at p. 6) Lennox (and other commenters) stated that DOE's cost analysis is unsupported and inconsistent with EPCA's statutory mandate, because the ''features'' provision at 42 U.S.C. 6295(o)(4) focuses on unavailability and does not mention costs as an appropriate consideration. (Lennox, No. 87 at pp. 5–6; CEC, No. 89 at p. 3; Advocates Joint Comment, No. 95 at pp. 1–3; Lennox, No. 114 at p. 4) The CEC made a similar comment and also pointed out that costs are likewise not relevant under 42 U.S.C. 6295(q)(1) (the product class provision). (CEC, No. 89 at p. 3) The AGs Joint Comment (and other commenters) stated that under 42 U.S.C. 6295(o)(2)(B), the statute directs DOE to consider costs as part of its analysis of economic justification. (AGs Joint Comment, No. 82 at pp. 10–12; A.O. Smith, No. 88 at p. 12; CEC, No. 89 at p. 3; Environmentalists Joint Comment, No. 90 at p. 3; Advocates Joint Comment, No. 95 at p. 3)

A.O. Smith also asserted that consideration of costs under the statute's ''features'' provision would predetermine the outcome of economic justification without performing that full analysis as required by the statute. (A.O. Smith, No. 88 at p. 12) A similar argument was made in the Advocates Joint Comment II. (Advocates Joint Comment II, No. 118 at pp. 1, 2, 5) The Environmentalists Joint Comment reasoned that if installed cost concerns could block consideration of a standard level, it would result in an ''end-run'' around the other statutory factors which DOE must consider in assessing economic justification. (Environmentalists Joint Comment, No. 90 at p. 3) The Advocates Joint Comment added that delineating product classes based upon cost considerations would subvert the statute's central purpose of energy conservation. (Advocates Joint Comment, No. 95 at pp. 1–2)

Commenters identified specific, economics-related concerns raised in the proposed interpretive rule which they believe should only be considered in DOE's economic analyses. For example, the Environmentalists Joint Comment argued that low-income consumers' ability to absorb the first-cost impacts of installing a condensing gas appliance should properly be addressed in the economic justification of a standards rulemaking. (Environmentalists Joint Comment, No. 90 at p. 5) The Advocates Joint Comment argued that affordability and other cost impacts should also be addressed as part of the economic analysis, rather than by establishing unjustified product classes which would preclude such analysis. Furthermore, the Advocates Joint Comment stated that topics such as housing affordability, higher up-front costs crowding out consumer spending on other necessities, and long payback periods that do little to ameliorate short-term up-front costs are economic matters relevant to whether a potential standard level is appropriate, after conducting the requisite economic and financial analysis called for under the statute; they argued that DOE has not shown that the difference between condensing and non-condensing products is more than a matter of cost. (Advocates Joint Comment, No. 95 at pp. 1–3)

The Advocates Joint Comment asserted that since each of DOE's attempted rationales for characterizing non-condensing products as a ''performance-related feature'' (*i.e.,* space constraints (and other limitations related to installation), aesthetics, and consumer preference for gas heating) are fundamentally cost considerations, the Department has failed to provide justification for establishing separate product classes along those lines. (Advocates Joint Comment, No. 95 at pp. 1–2, 3–5) Similarly, the CEC stated

that three out of four of DOE's justifications in its proposed interpretation rely on economic considerations and are, therefore, inappropriate for purposes of setting product classes. (CEC, No. 89 at p. 3) The Advocates Joint Comment expressed the view that DOE is seeking to solve ''hypothesized'' harmful economic impacts by establishing product classes, but that the statute allows for the mitigation of any such harms by setting an appropriate standard level or leaving the existing standard unchanged. (Advocates Joint Comment, No. 95 at p. 3) According to the Advocates Joint Comment, cost impacts, including those with respect to low-income consumers, are a central concern for DOE's standard level selection process, and the Department routinely performs consumer subgroup analyses, which examine impacts on subsets of consumers such as those with low incomes. (Advocates Joint Comment, No. 95 at pp. 1–2)

In contrast, several commenters supported DOE's tentative decision to interpret the use of non-condensing technology (and associated venting) to be a ''feature'' under the statute based upon the findings related to consumer utility. The Petitioners *et al.* Joint Comment responded to other commenters' suggestions that the difference in characteristics between condensing products and atmospherically vented product being simply a matter of cost as factually incorrect; instead, these commenters stated that an energy conservation standard set at a condensing level would leave consumers with no residential gas furnaces capable of operating with existing atmospheric venting systems, with other commonly-vented appliances, or without a condensate disposal system. The Petitioners *et al.* Joint Comment argued that critics of DOE's proposed interpretive rule mischaracterize these material differences which have significant utility to consumers, separate and apart from the substantial costs that a ban of such systems would generate. (Petitioners *et al.* Joint Comment, No. 80 at p. 10)

DOE agrees with commenters that costs are to be properly addressed in a rulemaking's economic analysis, and it said as much in the proposed interpretive rule. 84 FR 33011, 33020 (July 11, 2019). On this topic, the Department clearly stated, ''DOE has tentatively concluded that the other [*i.e.,* non-economic] reasons discussed immediately above are sufficient in and of themselves to justify the Department's proposed change in interpretation, but it acknowledges these cost impacts to be fully transparent in terms of the agency's thinking.'' *Id.* (DOE does not concur with certain commenters' attempts to classify all of the agency's stated reasons as economic, thereby better suiting their own arguments.) Even though economics is not an appropriate consideration in making a ''features'' determination under the statute, there is no question that economic effects will need to be considered in whatever decision is made with regard to establishing or revising standards. Discussing the potential economic effects of a decision is not equivalent to making them the basis for the ''features'' decision itself. This is no different than stakeholder comments on the proposed interpretation which raised the economic implications of an affirmative ''features'' determination and its impact on the energy conservation standards which could subsequently be set for products/equipment where both condensing and non-condensing models exist. Those economic concerns are similarly unsuitable for consideration in making a ''features'' determination under the statute. Accordingly, DOE would reiterate that it based neither its proposed interpretive rule nor this final interpretive rule upon economic considerations.

DOE notes that many of the environmental and efficiency advocacy groups raised no similar objections to DOE's September 2016 furnaces SNOPR, in which the agency proposed to set a separate product class and energy conservation standard at a non-condensing level for furnaces with a capacity less than 55 kBtu/h.[26] Essentially, this would have created a non-condensing standard to address, in large part, the economic concerns of many low-income consumers. 81 FR 65720, 65795, 65852 (Sept. 23, 2016). Arguably, this product class distinction was not required to protect the capacity from elimination, pursuant to 42 U.S.C. 6295(o)(4). Since the effect would have been comparable, it is difficult to reconcile these groups' differing positions regarding the propriety of taking economic considerations into account.

b. Factual Arguments

While maintaining their legal arguments in opposition, a number of commenters also directly challenged what they characterized as economic aspects of the proposed interpretive rule (*i.e.,* installation costs, changes impacting aesthetics, fuel switching, and energy affordability). For example, the AGs Joint Comment argued that while DOE's proposed interpretive rule expressly endorsed the approach that economic considerations should be addressed as part of a rulemaking's economic justification analyses, the agency nevertheless used and gave undue weight to economic considerations in its ''features'' analysis. Furthermore, the AGs Joint Comment emphasized that DOE's own rulemaking record found the Gas Industry Petitioners' claims regarding increased consumer costs and challenging installation scenarios to be overstated, and they further argued that the Gas Industry Petitioners had proffered no new evidence to support their claims, including ones about excessive installation costs and consumer preference for gas as a fuel type. (AGs Joint Comment, No 82 at pp. 10–12; similar comment from NRDC, No. 94 at pp. 6–7) The CA IOUs and NRDC stated that DOE has already shown the technological feasibility and economic justification for condensing furnaces and water heaters through analyses supporting the relevant rulemakings and that such findings should not be allowed to be undermined in a separate action to assess new product classifications. (CA IOUs, No. 85 at pp. 3–4; NRDC, No. 94 at pp. 2, 6–7) The Joint Advocates Comment added that solutions exist for difficult venting situations (a point echoed by Electrify Now), and that DOE has accounted for them in past rulemaking documents analyzing potential standards levels. (Advocates Joint Comment, No. 95 at pp. 3–5; Electrify Now, No. 106 at p. 1) Lennox commented that DOE has not explained when cost issues may become so extreme as to render certain furnace installations impossible or impracticable, and it argued that the lack of data in this regard causes the proposed interpretation to fail the preponderance of the evidence standard for designating a product ''feature.'' (Lennox, No. 87 at p. 6)

Lennox alleged that DOE has failed to consider various studies, analysis, and other work to address the extent of, and

[26] *See e.g.* the joint comment of the Appliance Standards Awareness Project, the Alliance to Save Energy, the Natural Resources Defense Council, the Northeast Energy Efficiency Partnerships, and Northwest Energy Efficiency Alliance. (EERE–2014–BT–STD–0031–0285) In relevant part, the joint comment states at page 3, ''The DOE proposal is based on a breakpoint of 55,000 Btu/hour and not the 50,000 Btu/hour we had recommended in our NOPR comments. While we can live with 55,000 for now, we recommend that prior to the next rulemaking that DOE conduct additional analysis on the heating loads of homes in the south and in new construction so that the next rulemaking can consider whether 55,000 Btu/hour remains a reasonable breakpoint, or whether another value is more appropriate.''

solutions to, difficult installation issues (*e.g.,* a May 2019 study conducted by Oak Ridge National Laboratory (ORNL) and UT-Battelle, a document prepared by Pacific Gas and Electric (PGE)/NEEA). (Lennox, No. 114 at p. 4) Along a similar vein, the Advocates Joint Comment II recited numerous technological solutions which they suggest are available to address installation barriers related to venting systems for gas-fired products, such as DuraVent's FasNSeal product. These commenters also claim that additional venting solutions are under development, such as the ORNL EntrainVent and DuraVent's vent retrofit design, although they acknowledge that neither of these products is commercially available today. (Advocates Joint Comment II, No. 118 at pp. 4–5) NEEA also cited DuraVent products as a potential solution to the problems DOE seeks to address. (NEEA, No. 119 at pp. 2–3)

The CA IOUs stated that DOE's proposal put the U.S. ''out-of-sync'' with other jurisdictions, such as Canada, which regulate the energy efficiency of similar products. These commenters pointed out that Canada has regulations in place resulting in 98 percent of its annual furnace shipments being condensing models (in 2017), and of these, 85 percent had an AFUE rating of at least 95 percent. According to the CA IOUs, Canada expanded on these regulations in 2019 to require all residential housing units (with a few relatively narrow exceptions) sold in Canada with input rates less than or equal to 65.92 kilowatts (or 225,000 Btu/h) that use single-phase electricity to achieve an AFUE of 95 percent. The CA IOUs added that the European Union's Ecodesign minimums for gas instantaneous and gas storage water heaters with higher draw patters (XL, XXL, and above) also require condensing technology levels of performance. (CA IOUs, No. 117 at pp. 2, 3–4) Lennox also commented as to DOE's failure to address the widespread installation of condensing furnaces in Canada. (Lennox, No. 114 at p. 4)

Commenters opposing DOE's proposed interpretation sought to highlight data suggesting that cost impacts associated with installation of condensing appliances, in most cases, would not have an excessively negative impact on consumers. For example, the AGs Joint Comment stated that recent market research (submitted to the present rulemaking docket) contradicts petitioners' claims regarding the impracticality or impossibility of condensing appliance retrofit installations. According to the AGs Joint Comment, a report by 2050 Partners, Inc. was based upon in-depth interviews with installers, distributors, and subject matter experts from around the U.S. in both residential and commercial settings, and it found that less than 5 percent of retrofit installations required significant modifications (*i.e.,* building or site modifications where installation costs would be more than double the total system cost of a typical retrofit). According to the AGs Joint Comment, that report indicates that condensing equipment can typically be incorporated with only minor changes into venting and plumbing infrastructure, and that condensate management, orphaned water heaters, and chimney relining were not identified as significant concerns, and that even in difficult cases, technical solutions were always available. The AGs Joint Comment also cited the earlier comment of Mitsubishi Electric on the petition, which stated that the percentage of homes with challenging retrofit situations is probably less than 1 percent of the total housing stock. (AGs Joint Comment, No. 82 at pp. 10–12) In its comments on the September 2020, NEEA pointed to the same study and made similar arguments. (NEEA, No. 119 at p. 2)

Along similar lines, the CA IOUs argued that their research has shown that installing a condensate drain is not a barrier to installation of condensing appliances. These commenters added that they only found approximately five percent of retrofit installations (going from atmospheric combustion natural gas appliances to condensing equivalents) to be '' 'challenging,' '' and even these always had technical solutions that allowed installation of the condensing appliance. The CA IOUs concluded that these technical solutions have associated costs, but cost is not a product feature. (CA IOUs, No. 117 at pp. 2–3)

The AGs Joint Comment also challenged DOE's concern expressed in the proposed interpretation that energy conservation standards set at a condensing level could price some low-income consumers out of the manufactured housing market or create other financial hardship, such that these concerns could sufficiently raise non-condensing appliances (and associated venting) in the consciousness of the consumer so as to be deemed a ''feature'' under EPCA. These commenters argued that DOE's rulemaking record shows that the costs for condensing and non-condensing mobile home furnaces are comparable due to lower installation costs for condensing furnaces in most of those installations, so these commenters reasoned that a condensing furnace standard would not have any effect on the affordability of single-section mobile homes. (AGs Joint Comment, No. 82 at p. 12)

The CEC stated that monthly savings from more-stringent standards would benefit low-income consumers more than the average consumer because, the commenter argued, they spend more than twice as much (as a percentage of income) on energy than median income consumers. The CEC did not directly respond to the first-cost concerns raised in DOE's proposed interpretation, but instead quoted from an ACEEE paper which linked high energy costs to the cycle of poverty. The commenter added that at least in California, a substantial number of low-income consumers are tenants, so they have no control over the appliance choice, but they pay the utility bills, a situation which runs counter to DOE's energy affordability concerns. (CEC, No. 89 at pp. 6–7)

Other commenters also raised the same issue about split incentives between landlords and renters. The CFA/NCLC argued that it is owners, rather than renters, who purchase central heating furnaces, and that most owners (particularly those who rent apartments to lower-income tenants) will choose less expensive, less efficient non-condensing furnaces that will result in tenants paying significantly more to heat their homes. According to these commenters, depending upon the non-condensing and condensing units under consideration, low-income tenants would pay at least 10 percent more and a much as 20 percent more for their heat. (CFA/NCLC, No. 93 at p. 2) The CFA/NCLC argued that DOE's proposed interpretation would harm many more low-income and moderate-income households than it would help, particularly since these households are disproportionately renters (not homeowners) and, therefore, must pay the associated energy bills. (CFA/NCLC, No. 93 at pp. 1–2) These commenters offered the following evidence to support their position. Citing U.S. Census Bureau data from 2017 through the second quarter of 2019, the CFA/NCLC stated that 78 percent of households with income greater than the median family income were homeowners, as compared to 50 percent homeownership for households below the median family income. Because the poverty line is significantly below the median and because homeownership rates decline as income declines, these commenting organizations reasoned that such low-income households would have homeownership rates well below 50 percent. The CFA/NCLC added that

homeownership rates are significantly lower for non-white families, in large part because they are also lower-income families; in the past two years, the commenters noted that homeownership rates for ''Black alone'' households were approximately 42 percent, and approximately 47 percent for ''Hispanic (of any race)'' households. (CFA/NCLC, No. 93 at p. 2)

CFA/NCLC challenged DOE's reasoning that an energy conservation standard that would require a condensing furnace would lead to higher rents to cover the landlord/owner's first cost of the more expensive appliance, arguing that it is both unsubstantiated and unlikely to occur. According to these commenters, the incremental cost (including equipment and installation) for a condensing furnace (beyond the cost of a non-condensing furnace) is likely to be in the range of several hundred dollars, but given a useful furnace lifetime of over 20 years, they estimate that a landlord would only need to raise rent by $3 per month to recoup these incremental costs over that period. The commenters noted that in an earlier filing with DOE, NCLC submitted an affidavit from a non-profit housing developer who stated that: (1) The incremental costs of a more-efficient furnace are so small compared to the owner's overall operating costs so as to not be directly and immediately reflected in rent, and (2) rents are generally set in accordance with governing regulations (in rent-regulated, low-income housing) or by external market conditions (for unregulated properties). Accordingly, CFA/NCLC concluded that small changes in the cost of one appliance would not lead to a rent increase. (CFA/NCLC, No. 93 at p. 3)

CFA/NCLC acknowledged that there are many low-income homeowners who directly bear the cost of a replacement furnace, but they did not address the issue of first-cost for these homeowners, instead focusing on the fact that such increased costs would be paid back in terms of lower energy operating costs over the more than 20-year lifetime of the furnace (citing section 8.2.2.5 of the technical support document for DOE's residential furnaces rulemaking (August 30, 2016)). These commenters added that low-income homeowners frequently face termination of utility services due to non-payment, a risk that could increase with inefficient, non-condensing furnaces. (CFA/NCLC, No. 93 at p. 3)

CFA/NCLC and Electrify Now faulted DOE's proposed interpretation for focusing on unquantified burdens that might fall on a very small percentage of residential households that would be required to install condensing furnaces, while ignoring the vast majority of households that would benefit—as clearly demonstrated under the Department's own earlier analysis—from adoption of a condensing furnace standard. (CFA/NCLC, No. 93 at p. 4; Electrify Now, No. 106 at p. 2) According to CFA/NCLC, the upshot of DOE's proposed interpretation would be that the agency would fail to carry out congressional intent, saddle consumers with potentially billions of dollars of excess energy costs, and impede efforts to help consumers use less energy. (CFA/NCLC, No. 93 at p. 4)

Lennox argued that DOE did not provide any support to show that failure to separate condensing and non-condensing product/equipment classes would lead to ''widespread, long-term homelessness,'' further arguing that furnace costs are a comparatively small fraction of overall housing costs. The commenter countered that a more factual analysis would show that overly-stringent efficiency standards would price some consumers out of a new furnace and would cause them to either continue to repair older, less-efficient units or purchase other, less-efficient heating options (*e.g.,* kerosene heaters, electric space heaters, using a stove or oven). Lennox stated that the lack of data and support deprives commenters of the ability to fully comment on DOE's proposal. (Lennox, No. 87 at p. 5)

Contrary to the concerns about energy affordability raised in DOE's proposed interpretive rule, certain commenters stated that such approach would harm the very groups most affected by high energy bills by allowing less-efficient equipment to remain on the market and locking in higher energy costs. NRDC pointed to research showing that space heating represents the largest energy expense for the average U.S. home at 45 percent of energy bills, and it similarly stated that about 50 percent of U.S. commercial building floor space gets hot water from gas-fired or propane-fired equipment. (NRDC, No. 94 at p. 2) NRDC agreed with DOE that energy affordability is a critical issue, stating that nearly one-third of U.S. households face challenges (often because their energy bills are unaffordable) and that energy burden is significantly higher for low-income households (3.5% for median income households but 7.2% for low-income households). The organization added that low-income households, renters, African-American households, and Latino households all have a higher than average energy burden (*i.e.,* paying more for utilities per square foot than the average household), which indicates that their homes are less efficient. NRDC stated that heating and cooling are the largest contributors to household energy use and that inefficient heating systems are one of the biggest drivers of household energy burden. The commenter argued that improving the efficiency of heating appliances offers a great opportunity to reduce energy burdens, but that DOE's proposed interpretation would move things in the wrong direction. Under DOE's proposed interpretation, NRDC argued, energy burdens would be perpetuated because lower-income customers and landlords may be inclined to purchase lower-first-cost appliances, even if those products have net higher operational costs over the product's lifetime. Citing an ACEEE study, NRDC made the case that strong energy efficiency standards help transform the market by making high-efficiency products readily available to all customers, with products becoming less expensive over time as installation costs drop and as manufacturers innovate. NRDC concluded that cost-effective condensing products have the potential to lower both energy bills and energy burden. (NRDC, No. 94 at pp. 9–10)

Furthermore, the Advocates Joint Comment argued that the proposed interpretation's recitation of harmful economic effects, at least in the case of mobile home furnaces, is specious. These commenters cited DOE's 2016 furnaces SNOPR (81 FR 65720 (Sept. 23, 2016)), which proposed a 92-percent AFUE standard for mobile home furnaces and was estimated to increase installed costs by $152. Using this example, the Advocates Joint Comment disputed DOE's claim that the resulting increased cost in a mobile home resulting from the required installation of a condensing furnace could price some consumers out of the housing market. These commenters countered that this cost differential would amount to less than a dollar a month on the monthly mortgage payment and that mortgage lending decisions do not turn on such small margins. The Advocates Joint Comment argued that a condensing furnace could actually make a home more affordable for such consumers by lowering energy bills, thereby freeing up money for other necessities such as food and medicine (seeking to refute DOE's argument on this point). The commenters also used this example to challenge DOE's concerns about energy savings being spread out over long payback periods, again citing the 2016 furnaces SNOPR for the proposition that under a 92-percent AFUE standard, a

mobile home furnace with a 21.5 year lifetime would have a payback period of just 1.7 years. (Advocates Joint Comment, No. 95 at p. 3)

Regarding energy affordability, the Advocates Joint Comment argued that rental housing markets have been thoroughly studied in the economic literature, and on the topic of whether increased appliance costs are passed on to consumers in the form of higher rent, it quoted Dr. Larry Dale, an economist for DOE who stated the following at an April 13, 2015 public meeting: ''The implications from these findings are: tenants benefit from lower energy bills; rent increases may not, and I would say almost certainly do not, cover the higher equipment costs. So overall, tenants (meaning largely low-income households in this case, or rather the other way around, low-income households that are largely tenants) are probably better off than suggested by our LCC [life-cycle cost] analysis.'' [27] The Advocates Joint Comment concluded that the best way for DOE to make decisions about future standards is to fully evaluate the costs and benefits of such potential standards, including through a consumer subgroup analysis which accounts for effects on renters, as opposed to setting separate product classes for condensing and non-condensing appliances, where such costs and benefits would not even get considered. (Advocates Joint Comment, No. 95 at pp. 5–6)

According to the NRDC, if implemented, the revised interpretation would have an extremely detrimental impact on the potential for natural gas savings from future appliance energy conservation standards, thereby resulting in higher energy bills for customers using gas appliances, especially low-income households. (NRDC, No. 94 at p. 1) Focusing on commercial consumers, Ceres raised similar concerns that if DOE were to establish separate product/equipment classes for residential furnaces and commercial water heaters based upon the use of condensing vs. non-condensing technology, such action would increase costs for ordinary businesses and their customers, who own and operate such appliances. (Ceres, No. 69 at p. 1) Ceres argued that granting the Gas Industry Petition would essentially result in a subsidy to those special interest groups, rather than benefit the American people or economy. (Ceres, No. 69 at p. 2) To overcome these concerns, NRDC reasoned that there are solutions to the problems which the proposed interpretive rule seeks to address, none of which would require reinterpretation of EPCA's ''features'' provision. More specifically, NRDC stated that if a consumer decides that the installation cost and/or aesthetic implications of a condensing appliance are too high, one could switch from a gas-fired appliance to an electric one; a similar comment was made by the Advocates Joint Comment II. (NRDC, No. 94 at pp. 6–7; Advocates Joint Comment II, No. 118 at pp. 4–5)

Other commenters acknowledged and agreed with the Department's separate discussion of likely consumer cost impacts (particularly for low-income consumers) that would be associated with energy conservation standards set at a level which can only be met through the use of condensing technology. For example, Weil-McLain expressed appreciation for DOE's acknowledgment of the cost impact that requiring a condensing appliance would have on low-income segments of the population, and it argued that the same concerns exist in the commercial market, because small businesses could face increased costs and job losses if they could no longer purchase Category I Vented Appliances. (Weil-McLain, No. 86 at p. 2) Carrier also cited continued affordability for low-income consumers as an important issue. (Carrier, No. 92 at p. 1)

The Petitioners *et al.* Joint Comment argued that suggestions that favorable action on the petition would harm the economic interests of consumers, especially low-income consumers, are based upon the flawed premise that a condensing standard for residential furnaces would give low-income renters the benefits of lower utility bills because a condensing furnace would then be installed in such cases. However, the Petitioners *et al.* Joint Comment suggested that existing multi-family properties, which provide much of the country's affordable housing stock, face some of the most serious technical impediments to installation of condensing gas furnaces. Consequently, the Petitioners *et al.* Joint Comment argued that a condensing furnaces standard would, in fact, force many property owners to switch to alternatives such as electric resistance heating as their only practical option, which could actually burden low-income renters with substantially higher utility bills. (Petitioners *et al.* Joint Comment, No. 80 at p. 4)

In response, DOE reiterates that, despite discussing potential ancillary economic effects, the Department based its ''features'' determination in the proposed interpretive rule upon non-economic grounds. Because DOE did not rely on economic factors in reaching its decision, commenters' allegations that the agency gave undue weight to economic considerations are incorrect. Similarly, arguments as to the economic justification of proposed standards for residential furnaces, commercial water heaters, or other similarly situated products are not relevant to DOE's ''features'' determination under EPCA. As discussed elsewhere in this document, DOE reexamined new and existing information (including the substantial evidence contained in existing rulemaking dockets) in light of the arguments raised in the Gas Industry Petition, and the agency determined that a revised interpretation would better comport with the requirements of the statute. DOE has come to see that in the substantial number of difficult installation situations, the practical differences between condensing and non-condensing appliance operation would be a distinction that many consumers may recognize and value, such that maintaining a non-condensing option would constitute an important consumer utility. DOE's decision to find non-condensing technology (and associated venting) to be a ''feature'' under EPCA preserves this consumer utility and consumer choice.

DOE acknowledges that the economic impacts of its energy conservation standards rulemakings are both complex and of great importance. That is why the Department conducts a comprehensive economic analysis as part of those rulemakings, including consumer and manufacturer subgroup analyses, as appropriate. However, as the commenters stress, these economic considerations are beyond the scope of the ''features'' determination at issue in this final interpretive rule.

In response to the CA IOUs' and Lennox's comments about Canadian and European experiences with condensing furnaces and water heaters, DOE does not find them directly opposite to the present case. First, such nations are situated significantly northward of large portion of the United States, so consequently, their climatic profile is different than that of the U.S., and that would be expected to impact their determinations of economic justification for standard-setting purposes. More importantly, however, it must be recognized that these foreign nations operate under an entirely different legal and regulatory structure, and

[27] U.S. Department of Energy Public Meeting Transcript on the Energy Conservation Standards for Residential Furnaces (April 13, 2015), p. 12, lines 3–10 (Available at: *https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0050*).

consequently, they are not subject to and have no duty to follow the statutory requirements of EPCA, including the ''features'' provision.

2. Fuel Switching

Commenters on DOE's proposed interpretive rule expressed conflicting views on the topic of fuel switching. The Petitioners *et al.* Joint Comment urged DOE to reconsider its analysis concerning the significance of fuel switching in the context of efficiency regulation. These commenters argued that fuel switching could occur because of the unavailability of important product characteristics, such as instances where it would be impractical to install condensing products or where such products could not be installed without the need for undesirable building modifications that consumers would be unwilling to accept. They added that driving gas products out of the market is not a legitimate regulatory objective under a statute designed to promote the efficiency of regulated products. Thus, the Petitioners *et al.* Joint Comment reasoned that in conducting its standards rulemakings, DOE must justify its standards on the basis of the economics of required efficiency improvements (*i.e.,* by accounting for those cases where poor economic outcomes drive consumers to alternative products), rather than by excluding such outcomes from the analysis and substituting more favorable economic outcomes based upon assumed product substitution. They asserted that using the logic of DOE's historic approach to economic analyses, standards could be determined to be economically justified on the grounds that they are so economically unjustified that consumers would no longer purchase the regulated products at all. These commenters argued that DOE's life-cycle cost analysis and payback analysis must reflect these real economic costs, rather than simply reducing the number of products sold.[28] (Petitioners *et al.* Joint Comment, No. 80 at pp. 13–15)

The CEC challenged DOE's statement that through its proposed interpretation it was seeking neither to determine winners and losers nor to limit consumer choice. The commenter pointed to DOE's September 2016 residential furnaces SNOPR, in which the Department determined that fewer than 8 percent of consumers would switch from gas furnaces to heat pumps or electric furnaces, and which did not find any consumers compelled to switch (although some might do so for a variety of reasons, including economic savings) (*citing* 81 FR 65720, 65813 (Sept. 23, 2016)). The CEC argued that by following its statutory mandate, DOE would be ensuring that consumers can make free and informed decisions about the cost of products they are purchasing. The CEC added that DOE did not offer any facts, data, or reasoning to suggest that a significant subset of consumers would resist switching to a more-efficient product because of fuel type or why such concerns would outweigh the energy consumption data or the risk of undermining the entire appliance efficiency program. The commenter concluded that these are economic concerns more properly addressed by the stringency of standards, rather than the creation of new product classes. (CEC, No. 89 at p. 5)

Regarding fuel switching, the Environmentalists Joint Comment stated that such concerns are unsupported. These commenters argued that EPCA poses no barriers to adoption of an energy conservation standard based upon fuel switching, recognizing that appliances using different fuel types compete against each other in the marketplace. The Environmentalists Joint Comment pointed out that in 1987, Congress amended EPCA (at 42 U.S.C. 6295(f)(1)(B)(iii)) to require that DOE prescribe energy conservation standards for small gas furnaces at a level ''which the Secretary determines is not likely to result in a significant shift from gas heating to electric resistance heating with respect to either residential construction on furnace replacement.''[29] In light of that provision, these commenters argued that Congress could have easily extended this consideration to subsequent rulemakings to amend the standards for residential furnaces and commercial water heaters, but it did not. The Environmentalists Joint Comment stated that if fuel switching concerns were to be addressed by the statute's ''features'' provisions, such outcome would render the statutory language regarding fuel switching limitations for small furnaces superfluous. (Environmentalists Joint Comment, No. 90 at pp. 4–5)

The Advocates Joint Comment largely dismissed any concerns about fuel switching and sought to offer alternative solutions that would not require the establishment of separate product classes under EPCA's ''features'' provision. These commenters argued that consumers with a preference for gas heat would still have that option, albeit with higher installation costs, and that DOE can account for any such subset of consumer behavior through its modeling of fuel switching. (Advocates Joint Comment, No. 95 at pp. 3–5)

In response, DOE acknowledges that fuel switching is a more nuanced matter when viewed beyond a purely economic lens. As an economic matter, a fuel-switching analysis shows how many consumers could change from one type of appliance to another as a result of amended energy conservation standards, occurrences that would have repercussions for down-steam analyses related to costs and benefits. As commenters point out, there is considerable evidence of the potential for fuel switching in the residential furnaces, commercial water heaters, and other relevant rulemaking dockets. As the CEC noted, DOE's September 2016 residential furnaces SNOPR found that up to 8 percent of consumers would switch from gas furnaces to heat pumps or electric furnaces under that proposal. However, DOE had not previously focused on the motivation behind such consumer fuel switching. In past rulemakings, DOE viewed fuel switching as just an economic decision, devoid of any consumer utility impacts. However, as more fully explained in section III.A.1.a of this document, after careful review of the Gas Industry Petition and public comments, DOE has come to see that a non-condensing gas appliance (and related venting) offers the ability for consumers with difficult installation situations to make like-for-like appliance replacements without the need for major modifications to their dwelling or commercial business. Such modifications could potentially result in the loss of patio or storage space, the installation of unsightly piping, or the loss of windows. These are interactions with the appliance which the consumer would notice, concerns beyond the appliance's primary function of providing warm air (for furnaces) or hot water (for water heaters). Under DOE's revised interpretation, these utilities are to be regarded as performance-related characteristics to be protected under EPCA's ''features'' provision, rather than simply an economic matter to be resolved through higher standards and unwelcome fuel switching, as the Advocates Joint Comment and CEC recommend. The Gas Industry

[28] The Petitioners *et al.* Joint Comment argued that while the adverse impact of a standard on product sales should be ignored for purposes of the payback period and LCC analyses, it should not be ignored for purposes of other analyses, such as the manufacturer impact analysis, utility impact analysis, and national energy savings analysis.

[29] The Environmentalists Joint Comment pointed to legislative history in H. Rpt. 100–11 at 35 and in S. Rpt. 100–6 at 6, 1987 U.S.C.C.A.N. at 56, which suggest that Congress's concerns were about switching to electric resistance heating, not heat pumps.

Petitioners have provided information related to such installations in the context of various appliance rulemakings, in addition to the current docket. Additional benefits of DOE's revised interpretation include expanded consumer choice, in terms of both product selection and fuel type.

In light of this final interpretive rule, DOE reasons that the Petitioners *et al.* Joint Comment's primary concerns vis-à-vis fuel switching have been addressed. However, these commenters' more technical arguments about the fuel switching analysis embedded within DOE's analytical methodology are more properly a matter to be addressed after the conclusion of the ongoing peer review of DOE's analytical processes being conducted by the National Academies of Sciences, Engineering, and Medicine (see more detailed discussion at section III.C of this document).

While DOE appreciates the Environmentalists Joint Comment's argument about the statutory directive to prevent a significant shift from gas heating to electric resistance heating when prescribing energy conservation standards for ''small'' gas furnaces under 42 U.S.C. 6295(f)(1)(B)(iii), the Department finds the commenters' legal theory to be a bit off point. First, DOE's goal is not to prevent fuel switching, but rather to prevent the loss of consumer utility. Having an appliance that fits in a limited/confined space is something very useful to the average consumer, and the statute expressly lists sizes as one of the protected aspects under 42 U.S.C. 6295(o)(4). Furthermore, DOE would argue in the alternative that the ''small'' furnaces provision to which the commenters point does not address the matter of fuel switching generally, but instead it articulates a particular concern to not encourage a shift to a certain type of electric appliance—*i.e.,* electric resistance heating. Notably, the statute does not mention heat pumps, another electric heating option. Thus, DOE concludes that the Environmentalists Joint Comment paints with too broad a brush in making its argument to prohibit consideration of fuel switching effects.

3. Other Economic Issues

Commenters also raised a few additional economic matters that did not fit squarely within any of the previous categories. The CA IOUs recommended that DOE should perform a cost-benefit analysis on the proposed new product class(es) that would arise from its proposed interpretation, as well as evaluating the potential costs to all consumers, manufacturers, and the environment resulting from such a change. The commenters argued that even if economic impacts were an appropriate rationale for a new product class, DOE's analysis of such impacts is incomplete. (CA IOUs, No. 85 at p. 5) The CA IOUs' analysis suggests that the potential impact of the new product classifications could be both significant and widespread, with the impacts related to residential furnaces alone potentially resulting in $1.8 billion/year in lost utility bill savings by 2050 and a 78 percent reduction in energy savings compared to the SNOPR published in 2016. Given the tremendous negative impacts for consumers, manufacturers, and the environment that are likely to result from DOE's proposed interpretation, the CA IOUs urged the Department not to move forward without weighing these impacts against the economic impacts used to justify the new product/equipment classes. (CA IOUs, No. 85 at p. 6)

A.O. Smith asserted that DOE's proposed interpretation would increase business uncertainty and impose unnecessary burdens upon manufacturers who would need to align their stock keeping units (SKUs) and divert resources that would otherwise be invested in more innovative technologies. A.O. Smith further alleged that DOE's proposed interpretation would favor low-cost and subsidized imported products, thereby creating an ''un-level'' playing field for domestic manufacturers. (A.O. Smith, No. 88 at p. 6)

In response, DOE has explained at length elsewhere in this document that a ''feature'' determination pursuant to EPCA does not turn on economic impacts, whatever the outcome of that decision. Although DOE explored some of these impacts in its proposed interpretive rule to examine the Gas Industry Petition in the broader context, the agency has not relied upon those economic impacts as the basis for either its proposal or this final interpretive rule determining non-condensing technology (and associated venting) to be a ''feature'' within the meaning of the statute. Consequently, the Department has concluded that it is not necessary to conduct the type of cost-benefit analysis suggested by the CA IOUs, because ultimately, it would not change the results of DOE's ''features'' determination.

As to A.O. Smith's unsubstantiated arguments about business uncertainty and burden associated with the proposed interpretive rule, DOE finds such arguments to be without merit. DOE has been clear in both its earlier proposal and in this final interpretive rule regarding its revised interpretation. Furthermore, if the potential for litigation (and related uncertainty) were to be a basis for DOE to withhold regulatory action (including relevant statutory interpretations), it could completely ossify the administrative law process, because cross-cutting stakeholder interests render most agency actions subject to potential legal challenge. DOE finds A.O. Smith's statements about burden and resource diversion to be without merit, given that the revised interpretation would essentially maintain the *status quo.* If A.O. Smith is operating effectively in the current market where both condensing and non-condensing appliances are available, it is difficult to see how its operational landscape would shift as a result of DOE's interpretation. Similarly, A.O. Smith's arguments about favoring low-cost/subsidized imported products and creating an un-level playing field for domestic manufacturers fail for the same reason. Because DOE's final interpretation does not alter the current standard levels or market, the Department is satisfied that the field remains appropriately level and fair for all market participants.

C. Analytical Issues

In seeking to justify the need for a determination that non-condensing technology (and associated venting) are a performance-related feature, the Petitioners *et al.* Joint Comment raised what it perceived to be flaws in the analytical methodology underlying DOE rulemakings. First, the Petitioners *et al.* Joint Comment urged DOE to reconsider its analysis concerning the significance of fuel switching in the context of efficiency regulation. These commenters argued that fuel switching could occur because of the unavailability of important product characteristics, such as instances where it would be impractical to install condensing products or where such products could not be installed without the need for undesirable building modifications that consumers would be unwilling to accept. They added that driving gas products out of the market is not a legitimate regulatory objective under a statute designed to promote the efficiency of regulated products. Thus, the Petitioners *et al.* Joint Comment reasoned that in conducting its standards rulemakings, DOE must justify its standards on the basis of the economics of required efficiency improvements (*i.e.,* by accounting for those cases where poor economic outcomes drive consumers to alternative products), rather than by excluding such

outcomes from the analysis and substituting more favorable economic outcomes based upon assumed product substitution. They asserted that using the logic of DOE's historic approach to economic analyses, standards could be determined to be economically justified on the ground that they are so economically unjustified that consumers would no longer purchase the regulated products at all. These commenters argued that DOE's life-cycle cost analysis and payback analysis must reflect these real economic costs, rather than simply reducing the number of products sold.[30] (Petitioners *et al.* Joint Comment, No. 80 at pp. 13–15)

Second, the Petitioners *et al.* Joint Comment urged DOE to acknowledge that there is a systemic error in its base-case efficiency assignment (due to the random nature of that assignment) which these commenters argue invalidates the entire economic analysis underlying the agency's pending proposals. Their argument was that, even if the overall number of efficiency investments is correct, DOE's analysis is based upon the wrong efficiency investments because it uses a random selection of investments rather than a selection reflecting outcomes that those purchasers would decline to make in the absence of regulatory compulsion. According to these commenters, this defect in DOE's economic analysis provides a separate and independent basis for DOE to withdraw its pending proposed rules for residential furnaces and commercial water heaters. (Petitioners *et al.* Joint Comment, No. 80 at pp. 15–16) Lennox made a similar argument about what it described as the ''random nature'' of DOE's consumer analysis, which it argues fundamentally (and incorrectly) assumes that consumers act irrationally. (Lennox, No. 114 at p. 4)

In further critique of DOE's analytical methodology, the Petitioners *et al.* Joint Comment argued that because DOE's analysis is based on the wrong installations, it does not provide a valid assessment of a rule's impacts, and it produces a systematic overstatement of regulatory benefits and understatement of costs. These commenters asserted that this problem with DOE's modeling approach fatally undermines a rulemaking's economic analysis, so they argued that there is no reasonable basis to conclude that standards based on that analysis are economically justified. For this reason alone, the Petitioners *et al.* Joint Comment concluded that withdrawal of the Department's pending proposals is warranted. (Petitioners *et al.* Joint Comment, No. 80 at p. 17)

In response, DOE notes that National Academies of Sciences, Engineering, and Medicine (collectively, ''the NAS'') are currently conducting a peer review of the analytical methods employed by DOE in setting energy conservation standards regulations for the energy performance of consumer products and commercial equipment. *See https://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.* At the time of the drafting of this final interpretive rule, the NAS committee responsible for this task has held public meetings on November 19–20, 2019, on March 2–3, 2020, and on May 5, 2020, to discuss various aspects related to DOE's analytical methodology when developing standards for those consumer products and industrial equipment that DOE regulates. DOE understands that at least some of the authors of the Petitioners *et al.* Joint Comment have participated in the NAS proceeding, raising issues regarding DOE's analytical methodologies similar to those submitted in the comments on DOE's proposed interpretation. At the conclusion of the study, the NAS will issue a consensus report with findings and recommendations on how DOE can improve its regulatory analyses to align with best practices for cost-benefit analysis. Once completed, DOE will review the NAS report and modify or adjust its own analytical methods consistent with those recommendations and DOE's statutory obligations. Until DOE has had the opportunity to assess the conclusions of these independent experts, the Department has concluded that it would be premature to make changes to its current analytical methodology. Although DOE has ultimately decided to withdraw its pending rulemaking proposal for residential non-weatherized gas furnaces, residential mobile home gas furnaces, and commercial water heating equipment (for the reasons explained in section III.D.3 of this document), the Department makes clear that it is not doing so on the basis of the analytical arguments raised by the Gas Industry Petitioners and discussed in this section. Thus, DOE's decision to grant the withdrawal request should not be viewed as in any way prejudging or preempting the outcomes of the NAS peer review process.

D. Other Issues

Finally, commenters on DOE's proposed interpretive rule raised a handful of other issues which did not fall neatly within the other sections of this comment summary, so they are addressed here in the balance of this comment discussion.

1. AFUE2

Regarding residential furnaces, AHRI stated that one reason it supports DOE's proposed interpretation is that it would help facilitate adoption of a unified energy efficiency metric for those products. (AHRI, No. 91 at pp. 1–2; similar comment by Nortek, No. 71 at pp. 1–2; Nortek, No. 107 at p. 3) More specifically, AHRI explained that in October 2018, it submitted a petition for rulemaking to DOE seeking to establish a combined energy efficiency metric (referred to as ''AFUE2'') for residential furnaces (currently rated using annual fuel utilization efficiency (AFUE)), furnace fans (currently rated using fan efficiency ratio (FER)), and standby mode/off mode energy consumption (currently rated in watts). AHRI suggested that furnace product classes split into condensing and non-condensing product classes (similar to what is currently done for furnace fans) would facilitate this transition by ensuring that the new, combined AFUE2 metric does not violate EPCA's ''anti-backsliding'' provision at 42 U.S.C. 6295(o)(1).[31] (AHRI, No. 91 at pp. 2–3) In response to the September 2020 SNOPIR, AHRI stated that if DOE decides not to adopt condensing/non-condensing product classes or its recommended AFUE2 approach for residential furnaces, then the trade association expressed support for the Department to pursue more tailored approaches such as capacity-based standards for smaller residential furnaces, which could also preserve non-condensing products for many difficult replacement installations. (AHRI, No. 109 at p. 3)

A number of other commenters also expressed support for AHRI's AFUE2 petition for rulemaking. (Nortek, No. 71 at pp. 2–3; Mortex, No. 72 at p. 1; Carrier, No. 92 at p. 2; Nortek, No. 107 at p. 3) Nortek suggested that there are synergies and burden reduction that would be associated with granting AHRI's AFUE2 petition. Nortek reasoned that efforts to come up with a

[30] The Petitioners *et al.* Joint Comment argued that while the adverse impact of a standard on product sales should be ignored for purposes of the payback period and LCC analyses, it should not be ignored for purposes of other analyses, such as the manufacturer impact analysis, utility impact analysis, and national energy savings analysis.

[31] 42 U.S.C. 6295(o)(1) provides: ''The Secretary [of Energy] may not prescribe any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.''

unified test procedure would be greatly simplified if the furnace and furnace fan product classes were aligned to differentiate condensing and non-condensing products. (Nortek, No. 71 at pp. 2–3; Nortek, No. 107 at p. 3) Mortex added that an AFUE2 metric would make it easier for consumers to use one number to compare different furnace models (similar point made by Nortek), and to this end, Mortex recommended using the same product classes set forth for furnace fans when developing the unified AFUE2 metric and associated energy conservation standards. (Mortex, No. 72 at p. 1; Nortek, No. 107 at p. 3) Carrier also suggested that a consolidated AFUE2 metric would reduce both the number of required rulemakings and unnecessary burdens/costs for manufacturers. (Carrier, No. 92 at p. 2) Several commenters on the September 2020 SNOPIR reiterated these arguments in support of transition to an AFUE2 metric. (Nortek, No. 107 at p. 3; AHRI, No. 109 at p. 3; Carrier, No. 110 at p. 2)

In response, DOE notes that the Department is currently considering the merits of AHRI's AFUE2 petition for rulemaking, including the reasoning recited in these comments, in a separate proceeding. DOE acknowledges that an interpretation finding non-condensing technology (and associated venting) to be a ''feature'' could potentially facilitate implementation of an AFUE2 metric, if the agency decides to grant the AHRI petition. However, such considerations pertaining to that distinct regulatory matter did not factor into the Department's decision-making process underpinning this final interpretive rule. Instead, this final interpretive rule is grounded in the law and facts particular to the matter raised in the Gas Industry Petition and discussed in this document.

2. Environmental and Climate Policy Issues

The AGs Joint Comment faulted DOE's proposed interpretive rule for its potential to create missed opportunities for consumers, businesses, and governments to conserve energy and to reduce economic and environmental costs of energy production and use (similar comment made by Electrify Now). These commenters argued that DOE's actions on the Gas Industry Petition have delayed promulgation of energy conservation standards, which in turn has hampered State and municipal energy efficiency, clean energy, and climate goals. Finally, the AGs Joint Comment cited the International Energy Agency (IEA) Energy Efficiency 2018 market report which highlights the potential for energy efficiency savings to help achieve global energy sustainability; these commenters stated that according to the IEA report, increased energy efficiency could account for half of the reductions in carbon dioxide emissions needed to attain a sustainable development scenario in 2040, and U.S. leadership would help drive deployment of more-efficient appliances and equipment worldwide. (AGs Joint Comment, No. 82 at p. 13; Electrify Now, No. 106 at p. 2) The CEC argued that the proposed interpretive rule would weaken human health and environmental health through increased avoidable air pollution. (CEC, No. 89 at pp. 1–2) Along these same lines, an anonymous commenter (and a number of other individuals) expressed opposition to DOE's proposed interpretation and urged its withdrawal, alleging that it would weaken energy conservation standards and harm public health by increasing the amount of greenhouse gas emissions. (Anonymous, No. 68 at p. 1; Sorkin, No. 73 at p. 1; Reed, No. 74; Woods, No. 76 at p. 1; Anonymous, No. 98 at p. 1; A.O. Smith, No. 113 at p. 5)

In response, DOE agrees that there may be costs and benefits resulting from energy conservation standards beyond those to be considered by Department when setting energy conservation standards under the Energy Policy and Conservation Act. Those impacts are not relevant to the current determination. Rather, the Department is constrained to act within its statutory authority—both in terms of standard setting and when making ''features'' determinations—and the provisions of EPCA make clear that while important, energy and cost savings are not the only relevant statutory considerations. As a prime example, EPCA's ''features'' provisions demonstrate that Congress intended certain aspects of covered products/equipment with consumer utility to be preserved, even if that means forgoing the energy savings or other benefits that might result from their elimination. (42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); and as applicable in certain cases through 42 U.S.C. 6316(a)). Under its revised interpretation, DOE has determined non-condensing technology (and associated venting) to be a ''feature'' within the meaning of the statute, as would justify a separate product/equipment class and energy conservation standard in appropriate cases. Such decision, where justified under the statute, does not turn on other externalities that may exist in the context of energy conservation standards.

3. Other Requested Relief

Beyond finalizing the interpretive rule along the lines proposed, the Petitioners *et al.* Joint Comment urged DOE to take further action, including issuing written findings consistent with its revised interpretation in the context of its pending residential furnaces and commercial water heaters rulemakings pursuant to EPCA's ''features'' provisions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa), respectively. These commenters also urged DOE to withdraw the pending proposed rules in those same rulemakings based upon those written findings. According to the Petitioners *et al.* Joint Comment, such actions are justified by the evidence, warranted by DOE's proposed interpretive rule, and sufficient to establish that adoption of the pending proposals would be contrary to law.[32] (Petitioners *et al.* Joint Comment, No. 80 at p. 4)

The Petitioners *et al.* Joint Comment stated that if DOE adopts its interpretive rule as proposed, then the proposals in the residential furnaces and commercial water heaters rulemakings are legally defective and cannot be adopted as proposed, so they reasoned that withdrawal is appropriate and that it would show the public DOE is making constructive progress on these rulemakings. These commenters suggested that the withdrawal document could also serve as a vehicle to give the public notice that new proposals will be required and to request comment informing the development of those proposals. The Petitioners *et al.* Joint Comment also argued that withdrawal of the pending proposals is warranted to correct the public record, because both were subject to substantial adverse comment to which DOE has never responded. These commenters also argued that transparency dictates that, if the Department's interpretation has changed, DOE should not leave these documents as the latest statement of its views until such time as new proposals can be crafted. The Petitioners *et al.* Joint Comment reasoned that failure to act quickly would ''undermine the

[32] The Gas Industry Petitioners again raised the issue of withdrawal of the rulemaking proposals for the subject residential furnaces and commercial water heating equipment in the September 29, 2020 letter urging prompt action on the petition. (Docket No. EERE–2018–BT–STD–0018–0101) In reiterating the arguments raised in its earlier public comments, the Gas Industry Petitioners noted that because these appliances are now the subject of litigation, it would be beneficial to clarify the administrative record for these rulemakings so as to be consistent with DOE's final interpretation.

significance of DOE's response to the Petition,'' and it urged DOE to move forward in the manner it suggests, even if that were to accelerate the timing of potential litigation. (Petitioners *et al.* Joint Comment, No. 80 at pp. 5–6)

The Petitioners *et al.* Joint Comment also urged DOE to formally renounce its prior asserted legal basis for its historic position that type of venting is not a ''feature,'' a position which rendered a ban of atmospherically vented gas products permissible. According to these commenters, DOE's previous interpretation that there is no difference in consumer utility between atmospherically vented products and condensing products was factually unsupported, despite the fact that DOE had acknowledged such differences. The Petitioners *et al.* Joint Comment asserted that the applicability of the statute's ''features'' provision was clear and that DOE ignored this fact and ''simply read unqualified statutory language to include qualifications of DOE's own creation.'' The comment stated that DOE's previous analysis was too narrow in focus and that questions as to whether ''a consumer's interaction with and perception of a furnace or water heater may go beyond its primary function'' are legally irrelevant. (Petitioners *et al.* Joint Comment, No. 80 at pp. 8–9)

After careful consideration, DOE has decided to address these supplemental actions requested by the Petitioners *et al.* Joint Comment as follows. The Department is quite certain that stakeholders and the interested public will become aware very rapidly of this final interpretive rule once it is published in the **Federal Register**, thereby making arguments about the need for greater transparency specious. After reading this final interpretive rule, its meaning should be clear, so ''renunciation'' of DOE's past position is not necessary to, in effect, deliver the final interpretation's message a second time. It should also be readily apparent that the pending rulemakings for residential furnaces, commercial water heaters, and any other similarly-situated products/equipment will require further rulemaking action to ensure that they are consistent with this revised interpretation. DOE has plainly stated as much in both its proposed interpretive rule, as well as this document. For these reasons, DOE had previously tentatively determined that withdrawal of its existing rulemaking proposals for residential non-weatherized gas furnaces, residential mobile home gas furnaces, and commercial water heating equipment would be unnecessary. However, given DOE's own statements as to the need for further rulemaking, DOE has reconsidered this matter raised by commenters and has decided to withdraw these rulemaking proposals, as requested by the Petitioners *et al.* Joint Comment. As they currently stand, the existing proposals are inconsistent with this final interpretation and, accordingly, cannot be adopted without modification, so DOE has determined that their withdrawal may have some additional benefit in terms of promoting clarity and eliminating any potential for confusion. As noted previously in the preamble of this final interpretive rule, elsewhere in this issue of the **Federal Register**, DOE withdraws its March 12, 2015 proposed rule and September 23, 2016 supplemental proposed rule for energy conservation standards for non-weatherized gas furnace and mobile home gas furnaces, as well as its May 31, 2016 proposed rule for energy conservation standards for commercial water heating equipment.

4. Final Agency Action

A.O. Smith asserted that DOE is seeking to shield its features provision determination from judicial review by claiming that it does not constitute ''agency action.'' Instead, A.O. Smith commented that the determination, once finalized, would be subject to review under the Administrative Procedure Act. The commenter argued that rather than being merely interpretive, the interpretation would have a definitive and direct effect by requiring/binding the Department to maintain non-condensing products/equipment in the marketplace, despite the fact that further implementing rulemaking may be necessary. According to A.O. Smith, a final interpretation would constitute final agency action because it would: (1) Consummate DOE's features determination with respect to condensing technology and (2) affect legal rights and obligations. The commenter argued that such results are final and not subject to further DOE discretion, and consequently, the company reasoned that the final interpretation would have a direct and certain substantive effect by ensuring that manufacturers would continue to be able to produce and distribute in commerce non-condensing products/equipment, independent of the outcomes of the related energy conservation standards rulemakings. (A.O. Smith, No. 88 at pp. 13–15)

DOE disputes A.O. Smith's allegation that the Department is attempting to shield its final interpretive rule from judicial review. Moreover, while DOE acknowledges that the courts ultimately determine what constitutes a final agency action, A.O. Smith's attempt to characterize DOE's final interpretive rule as ''final agency action'' under the APA is based upon a flawed reading of the statute and relevant legal precedent. This final interpretive rule is a type of rule or regulation within the meaning of 5 U.S.C. 551(4).[33] It is well established under the APA that agencies have the authority to issue interpretive rules, and that these rules are a valuable tool for an agency to use to advise the public prospectively and in a clear and transparent manner of the agency's construction of a statute it administers. *Shalala* v. *Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995); compare *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302–303 (1979) (whereas ''legislative rules'' have the ''force and effect of the law''). An interpretive rule does not have substantive force and effect on its own. It is not until the agency takes an action in which the interpretation is applied and becomes enforceable that the interpretation can have an effect and, even then, only through that subsequent action. *Cf. Bennett* v. *Spear,* 520 U.S. 154, 177–78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *Am. Tort Reform Ass'n* v. *Occupational Safety & Health Admin.,* 738 F.3d 387, 395 (D.C. Cir. 2013) (interpretive rules or statements of policy generally do not qualify as final agency action because they are not finally determinative of the issues or rights to which they are addressed); *see also Am. Mining Cong.* v. *Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) (holding that whether a rule is interpretive turns on whether it has independent ''legal effect''); *Sec. Indus. & Fin. Mkts. Ass'n* v. *United States CFTC,* 67 F. Supp. 3d 373, 416, 425 (D.D.C. 2014). This rule does not determine rights or obligations, or produce ''legal consequences,'' *see Bennett* v. *Spear,* 520 U.S. at 177–78, or carry the force and effect of law, *see Ass'n of Flight Attendants-CWA, AFL–CIO* v. *Huerta,* 785 F.3d 710, 713 (D.C. Cir. 2015). This particular interpretive rule will have no direct impact on regulated parties.

Moreover, through this final interpretive rule, DOE is not making any changes to its existing regulations in the

[33] Under 5 U.S.C. 551(4), ''rule'' means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Code of Federal Regulations or policies regarding individual appliance standards rulemakings, and it cannot and will not take any enforcement action pursuant to its revised interpretation until after the effective date of a legislative final rule, published in the **Federal Register**, amending the applicable product/equipment classes and energy conservation standards, as necessary.

In this final interpretation, DOE sets forth its understanding of EPCA's ''features'' provisions as it relates to condensing and non-condensing technology (and associated venting), but this understanding must then be applied to the facts and data underlying any given rulemaking. Given the potential for technological advances, the outcome of a future rulemaking cannot be adjudged with certainty until such time as a standards rulemaking is commenced. Thus, until such interpretation is implemented through a final rule for energy conservation standards, no party can validly claim any demonstrable and definite harm. At the present time, current product/equipment classes and standard levels remain unchanged by the final interpretive rule. The market *status quo* is left unaltered by the final interpretive rule, and there is no change in the products/equipment that can be sold in the marketplace as a result.

IV. DOE's Final Interpretation

In consideration of public comments and other information received on the proposed interpretive rule, DOE is revising its interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technology (and associated venting) used in furnaces, water heating equipment, and similarly-situated appliances (where permitted by EPCA). Based on those comments, DOE interprets the statute to preclude the adoption of energy conservation standards that would limit the market to natural gas, propane gas, and/or oil-fired furnaces, water heaters, or similarly-situated covered products/equipment (where permitted by EPCA) that use condensing combustion technology, as that would result in the unavailability of a performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). Stated differently, DOE has determined that non-condensing technology (and associated venting) constitutes a performance-related ''feature'' for such appliances covered under EPCA.

The statute accords the Secretary of Energy considerable discretion in terms of determining whether a performance characteristic of a covered product/equipment amounts to a performance-related feature which cannot be eliminated through adoption of an energy conservation standard. DOE has taken the opportunity presented by the Gas Industry Petition to reconsider its historical interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technologies used by certain gas appliances. A number of factors have convinced DOE to revise its interpretation, as explained in the reasons that follow.

First, DOE acknowledges that it has, in the past, taken space constraints and similar limitations into account when setting product classes (*e.g.,* PTACs, ventless clothes dryers). For example, DOE was sensitive to the need for extensive building modifications when it decided to set separate equipment classes for standard size PTACs and non-standard size PTACs. 73 FR 58772 (Oct. 7, 2008). DOE expects that a small but substantial number of installations would require similar building modifications here, if DOE were to hold to its historical interpretation. For example, these more complicated installations are documented as part of DOE's analysis of the venting costs for residential furnaces, which considered potential venting modifications that could be required when replacing an existing category I furnace with a condensing (category IV) furnace (*see* appendix 8D of the 2016 SNOPR TSD for further details). In certain situations, commenters have made the case that accommodating condensing products may not even be possible.

Second, DOE has focused on the consumer's interaction with the product/equipment in deciding whether a performance feature is at issue. In the context of residential furnaces and commercial water heaters, DOE had previously tied consumer utility to the primary function of the appliance (*e.g.,* providing heat to a home or potable hot water) in establishing the nexus to the consumer. In the past, DOE opined that consumers were interested only in obtaining heat or hot water from the appliance, such that they would not care about the mechanism for generating that output. However, commenters have made clear that in at least some cases, a condensing appliance may necessitate significant and unwelcome physical modifications to a home or business (*e.g.,* by adding new venting into the living/commercial space or decreasing closet or other storage/retail space), thereby impacting consumer utility even under DOE's prior approach. Thus, DOE is not changing the test for consumer utility (*i.e.,* a consumer's interaction with the subject product/equipment), but it is refining how that test is to be applied in the context of condensing and non-condensing appliances (and associated venting), after further consideration of the facts regarding consumer preferences that relate to application of the test.

Third, DOE notes that it has been its policy to remain neutral regarding competing energy sources in the marketplace. As certain commenters have pointed out and as DOE's own analyses have shown, some enhanced level of fuel switching would be likely to accompany standard setting using DOE's prior interpretation. Given that DOE's revised interpretation essentially would support maintaining the market *status quo,* the interpretation would support and be consistent with maintaining a broader range of consumer choice across fuel types.

Creating separate product classes for condensing and non-condensing furnaces, water heaters, and similarly-situated products/equipment (where permitted by EPCA) would prevent many of these potential problems. Although an approach consistent with DOE's interpretation may have some impact on overall energy saving potential as a result of establishing separate product/equipment classes, that is not the touchstone of EPCA's ''features'' provision. Through that provision, Congress expressed its will that certain product utilities will take precedence over additional energy savings measures. DOE has applied this provision on several occasions without major controversy. (For example, DOE did not eliminate the oven window, which consumers found useful, despite the potential for further energy savings that elimination of the window would have created.) That said, DOE believes that any potentially negative programmatic impacts of future actions consistent with its revised interpretation are likely to be limited. This interpretation is likely to be relevant to only a subset of appliances, and DOE notes that market trends have favored the growing reach of condensing furnaces, even as non-condensing alternatives have remained available. DOE has every reason to believe that such trends will continue.

DOE would clarify the limitations of its revised interpretation, based upon the existing statutory provisions. As discussed previously, DOE can adopt this interpretation for all relevant consumer products, all non-ASHRAE

commercial and industrial equipment, and ASHRAE equipment in those instances where DOE has clear and convincing evidence to adopt levels higher than the levels in ASHRAE Standard 90.1. However, additional rulemaking action by the Department will be required consistent with the interpretation contained in this final interpretive rule. More specifically, DOE is reserving appliance-specific implementation issues (including class setting, associated venting, *etc.*) for review and analysis in the context of individual product rulemakings. DOE has concluded that such an approach would best serve all parties, including manufacturers and consumers. Individual product rulemakings will have the requisite mix of interested stakeholders, technical experts, a comprehensive record with product-specific data (including a review of relevant industry consensus standards), and the full suite of analyses for class and standard setting. In that venue, DOE and interested stakeholders will be better able to address any relevant technical matters or product-specific nuances. Consequently, DOE anticipates continued engagement and productive involvement by members of the public and the regulated community in subsequent activities that may follow this revised interpretation.

V. Conclusion

In summary, DOE has granted the Gas Industry Petition to the extent that DOE interprets the statute to preclude the adoption of energy conservation standards that would limit the market of natural gas, propane gas and/or oil-fired furnaces, water heaters, or similarly-situated covered products/equipment (where permitted by EPCA) to appliances that use condensing combustion technology, as that would result in the unavailability of a performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). Stated differently, DOE has determined that non-condensing technology (and associated venting) constitutes a performance-related ''feature'' for such appliances covered under EPCA. Such interpretation would extend to all relevant/applicable cases involving consumer products, non-ASHRAE commercial equipment, and ASHRAE equipment where DOE adopts a level more stringent than the ASHRAE level. Through this final interpretive rule, DOE states its understanding of the proper interpretation of the statutory text in light of the language and purposes of EPCA, so as to be consistent with Congress's direction. Upon further consideration and after careful review of the information presented with and in response to the Gas Industry Petition, DOE has concluded that this revised interpretation offers the best reading of EPCA's ''features'' provision.

DOE has denied the Gas Industry Petition as it pertains to those rulemakings where ASHRAE sets standard levels that trigger DOE to consider and adopt those level (unless DOE finds clear and convincing evidence to adopt more-stringent levels), due to lack of authority. (See section II.D. of this document.)

DOE has granted the Gas Industry Petition's request for DOE to withdraw the existing proposed rules for residential furnaces and commercial water heaters. The existing proposals are inconsistent with this final interpretation and, accordingly, should not be adopted. Consequently, DOE has determined that their withdrawal may have some additional benefit in terms of promoting clarity and eliminating any potential for confusion. DOE anticipates developing new notices of proposed rulemaking for the subject residential furnaces and commercial water heaters that would be consistent with this revised legal interpretation. As noted previously in the preamble of this final interpretive rule, elsewhere in this issue of the **Federal Register**, DOE withdraws its March 12, 2015 proposed rule and September 23, 2016 supplemental proposed rule for energy conservation standards for non-weatherized gas furnace and mobile home gas furnaces, as well as its May 31, 2016 proposed rule for energy conservation standards for commercial water heating equipment.

DOE wishes to make clear that an interpretive rule is a type of rule or regulation within the meaning of those terms in the Administrative Procedure Act, 5 U.S.C. 551(4). It is well established under the APA that agencies have the authority to issue interpretive rules, and that these rules are a valuable tool for an agency to use to advise the public prospectively and in a clear and transparent manner of the agency's construction of a statute it administers. As explained above, DOE's legal interpretations do not themselves constitute final agency action, and DOE does not believe that this rule reflects final agency action.

Implementation of this interpretation in the context of energy conservation standards for particular covered products or equipment, and any changes to existing policies that may be appropriate in light of this interpretation, will be the subject of subsequent actions. As appropriate, the public will be notified and have an opportunity to comment on any such proposals implementing the interpretation. Furthermore, the many substantive comments received, including comments that led to revisions of DOE's interpretation of the ''features'' provision,'' as reflected in this final interpretive rule, indicate that the public had a meaningful opportunity to comment on DOE's general interpretation. As DOE has indicated, there will be additional processes after this interpretation has been issued but before any rulemaking decisions are implemented that would have impacts on regulated parties or any other stakeholders.

Review Under Executive Order 12866. This final interpretive rule was determined by the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA) to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this final interpretive rule was subject to review under the Executive Order by OIRA.

VI. Approval of the Office of the Secretary

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

Signing Authority

This document of the Department of Energy was signed on December 23, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC on December 28, 2020.

Treena V. Garrett,

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

[FR Doc. 2020–28956 Filed 1–14–21; 8:45 am]

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Part XI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2020–0050; FF09E21000 FXES11110900000 212]

RIN 1018–BF01

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), revise the designation of critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (Act) by excluding approximately 3,472,064 acres (1,405,094 hectares) in Whatcom, Okanogan, Skagit, Chelan, Snohomish, King, Kittitas, Pierce, Yakima, Lewis, Cowlitz, Skamania, Clark, and Klickitat Counties in Washington; Tillamook, Washington, Multnomah, Hood River, Wasco, Yamhill, Clackamas, Marion, Polk, Lincoln, Linn, Jefferson, Benton, Lane, Deschutes, Douglas, Coos, Klamath, Curry, Jackson, and Josephine Counties in Oregon; and Del Norte, Siskiyou, Humboldt, Trinity, Shasta, Tehama, Mendocino, Glenn, Lake, and Colusa Counties in California, under section 4(b)(2) of the Act. These exclusions are based on a reconsideration of the relevant impacts under section 4(b)(2) of the Act as well as new information since our 2012 revised critical habitat designation for the northern spotted owl. This final rule focuses only on new exclusions under section 4(b)(2) of the Act; we are not making any other revisions to the northern spotted owl critical habitat designation.

DATES: This rule is effective March 16, 2021.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* under Docket No. FWS–R1–ES–2020–0050 and at *http://www.fws.gov/oregonfwo.* Comments and materials we received, as well as some supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov* under Docket No. FWS–R1–ES–2020–0050.

The coordinates from which the Service generated the maps are included in the administrative record for this critical habitat designation and are available at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2020–0050 and at *http://www.fws.gov/oregonfwo.* The GIS data reflecting the revised critical habitat units can be downloaded at *https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B08B* under the heading Critical Habitat Spatial Extents. Any additional tools or supporting information that we developed for this critical habitat designation will also be available at the Service website and in the preamble at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, telephone 202/208–4646. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. In settlement of litigation challenging the critical habitat rule, the Service agreed to submit a proposed revised rule to the **Federal Register** that identifies proposed exclusions under section 4(b)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.;* hereafter, Act or ESA) by July 15, 2020, and to submit to the **Federal Register** a final revised critical habitat rule on or before January 6, 2021, or withdraw the proposed rule by that date if we determined not to exclude any areas from the designation under ESA section 4(b)(2). We delivered a proposed rule to the **Federal Register** on July 15, 2020, which was published on August 11, 2020 (85 FR 48487).

What this rule does. We revise the designation of critical habitat for the northern spotted owl by excluding additional areas.

Basis for this rule. Under section 4(b)(2) of the Act, the Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. This revision to critical habitat excludes 3,472,064 acres (1,405,094 hectares) in Whatcom, Okanogan, Skagit, Chelan, Snohomish, King, Kittitas, Pierce, Yakima, Lewis, Cowlitz, Skamania, Clark, and Klickitat Counties in Washington; Tillamook, Washington, Multnomah, Hood River, Wasco, Yamhill, Clackamas, Marion, Polk, Lincoln, Linn, Jefferson, Benton, Lane, Deschutes, Douglas, Coos, Klamath, Curry, Jackson, and Josephine Counties in Oregon; and Del Norte, Siskiyou, Humboldt, Trinity, Shasta, Tehama, Mendocino, Glenn, Lake, and Colusa Counties in California, under section 4(b)(2) of the Act.

This rule revises the 2012 critical habitat designation based upon the Secretary's determination that the benefits of exclusion of particular areas of critical habitat outweigh the benefits of designation of particular areas of critical habitat based on economic, national security and other relevant impacts. Based upon the best scientific and commercial data available, the Secretary has not concluded that these exclusions will result in extinction of the species.

Previous Federal Actions

On December 4, 2012, we published in the **Federal Register** (77 FR 71876) a final rule designating revised critical habitat for the northern spotted owl and announced the availability of the associated economic analysis and environmental assessment. For additional information on previous Federal actions concerning the northern spotted owl, refer to that December 4, 2012, final rule.

In 2013, the December 4, 2012, revised critical habitat designation was challenged in court in *Carpenters Industrial Council et al.* v. *Bernhardt et al.,* No. 13–361–RJL (D.D.C.) (now retitled *Pacific Northwest Regional Council of Carpenters et al.* v. *Bernhardt et al.* with the substitution of named parties). In 2015, the district court ruled that the plaintiffs lacked standing. The D.C. Circuit Court of Appeals reversed and remanded, and the case remained pending before the district court. In December of 2019, the plaintiffs filed a motion with the district court seeking permission to file a supplemental brief regarding the United States Supreme Court's decision in *Weyerhaeuser Co.* v. *U.S. Fish and Wildlife Service,* 139 S. Ct. 361 (2018), concerning the designation of critical habitat for the dusky gopher frog. The plaintiffs asserted that supplemental briefing on the *Weyerhaeuser* decision would benefit the district court's consideration of two of their arguments regarding the 2012 northern spotted owl critical habitat designation: That the Service unlawfully designated areas that are not northern spotted owl habitat, and that the Service failed to weigh the designation's economic impacts and consider other relevant factors when excluding lands under section 4(b)(2).

On April 13, 2020, we entered into a stipulated settlement agreement

resolving the litigation. The settlement agreement was approved and ordered by the court on April 26, 2020. Under the terms of the settlement agreement, the Service agreed to submit a proposed revised critical habitat rule to the **Federal Register** that identifies proposed exclusions under section 4(b)(2) of the Act by July 15, 2020, and to submit to the **Federal Register** a final revised critical habitat rule on or before December 23, 2020, subsequently extended by agreement to January 6, 2021, or withdraw the proposed rule by that date if we determined not to exclude any areas from the designation under ESA section 4(b)(2). We delivered a proposed rule to the **Federal Register** on July 15, 2020, which was published on August 11, 2020 (85 FR 48487), and by this final rule we exclude the particular areas described below from the designation.

Summary of Comments and Recommendations

In the August 11, 2020, proposed revised critical habitat rule (85 FR 48487), we requested that all interested parties submit written comments on the proposed revision by October 13, 2020. We requested comments on the exclusions discussed in the proposed rule and invited comments on any additional proposed exclusions the public requested we consider. We also contacted appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposed rule. A newspaper notice inviting general public comment was published in The Oregonian on August 16, 2020, and in the Medford Mail Tribune on August 17, 2020. We did not receive any requests for a public hearing.

During the comment period, we received 572 public comment letters addressing the proposed revised critical habitat designation. Many comments were non-substantive in nature, expressing either general support for or opposition to provisions of the proposed revised rule with no supporting information or analysis, or expressing opinions regarding topics not covered within the proposed revised regulation. We also received many detailed substantive comments with specific rationale for support of or opposition to specific portions of the proposed revised rule as well as specific comments requesting additional exclusions. Below, we summarize and respond to the substantive comments on the proposed revised regulation. Comments received were grouped into general categories specifically relating to the proposed revised critical habitat designation (85 FR 48487, August 11, 2020), and are addressed in the following summary.

Comments From Federal Agencies

Comment (1): The U.S. Department of Agriculture Forest Service (USFS) Region 6 expressed neither support for nor opposition against the proposed critical habitat revision. It noted however that, as critical habitat in southern Oregon and northern California becomes more fire prone, as evidenced by the 2020 fire season, the USFS continues to be concerned for the persistence of the northern spotted owl in the Pacific Northwest. The USFS encouraged connectivity between existing critical habitat units. In particular, the USFS commented that the Service should consider the probability of wildfire events, the effect of climate change, and projected fire behavior as tools for determining where critical habitat designations should be revised throughout the range of the northern spotted owl. Additionally, we received a comment letter from the Under Secretary, Natural Resources and Environment, Department of Agriculture supporting Interior's efforts to ''right size'' the northern spotted owl critical habitat designation because of the difficulties encountered by the Forest Service in achieving its statutory mission for managing the National forests. The letter discussed the devastation to the spotted owl habitat and to other property caused by wildfire in general, using the 2020 wildfire season as an example. The letter requested that the Forest Service and the FWS work together in protecting the northern spotted owl and lowering the risks of catastrophic wildfire.

Our response: We thank the Forest Service for its response and recognize that the exclusion of particular areas from critical habitat may lessen one of the regulatory burdens for the Forest Service in carrying out its statutory mission. We also agree that good management of the Forest Service lands may provide additional environmental benefits including possibly reducing the risk of catastrophic wildfire, which may benefit for the northern spotted owl by protecting its habitat from destruction. Because ESA section 7 consultation will be completed for discretionary Federal actions and decisions where northern spotted owls are present, the additional benefit of ESA section 7 consultation for adverse modification of critical habitat is minimal compared with the environmental benefits of additional forest management. For example, we recognize that having more lands in the potential timber harvest base may permit the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) to allow longer cycles between timber harvests. Longer cycles between timber harvests can have many environmental benefits, including ensuring a mix of tree ages, which can be used by the northern spotted owl for connectivity between nesting areas, and lessening the risk of catastrophic wildfire, which harms the northern spotted owl and puts rural communities, private property and lives at risk.

Comments From States

Section 4(b)(5)(A)(ii) of the Act requires the Service to give actual notice of any designation of lands that are considered to be critical habitat to the appropriate agency of each State in which the species is believed to occur, and to invite each such agency to comment on the proposed regulation. Section 4(i) of the Act states: ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' We notified the States of Washington, Oregon, and California of the proposed critical habitat designation. We did not receive comments from any State or State agency.

Comments From Counties

We received comments from Lewis, Klickitat, and Skamania Counties in Washington; from Douglas and Harney Counties in Oregon; and from Siskiyou County in California. All comments from counties pertained to either the economic or environmental analysis and requested additional exclusions based on economic or environmental factors; see Economic Analysis Comments and Exclusions Comments below for County comments and our responses.

Comments From Tribes

We received comments from the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians; the Cow Creek Band of Umpqua Tribe of Indians; and the Coquille Indian Tribe.

Comment (2): The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the Cow Creek Band of Umpqua Tribe of Indians commented in support of the proposed exclusion of lands recently transferred to them in trust. The Cow Creek Band of Umpqua Tribe of Indians expressed concern, however, that the proposed rule did not consider Tribal management plans and objectives for Indian forest land as a basis for the exclusions. The Coquille Tribe similarly

commented in general that the rule should include a statement that recognizes the dominant purpose of the Coquille Forest to generate sustainable revenues sufficient to support the Coquille Tribal government's ability to provide services to Coquille Tribal members, and ensure that the resulting critical habitat designation avoids burdening the Coquille Forest's dominant purpose.

Our response: No Indian lands were designated in the December 4, 2012, critical habitat rule (77 FR 71876). Since 2012, Federal lands managed by the BLM were transferred in trust to the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI) and the Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) pursuant to the Western Oregon Tribal Fairness Act (Pub. L. 115–103). This revised rule excludes those recently transferred lands from critical habitat designation, which were referred to as ''Tribal lands'' in the proposed rule but which we now refer to as ''Indian lands'' as defined in the 2012 critical habitat rule. We considered Tribal management plans in our analysis of these exclusions, *see* Consideration of Impacts under Section 4(b)(2) of the Act.

We have not designated critical habitat within the Coquille Forest. Should we consider revisions to the critical habitat designation in the future, the Service will coordinate with the Coquille Tribe to address effects to the Forest and its dominant use as managed by the Tribe.

Public Comments

Public Comments on Critical Habitat Boundaries

Comment (3): Commenters expressed concern that the areas proposed for exclusion provide important connectivity between the Coast Range, Cascades, and Klamath/Siskiyou Mountains Populations and that exclusion could reduce gene flow, cause further isolation, and increase the probability of extinction of the northern spotted owl.

Our response: We have thoroughly examined each of the particular areas described in this final rule, weighing the benefits of exclusion with the benefits of inclusion as critical habitat. We then examined the totality of the excluded areas and, based on the best scientific and commercial data available and have not concluded that the exclusions will result in the extinction of the northern spotted owl. As noted in the preamble to this rule, the standard against which to measure exclusions under section 4(b)(2) is whether the exclusions ''will'' result in extinction. With regard to the connectivity concerns, all discretionary Federal actions and decisions that ''may affect'' the northern spotted owl where it is found will be subject to section 7 consultation to ensure that the continued existence of the northern spotted owl is not jeopardized. This includes those owls using excluded areas for connectivity between critical habitat designations. This should ensure that populations will not become isolated because owls will continue to be protected as they migrate from one range to another. Additionally, the northern spotted owl will also be protected by the prohibition against ''take'' of the species under ESA section 9. Thus, we have not concluded that these exclusions will result in the extinction of the northern spotted owl. Some of the areas used by the northern spotted owl for migration are secondary growth forests. The Service anticipates that excluding such areas from critical habitat will not change their characteristics as secondary growth forests; therefore, the Service anticipates the areas will continue to function as habitat for migratory purposes.

Comment (4): Commenters noted that the lands proposed for exclusion met the definition of critical habitat for the northern spotted owl and were determined to be essential in our 2012 critical habitat designation (77 FR 71876, December 4, 2012), and so questioned how those lands could now be appropriate for exclusion from designation.

Our response: Areas that are found essential to the conservation of the species are appropriate to considered for exclusion from a critical habitat designation under section 4(b)(2) of the Act. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat designation, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. We found the areas we designated in 2012 to be essential to the conservation of the northern spotted owl. However, the Secretary has the discretion to consider these exclusions in light of either new information that has come about since the 2012 rule, as well as a consideration of relevant factors not considered in 2012. See our analysis under Consideration of Impacts under Section 4(b)(2) of the Act. Because exclusions of these particular areas will not result in the extinction of the northern spotted owl, based upon our consideration of the best scientific and commercial data available, we are making the exclusions set forth in this rule.

Comment (5): A commenter stated that smaller blocks of northern spotted owl critical habitat, such as those areas in the Harvest Land Base proposed for exclusion, are also important for the following reasons: They are migration/dispersal corridors linking larger habitat blocks; they link the Coast Range province with the Cascade Range province; and they provide migration corridors that allow a species to adapt to climate (and habitat) change by relocating to more suitable habitat.

Our response: See our response to *Comment (3).*

Comment (6): Commenters stated that we failed to explain why the Service no longer believes that Oregon and California Railroad Revested Lands (O&C lands) make a significant contribution toward meeting the conservation objectives for the northern spotted owl and that we cannot attain recovery without them.

Our response: The O&C lands were revested to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218). The Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; Pub. L. 75–405) addresses the management of O&C lands. The O&C Act provides, and the courts have confirmed, that the primary use of these revested timberlands is for permanent forest production on a sustained yield basis. The Supreme Court has additionally determined that the ESA does not take precedence over an agency's mandatory (non-discretionary) statutory mission. Based on these court rulings, we have determined that exclusion of the O&C lands as critical habitat is proper in this case.

Second, all discretionary Federal actions where northern spotted owls are found will be subject to section 7 consultation to ensure that the continued existence of the northern spotted owl is not jeopardized. This should ensure that populations will not become isolated because owls will continue to be protected as they migrate from one range to another. Third, the northern spotted owl will also be protected by the prohibition against ''take'' of the species under ESA section 9. Finally, once the Secretary determines that the benefits of excluding a particular area outweigh the benefits of including that area, the remaining legal standard governing whether the Secretary can exclude that area from critical habitat is whether exclusion of the area will result in extinction of the species. Although there

are no cases directly on point, the two cases that have discussed ''extinction'' have done so with reference to the ''survival'' of the species rather than recovery of the species. *See Northern New Mexico Stockman's Association* v. *United States Fish and Wildlife Service,* __F. Supp.3d__ , 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force* v. *USFWS,* 378 F.3d 1059, 1069–71 (9th Cir. 2004) (rejecting the previous FWS ESA section 7 regulation defining ''destruction or adverse modification'' because the regulation improperly conflated survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species.

Public Comments Regarding the Northwest Forest Plan (NWFP) or the BLM Revised Resource Management Plans (RMPs)

Comment (7): Commenters expressed concern that exclusions would allow BLM to harvest timber without project-specific consultation under Endangered Species Act section 7.

Our response: We completed a programmatic section 7 consultation on the BLM RMPs in 2016 under the assumption that BLM will implement its actions consistent with the RMPs over an analytical timeframe of 50 years (FWS 2016, p. 2). This approach allowed us to evaluate at a broad scale BLM's plans to ensure that the management direction and objectives are consistent with the conservation of listed species. We found that the BLM's plans, at the programmatic scale, were not likely to jeopardize the continued existence of the northern spotted owl, or destroy or adversely modify the owl's designated critical habitat (FWS 2016).

Additionally, even on excluded lands, all discretionary Federal actions and decisions on areas that are occupied by the species will be required to undergo section 7 consultation if such action or decision ''may affect'' the northern spotted owl. Such consultation will ensure that the continued existence of the northern spotted owl is not jeopardized. Thus, we have determined that additional consultation addressing effects to designated critical habitat provide little incremental conservation benefit and thus would not be an efficient use of limited consultation and administrative resources. Given this, in conjunction with all of the other considerations discussed in Consideration of Impacts under Section 4(b)(2) of the Act, we conclude that the benefits of including these particular areas as critical habitat are relatively minor when compared to the benefits of excluding them from critical habitat.

Comment (8): Commenters expressed concern that wildlife provisions in the BLM RMPs do not apply in the Harvest Land Base and that the exclusion of critical habitat would remove overlapping protections.

Our response: According to the 2016 BLM RMPs for western Oregon, the management objectives and management direction described for resource programs (including wildlife) apply across all land use allocations, unless otherwise noted (BLM 2016a, p. 47, BLM 2016b, p. 47). Regarding overlapping protections, see our response to *Comment (7)* for our rationale for excluding these lands from critical habitat for the northern spotted owl.

Comment (9): Commenters stated that we should consider the impact of recent fires that have occurred in Washington, Oregon, and California on the northern spotted owl and its habitat since the 2016 BLM RMPs were finalized, and that recent events make the modeling and analyses in the RMPs ineffective and obsolete. Commenters noted that the number of acres burned has exceeded the number of acres affected by wildfire that were modeled for the first decade in the BLM RMPs.

Our response: We recognize that wildfire can be detrimental to the northern spotted owl and its habitat and that the number of burned acres far exceeded modeled numbers. Commenters also noted that in September 2020, several major wildfires burned across portions of the range of the northern spotted owl in Washington, Oregon, and California, negatively affecting habitat conditions. The fires impacted multiple ownerships, including Federal lands managed by the BLM and USFS, State lands, and private lands. As part of our balancing of the benefits of inclusion with the benefits of exclusion of critical habitat, we considered that one benefit of exclusion could be a lessening of the regulatory burdens for discretionary Federal decisions when considering management practices to protect forested lands from catastrophic wildfire. Although the commenters suggest that higher than projected wildfires necessitate designating more area as critical habitat, the Service notes that removing the obligation to consult on certain areas may facilitate wildfire management, possibly protecting these areas from wildfire destruction. Thus, we have included a consideration of wildfire management as part of the balancing for excluding particular areas from the critical habitat designation.

Comment (10): A commenter expressed concern that habitat for the northern spotted owl will not grow as projected in the Recovery Plan and the BLM RMPs due to climate change and the combined effects of increased fire, insects, disease, storms, and carbon enrichment. The commenter stated that mitigating the risks of climate change require greater conservation of northern spotted owl habitat and, therefore, that these additional exclusions should not be made.

Our response: We analyzed climate change and its potential impact on northern spotted owl recovery in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011). We noted that the combined effects of climate change and past management practices are altering forest ecosystem processes and dynamics (including patterns of wildfires, insect outbreaks, and disease) to a degree greater than anticipated in the NWFP. The Recovery Plan encourages land managers to consider this uncertainty and how best to integrate knowledge of management-induced landscape pattern and disturbance regime changes with climate change when making spotted owl management decisions. The Recovery Plan further recommended an adaptive management approach to reduce scientific uncertainties. Recovery Action 5 in the Recovery Plan for the Northern Spotted Owl states: ''Consistent with Secretarial Order 3226, as amended, the Service will consider, analyze and incorporate as appropriate potential climate change impacts in long-range planning, setting priorities for scientific research and investigations, and/or when making major decisions affecting the spotted owl'' (FWS 2011, p. III–11). The Plan acknowledged the uncertainty associated with estimating rates of habitat recruitment (FWS 2011, p. B–8).

The BLM did not incorporate projections of climate change into the simulation of the growth of stands through time in its 2016 RMPs because of the uncertainty in climate change predictions and limitations in downscaling the available climate predictions for use in forest stand growth and harvesting models (BLM 2016c, p. 89). However, the BLM RMPs state that if the need for adaptive management to address changes in the climate would so alter the implementation of actions consistent with the RMPs that the environmental consequences would be substantially different than those anticipated in the Proposed RMP/Final EIS, then the BLM would engage in additional planning

steps and NEPA procedures (BLM 2016a, p. 111).

The BLM may also apply adaptive management by acting on information found through the monitoring questions (Appendix B) (BLM 2016a, p. 111; BLM 2016b, p. 133).

Comment (11): Commenters asserted that our statement in the proposed rule that the designation of the areas proposed for exclusion provided ''no incremental conservation benefit over what is already provided for in the RMPs'' conflicts with the Service's prior finding that the owl ''fared very poorly'' on reserves within the NWFP compared to designated critical habitat.

Our response: The statement concerning ''reserves faring very poorly'' in the 2012 critical habitat rule was in reference to a modeling scenario where we tested population performance of a potential critical habitat designation based on only NWFP reserves. Our 2012 designation was not based on this modeling scenario.

Comment (12): Commenters expressed concern that the BLM RMPs that we rely on for our basis for exclusions could be vacated due to current litigation and that the protection in place under the 2016 RMPs would no longer apply.

Our response: In the U.S. District Court for the District of Columbia, in a consolidated set of cases, the court found that the BLM RMPs violate the O&C Act because BLM excluded portions of O&C timberland from sustained yield harvest (*i.e.,* the BLM allocated some timberlands to reserves instead of the Harvest Land Base); *see, e.g., American Forest Resource Council et al.* v. *Steed* (No. 16–1599–RJL) (Memorandum Opinion, November 22, 2019). Although we will not speculate on the future resolution of this litigation, we have excluded the O&C lands because the benefits of exclusion outweigh the benefits of inclusion and, based on the best scientific and commercial data available, the Secretary has not concluded that the exclusions of these areas will result in extinction of the species. See our response to *Comment 25.*

Public Comments on Competition From Barred Owls

Comment (13): Commenters expressed the importance of preserving mature and old-growth forest for spotted owls in light of competition with barred owls and stated that the Service has not fully explored how much more habitat needs to be conserved to mitigate for northern spotted owl habitat occupied by barred owls.

Our response: The northern spotted owl faces a significant and complex threat in the form of competition from the congeneric (referring to a member of the same genus) barred owl (FWS 2011, pp. I–7 to I–8). Even despite the significant acreages of critical habitat that have been set aside for the northern spotted owl since 1990, estimated populations of northern spotted owl have declined more than 70% since the listing of the northern spotted owl. 85 FR at 81145, December 15, 2020. A recent published demographic study for the northern spotted owl (Dugger *et al.* 2016, entire) found that the nonnative barred owl that is invading northern spotted owl habitat was currently the stressor with the largest negative impact on the northern spotted owl through competition for resources. Thus, the current best available scientific and commercial data indicate that the largest negative contributing impact on northern spotted owl population is the invasive barred owl. Mitigation for the barred owl is currently being analyzed through the barred owl removal experiment that has been underway since 2013. According to the recently completed species assessment for the northern spotted owl, the northern spotted owl is showing a positive response to the removal of the barred owl on some of the study areas. Further, the study areas occur in both areas that have previously been designated as critical habitat and areas that have not been included. This supports our understanding that exclusions of critical habitat designations in these areas will not result in the extinction of the northern spotted owl.

Other Public Comments

Comment (14): Commenters asked why regulatory oversight of critical habitat is no longer necessary in light of the Service's previous position that old-growth reserves of the Northwest Forest Plan ''are plan-level designations with less assurance of long-term persistence than areas designated by Congress. Designation of LSRs (late-successional reserves) as critical habitat complements and supports the Northwest Forest Plan and helps to ensure persistence of this management directive over time'' as well as the Service's prior statements that critical habitat has significant additional value to listed species separate from any value provided by land management plans. Commenters further stated that our previous position is in contrast to our statement in the proposed rule that these exclusions are to ''clarify the primary role of these lands in relation to northern spotted owl conservation,'' and ''eliminat[e] any unnecessary regulatory oversight.''

Our response: Our exclusion of the areas described in this rule is based on our reevaluation of the benefits of exclusion of particular areas as critical habitat with the benefits of inclusion of particular areas as critical habitat. That reanalysis along with the consideration of the other relevant impacts of a critical habitat designation support our decision. We also note that even on excluded lands, all discretionary Federal actions and decisions on areas that are occupied by the species will be required to undergo section 7 consultation if such action or decision ''may affect'' the northern spotted owl. Such consultation will ensure that the continued existence of the northern spotted owl is not jeopardized. Likewise, the prohibitions of ESA section 9 continue to be applicable.

Comment (15): A commenter stated that when the critical habitat designation was originally established, it was understood that much of the old forest reserves would require considerable time to recover old-growth characteristics and support northern spotted owl reproduction, having been subject to logging prior to 1990. The commenter asserted that much of the occupied habitat in the Harvest Land Base would need to be left unlogged during the intervening time, to assure an ecologically sustainable continuity of old-growth forest, with no significant net loss.

Our response: In our 2016 Biological Opinion on the BLM RMPs, we concluded that there will be a net increase in habitat for northern spotted owls during the life of the RMPs due to forest ingrowth outpacing harvest, and the RMPs contain more reserve acres and habitat than the NWFP (FWS 2016, p. 5). During the first 5 to 8 years of the RMPs, the BLM will take measures to avoid take of northern spotted owls until implementation of a barred owl management program has begun. In addition, subsequent effects to northern spotted owls would be meted out over time. These measures in the BLM RMPs, which are unchanged by the exclusions made under section 4(b)(2) in this rule, will minimize near-term negative effects to occupied northern spotted owl habitat as habitat continues to further develop late-successional characteristics in the reserve land use allocations.

Comment (16): Commenters stated that our proposal ignores the northern spotted owl Recovery Plan recommendation to protect older, complex forests on Federal lands west of the crest of the Cascades range.

Our response: Although the ESA requires completion of a recovery plan for species listed under the ESA, the legal standards for a recovery plan are statutorily different than those Congress developed for consideration of exclusions under section 4(b)(2). While the Recovery Plan properly focuses on recovery, the consideration of critical habitat exclusions under section 4(b)(2) focus on the prevention of extinction. The courts that have discussed ''extinction'' have done so with references to the ''survival'' of the species rather than recovery of the species. *See Northern New Mexico Stockman's Association* v. *United States Fish and Wildlife Service,* F. Supp.3d , 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force* v. *USFWS,* 378 F.3d 1059, 1069–71 (9th Cir. 2004) (rejecting the previous FWS ESA section 7 regulation defining ''destruction or adverse modification'' because the regulation improperly conflated survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species.

Even with these exclusions, the total designated critical habitat includes 6,105,279 acres (2,470,719 hectares) of designated critical habitat as well as several million additionally protected acres of habitat for the northern spotted owl in designated wilderness and National Parks (see 77 FR 1876 at 71986)

Comment (17): Commenters expressed concern that excluding critical habitat will impede recovery of the northern spotted owl.

Our response: We considered the effects of exclusion of these particular areas of critical habitat on recovery of the species in our analysis of the benefits of exclusion against the benefits of inclusion but nonetheless concluded that the benefits of exclusion outweighed the benefits of inclusion as described in this rule. The correct analysis for a determination of whether to exclude particular areas from critical habitat is whether the exclusions will result in extinction of the species. As stated above, the courts that have discussed ''extinction'' have done so with references to the ''survival'' of the species rather than recovery of the species. *See Northern New Mexico Stockman's Association* v. *United States Fish and Wildlife Service,* __F. Supp.3d __, 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force* v. *USFWS,* 378 F.3d 1059, 1069–71 (9th Cir. 2004) (rejecting the previous FWS ESA section 7 regulation defining ''destruction or adverse modification'' because the regulation improperly conflated survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species. It is against this correct legal backdrop that we have determined that the exclusion of these particular areas of critical habitat outweighs the benefits of inclusion, and that, based upon the best scientific and commercial data available, we have not concluded that exclusion of these areas will result in extinction of the species.

Comment (18): Commenters expressed concern that the downward trend in northern spotted owl populations has continued since the 2016 BLM RMPs were finalized, and that we should evaluate the 2020 meta-analysis (demographic analyses that are performed every five years under the NWFP) prior to making changes in the critical habitat designation.

Our response: The northern spotted owl continues to suffer a significant population decline across its range, due primarily in recent years to increasing competition from the invasive and aggressive barred owl. The impact of barred owls is expected to grow unless proactively managed. To that end, our recent Species Status Report notes the preliminary positive response that northern spotted owls have in certain areas where we have implemented the experimental barred owl removal program. For example, in the most recent Species Status Report, the FWS noted:

> The Barred Owl Removal Experiment has been underway since 2013. There are encouraging signs of a positive spotted owl response to the removal of barred owls on some study areas. For example, on all study areas the number of occupied sites on the treatment areas (where barred owls are removed) have been maintained while the number of occupied sites on the control area continue to decline. On the Hoopa treatment area, the apparent survival rate of spotted owls has increased by almost 10 percent compared to the period immediately before removal began. Species Status Report, at page 91. Report is published at *https://www.regulations.gov/document?D=FWS-R1-ES-2014-0061-0030*

Regarding a 2020 meta-analysis, the latest 5-year demographic analysis is still in process and not yet available for our review. The most current demographic analysis was published in 2016 and was considered in the BLM RMPs' analyses and our 2016 Biological Opinion.

Comment (19): Commenters stated that the BLM and Service cannot avoid their duties under the ESA simply because the area in question involves O&C lands and that section 4(b)(2) exclusions should not be used as a tool to circumvent section 7 consultation recommendations.

Our response: The ESA was written by members of Congress. They conveyed a powerful tool on the Secretary of the Interior by giving him the authority to exclude areas unless he determined that exclusion will result in extinction of the species. Our rationale for excluding the critical habitat exclusions is not to circumvent section 7 consultation. Rather, because there will continue to be section 7 consultations for discretionary actions in areas where the spotted owl occurs, we have concluded that the additional regulatory requirement related to review for adverse modification is outweighed by other relevant factors.

Economic Analysis Comments

Comments From Counties

Comment (20): Several counties requested that the Service undertake a new economic analysis to consider the economic impacts of the designation on local communities and natural resource-based economies.

Our response: We reviewed the 2012 final economic analysis (IEc 2012) conducted for the December 4, 2012, critical habitat designation (77 FR 71876) as well as additional information submitted during the public comment period. We also conferred with the consultants who prepared the final economic analysis regarding the additional information submitted (IEc 2020). See response to *Comment 21* below for further detail. In general, we found that the commenters disagree with the Service's incremental methodology used to analyze the economic effects of the critical habitat designation for northern spotted owl, although that approach was the Service's policy at the time and has since been codified in its regulations (see 50 CFR 424.19(b)). As explained in response to Comment 21, the information in the IEc 2012 report in combination with the Brattle Report continues to be the best scientific and commercial data available. Were we to be adding additional lands to this critical habitat designation, we agree that a new economic analysis would be required.

Comment (21): The American Forest Resource Council (AFRC 2020) provided public comments requesting that the Service exclude at least 2,506,890 additional acres in addition to the 204,653 acres proposed for exclusion. It

provided a new report prepared by The Brattle Group (2020) (Brattle report) critiquing the 2012 Critical Habitat economic analysis (IEc 2012). The Brattle report included updated estimates of the economic impacts of the 2012 rule using more recent data and/or different assumptions. The Oregon Farm Bureau and Oregon Cattlemen's Association; California Farm Bureau Federation; Lewis, Skamania, and Klickitat Counties in Washington; and Douglas County in Oregon also cited the Brattle report in their comment letters as justification for additional exclusions. We summarize AFRC and other comments pertaining to economic analysis issues in the following:

(a) A focus of the Brattle report is a review of our analysis of potential timber harvest losses attributable to northern spotted owl critical habitat designation in 2012. The Brattle report follows the same analytic approach for measuring timber harvest impacts as employed in the economic analysis for the critical habitat designation, but uses alternative assumptions or updated data. These adjustments yield the following differences when compared to the results of the 2012 economic analysis (see IEc 2020 for more details):

- The number of acres where incremental harvest impacts may occur is higher;
- The baseline annual harvest potential is higher;
- The potential reductions in harvest volumes due to the impact of critical habitat are larger;
- The estimated stumpage values are lower.

As described by IEc in their review of this information, the effect of these changes in inputs by the Brattle report results in a higher measure of the negative annualized timber harvest impacts across the affected acres. The Brattle report asserts that across 1.7 million acres, the critical habitat designation greatly diminishes harvest and causes losses to the market of between $66.4 million and $77.2 million on an annualized basis, and between $753 million and $1.18 billion over 20 years on a net present value (NPV) basis. AFRC and others suggest that the results of the Brattle report support their request for exclusion of additional acres based on economic impacts.

Our Response: Section 4(b)(2) of the ESA gives the Secretary discretion on how to weigh economic impacts in addressing the benefits of exclusion against the benefits of inclusion of particular areas of critical habitat. Thus, while we find several issues with the analysis provided in the Brattle report, specifically the assumptions or data used to produce the estimate of negative annualized timber harvest impacts and their numeric conclusions due to the critical habitat designation, we agree that there is an incremental negative economic impact associated with the designation of critical habitat for the northern spotted owl.

First, the Brattle report states that the higher number of acres where incremental impacts may occur (1.7 million acres) is based upon a review of GIS files and other related information. However, the report provides no clear basis for this increase. We asked IEc to review the Brattle report and they concluded that they could not replicate the result. Additionally, the Brattle report does not evaluate the potential incremental effects as it may occur across the geographic area of the designation, by critical habitat units and subunits. In contrast, our 2012 economic analysis included an analysis of acreages by subunit where impacts may occur, scored these areas by the potential extent of impact, and then ranked each subunit according to a composite score against all other subunits (see Section 4.3 of IEc 2012). The Brattle report provides no such analysis and simply provides gross measures of potential impact across approximately 1.7 million acres.

Second, the Brattle report assumes a higher baseline annual harvest potential on USFS and BLM lands (a 9-fold increase on lands managed by USFS and a 4-fold increase on lands managed by BLM). We understand that the report relied on average yields from 2018–2020 harvest data on lands managed by BLM for moist and dry forests and then translates these harvest levels into estimates of long-term annual yields across the acres where the report assumes incremental impacts may occur. The report also assumes similar yields on BLM and USFS lands, a standard rotation age of 100 years where one percent of the land would be regeneration harvested and one percent would be thinned. The assumptions are hypothetical, however, as the BLM and USFS are unlikely to have similar yields generally for a variety of reasons; there is no standard of a 100-year rotation age or one percent regeneration harvest used by either agency for all of their managed lands. Under the RMPs, the BLM assumed harvest of 8 percent of forested land base per decade within all land use allocations (Hooper 2020, pers. comm.). This is significantly lower than the assumptions made in the Brattle report. In contrast, we based our yield rates on actual harvest data provided by the BLM and USFS over an extended period. For lands managed by BLM, the 2012 economic analysis used data BLM provided on 30 years of planned timber harvest by land allocation type (reserve/matrix), forest conditions (nesting/roosting habitat, predominantly younger forests), and harvest type (thinning, regeneration) at the critical habitat subunit level. For lands managed by USFS, the 2012 economic analysis used projected yield rates provided by the USFS for each critical habitat unit.

Third, the Brattle report assumes an 80 percent reduction in harvest volumes due to the critical habitat designation versus the 20 percent used in the 2012 economic analysis high impact scenario. Specific information supporting the assumption of an 80 percent reduction in harvest volumes was not provided in the report; rather, the report indicates that this assumption is based on discussions with AFRC and unspecified comments provided by the USFS and BLM on the 2012 economic analysis. Additionally, the Brattle report notes that it ''cannot model the timber markets that influence the demand for timber in the Pacific Northwest,'' to test the reasonableness of its assumption concerning timber harvest effects (The Brattle Group 2020, p. 17).

The potential incremental effect of critical habitat on harvest levels was a point of significant debate for the 2012 critical habitat designation, see section 4.4.2 of the 2012 economic analysis. As IEc notes in its assessment of the Brattle report, ''Various land managers, Service experts, and other commenters concluded that the direction and magnitude of effect due to critical habitat was uncertain, noting that harvest levels could be higher or lower depending on a variety of land management considerations and harvest factors. In addition, the implementation of critical habitat occurs within a complex set of factors, including volatility in global demand for wood products, general timber industry transformation, and existing regulatory and statutory requirements, among other factors.'' The 2012 economic analysis used three separate scenarios, along with additional sensitivity analysis to capture this uncertainty and the concerns of multiple stakeholders, including BLM and USFS. ''The Brattle report does not endeavor to model markets or other factors that influence the demand for timber in the Pacific Northwest'' (IEc 2020). The Brattle report did not include a sensitivity analysis to address the uncertainty of effects associated with critical habitat.

Fourth, concerning estimated stumpage values, as IEc noted in their review, our 2012 economic analysis

''recognized that prices vary across forest, land manager, and year, and that future prices were uncertain. The analysis captured annual average prices from Federal timber sales on BLM and USFS managed lands between 2000 and 2011. The low-end price ($100 per thousand board feet (mbf))) was similar to more recent prices (as of 2012) from Federal timber sales, which had been below historical averages. The higher end was selected to purposely capture the highest price received since the year 2000. This high price, therefore, served as a conservative approach, meaning it would yield the highest negative impacts from any constraints on timber harvest volumes due to critical habitat designation. Beyond this range, the 2012 economic analysis conducted a further sensitivity analysis based upon a comment received from AFRC. In this scenario, an even higher price of $350 per mbf was analyzed for its effect and included in the economic analysis. Thus, the original range and further sensitivity analysis captured a reasonable upper and lower bound of the role of timber prices on potential impacts. In contrast, the Brattle report uses similar average stumpage prices from similar sources, but only from 2018 to 2020, a much shorter time frame. In addition, its price range of $83 to $191 per mbf is consistent with the price range used in the 2012 report, especially when considering the passage of eight years and the general market volatility of lumber prices.'' (IEc 2020).

In sum, the Brattle report and associated commenters concluded that the total effect of these alternative inputs is a higher measure of negative annualized timber harvest impacts across the total of potentially affected acres compared to what was estimated in the 2012 economic analysis (IEc 2012) ($66 to $77 million versus $6.5 million). As noted above, the Brattle report does not distribute its overall measure of impacts across the designation's subunits. We note that the Brattle report included additional conclusions, such as effects on Gross Domestic Product and employment. However, these conclusions are based on the assumptions we discuss above which are misapplied or cannot be confirmed with the methods provided. Therefore, for the reasons discussed above, we are unable to confirm the economic conclusions in the Brattle report.

Despite these concerns with the Brattle Report, even the economic study in 2012 by IEc notes a negative incremental impact because of the designation of critical habitat for the northern spotted owl. Our weighing of the benefits of exclusion against the benefits of inclusion considers these negative economic impacts. We have reevaluated the relative impact of even an economic loss for rural communities already faced with impacts including the initial listing of the species as well as the unquantified effects in the 2012 analysis that have taken on increasing importance due to more recent economic trends. See Consideration of Economic Impacts.

(b) The Brattle report included information on annual timber harvest levels on Federal lands in 18 counties within California, Oregon, and Washington, from 2002–2018. The report concluded that these data demonstrate that timber harvest in these counties declined as a direct consequence of the 2012 critical habitat designation.

Our Response: We reviewed this information and found errors and assumptions in the Brattle report. First, four of the 18 counties cited in the analysis (Calaveras, Riverside, and Mono in California, and Morrow in Oregon) are located outside of the range of the northern spotted owl and do not contain designated northern spotted owl critical habitat, so the designation would not have impacted timber harvest in these counties. Second, of the remaining 14 counties cited in the report that contain some spotted owl critical habitat, the commenter reports timber harvest declines occurring in seven counties somewhere around (*i.e.,* proximally before and after) the year 2012, stable or flat trends in three counties, and increased harvest levels in four counties.

Of the declines highlighted by the commenter, several began prior to the designation in December 2012, casting doubt on the potential direct impact of the 2012 designation. Almost all of these counties also show large fluctuations in the harvest levels between years going back to 2002. Third, the analysis did not include all of the counties within the critical habitat designation. A rapid assessment of the same data source cited by the commenter, but evaluating a random number of additional counties in Oregon, Washington, and California in the range of the northern spotted owl, revealed no discernible pattern in timber harvest declines that could reasonably be attributed to the 2012 critical habitat designation. Some counties experienced general increases in timber harvest after 2012, some declined, and some were relatively flat when compared to long-term trends. A similar pattern of fluctuation exists for individual counties located outside of the range of the spotted owl but within Oregon, Washington, and California, as well as in other western States.

Using the same data source cited by this commenter (with 2019 data from BLM and USFS on timber volume offered for sale), we reviewed Federal lands harvest data in Oregon counties with northern spotted owl critical habitat. The annual average harvest from 2002–2012 on BLM lands in the range of the spotted owl was approximately 159 million board feet per year prior to the 2012 critical habitat designation. The annual average harvest on BLM lands located in the range of the spotted owl from 2013–2019, after the 2012 critical rule was published, was 235 million board feet; the total in 2019 was 272 million board feet offered for sale. Thus, annual harvest appears to have increased subsequent to the 2012 designation of critical habitat. Likewise, the annual average harvest from 2002–2012 on USFS lands located within the range of the spotted owl was approximately 196 million board feet per year prior to the 2012 critical habitat designation. The annual average harvest on USFS land from 2013–2019, after the 2012 critical rule was published, was 288 million board feet. We also reviewed Federal harvest data in Oregon counties outside the range of the spotted owl (and therefore in counties with no spotted owl critical habitat or obligation for Federal agencies to consult under ESA section 7) and saw harvest volume fluctuations similar to those in counties located within critical habitat. Based on these data it does not appear that designation of critical habitat in 2012 had a significant incremental depressive effect on subsequent Federal timber harvest. However, we also agree that the relative impact of even a ''relatively small'' economic loss for rural communities already faced with impacts including the initial listing of the species can economically impact that rural community. Thus, as part of our analysis of the particular areas in this case and based on the totality of the circumstances, we have determined the benefits of exclusions of these particular areas outweigh the benefits of inclusion.

Comment (22): Douglas County requested that the Service exclude all land within Douglas County from the critical habitat designation due to severe and disproportionate economic impacts. The County provided a 2007 report that discusses the negative economic impacts of reduced harvest on Federal lands. Additionally, Douglas County asserted that our 2012 economic analysis is flawed with respect to Douglas County and should be revised.

Our response: The report provided by Douglas County focuses on the impact that termination of ''safety net'' payments under the Secure Rural Schools and Community Self-Determination Act would have on counties in western Oregon. The report discusses reductions in harvest on Federal lands in the O&C counties attributable to a range of factors, resulting in a loss of revenue sharing that limited county budgets and rapid contractions of the wood products sector as logging declined and mills closed or reduced shifts. The report, prepared in 2007, does not discuss impacts of the critical habitat designation (which came afterwards, in late 2012) but describes general pressures on the timber industry.

Our 2012 economic analysis (IEc 2012) addressed the incremental effects of critical habitat within the area proposed for designation for the northern spotted owl. Consistent with our practice at the time (now codified in regulations) the economic analysis quantifies the economic impacts that may be directly attributable to the designation of critical habitat, comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' Our incremental analysis did not consider the economic impact of changes other than from the proposed critical habitat designation, and did not evaluate the economic condition or status of the timber industry at large. Rather, it addressed the effects related to the impacts to Federal agencies and their activities, because Federal agencies are the only entities directly subject to the requirement to evaluate and consider effects of their actions on designated critical habitat.

Nonetheless, we acknowledged that, ''[m]ultiple forces have contributed to the recent changes in the Pacific Northwest timber industry. In general, the timber industry is characterized as being highly competitive; there is a relatively low degree of concentration of production among the largest producers and there is essentially a single national price for commodity grades of lumber. In recent decades, competition has intensified with increased harvesting in the U.S. South and interior Canadian Provinces. New technologies and increased mechanization have led to mill closures; generally, less efficient mills located near Federal forests have been closed in favor of larger more advanced facilities closer to major transportation corridors or private timberlands. In addition, other forces such as endangered species protections, fluctuations in domestic consumption, shifts in international trade, and changes in timberland ownership, have all contributed to changes in the Pacific Northwest timber industry'' (IEc 2012, p. 3–17).

Comment (23): One commenter noted that a 2012 economic analysis from the Sierra Institute, ''Response to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl by Industrial Economics'' (Kusel and Saah 2012), was not fully considered in the 2012 designation and that a new economic analysis should be conducted.

Our Response: The Service fully considered the content of the Kusel and Saah report and found a great deal of overlap between that economic analysis and the economic analysis contracted by the Service and written by Industrial Economics (IEc 2012), even incorporating a summary of the Kusel and Saah report (see our response to *Comment (201)* in the December 4, 2012, critical habitat rule (77 FR 71876, p. 72040)). The Service believes the 2012 economic analysis (IEc 2012) is a reasonable assessment of the quantified costs related to timber harvest. We have reviewed other aspects of the 2012 final economic analysis (IEc 2012) and determined the unquantified effects, including the effects associated with ''linear projects'' have become more significant due to recent economic trends that were not foreseen in 2012. In 2012, we acknowledged that ''considerable uncertainty surrounds the future level of construction of natural gas pipelines and electric transmission lines as significant uncertainty exists related to the level of demand for natural gas and electricity from hydropower sources. Due to this uncertainty, this analysis does not attempt to forecast activity associated with the construction of new natural gas pipelines and storage facilities or transmission lines related to hydro-power generation based on historical activity levels within the proposed critical habitat area in the foreseeable future.'' (IEc 2012) The uncertainty continues to persist but the recent trends in the electricity power sector makes these unquantified effects more important and significant. However, the persisting uncertainty makes new analysis difficult.

Environmental Analysis Comments

Comment (24): Commenters expressed that the Service must conduct a NEPA analysis and evaluate the exclusions in a biological opinion before finalizing exclusions.

Our response: It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit (see *Catron County Board of Commissioners, New Mexico* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we do not need to prepare environmental analyses pursuant to NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit in *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995). All of the States impacted by the critical habitat designation for the northern spotted owl are located within the jurisdiction of the Ninth Circuit Court. Therefore, consistent with the ruling in *Douglas County,* conducting a NEPA analysis and completion of a biological opinion on the proposed exclusions would be redundant, and an inefficient use of limited government resources.

Section 4(b)(2) Exclusions Comments

Comment (25): Commenters variously requested that we exclude all O&C lands, all USFS matrix lands, all USFS lands, BLM lands outside the Harvest Land Base, and all Douglas County lands. We respond separately to each reason provided for these suggested exclusion requests first (except for assertions of economic impacts, which are addressed above in response to *Comments 20–23*), and then provide a collective summary:

(a) Commenters asserted that critical habitat conflicts with BLM and USFS management direction and constrains timber harvest on O&C lands and matrix lands.

Our Response: We have analyzed the statutory basis for the O&C lands and the USFS matrix lands in the section entitled *Exclusion of Additional Federal Lands.* Please see that section for a response.

(b) There are conflicting principles between the O&C Act and the Endangered Species Act, and the Service should consider the pending court remedy on O&C lands.

Our Response: We note that there is ongoing litigation challenging BLM's management of O&C lands under the 2016 RMPs (BLM 2016a, 2016b). As we described in the proposed rule, one district court has concluded the 2016 RMPs (including their consideration of the Endangered Species Act) does not conflict with the O&C Act, a conclusion affirmed by an appellate court (see *Pacific Rivers* v. *BLM* (No. 19–35384) (Memorandum, May 15, 2020)). In a separate proceeding, the U.S. District Court for the District of Columbia, in a

consolidated set of cases, found that the BLM RMPs violate the O&C Act because BLM excluded portions of O&C timberland from sustained yield harvest (*i.e.,* the BLM allocated some timberlands to reserves instead of the Harvest Land Base); *see, e.g., American Forest Resource Council et al.* v. *Steed* (No. 16–1599–RJL) (Memorandum Opinion, November 22, 2019). The parties briefed the court on the appropriate remedy, but the court has not yet issued an order. We considered this information in developing the proposed rule, and sought comment specifically on how we should address this information in the final rule. One commenter suggested that we wait for the outcome of that proceeding before revising critical habitat; another commenter indicated that the court ruling, even without the remedy order, supported the exclusion of all O&C lands from designated critical habitat.

As stated in the section entitled *Consideration of Impacts under Section 4(b)(2) of the Act,* we have considered the statutory mandates for the lands mandated by the BLM and USFS as part of our exclusion analysis. The Secretary's decision in this case was not based on speculation about the outcome of a particular case but upon a weighing of the benefits of inclusion against the benefits of exclusion of particular areas of critical habitat. Because, based on the best scientific and commercial data available, the Secretary has not concluded that the exclusions will result in extinction of the species, we are granting the request to exclude the O&C lands and NWFP matrix lands from this critical habitat designation.

(c) A commenter asserted that O&C lands managed by the BLM and land managed by the USFS should be excluded because the NWFP and RMPs should guide management on Federal lands since they are consistent with the Recovery Plan for the Northern Spotted Owl (FWS 2011).

Our Response: The Service agrees that the NWFP and RMPs guide management on Federal lands, as informed by other plans, laws, designations, and input. Federal land managers are skilled at incorporating a wide variety of required inputs and feedback when planning and carrying out land management actions, including public comment under the National Environmental Policy Act, recommendations from listed species' recovery plans, input from the Service and National Marine Fisheries Service through the section 7 consultation process, growth and yield models, and critical habitat designations, to name just a few. The BLM RMPs have undergone section 7 consultation recently, in 2016, with the 2012 spotted owl critical habitat rule in place and were found to be consistent with the Endangered Species Act, including our determination that the management direction of the plans is consistent with the critical habitat designation. All USFS actions carried out under the NWFP since the 2012 designation of critical habitat that have undergone section 7 consultation have also resulted in our determination that there was no destruction or adverse modification of critical habitat, affirming that the management of these lands is consistent with the critical habitat designation.

Additionally, all discretionary USFS and BLM actions carried out under the NWFP since the 2012 designation of critical habitat have undergone section 7 consultation on a project-by-project basis and have been found to be consistent with the Endangered Species Act. The determination of whether to exclude particular areas from a critical habitat designation is whether the benefits of exclusion outweigh the benefit of inclusion, so long as, based on the best scientific and commercial data available, unless the Secretary concludes that the extinction of the species will result from the exclusions. Our considered analysis of the statutory requirements for a critical habitat designation has been fully documented and discussed in this rule.

(d) Non-O&C BLM lands should be excluded for ease of administration.

Our Response: We are excluding all BLM Harvest Land Base lands addressed in the 2016 RMPs (referred to as ''matrix lands'' prior to the 2016 RMPs) that are not managed under the O&C Act (approximately 12,000 acres) from critical habitat for the northern spotted owl. See Consideration of Impacts under Section 4(b)(2) of the Act.

(e) Commenters stated that our reliance on the management under the BLM RMPs (BLM 2016a, 2016b), as a rationale for excluding the Harvest Land Base in those plans, should also be applied to considering all O&C lands addressed in those plans and that we should also rely on a similar rationale for excluding O&C lands and matrix lands managed by the USFS under the protections of the NWFP for exclusions.

Our response: See our response to *Comment 25(b), (c) and (e)* above.

Comment (26): Commenters requested that we exclude: All unoccupied areas; areas of younger forests; all critical habitat subunits that have 50 percent or more younger forests; areas described as dispersal habitat; ''habitat capable'' lands; stands under 80 years old; and low-quality habitat.

Our Response: We decline to revisit whether younger forests, including stands under 80 years old, habitat capable lands, stands under 80 years old and low-quality habitat fit within the definitions of habitat or critical habitat for the northern spotted owl. As stated in our proposed rule, the purpose of this rule was to consider exclusion of particular areas based on section 4(b)(2) of the ESA. The determination of whether younger forests, including stands under 80 years old, areas for dispersal habitat, habitat capable lands and low-quality habitat falls outside the definitions of habitat and critical habitat is not contemplated by this rulemaking.

Comment (27): Commenters requested that we exclude all California lands, areas of high or moderately high fire hazard risk or fire-prone forests, dry forest in California, dry forest in the Eastern Washington Cascades, and previously burned Late Successional Reserves, citing the following rationale:

(a) Commenters stated that a conflict exists between critical habitat and management objectives for fuels reduction and active management, and that wildfire suppression costs are immense. They asserted that exclusion of certain lands would facilitate density management, dry forest restoration, and fuels reduction on the most vulnerable acres and prevent loss of northern spotted owl habitat.

Our Response: Both the Forest Service and the BLM are required to manage the lands under their jurisdictions in compliance with the statutory mandates of their organic statutes. Since the 2012 rule, the courts have provided additional guidance on those mandates. This final rule recognizes the courts' guidance as discussed in the *Consideration of Impacts under Section 4(b)(2) of the Act.* In the 2012 critical habitat rule, the Service accounted for the drier provinces and parts of the range and recognized that forest management needs to be tailored to the forest type and climatic conditions, including the dry forests in California and the Eastern Washington Cascades. As part of the critical habitat rule, the Service expressly encourages land managers to consider implementation of active forest management, utilizing ''ecological forestry'' practices, to restore natural ecological processes where they have been disrupted or suppressed (*e.g.,* natural fire regimes). In this rule we continue to encourage these practices as well as recognizing the statutory requirements for providing sustained yield timber harvest on O&C lands and multiple use management on Forest Service matrix lands.

On page 71908 of the December 4, 2012, critical habitat rule (77 FR 71876) we stated that, in drier, more fire-prone regions of the owl's range, habitat conditions will likely be more dynamic, and more active management may be required to reduce the risk to the essential physical or biological features from fire, insects, disease, and climate change, as well as to promote regeneration following disturbance.

The Service recognizes that land managers have a variety of forest management goals, including maintaining or improving ecological conditions where the intent is to provide long-term benefits to forest resiliency and restore natural forest dynamic processes (USDI FWS 2011, III–45).

The Service has consulted under section 7 with Federal agencies on their fuels reduction, stand resiliency, and pine restoration projects in dry forest systems within the range of the northern spotted owl. For example, we have consulted with the BLM and the USFS on such actions in the Klamath Province of southern Oregon. The proposed actions may include treatment areas that reduce forest canopy to obtain desired silvicultural outcomes and meet the purpose and need of the project, including timber production. They can also promote ecological restoration and are expected to reduce future losses of spotted owl habitat and improve overall forest ecosystem resilience to climate change.

In the 2012 critical habitat rule, we repeatedly reference the need and appropriateness for conducting forest health treatments in spotted owl habitat, including designated critical habitat. Likewise, the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) encourages application of active forest management within spotted owl habitat to address forest health, wildfire risk, and impacts of climate change. Lastly, the 2016 Biological Opinion on the BLM's 2016 RMPs generally supports this need as well.

(b) Commenters requested the exclusion of burned areas to allow reforestation and fuels treatments to occur.

Our Response: To the extent the commenters are suggesting that burned areas do not fit within the definition of critical habitat, those determinations are not contemplated by this rulemaking.

(c) Commenters asserted that ''habitat capable'' lands do not meet the definition of critical habitat.

Our Response: To the extent the commenters are suggesting that habitat capable lands do not fit within the definition of critical habitat, those determinations are not contemplated by this rulemaking.

Comment (28): Commenters requested that we exclude areas of less than 3,000 contiguous acres because areas this small cannot support northern spotted owls.

Our Response: To the extent the commenters are suggesting that areas of less than 3,000 contiguous areas do not fit within the definition of critical habitat, we decline to address those comments as outside the scope of this rulemaking.

Comment (29): Commenters requested that we exclude the White Pass Ski Area in Washington to avoid any ambiguity because this acreage does not function as northern spotted owl habitat.

Our Response: We have excluded the critical habitat within the White Pass ski area as part of this critical habitat determination. See *Exclusion of the White Pass Ski Area.*

Comment (30): Certain Tribes requested that Federal lands within 5 miles of Indian land be excluded from critical habitat due to economic impacts, the need to maintain road infrastructure to access Indian land in checkerboard ownership, and to provide greater management flexibility to maintain forest health and prevent wildfires.

Our Response: The Service recognizes in the critical habitat rule the need to actively manage forests, particularly in the drier provinces, to increase their resiliency to wildfires, including reducing ladder fuels, uneven age management, and prescribed burning. This recognition includes the forests that are within 5 miles of Indian lands. Roads are not considered critical habitat, and thus the designation should not hinder road maintenance anywhere, including access across Federal lands. Because the critical habitat designation does not preclude active management or road maintenance of the lands adjacent to Indian lands, we do not find a basis for exclusion of additional Federal lands adjacent to Indian land.

Comment (31): Commenters requested we exclude Adaptive Management Areas and Experimental Forests because placing additional constraints on actions in these areas will limit the ability to conduct scientifically credible work.

Our Response: To the extent that Adaptive Management Areas and Experimental Forests are included within the exclusions discussed on BLM and Forest Service lands as part of this rule, they are excluded from the critical habitat designation. To the extent they are not within the excluded portion of critical habitat discussed in this rule, the opportunities for scientific research and management experimentation associated with experimental forests and Adaptive Management Areas lend themselves to putting into practice the types of timber management that the critical habitat rule recommends, thereby serving as a type of field laboratory to try new and alternative approaches that could prove useful in applying those approaches across a greater landscape. Additionally, there is enough flexibility built into the recommendations in the critical habitat rule that Experimental Forests and Adaptive Management Areas can continue to conduct their valuable work on their landscapes.

Comment (32): Commenters asserted that because the barred owl is now widespread and competes with the northern spotted owl, the designated critical habitat lacks the biological features necessary to restore northern spotted owl breeding populations and recover the species.

Our Response: The barred owl poses a tremendous challenge to the future of the northern spotted owl. The barred owl impact on spotted owls is extremely significant. Although the northern spotted owl Recovery Plan identified two primary threats to spotted owls—habitat loss and competition from barred owls—and did not recognize either as preeminent, we now have further research and analysis to determine that the aggressive and invasive barred owl is the primary threat to the northern spotted owl. In fact, the recent 12-Month Finding for the northern spotted owl (85 FR 81144; December 15, 2020) determined that an uplisting from threatened to endangered was warranted but precluded by higher priorities. *Id.* A recent published demographic study for the northern spotted owl (Dugger *et al.* 2016, entire) found that the nonnative barred owl has the largest negative impact on the northern spotted owl through competition for resources. Based on this recognition, the Service is currently developing a barred owl management strategy to help reduce the effect of barred owls on northern spotted owls.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely, by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known and using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will consider unoccupied areas to be essential only where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

In our December 4, 2012, final rule (77 FR 71876), we determined that all units and subunits met the Act's definition of being within the geographical area occupied by the species at the time of listing. This rule does not revisit that determination, and the comments raised as to whether certain habitats did or did not fit the definition of critical habitat are outside the scope of this rulemaking. Rather, the purpose of this rulemaking is to apply the requirements of section 4(b)(2) to the determinations discussed in the 2012 rule to determine if the benefits of exclusions of particular areas outweigh the benefits of inclusion of those particular areas. Because we have not concluded, based on the best scientific and commercial data available, that these exclusions will result in extinction of the species, we are finalizing the exclusions in this rule.

Final Revised Critical Habitat Designation

Changes From the Proposed Rule

In our proposed rule, we proposed excluding those acres managed by the BLM under the O&C Act as Harvest Land Base pursuant to BLM's 2016 RMPs, or approximately 204,797 acres (82,809 hectares) in Benton, Clackamas, Coos, Curry, Douglas, Jackson, Josephine, Klamath, Lane, Lincoln, Multnomah, Polk, Tillamook, Washington, and Yamhill Counties, Oregon, under section 4(b)(2) of the Act. With this final rule, we are excluding (1) all O&C lands, whether managed by the BLM or USFS (approximately 1,391,714 acres); (2) Forest Service ''matrix lands'' addressed in the NWFP and not already managed under the O&C Act (approximately 2,047,929 acres); (3) lands managed under the 2016 RMPs as Harvest Land Base, though not under the O&C Act (referred to as ''matrix'' prior to the 2016 RMPs) (approximately 12,046 acres); (4) northern spotted owl critical habitat lands within the Forest Service Special Use Permit for the White Pass Ski Area (approximately 211 acres); and (5) additional Tribal lands (approximately 20,177 acres).

Consistent with the 2012 rule, 6,105,279 ac (2,470,719 ha) are now identified as critical habitat in 11 units and 60 subunits as meeting the definition of critical habitat for the northern spotted owl. The 11 units we have identified as critical habitat are: (1) North Coast Olympics, (2) Oregon Coast Ranges, (3) Redwood Coast, (4) West Cascades North, (5) West Cascades Central, (6) West Cascades South, (7) East Cascades North, (8) East Cascades South, (9) Klamath West, (10) Klamath

East, and (11) Interior California Coast Ranges. All of the critical habitat units and subunits identified were occupied at the time of listing; however, some units may include some smaller areas that were not known to be occupied at the time of listing but have been determined to be essential to the conservation of the species. Land ownership of the designated critical habitat includes Federal and State lands. No Indian lands or private lands are included in the critical habitat designation. The approximate area of each excluded area within critical habitat subunits is shown in Table 1. Only the units and subunits that we have revised in this rule are described below; see the 2012 critical habitat rule for descriptions of the units and subunits that remain unchanged.

TABLE 1—AREAS EXCLUDED BY CRITICAL HABITAT SUBUNIT BY THIS RULE

Subunit	2012 critical habitat in acres (hectares)	Areas excluded in acres (hectares)	Final critical habitat in acres (hectares)	Excluded lands
ECN 1	101,656 (41,139)	22,643 (9,163)	79,013 (31976)	USFS Matrix.
ECN 2	60,087 (24,316)	17,475 (7,072)	42,612 (17244)	USFS Matrix.
ECN 3	301,220 (121,899)	108,367 (43,855)	192,853 (78045)	USFS Matrix.
ECN 4	223,282 (90,359)	8,031 (3,250)	215,251 (87109)	USFS Matrix.
ECN 5	201,140 (81,398)	83,107 (33,632)	118,033 (47766)	USFS Matrix.
ECN 6	81,842 (33,120)	47,896 (19,383)	33,946 (13738)	USFS Matrix.
ECN 7	139,979 (56,647)	96,433 (39,025)	43,546 (17623)	USFS Matrix.
ECN 8	94,622 (38,292)	33,590 (13,593)	61,033 (24699)	USFS Matrix.
ECN 9	155,434 (62,902)	59,264 (23,983)	96,170 (38919)	USFS Matrix.
ECS 1	125,560 (50,812)	68,723 (27,811)	56,837 (23001)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
ECS 2	66,086 (26,744)	18,209 (7,369)	47,877 (19375)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
ECS 3	112,179 (45,397)	33,533 (13,571)	78,646 (31827)	USFS Matrix.
ICC 1	332,061 (134,380)	51,308 (20,764)	280,753 (113617)	USFS Matrix.
ICC 2	204,461 (82,742)	107,558 (43,527)	96,903 (39215)	USFS Matrix.
ICC 3	104,813 (42,416)	39,600 (16,025)	65,214 (26391)	USFS Matrix.
ICC 4	119,957 (48,545)	47,256 (19,124)	72,701 (29421)	USFS Matrix.
ICC 5	34,955 (14,146)	6,358 (2,573)	28,597 (11573)	USFS Matrix.
ICC 7	119,729 (48,453)	20,019 (8,101)	99,710 (40351)	USFS Matrix.
ICC 8	83,376 (33,741)	7,100 (2,873)	76,276 (30868)	USFS Matrix.
KLE 1	242,905 (98,300)	130,233 (52,703)	112,672 (45597)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix.
KLE 2	100,454 (40,652)	96,490 (39,048)	3,964 (1,604)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix.
KLE 3	112,799 (45,648)	105,262 (42,598)	7,537 (3,050)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
KLE 4	256,079 (103,631)	103,077 (41,714)	153,002 (61,918)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
KLE 5	38,252 (15,480)	36,567 (14,798)	1,684 (682)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
KLE 6	167,849 (67,926)	56,161 (22,728)	111,688 (45,198)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
KLE 7	66,478 (26,903)	22,797 (9,226)	43,681 (17,677)	USFS Matrix.
KLW 1	147,263 (59,595)	130,290 (52,726)	16,973 (6,869)	BLM Harvest Land Base, Indian, BLM O&C, USFS Matrix.
KLW 2	149,965 (60,689)	105,256 (42,596)	44,709 (18,093)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
KLW 3	146,092 (59,121)	37,595 (15,214)	108,498 (43,907)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
KLW 4	158,835 (64,278)	94,360 (38,186)	64,475 (26,092)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
KLW 5	31,084 (12,579)	5,475 (2,216)	25,610 (10,364)	BLM Harvest Land Base, USFS Matrix.
KLW 6	117,541 (47,567)	10,289 (4,164)	107,252 (43,404)	USFS Matrix.
KLW 7	254,465 (102,978)	168,854 (68,333)	85,610 (34,645)	USFS Matrix.
KLW 8	114,676 (46,408)	39,225 (15,874)	75,452 (30,534)	USFS Matrix.
KLW 9	149,641 (60,558)	735 (297)	148,906 (60,260)	USFS Matrix.
NCO 4	124,219 (50,270)	2,244 (908)	121,975 (49,362)	BLM Harvest Land Base, BLM O&C.
NCO 5	198,463 (80,315)	57,326 (23,199)	141,137 (57,116)	BLM Harvest Land Base, USFS O&C, BLM O&C.
ORC 1	110,658 (44,782)	23,538 (9,526)	87,120 (35,256)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
ORC 2	261,403 (105,786)	83,330 (33,723)	178,073 (72,064)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix.
ORC 3	204,185 (82,631)	130,177 (52,681)	74,008 (29,950)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix.
ORC 4	8,263 (3,344)	8,202 (3,319)	61 (25)	BLM O&C.
ORC 5	176,402 (71,387)	111,009 (44,924)	65,392 (26,463)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
ORC 6	81,912 (33,149)	78,257 (31,669)	3,655 (1,479)	BLM Harvest Land Base, Indian, BLM O&C.
RDC 1	60,766 (24,591)	1,459 (590)	59,307 (24,001)	USFS Matrix.
WCC 1	225,272 (91,164)	12,704 (5,141)	212,568 (86,023)	USFS Matrix.
WCC 2	279,420 (113,077)	88,765 (35,922)	190,655 (77,156)	USFS Matrix, White Pass Ski Area.

TABLE 1—AREAS EXCLUDED BY CRITICAL HABITAT SUBUNIT BY THIS RULE—Continued

Subunit	2012 critical habitat in acres (hectares)	Areas excluded in acres (hectares)	Final critical habitat in acres (hectares)	Excluded lands
WCC 3	394,462 (159,633)	122,196 (49,451)	272,266 (110,182)	USFS Matrix.
WCN 1	438,247 (177,352)	4,816 (1,949)	433,431 (175,403)	USFS Matrix.
WCN 2	103,899 (42,046)	318 (129)	103,581 (41,918)	USFS Matrix.
WCS 1	92,586 (37,468)	48,904 (19,791)	43,682 (17,677)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
WCS 2	151,418 (61,277)	115,898 (46,902)	35,520 (14,374)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
WCS 3	318,382 (128,845)	99,805 (40,390)	218,577 (88,455)	BLM Harvest Land Base, BLM O&C, USFS Matrix.
WCS 4	379,023 (153,385)	172,930 (69,982)	206,093 (83,403)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
WCS 5	356,718 (144,359)	194,057 (78,532)	162,661 (65,827)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.
WCS 6	99,516 (40,273)	96,994 (39,252)	2,522 (1,021)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat designation. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat designation, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We took into consideration the economic and national security impacts in the 2012 critical habitat designation (77 FR 71876, December 4, 2012; pp. 71944–71947). We are revising the 2012 critical habitat designation here based on a reconsideration of those economic impacts combined with a consideration of other relevant factors that were not discussed in the 2012 rule as well as those raised in the public comment period.

Process for Consideration of Impacts

When identifying the benefits of inclusion of an area as designated critical habitat, we primarily consider the additional regulatory benefits that a species would receive due to the protection of that area from potential destruction or adverse modification as a result of actions with a Federal nexus (that is, a discretionary activity or program authorized, funded, or carried out in whole or in part by a Federal agency), the educational benefits of mapping the critical habitat of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat. In the case of the northern spotted owl, the benefits of including an area as designated critical habitat include public awareness of the presence of northern spotted owls and the importance of habitat protection. Another benefit, where a Federal nexus exists, is increased habitat protection for northern spotted owls through the Act's section 7(a)(2) mandate that Federal agencies ensure that any discretionary action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Although regardless of a critical habitat determination, Federal agencies will still be required to complete section 7 consultation for the northern spotted owl where the species is present, we acknowledge that there could be adverse impacts to the habitat if the species is not present at the time of the consultation. Because the FWS determined that all 2012 designated critical habitat was ''occupied,'' surveys will occur prior to authorizing any project on Federal lands to determine if the species is present. Thus, while we recognize that additional section 7 consultation based on the destruction or adverse modification standard is a benefit, completion of section 7 consultation based on the jeopardy standard only will not result in the extinction of the species. Finally, there may be a benefit from a critical habitat designation for certain sources of third-party funding for habitat conservation projects.

When considering the benefits of exclusion, we considered whether the proposed critical habitat designation conflicts with any statutory requirements or nondiscretionary mandates for managing any Federal lands within the critical habitat designation. Second, we considered whether lessening any of the regulatory burdens that may occur due to section 7 consultation for habitat modification may provide other environmental benefits such as lessening the risk of catastrophic wildfire. Third, we place great value on our relationships with Tribal, State, and local governments, so we affirmatively consider their expertise in protecting their local tax base, and the customs and cultures of those within their jurisdiction. Recognizing the expertise and comments from our governmental partners is critical in gaining support for the protection of the northern spotted owl and other listed species.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. The Secretary may assign the weight given to any of the benefits of inclusion as critical habitat as well as the benefits of exclusion from a critical habitat designation. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If

exclusion of an area from critical habitat designation will result in extinction of the species, we will not exclude it from the critical habitat designation under section 4(b)(2) of the Act. The final decision on whether to exclude any areas under section 4(b)(2) will be based on the best scientific and commercial data available at the time of the final designation.

Exclusions

Based on a reanalysis of the 2012 designation, as well as additional public comments we received, we evaluated whether the areas proposed for exclusion or additional areas suggested for exclusion were appropriate to exclude from the final designation under section 4(b)(2) of the Act. Our analysis indicated that the benefits of excluding certain lands from the final designation outweigh the benefits of including those lands as critical habitat; therefore, the Secretary exercises his discretion to exclude these lands from the final designation. Accordingly, we exclude the areas identified below in Table 8 Addendum under section 4(b)(2) of the Act from the critical habitat designation for the northern spotted owl. (Note that the Table 8 Addendum is an addendum to Table 8 in the 2012 final critical habitat rule and displays the areas we are further excluding from the December 4, 2012, final critical habitat designation (77 FR 71876, pp. 71948–71949).) The Table 8 Addendum identifies the specific critical habitat units from the December 4, 2012, final rule (77 FR 71876), which is codified in title 50 of the Code of Federal Regulations (CFR) at § 17.95(b), that we are excluding, at least in part; the approximate areas (ac, ha) of lands involved; and the ownership of the excluded areas.

TABLE 8 ADDENDUM—ADDITIONAL LANDS EXCLUDED FROM THE DESIGNATION OF CRITICAL HABITAT UNDER SECTION 4(b)(2) OF THE ACT

Type of agreement	Critical habitat unit	State	Land owner/agency	Acres	Hectares
O&C Lands, NWFP Matrix	ECN	OR	USFS	476,806	192,957
	ECS	OR	BLM, USFS	120,465	48,751
	ICC	OR	USFS	279,198	112,987
	KLE	OR	BLM, USFS	539,8003	218,450
	KLW	OR	BLM, USFS	588,258	238,059
	NCO	OR	BLM, USFS	59,570	24,107
	ORC		BLM, USFS	428,939	173,585
	RDC		USFS	1,459	590
	WCC		USFS	223,454	90,428
	WCN		USFS	5,134	2,078
	WCS		BLM, USFS	728,588	294,849
Indian lands	ORC	OR	CTCLUSI [1]	5,575	2,256
	KLE	OR	CCBUTI [2]	10,783	4,364
	KLW	OR	CCBUTI	3,821	1,546
White Pass Ski Area	WCC	WA	USFS	211	85
Total additional lands excluded under section 4(b)(2) of the Act.				3,472,064	1,405,094

[1] CTCLUSI is the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.
[2] CCBUTI is the Cow Creek Band of Umpqua Tribe of Indians.

These exclusions are based in part on new information that has become available since the December 4, 2012, critical habitat designation for the northern spotted owl (77 FR 71876), including the Western Oregon Tribal Fairness Act (Pub. L. 115–103), court decisions regarding the future management of O&C lands, and public comments. The exclusions also reflect the new conclusions by the Secretary as to the weight to be accorded to various benefits. In the paragraphs below, we provide a detailed analysis of our consideration of the lands excluded under section 4(b)(2) of the Act.

Consideration of Economic Impacts

Although the economic impacts analysis showed economic impacts in 2012, we did not exclude areas from our December 4, 2012, final critical habitat designation (77 FR 71876) based on those economic impacts. Refer to the December 4, 2012, rule (77 FR 71876) for a description of the purpose and process of evaluating the economic impacts that may result from a designation of critical habitat. However, we have reconsidered those incremental economic impacts in light of our commitment to our Tribal, State, and local government partners and give weight to the needs of the local tax and economic base as well as the custom and culture of the citizens most impacted by a critical habitat designation in addition to updated information that suggests that economic benefits could accrue. We have reevaluated the relative impact of even a ''relatively small'' economic loss for rural communities already faced with impacts including the initial listing of the species. As noted in our 2012 analysis, the direct incremental effects from the critical habitat designation included: (1) An increased workload for action agencies, the Service, and third-party applicants to conduct reinitiated consultations for ongoing actions in newly designated critical habitat (areas proposed for designation that were not already included within the then-extant designation); (2) the cost to action agencies of completing an analysis of the effects to critical habitat for discretionary new projects occurring in occupied areas of designated critical habitat; and (3) potential project alterations in critical habitat areas that are currently unoccupied by spotted owls, since the critical habitat designation would create a potential section 7 obligation based on the adverse modification standard that might not otherwise exist.

In response to the proposed rule, we received submissions of additional economic information from several commenters, including Counties, as well as from the American Forest Resource Council. We reviewed this information carefully, and we also conferred with IEc, which conducted the economic analysis in the 2012 designation (IEc 2012), regarding

critiques in the additional materials submitted regarding the 2012 economic analysis. We incorporated our review and consideration of this information in our response to comments above (See *Comments 20–23*).

Based on this review, we have concluded that completing a new economic analysis for these additional critical habitat exclusions is unnecessary. For further information regarding the 2012 analysis, see the December 4, 2012, final rule for a summary of the final economic analysis and our consideration of economic impacts (77 FR 71876, pp. 71878, 71945–71947, 72046–72048). Both the 2012 economic analysis as well as the additional information we received showed that there is an incremental economic impact to the critical habitat designation. There is no minimum statutory economic impact included in the section 4(b)(2) regulation or the legislative history against which the Secretary is directed to consider in his exclusion analysis. Thus, the Secretary is using the wide discretion under the ESA to weigh these economic costs in favor of exclusion. We reviewed the 2012 final economic analysis (IEc 2012) as well as comments and additional information received on the proposed rule. Both the original 2012 economic analysis and the additional information presented show that there is some monetized economic cost savings based upon the exclusions undertaken in this final rule. However, the original 2012 economic analysis did not provide quantified cost estimates related to consultation and potential project modifications of ''linear projects,'' including power lines and natural gas pipe lines. The 2012 economic analysis could not have foreseen the recent changes in the electricity generating industry that moved the industry from retiring coal powered plants to natural gas plants. Because of such changes, the unquantified effects of the 2012 economic analysis takes on more importance in this action, albeit still unquantified. We have weighed those economic costs, in combination with the other relevant factors discussed below to determine that the balance weighs in favor of excluding additional habitat.

Consideration of Impacts on National Security

We did not exclude areas from our December 4, 2012, revised critical habitat designation based on impacts on national security, but we did exempt Joint Base Lewis-McChord lands based on the integrated natural resources management plan under section 4(a)(3) of the Act (77 FR 71876, pp. 71944–71945). We did not receive any comments or additional information on the impacts of the proposed revised designation on national security or homeland security. We have determined not to exclude any additional areas on the basis of impacts on national security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans such as habitat conservation plans (HCPs), safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs) covering species in the area, or whether designation of, or exclusion from, critical habitat would encourage any non-permitted conservation agreements and partnerships. In addition, we consider any Tribal forest management plans (FMPs) and partnerships and consider the government-to-government relationship of the United States with Tribes. We also considered the requests from the local governments directly impacted by the northern spotted owl critical habitat designation based upon our recognition that County Commissions are elected representatives of their constituents and have knowledge and expertise in the areas related to the economic well-being, employment, tax base, and custom and cultures of the citizens within their jurisdictions. Because we recognize their duty as locally elected officials to represent the best interests of their citizens and we take their concerns seriously, we acknowledge the impacts that the northern spotted owl listing and critical habitat designation has had on their jurisdictions as part of our balancing of other relevant impacts.

Exclusion of Indian Lands

Several Executive Orders, Secretarial Orders, and policies are relevant when working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Indian lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service, Secretarial Order 3206, American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation;, it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: ''Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.'' In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we always consider exclusions of Indian lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and give great weight to Tribal concerns in analyzing the benefits of exclusion.

In this final designation, the Secretary has exercised his discretion under section 4(b)(2) of the Act to exclude from this critical habitat designation 14,605 acres (5,910 hectares) of Indian lands (in this case, lands held in trust) for Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) and 5,575 acres (2,256 hectares) of land for Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI). See Table 1 for the Unit and Subunit location of these Indian lands.

In our December 4, 2012, final rule (77 FR 71876), we prioritized areas for critical habitat designation by looking first to Federal lands, followed by State, private, and Indian lands. No Indian lands were designated in our final rule because we found that we could achieve the conservation of the northern spotted owl with limiting the designation to other lands. However, in 2018, Congress passed and the President signed the Western Oregon Tribal Fairness Act (Pub. L. 115–103). This act mandated that certain lands managed by BLM be taken into trust by the United States for the benefit of the CCBUTI and the CTCLUSI. In January 2020, BLM released its decision record (BLM 2020) transferring management authority of approximately 17,800 acres (7,203 hectares) to CCBUTI and 14,700 acres (5,949 hectares) to CTCLUSI. Of the transferred lands, 20,179 acres (8,166 hectares) are located within designated critical habitat for the northern spotted owl. We considered this new

information, as well as comments received on this proposed exclusion of these lands, and we are now excluding these Indian lands under section 4(b)(2) of the Act, as explained below.

Benefits of Inclusion—Indian Lands

The CCBUTI and CTCLUSI Indian lands includes areas occupied by the northern spotted owl. Therefore, even without designating these lands, Federal agencies would need to consult for jeopardy if they are considering actions that may affect the species. This would limit the extent to which designating these areas will incrementally benefit the species through consultation under section 7. Nevertheless, designating these areas will have other benefits.

One of the benefits of the designation of critical habitat on Tribal land is that it may affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential environmental effects of proposed projects via ESA section 7 consultation, and completion of that consultation on critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Additionally, there is an educational benefit to the inclusion of land as critical habitat. A critical habitat designation can inform Tribal members and others about the potential conservation value of the area for the species.

Another possible benefit is that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for northern spotted owl habitat-related projects.

A final possible benefit is these lands may contribute to the recovery of the species by providing additional areas of habitat for breeding, feeding, or connectivity between active home territories.

Benefits of Exclusion—Indian Lands

The benefits of excluding Indian lands from designated critical habitat are significant. We have determined that the significant benefits that would be realized by forgoing the designation of critical habitat on these areas include: (1) Our deference to the Tribes to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the northern spotted owl and its habitat that might not otherwise occur; and (2) the continuance and strengthening of our effective working relationships with the Tribes to promote the conservation of the northern spotted owl and its habitat.

We have determined that the CCBUTI and CTCLUSI should be the governmental entities to manage and promote the conservation of the northern spotted owl on their trust land as indicated in Secretarial Order 3206; Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2).

We find that other conservation benefits are provided to the affected critical habitat subunits and the northern spotted owl and its habitat by excluding these lands from the designation. For example, the Continuous Forestry Management Approach adopted by the CCBUTI in their forest management plan takes proactive prevention, control, and recovery actions to mitigate damages and loss of forest values from wildfire, insects, and disease and other damaging events. Additionally, the CTCLUSI has committed to coordination with the Service in developing its approach to conservation of listed species for these newly acquired lands.

Finally, both Tribes specifically requested these exclusions in their comment letters on the proposed rule and we evaluated these exclusions in light of their requests. We place a high value on our relationship with the Tribes and recognize their expertise in areas related to the representation of their Tribal members. Because we recognize our government-to-government relationship, we seriously consider their requests as part of our balancing of other relevant impacts as required under ESA section 4(b)(2). For these reasons, we have determined that excluding these recently transferred lands from the designation of critical habitat for the northern spotted owl is of substantial benefit in aid of the unique relationship between the Federal Government and Tribes and in support of Tribal self-governance.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Indian Lands

The benefits of including Indian lands in the critical habitat designation are educational awareness, the potential additional grant funding, and the completion of section 7 based upon the implementation of other laws and regulations. While there remain some benefits to these regulatory intersections, the Tribes' commitment to continue to coordinate with us in conserving habitat for the northern spotted owl in these newly acquired areas as they manage the landscape is also significant. Consistent with principles of self-determination and the unique Federal-Tribal relationship, we conclude that requests from Tribal governments are important to consider and weigh. We view this as a substantial benefit since we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the northern spotted owl. Because the Tribes will implement habitat conservation efforts on these newly acquired lands, and are aware of the value of their lands for northern spotted owl conservation, the educational benefits of a northern spotted owl critical habitat designation are also minimized. For these reasons, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from the presence of the species.

In summary, the benefits of these Indian lands as critical habitat are low, and are limited to additional regulatory processes and educational benefits that are insignificant—particularly since the northern spotted owl listing and past critical habitat needs have been so well publicized and are known. Additionally, the Tribes have committed to managing these lands to benefit (which include the potential recovery of) the northern spotted owl making the additional benefit of designating these lands as critical habitat for recovery purposes also minimal. The benefits of excluding these areas from designation as critical habitat for the northern spotted owl are significant, and include encouraging the continued development and implementation of special management measures that the Tribes plan for the future or are currently implementing. These activities and projects will allow the Tribes to manage their natural resources to benefit the northern spotted owl. This approach is consistent with the government-to-government nature of our working relationship with the Tribes, and also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding these

areas from critical habitat designation outweigh the benefits of including these areas as critical habitat.

Exclusion Will Not Result in Extinction of the Species—Indian Lands

We do not conclude that the exclusion of these Indian lands will result in extinction of the species. First, as discussed under Effects of Critical Habitat Designation Section 7 Consultation in the 2012 critical habitat rule (77 FR 71876, December 4, 2012, p. 71937), if a Federal action or permitting occurs, the known presence of northern spotted owls would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will provide the information and means to protect the species against extinction. Second, the Tribes are committed to protecting and managing these lands and species found on these lands, according to their Tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the northern spotted owl and its habitat. Accordingly, we are excluding the 20,179 acres (8,166 hectares) of Indian lands under section 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and exclusion will not cause the extinction of the species.

Exclusion of the White Pass Ski Area

The White Pass Ski Area occupies approximately 1,200 acres of Forest Service lands (211 acres of which are within the 2012 northern spotted owl critical habitat designation) in the Okanogan/Wenatchee and Gifford Pinchot National Forests. The Ski Area contains ski lifts and runs and provides recreational opportunities for approximately 130,076 visitors each year benefitting a county with a population of just over 75,000. Although the 2012 critical habitat rule states that ''meadows and grasslands . . . and manmade structures and the land on which they are located'' are not critical habitat, because the part of the area encompassed by the Ski Area's special use permit with the Forest Service is within the critical habitat boundaries, the Ski Area owners and Lewis County have raised concerns as to the Ski Area's future vis-a-vis the northern spotted owl critical habitat designation. Lewis County, Washington, is particularly concerned given the Ski Area's large and positive economic impact for the County.

Benefits of Inclusion—White Pass Ski Area

As noted above, one benefit of inclusion of Federal lands in a critical habitat designation is that Federal agencies are required to consult on whether their activity would destroy or adversely modify critical habitat. In this case, we believe that benefit based both on the current habitat needs and recovery needs is small considering the amount of acreage concerned (211 acres) and the remaining requirement for section 7 consultation should owls be located within the area impacted by future Forest Service actions regarding the Ski Area. An additional benefit is public education and awareness of the presence of northern spotted owls and their habitat and range.

Benefits of Exclusion—White Pass Ski Area

Lewis County, Washington, noted that the ski area provides significant economic benefit to the County. Although quantification of these economic impacts may be difficult, minimum estimations based on the number of annual visitors to the Ski Area; the cost of lift tickets, equipment rentals, and group and private lessons at the Ski Area; and related economic benefits from this influx of visitors to the County are likely in the magnitude of tens of millions of dollars annually. The Secretary exercises his discretion to give weight to the economic importance of this continued use of the National Forest lands. This weight is based on our recognition that County Commissioners are elected representatives of their constituents and have knowledge and expertise in the areas related to the economic well-being, employment, tax base, and custom and cultures of the citizens within their jurisdictions. Because we recognize their duty as locally elected officials to represent the best interests of their citizens and we take their concerns seriously, we acknowledge the impacts that the northern spotted owl listing and critical habitat designation has had on their communities as part of our balancing of other relevant impacts. Thus, we conclude that the benefits of excluding the White Pass Ski Area from designated critical habitat are significant.

Benefits of Exclusion Outweigh the Benefits of Inclusion—White Pass Ski Area

Because we conclude that the benefits of exclusion are significant, and the benefits of inclusion are small, we conclude that the benefits of exclusion outweigh the benefits of inclusion of 211 acres of critical habitat in the Ski Areas Special Use Permit. With regard to the educational benefits of inclusion as critical habitat, because the spotted owl has been listed as a threatened species since 1990 and the significant amount of local and national discussion and debate that has occurred since that time, the public is very aware of the species' range and habitat needs; thus, any additional educational benefits of designated critical habitat are limited. With regard to recovery, the benefits of inclusion are also small because of the small size of the acreage and because section 7 consultation will still be required for all discretionary activities if the owl is present.

Additionally, as discussed under Effects of Critical Habitat Designation, *Section 7 Consultation,* in the 2012 critical habitat rule (77 FR 71876, December 4, 2012, p. 71937), if a discretionary Federal action or permitting occurs, the known presence of northern spotted owls would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat. Because the separate requirement of an evaluation under the jeopardy standard limits the benefits of including the area in the designation of critical habitat, the benefits of exclusion outweigh the benefits of inclusion.

Exclusion of the Ski Area Will Not Result in Extinction of the Species

We do not conclude that the exclusion of 211 acres within the White Pass Ski Area will result in extinction of the species because exclusion of this area is so small that exclusion will have minimal impacts on the conservation of the owl. First, because of the significant development of ski lifts (manmade structures) and the removal of trees for ski runs, the conservation benefit of this land is very low. Second, the Forest Service will still be required to consult on whether renewal of the special use permit or changes to the permit will jeopardize the continued existence of the species if northern spotted owls are found to be present in the Ski Area Special Use Permit boundaries. Ensuring that the proposed action or permitting does not jeopardize the existence of the species will further ensure that exclusion will not cause extinction of the species. Therefore, we are excluding this area from the designation of critical habitat.

Exclusion of Additional Federal Lands

We recognize that, under our 2016 policy regarding implementation of section 4(b)(2) (81 FR 7226, February 11,

2016), we generally focus our exclusions on non-Federal lands, as the 2016 policy opined that the benefits of designating Federal lands as critical habitat are typically greater than the benefits of excluding Federal lands. This policy was based on Congress's declaration that ''all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.'' (Section 2(c)(1)). Additionally, Congress requires that all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. However, for the reasons set forth below, we can comply with these mandates while still determining that the benefits of exclusion of critical habitat outweigh the benefit of including these areas as critical habitat.

As stated above, the Secretary has very broad discretion under the second sentence of section 4(b)(2) on how to weigh the impacts of a critical habitat designation. In particular, ''[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion.'' (H.R. Rep. No. 95–1625, at 17 (1978)). In weighing the benefits of inclusion against the benefits of exclusion, we considered the following general principles. First, we gave considerable weight to the statute's governing the use and management of the O&C lands, which specifies that the primary purpose of those lands is to produce timber on a sustained yield basis.

Second, even if the exclusion of certain Federal lands occurs, under section 7 of the Act, Federal agencies cannot fund, authorize, or carry out any discretionary activities that result in jeopardy to a listed species. This requirement applies regardless of the existence of designated critical habitat. Additionally, the northern spotted owl will be protected from ''take'' under section 9 of the ESA. Thus, the species will be protected regardless of the critical habitat exclusions discussed in the rule, and the benefits of inclusion are therefore small. The only direct consequence of critical habitat designation is to require Federal agencies to ensure that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this requirement may impose on Federal agencies can be divided into two types: (1) The additional administrative or transactional costs associated with the consultation process with a Federal agency, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (*e.g.,* permits, licenses, leases), of any project modifications necessary to avoid destruction or adverse modification of critical habitat. These costs may be minimal, however, if the species occupies the area so that section 7 consultation would occur regardless of whether the habitat is designated as critical habitat. Nevertheless, although our original 2012 economic analysis found that the actual administrative cost with a critical habitat designation is small, avoidance of that specific cost is not the only measure of benefits of excluding an area from a critical habitat designation. More recent information about the transition of the electricity power sector and well as the potential administrative costs consultation including the underlying analytic requirements lends more compelling weight to the previously unquantified effects noted in the 2012 analysis. We have also considered the great benefits of excluding certain federally owned areas from critical habitat, and we find that these significant benefits greatly tip the balance in favor of exclusion.

For example, the additional requirement for completing section 7 consultation and the underlying analytic requirements constitutes a regulatory hurdle for Federal agencies in completing their duties under their organic statutes. These costs do not account for the economic costs associated with potential delay or modification of projects. Lessening one of the regulatory hurdles could lead to increased timber production and thereby benefit local counties and communities by supplying jobs and county revenues for schools and roads, protecting the local tax base, and protecting the social fabric and customs and culture of the citizens of the county. These benefits outweigh the benefits of including the areas in the critical habitat designation because section 7 consultation will still be completed under the jeopardy standard even if the areas are excluded from designation. Moreover, such section 7 consultations based on the jeopardy standard will ensure that excluding the areas from the designation will not result in extinction of the species.

Oregon and California Lands (O&C Lands)

In this final designation, the Secretary has exercised his discretion under section 4(b)(2) of the Act to exclude from this critical habitat designation 1,373,693 acres (555,913 ha) of lands that were reserved to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218) (O&C lands). See Table 1 for the Unit and Subunit locations of these exclusions.

The O&C lands were revested to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218). The Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; Pub. L. 75–405) addresses the management of O&C lands. The O&C Act identifies the primary use of revested timberlands for permanent forest production. These lands occur in western Oregon in a checkerboard pattern intermingled with private land across 18 counties. Most of these lands (82 percent) are administered by BLM (FWS 2019, p. 1). The remaining lands are administered by the U.S. Forest Service. The opening statement of the O&C Act provides that these lands are to be managed ''for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.'' 43 U.S.C. 2601.

The counties where the O&C lands are located participate in a revenue-sharing program with the Federal Government wherein the counties receive 50% of the revenues based on commercial receipts (*e.g.,* income from commercial timber harvest) generated on these Federal lands. 43 U.S.C. 2605(a). When timber production on these lands was severely curtailed by listing of the northern spotted owl among other things, Congress in 1993 attempted to establish certain safety-net payments to the affected counties, and in 2000 passed the Secure Rural Schools and Community Self Determination Act, Public Law 106–393, 16 U.S.C. 500 (SRS) to, among other things, extend the previously established safety-net payments to try to make up for the economic devastation of the loss of timber receipts to the impacted counties. However, because none of the safety-net provisions, including the SRS, authorizes a permanent fund, the local governments that commented on this rulemaking do not view it as an equal replacement to the loss their schools and roads suffered from the loss in their timber receipts from the O&C lands.

Since the mid-1970s, scientists and land managers have recognized the importance of forests located on O&C lands to the conservation of the northern spotted owl and have attempted to reconcile this conservation need with other land uses (Thomas *et al.* 1990, entire). Starting in 1977, BLM worked closely with scientists and other State and Federal agencies to implement northern spotted owl conservation measures on O&C lands. Over the ensuing decades, the northern spotted owl was listed as a threatened species under the Act, and critical habitat was designated (57 FR 1796, January 15, 1992) and revised two times (73 FR 47326, August 13, 2008; 77 FR 71876, December 4, 2012) on portions of the O&C lands.

An initial Recovery Plan for the owl was completed in 2008 (73 FR 29471, May 21, 2008). In 2011, the Service revised the northern spotted owl Recovery Plan (see 76 FR 38575, July 1, 2011), and the revised plan recommended ''continued application of the reserve network of the [Northwest Forest Plan] NWFP until the 2008 designated spotted owl critical habitat is revised and/or the land management agencies amend their land management plans taking into account the guidance in this Revised Recovery Plan'' (FWS 2011, p. II–3). On December 4, 2012, the Service published in the **Federal Register** (77 FR 71876) a final rule revising the northern spotted owl critical habitat designation, and in 2016, BLM revised its RMPs for western Oregon, resulting in two separate plans (BLM 2016a, 2016b). These two BLM plans, the Northwestern Oregon and Coastal Oregon Record of Decision and Resource Management Plan (BLM 2016a) and the Southwestern Oregon Record of Decision and Resource Management Plan (BLM 2016b), address all or part of six BLM districts across western Oregon.

The land and use allocations in the BLM RMPs were challenged in the Federal District Court for the District of Columbia. The Court determined that the O&C Act ''plainly requires that timber grown on O&C land be 'sold, cut, and removed in conformity with the princip[le] of sustained yield.''' *American Forest Resource Council* v. *Hammond,* 422 F. Supp. 3d 184, 189 (D.D.C. 2019) (quoting 43 U.S.C. 2610). The ruling also calls into question aspects of the legal analysis in the 2012 critical habitat designation that it failed to recognize the statutory requirement for the management of the O&C lands.

Finally, while the proposed rule only included the Harvest Land Base portion of the O&C lands for exclusion, we conclude that all O&C lands should be excluded. First, commenters had requested exclusion of all O&C lands as part of the public comments on the proposed rule, illustrating that the public was on fair notice that the exclusions in the final rule could be expanded. Second, the O&C Act and its mandate for sustained yield timber harvest applies to all O&C lands, not just those identified for harvest in the 2016 BLM RMPs. Third, section 4(b)(2) gives the Secretary very broad discretion in weighing the benefits of inclusion with the benefits of exclusion, so long as he concludes that the exclusion will not result in extinction of the species. The Secretary has exercised that extremely broad discretion in this case as explained below. Thus, the exclusion of the O&C lands in this case is procedurally and legally supported.

NWFP Matrix Lands

This rule also excludes approximately 2,077,697 acres (840,814 ha) of Forest Service and BLM matrix lands described in the NWFP. On April 2, 1993, President Clinton convened a Forest Conference in Portland, Oregon, to discuss the management on over 24 million acres of Federal lands, in light of the listing of the northern spotted owl in 1990. Out of that conference and based on an interdisciplinary team effort came the Northwest Forest Plan. The plan proceeded from the Forest Service's and BLM's statutory authorities as set forth in the Forest Service Organic Act, the Multiple-Use Sustained-Yield Act, the Endangered Species Act, and the Federal Land Policy and Management Act. These statutes grant the Departments of Agriculture and the Interior broad discretion to rely upon their expertise to manage the lands under their authorities in a manner deemed to best meet the purposes Congress has delineated. The purpose of the O&C lands has been discussed in the preceding paragraphs. With regard to the Forest Service lands, one of the purposes of the National Forest organic statutes is to provide for the long-term sustainability of the forests' many natural resources, including the species that inhabit them. Another purpose of the Forest Service Organic Act was to ''to improve and protect the forest within the reservation, . . . securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.'' 16 U.S.C. 473.

Through its utilization of ecosystem management principles, the NWFP was designed to balance these mandates more effectively and efficiently than previous planning efforts associated with management of Federal old-growth forests. Statutes such as the Forest and Rangeland Renewable Resources Planning Act, the National Forest Management Act, and the Federal Land Policy and Management Act, which outline various procedures to follow in Federal public land planning, also authorize the employment of principles intrinsic to ecosystem management. ESA section 7 consultation was completed on the NWFP and we found that implementation of that plan would not result in jeopardy to the Northern Spotted Owl. Based on these principles, the Record of Decision (ROD) for the NWFP was signed on April 13, 1994. The ROD designated seven land allocations, including:

Congressionally Reserved Areas—7,320,600 acres
Late Successional Reserves—7,430,800 acres
Adaptive Management Areas—1,521,800 acres
Managed Late Successional Areas—102,200 acres
Administratively Withdrawn Areas—1,477,100 acres
Riparian Reserves—2,627,500 acres
Matrix lands—3,975,300 acres

Matrix lands represent just 16% of the Federal land within the range of the northern spotted owl. According to the Record of Decision, it was to be in the matrix lands where the most timber harvest and other silvicultural activities would be conducted.

Finally, while the proposed rule only included the Harvest Land Base portion of the O&C lands for exclusion, we conclude that the NWFP matrix lands should also be excluded. First, commenters had requested exclusion of all NWFP matrix lands as part of the public comments on the proposed rule, illustrating that the public was on fair notice that the exclusions in the final rule could be expanded. Second, the NWFP matrix lands have previously been designated as multiple use lands, including timber harvest thus, including them here does not change the character of the prior decisions. Third, makeup and management of these lands is similar to the O&C lands. Fourth, section 4(b)(2) gives the Secretary very broad discretion in weighing the benefits of inclusion with the benefits of exclusion, so long as he does not conclude that the exclusion will result in extinction of the species. The Secretary has exercised that extremely broad discretion in this case as explained below. Thus, the exclusion of the NWFP matrix lands in this case is procedurally and legally supported.

Benefits of Inclusion—O&C and NFWP Matrix Lands

As discussed above under *Consideration of Impacts under Section 4(b)(2) of the Act,* the primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with the FWS under section 7 of the Act to ensure discretionary actions that they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Thus, a benefit of a critical habitat designation on these lands would be any additional measures or alternatives required by the FWS as a result of the section 7 consultation if the proposed activity would otherwise destroy or adversely modify critical habitat.

An additional benefit of including an area as designated critical habitat includes public awareness of the presence of northern spotted owls and the importance of habitat protection.

A third benefit of including these lands is the role that they play in the recovery of the northern spotted owl. According to the guidance in the 2011 Revised Recovery Plan, the inclusion of these lands is important for connectivity between the Eastern and Western northern spotted owl ranges. Additionally, there is benefit of including low-suitability or marginal lands as critical habitat as these habitats may be able to grow into ''old growth forests'' at some point in the future. We also considered whether inclusion of these lands supports recovery of the northern spotted owl.

Benefits of Excluding—O&C Lands and NWFP Matrix Lands

There are appreciable benefits that will be realized by excluding O&C and the NWFP matrix lands (including those ''matrix'' lands now managed by BLM as Harvest Land Base lands under the 2016 RMPs outside of the O&C lands) from critical habitat. Executive Order 12866 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Thus, one benefit of excluding these lands from critical habitat is to remove one of the regulatory burdens in managing these lands for their original purposes, including sustained yield timber production. As stated above, O&C lands are to be managed for providing timber on a sustained-yield basis. NWFP matrix lands are to be managed for multiple use and sustained yield. Lessening one of the regulatory hurdles towards that management could lead to increased timber production that would benefit local counties and communities by supplying jobs and county revenues for schools and roads, protecting the local tax base, and protecting the social fabric and customs and culture of the citizens of the county.

An additional benefit of excluding these lands is that making more lands available for timber harvest gives land managers a greater opportunity to allow longer cycles between timber harvests or to design timber harvests to benefit the northern spotted owl. The northern spotted owl can use second-growth timber that leaves a few snags or old trees on the harvested land. The more land that is in the potential harvest base, the more flexibility the BLM and Forest Service have to manage for longer cycles between timber harvests, providing environmental benefits from the resulting mix of tree ages. Authorizing and conducting more timber sales may also lessen the risk of catastrophic wildfire that can destroy or degrade northern spotted owl habitat and puts rural communities, private property, and lives at great risk.

Another important and relevant factor in considering the benefits of exclusion is the recognition of the expertise of locally elected governments in areas relating to the stability of the local economy and protection of the local custom and culture of the county. While the FWS has expertise in biological matters, our expertise does not extend to consideration of the local tax base, areas of potential employment, and the social fabric of communities and counties. We also recognize that the Federal Government should strongly consider and give weight to the input of its State and local government partners, and we do so here. The County Commissions commenting on this rule are also elected representatives of their constituents and should have a considered voice in the decisions directly affecting their constituents.

Benefits of Exclusion Outweigh the Benefits of Inclusion—O&C Lands and NWFP Matrix Lands

The Secretary has determined that the benefits of excluding the O&C and the NWFP matrix lands from the designation of critical habitat for the northern spotted owl outweigh the benefits of including these areas as critical habitat. Even after excluding these lands, there remain approximately 6,105,279 acres of designated critical habitat as well as several million additional acres of protected habitat for the northern spotted owl in designated wilderness and National Parks, throughout the owl's range. Although the excluded areas provide some conservation value, the Secretary has determined that the benefits of excluding the O&C lands, given their mandated primary use for timber harvest, and the NWFP matrix lands, given their multiple-use values, outweigh the value of their inclusion as critical habitat. This conclusion is supported by the northern spotted owl's use of timbered private lands where some older trees and snags have been retained but timber harvest is allowed.

This also supports our determination that these areas can still be used for recovery of the northern spotted owl. First, as stated in our analysis, currently the biggest threat to the recovery of the northern spotted owl is the invasive barred owl. We are considering the next steps to implement an aggressive barred owl treatment/management program with the completion of our experimental study. Additionally, northern spotted owl can use a variety of timber age classes for recovery. Simply excluding these lands from critical habitat does not mean that the owls will abandon these areas or that they will not contribute, in some manner, to the recovery of the species, assuming an aggressive barred owl removal program is implemented.

Additionally, where northern spotted owls are present and may be affected by discretionary Federal actions, any resulting section 7 consultations will determine if the actions jeopardize the continued existence of the owl; if so, we can work with the Federal agencies and applicants to develop reasonable and prudent measures or alternatives that allow the action to go forward without jeopardizing the species. In other words, for discretionary actions, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species where it is present to ensure such actions do not jeopardize the species' continued existence, even in the absence of designated critical habitat. On both O&C and matrix lands to be excluded in this rule, surveys for northern spotted owls will be completed to determine the presence or absence of owls before any activity can occur. If the northern spotted owl is present, the proposed activity cannot jeopardize the continued existence of the species. Additionally, any programmatic land use plans or amendments proposed by the BLM and Forest Service will have to be analyzed through section 7 consultation, further ensuring that the management actions therein do not jeopardize the species. Thus, the added requirement to consult on effects to

designated critical habitat in the O&C and matrix lands is not an efficient use of limited consultation and administrative resources.

Finally, the informational benefits of including the O&C lands and matrix lands as critical habitat are minimal given the well-known history of the northern spotted owl. Because the spotted owl has been listed since 1990, the public is very aware of its status and any additional educational benefits are limited.

In sum, the benefits derived from excluding the O&C and the NWFP matrix lands outweigh the benefit of including these lands in the designation. Excluding the O&C and the NWFP matrix lands reduces the unnecessary regulatory burden of additional section 7 consultations on discretionary activities about adverse modification of designated critical habitat. Additionally, exclusion of these lands to ease the process for authorizing Federal timber harvesting reflects our consideration of the input of the local governments.

Exclusion Will Not Result in Extinction—O&C Lands and NWFP Matrix Lands

We do not find that excluding the O&C and the NWFP matrix acres, in addition to the other exclusions discussed above, from the critical habitat designation will result in extinction of the northern spotted owl. Our findings are summarized below, and are further described in a memorandum from the Director to the Secretary (FWS 2021).

The legal standard under which exclusions are evaluated is whether, based on the best scientific and commercial data available, the Secretary concludes that the exclusions ''will result in extinction of the species.'' Although there are no cases directly on point, the two cases that have discussed ''extinction'' have done so with references to the ''survival'' of the species rather than recovery of the species. *See Northern New Mexico Stockman's Association* v. *United States Fish and Wildlife Service,* __F. Supp.3d__, 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force* v. *USFWS,* 378 F.3d 1059 (9th Cir. 2004) (rejecting the FWS ESA section 7 regulation defining ''destruction or adverse modification'' for conflating survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species—that is whether the species can survive without these particular areas. For the following reasons, based on the best scientific and commercial data available, the Secretary has not concluded that excluding these particular areas will result in extinction of the northern spotted owl.

First, as stated above, the determination to exclude an area from critical habitat designation does not affect the requirement that Federal agencies comply with the section 7 obligation to avoid discretionary actions that may jeopardize the continued existence of a listed species. Similarly, the decision to exclude an area from critical habitat does not eliminate the need to comply with the section 9 prohibitions of the Endangered Species Act. Because there is no section 4(d) rule accompanying the northern spotted owl threatened listing, the species is treated as if it were endangered and take is prohibited. Therefore, any assumptions regarding the future activities that take place on Federal or private lands must recognize the compliance with those section 7 and section 9 of the ESA, where applicable.

Second, despite the significant acreages of critical habitat that have been set aside for the northern spotted owl since 1990, estimated populations of northern spotted owl have declined more than 70% since the listing of the species. (85 FR 81145, December 15, 2020.) The recent 12-Month Finding for the northern spotted owl (85 FR 81144, December 15, 2020) determined that an uplisting from threatened to endangered was warranted but precluded by higher priorities. *Id.* A recent published demographic study for the northern spotted owl (Dugger *et al.* 2016, entire) found that the nonnative barred owl that is invading northern spotted owl habitat was currently the stressor with the largest negative impact on the northern spotted owl through competition for resources. Current best available scientific and commercial data indicate that the largest negative contributing factor on the northern spotted owl population is the invasive barred owl. Thus, in order to protect the northern spotted owl from extinction, management of the barred owl must occur.

Third, in addition to the critical habitat exclusions finalized here, there remain several million acres in National Parks, designated wilderness, and wilderness study areas that contain northern spotted owl habitat. These areas are not officially designated as critical habitat because no additional management is needed in these areas to protect the habitat. Absent invasions by the barred owl or wildfire, this habitat and the owls living therein will be maintained in their current state regardless of any critical habitat exclusions. Because the habitat and owls living in National Parks and wilderness will continue to be maintained absent barred owl invasions, the proposed exclusions will not cause the extinction of the northern spotted owl under the section 4(b)(2) standard.

State Lands

We also evaluated whether additional exclusions from the critical habitat designation under section 4(b)(2) of the Act should be considered on State lands. In our December 4, 2012, critical habitat designation (77 FR 71876), we excluded State lands in Washington and California that were covered by HCPs and other conservation plans. In Oregon, State agencies are currently working on HCPs that will address State forest lands in western Oregon, including the Elliott State Forest (managed by the Oregon Department of State Lands) and other State forest lands in western Oregon (managed by the Oregon Department of Forestry).

HCPs necessary in support of incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, as a result of their commitments in the HCPs, incidental take permittees agree to provide more conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

When we undertake a discretionary section 4(b)(2) exclusion analysis, we consider areas covered by an approved HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met:

(1) The permittee is properly implementing the HCP and is expected to continue to do so for the term of the agreement. An HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the HCP, implementing agreement, and permit.

(2) The species for which critical habitat is designated is a covered species in the HCP, or very similar in its habitat requirements to a covered species. The recognition that the Service extends to such an agreement depends on the degree to which the conservation measures undertaken in the HCP would also protect the habitat features of the similar species.

(3) The HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

The proposed State forest HCPs will not be completed prior to the publication of this document; thus, they do not yet fulfill the above criteria. As a result, we are not including additional State lands for exclusion from the critical habitat designation for the northern spotted owl.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has identified this rulemaking action as economically significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in the light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Although the Service acknowledges that there may be significant economic impacts to small entities, largely deregulatory, as a result of the Service's decision to exclude additional area in this rule, there is no requirement under the RFA to evaluate the potential impacts to entities that are not directly regulated. The Service has discussed economic impacts to small entities elsewhere as part of its reasoning with respect to exclusions considered under section 4(b)2 and the requirements of E.O. 12866.

Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that the revised critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the revised designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that the revised critical habitat designation will not have a significant adverse economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

Executive Order 13771

This rule is an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) deregulatory action.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis for the December 4, 2012, revised critical habitat designation for the northern spotted owl (77 FR 71876), we did not find that the critical habitat designation would significantly affect energy supplies, distribution, or use. Any administrative costs due to the designation of critical habitat would be reduced because we are excluding additional lands from the designation in this final rule. The OIRA Administrator has not otherwise designated this action as an energy action. Accordingly, no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This final rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.''

These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The revised designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because we are only excluding areas from the northern spotted owl's critical habitat designation; we are not designating additional lands as critical habitat for the species. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for northern spotted owl in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the revised designation of critical habitat for northern spotted owl, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this final rule does not have significant federalism effects that warrant preparation of a federalism summary impact statement. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this revised critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, this final rule does not have substantial direct effects on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. As noted above, the decision set forth in this document removes areas from the designation.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation with the Federal agency under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Further, in this document, we are excluding areas from the northern spotted owl's critical habitat designation; we are not designating additional lands as critical habitat for the species.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are revising critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the northern spotted owl, the December 4, 2012, final rule (77 FR 71876) identifies the elements of physical or biological features essential to the conservation of the species, and we are not making any changes to those elements in this document. The areas that we are excluding from the designated critical habitat are described in this rule and the maps and coordinates or plot points or both of the subject areas are included in the administrative record and are available at *http://www.fws.gov/oregonfwo* and at *http://www.regulations.gov* under Docket No. FWS–R1–ES–2020–0050.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. Seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Indian lands are not subject to the same controls as Federal public lands, to remain sensitive to Tribal culture, and to make information available to Tribes. We have also evaluated this rule under the criteria in Executive Order 13175 and under the Department's Tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian Tribes. To fulfill our responsibility under Secretarial Order 3206, we have consulted with the Cow Creek Band of Umpqua Tribe of Indians and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, which both manage Indian land within the areas designated as critical habitat for the northern spotted owl.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the U.S. Fish and Wildlife Service and the Department of the Interior.

Author

The primary author of this final rule was Karen Budd-Falen, Deputy Solicitor, Parks and Wildlife, Immediate Office of the Solicitor, Department of the Interior, 1849 C Street NW, Washington, DC 20240.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, for the reasons discussed above in the preamble, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citations for part 17 are revised to read as follows:

Authority: 16 U.S.C. 1361–2012;1407; 1531–2012;1544; and 4201–2012;4245, unless otherwise noted.

■ 2. Amend § 17.95(b), the entry for ''Northern Spotted Owl *(Strix occidentalis caurina),*'' by revising paragraphs (6) through (8), introductory text and second map of (9), and (10) through (19) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

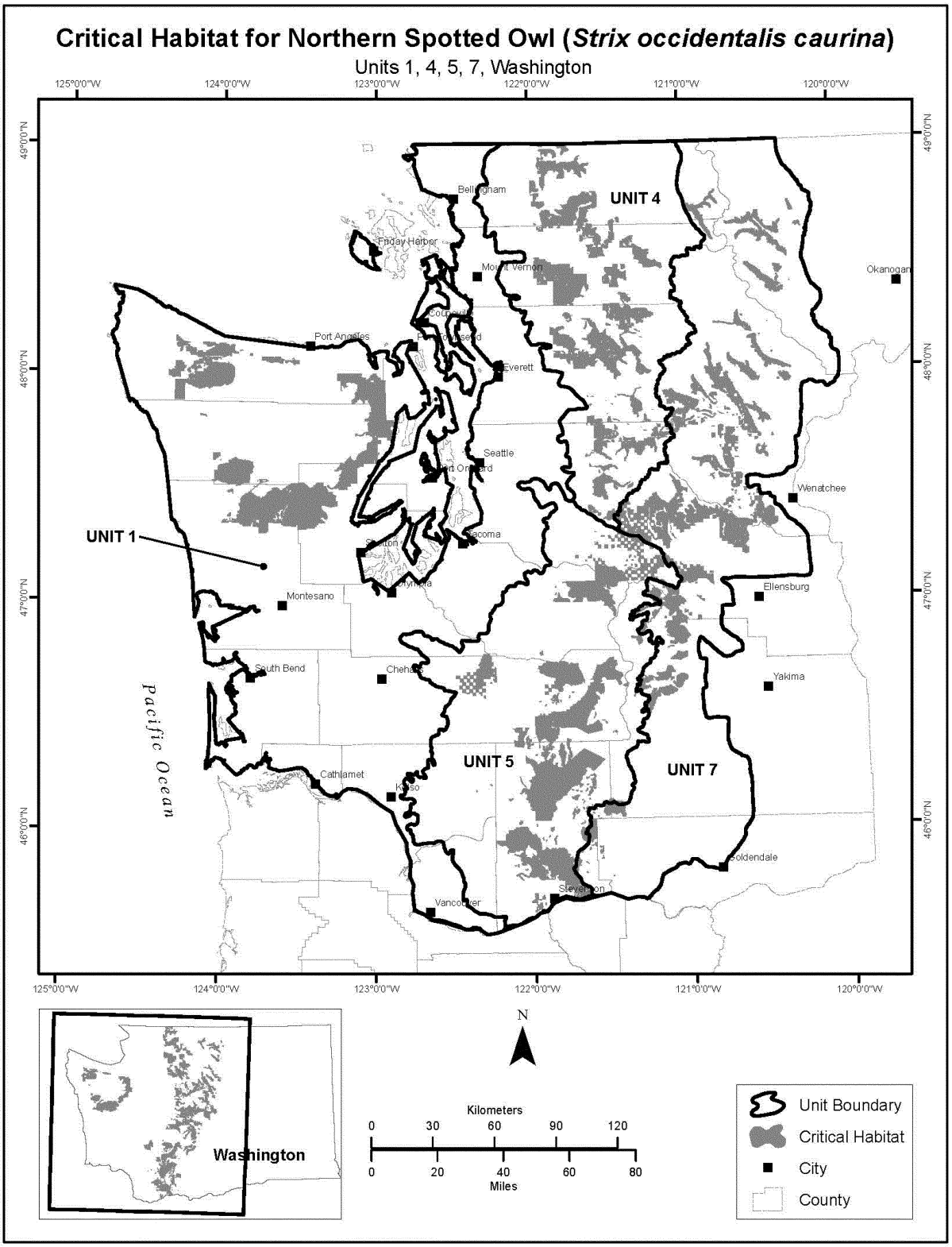
(b) *Birds.*

* * * * *

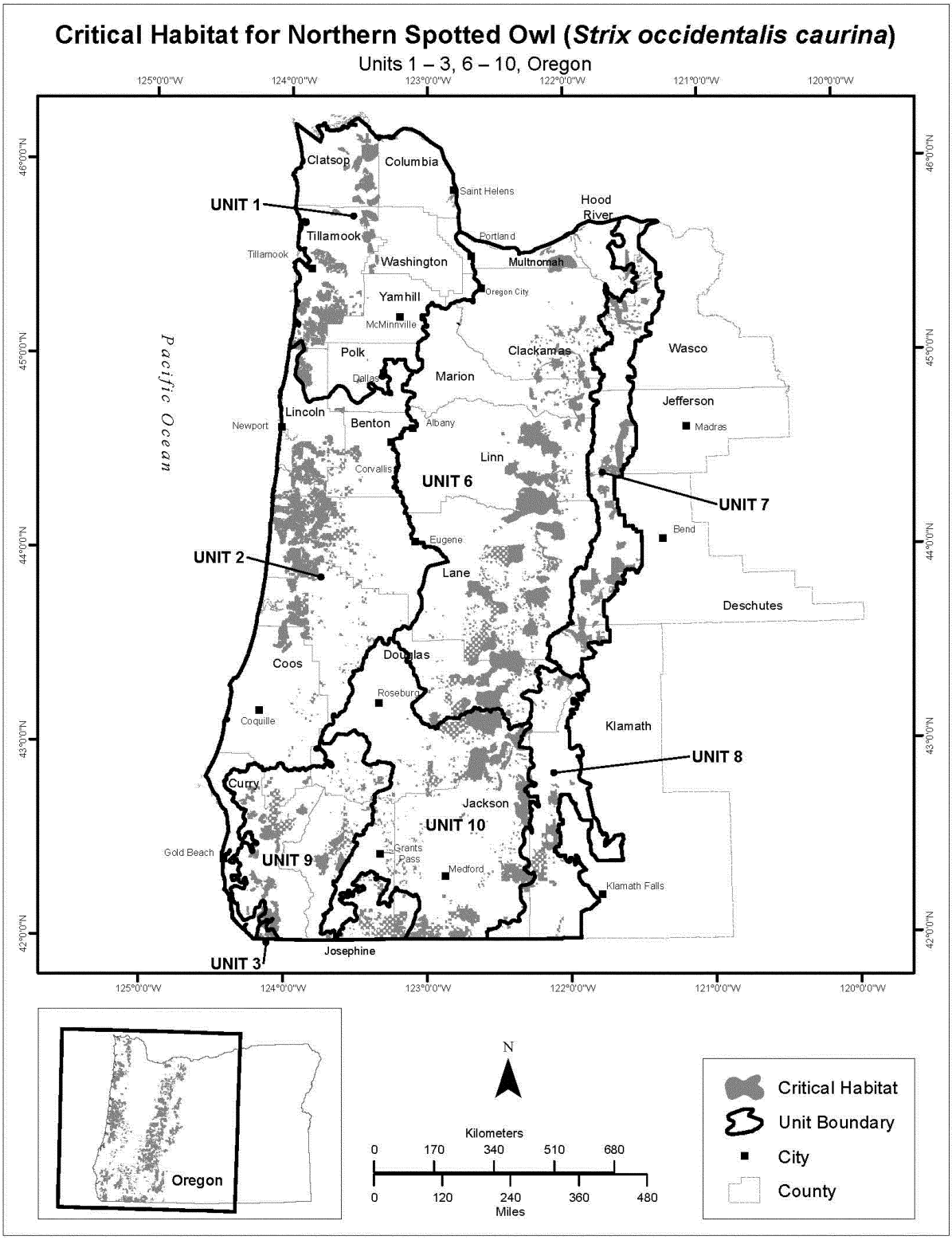
Northern Spotted Owl (*Strix occidentalis caurina*)

* * * * *

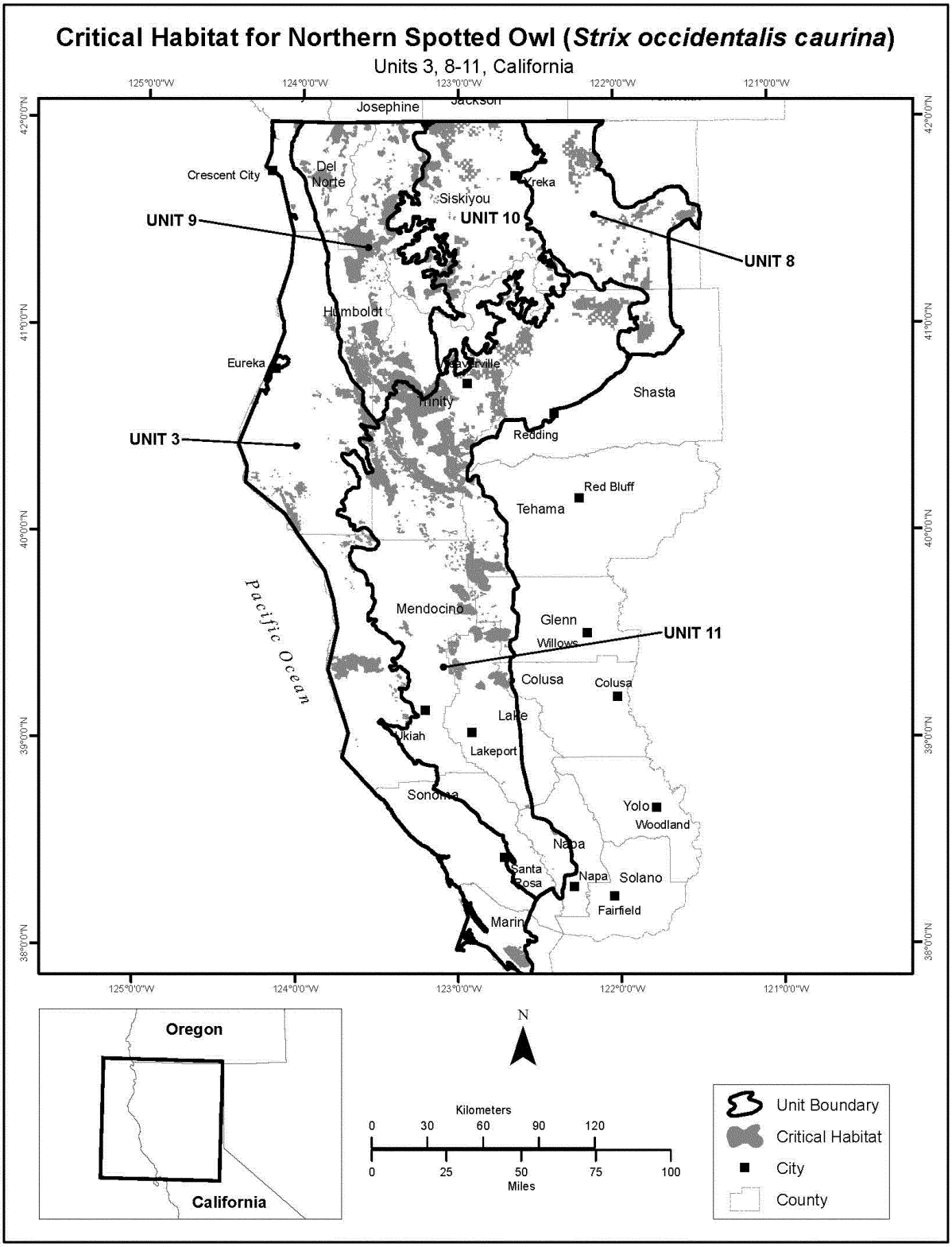
(6) *Note:* Index map of critical habitat units for the northern spotted owl in the State of Washington follows:


Critical Habitat for Northern Spotted Owl (Strix occidentalis caurina)
Units 1, 4, 5, 7, Washington
125°0'0"W
124°0'0"W
123°0'0"W
122°0'0"W
121°0'0"W
120°0'0"W
49°0'0"N
48°0'0"N
47°0'0"N
46°0'0"N
UNIT 1
UNIT 4
UNIT 5
UNIT 7
Pacific Ocean
Bellingham
Friday Harbor
Mount Vernon
Port Angeles
Everett
Seattle
Port Orchard
Tacoma
Olympia
Montesano
South Bend
Cathlamet
Longview
Vancouver
Stevenson
Goldendale
Yakima
Ellensburg
Wenatchee
Okanogan
Washington
N
Kilometers
0 30 60 90 120
0 20 40 60 80
Miles
Unit Boundary
Critical Habitat
City
County

(7) *Note:* Index map of critical habitat units for the northern spotted owl in the State of Oregon follows:

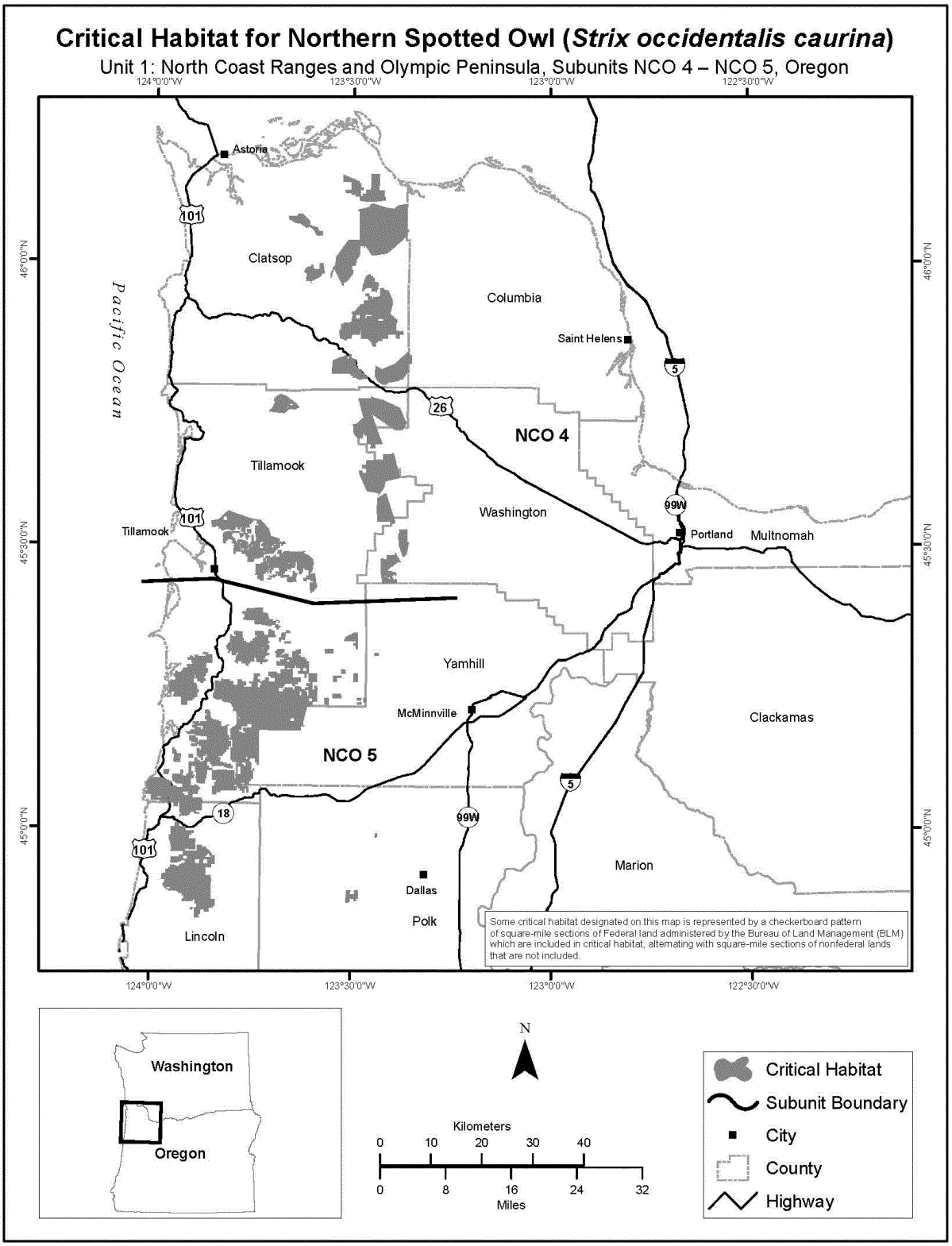


(8) *Note:* Index map of critical habitat units for the northern spotted owl in the State of California follows:

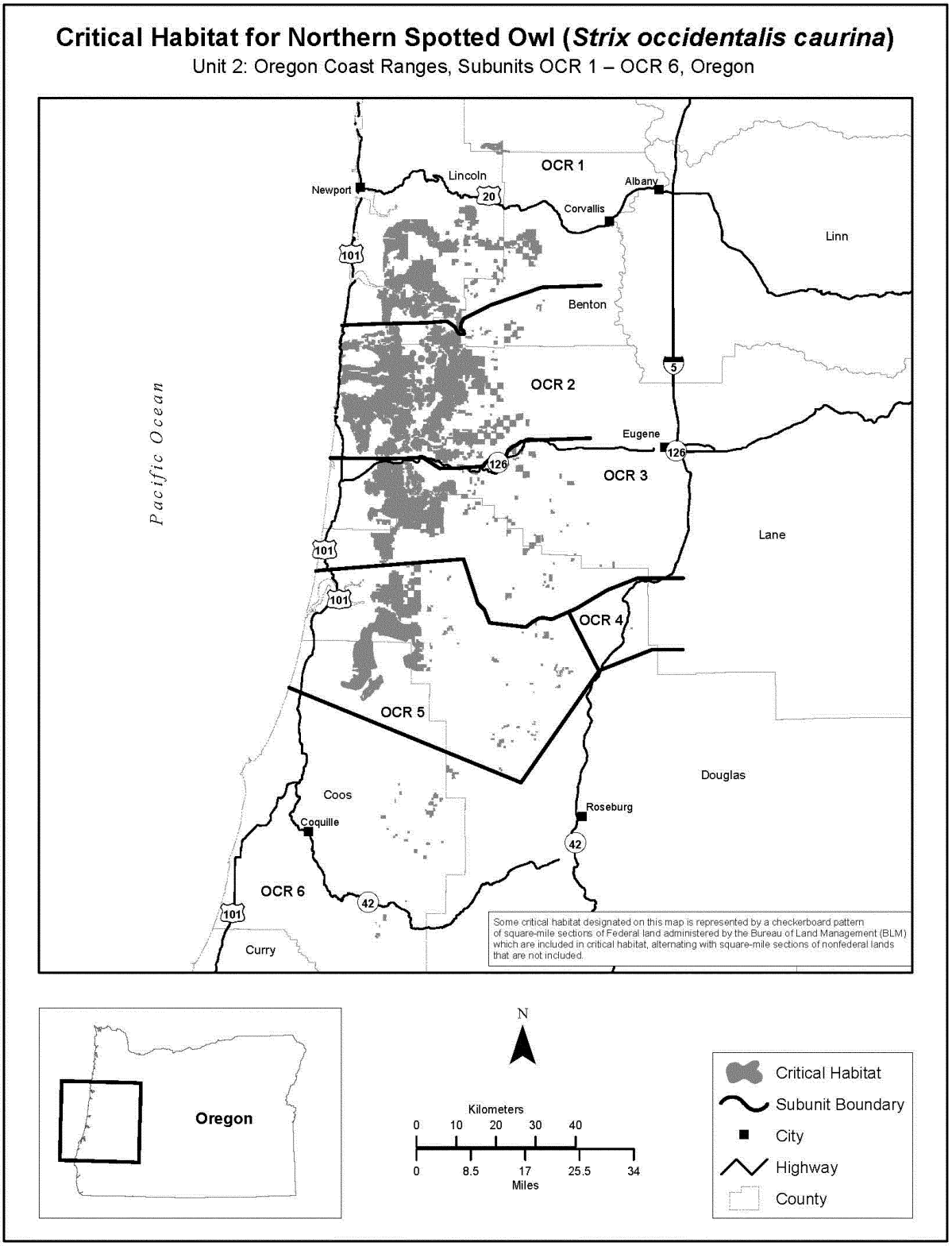


(9) Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and Washington. Maps of Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and Washington, follow:

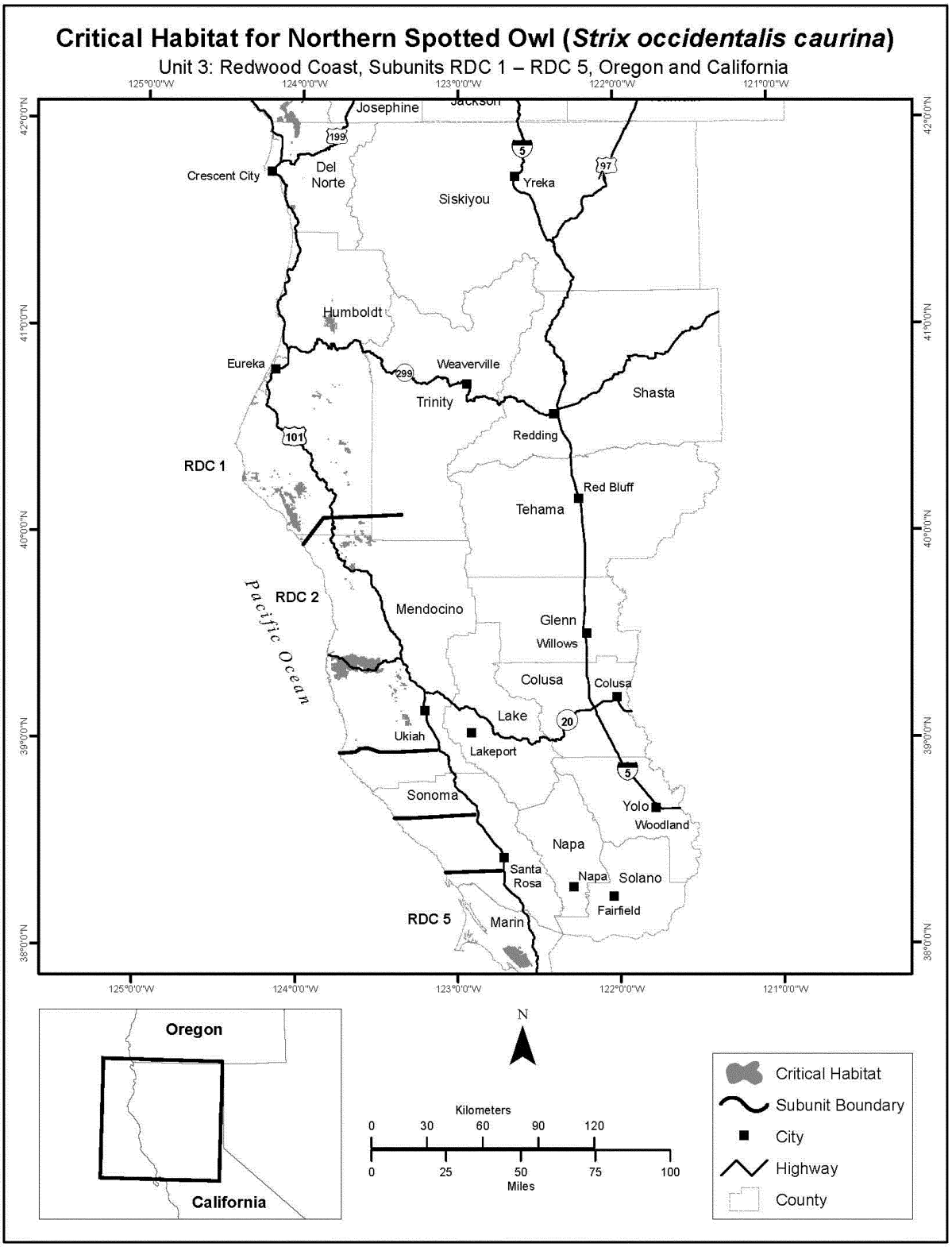
* * * * *



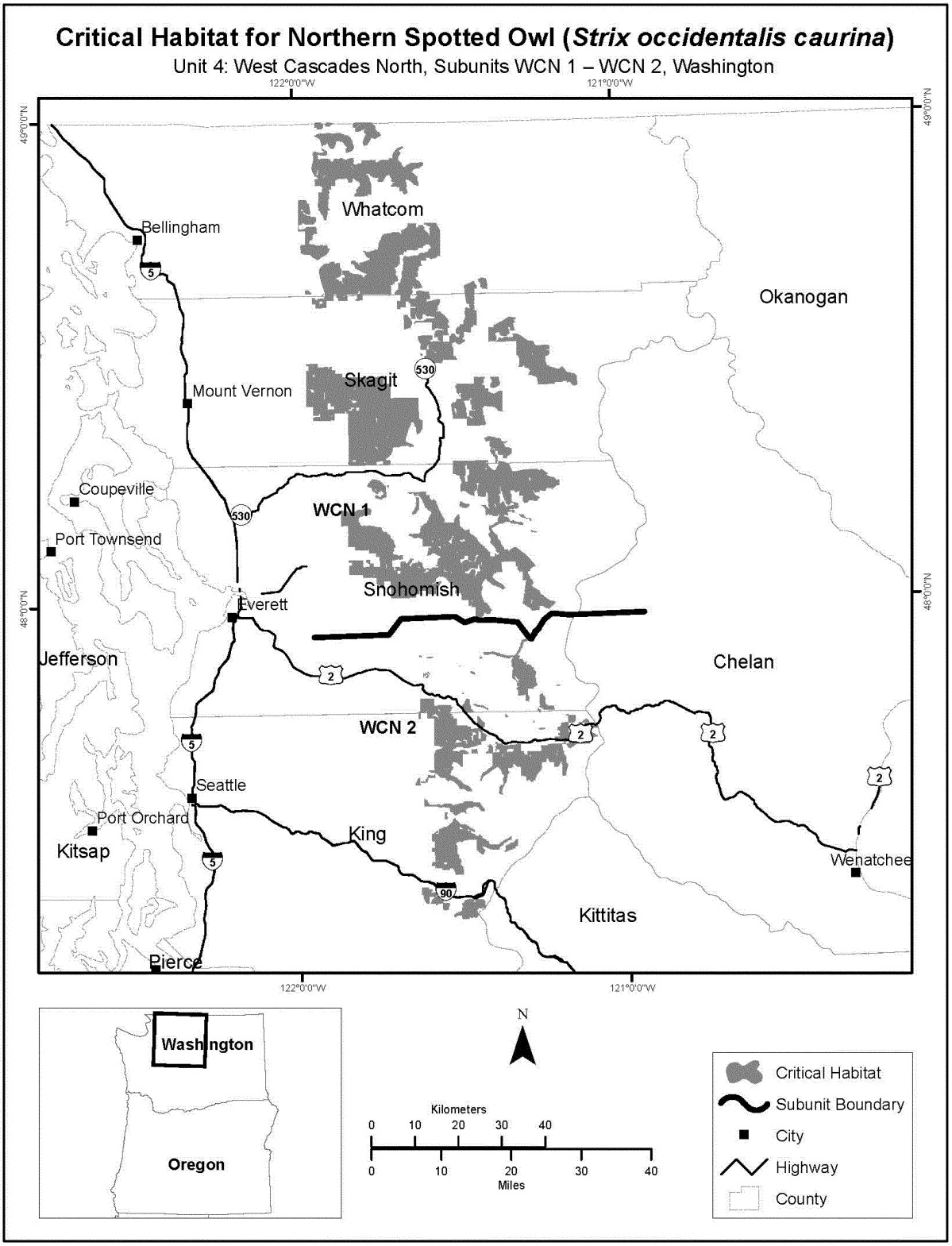
(10) Unit 2: Oregon Coast Ranges, Oregon. Map of Unit 2, Oregon Coast Ranges, Oregon, follows:



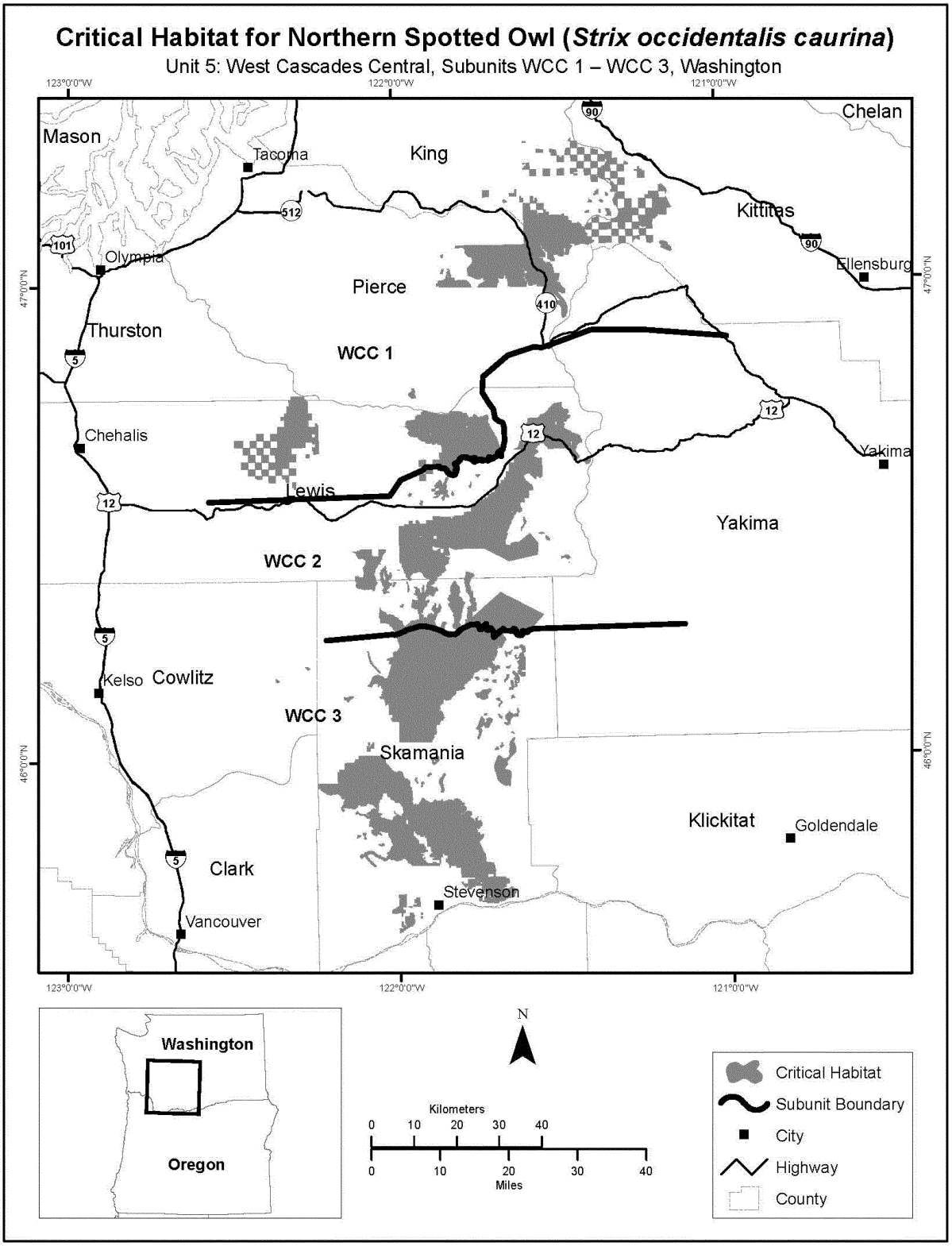
(11) Unit 3: Redwood Coast, Oregon and California. Map of Unit 3, Redwood Coast, Oregon and California, follows:



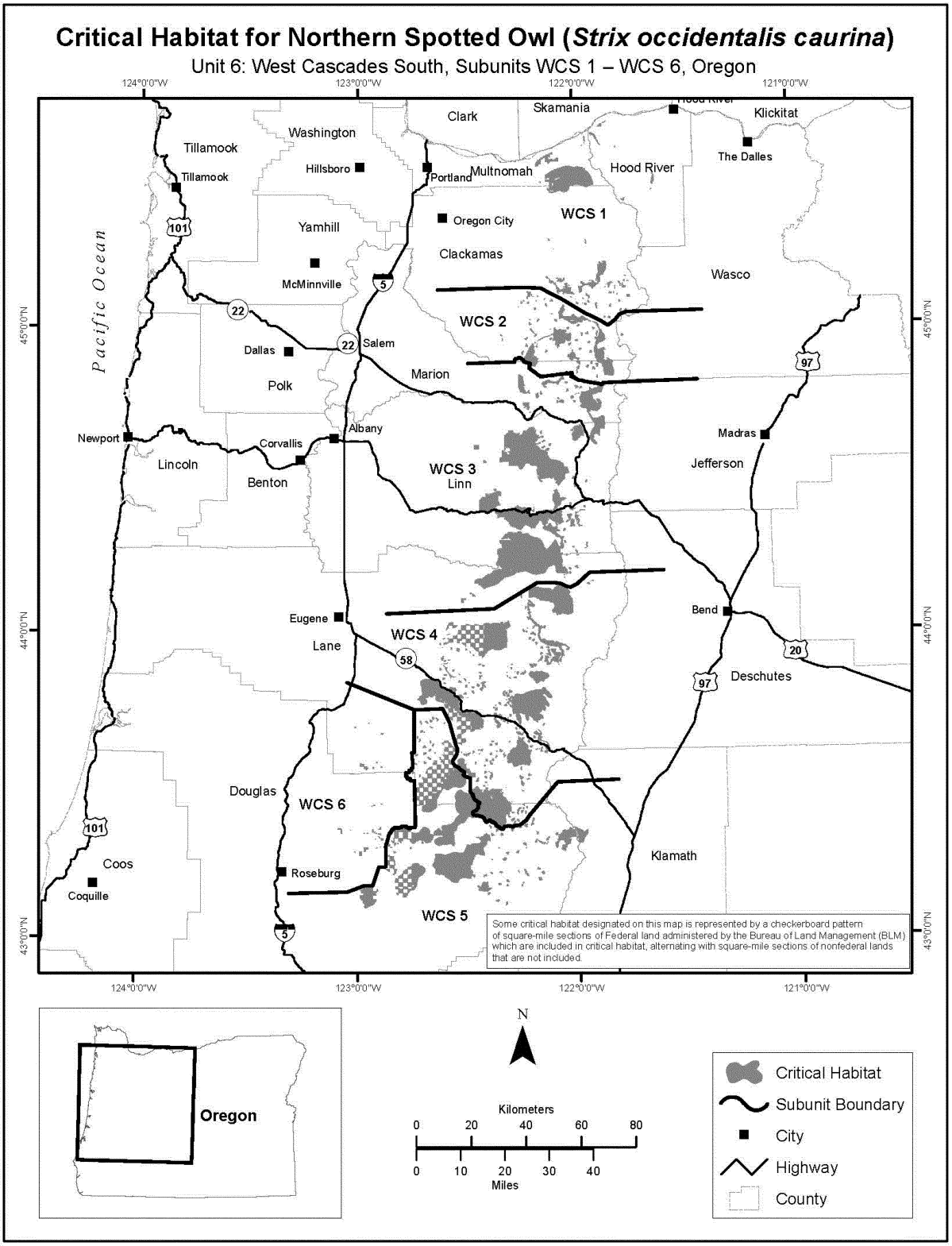
(12) Unit 4: West Cascades North, Washington. Map of Unit 4, West Cascades North, Washington, follows:



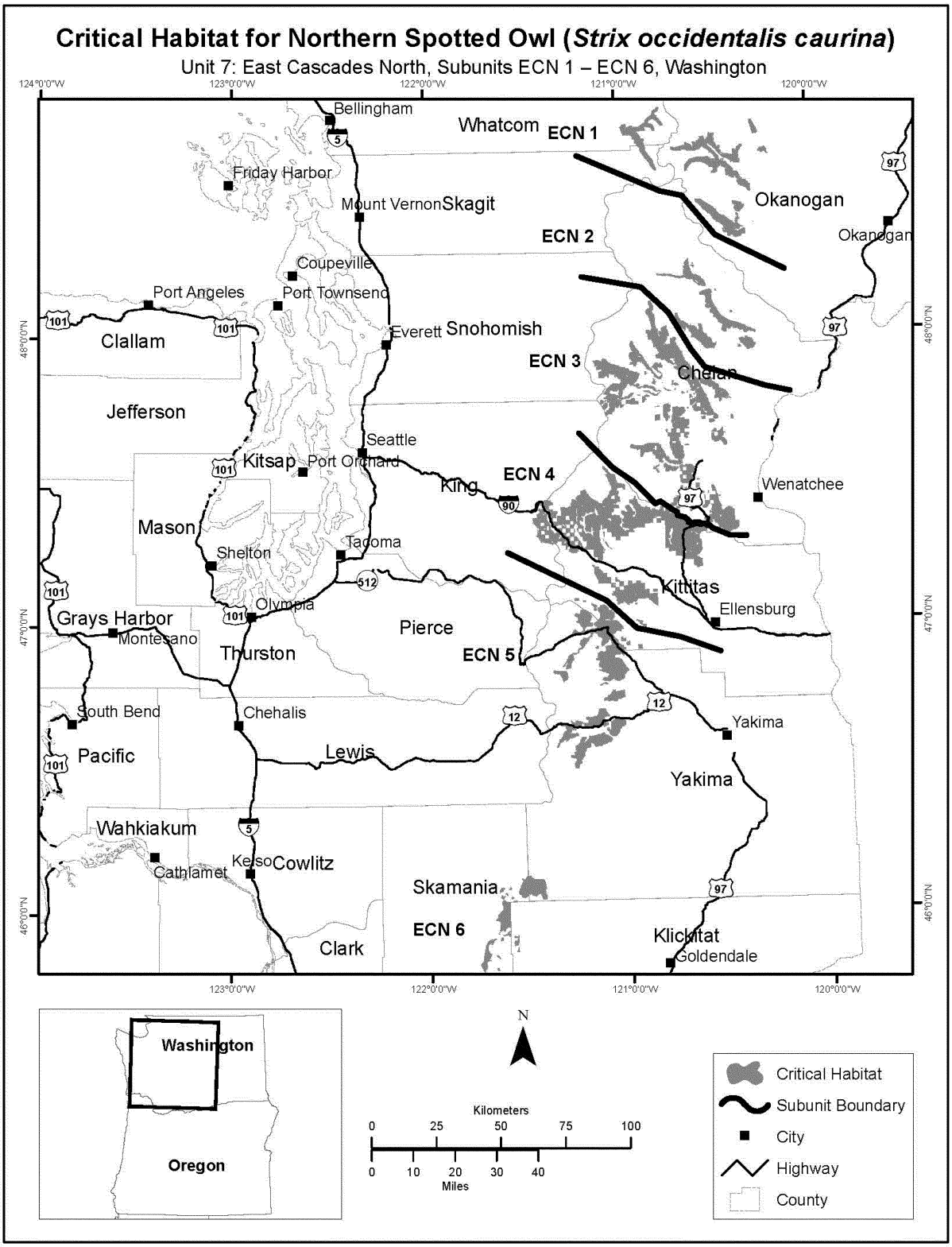
(13) Unit 5: West Cascades Central, Washington. Map of Unit 5, West Cascades Central, Washington, follows:

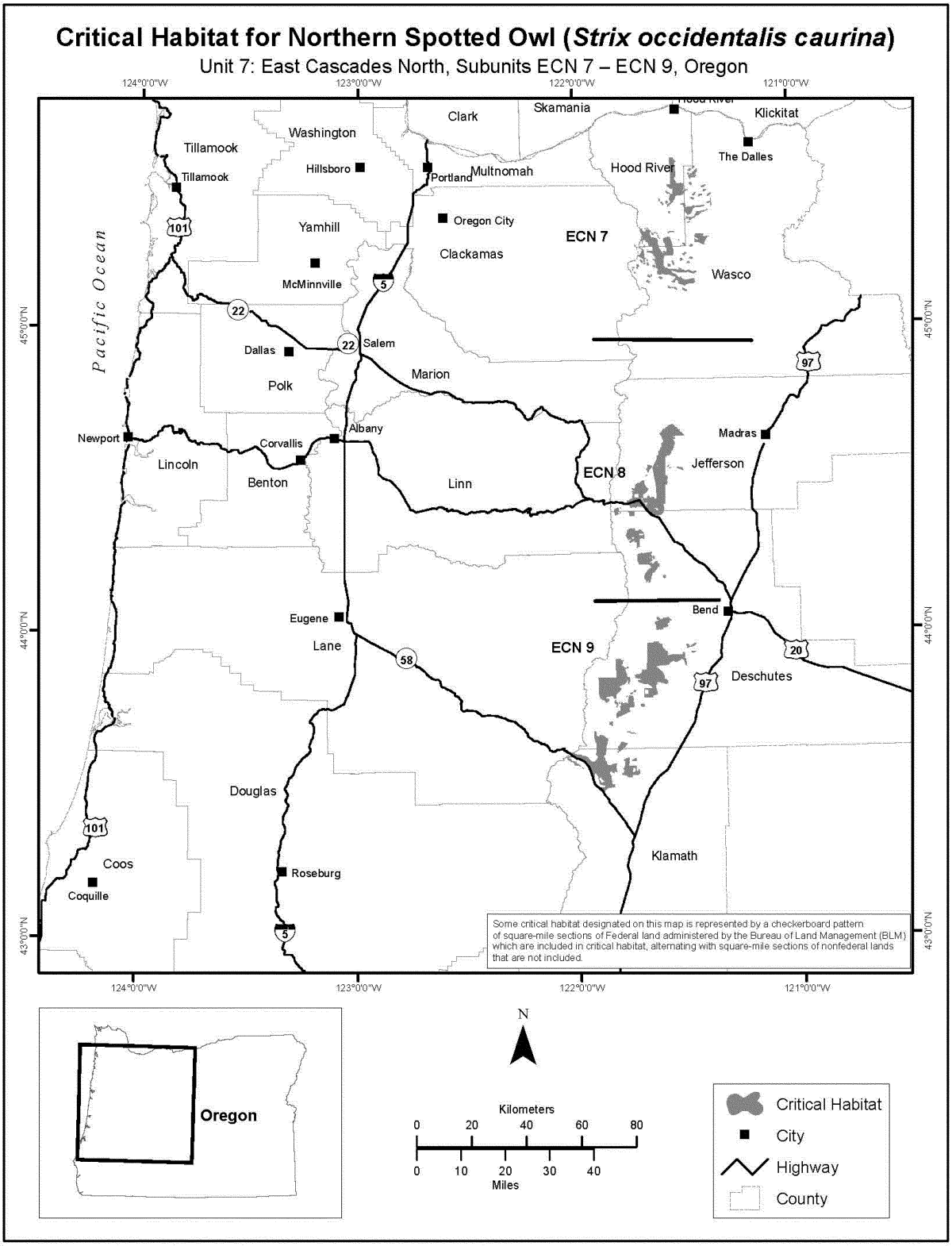


(14) Unit 6: West Cascades South, Oregon. Map of Unit 6, West Cascades South, Oregon, follows:

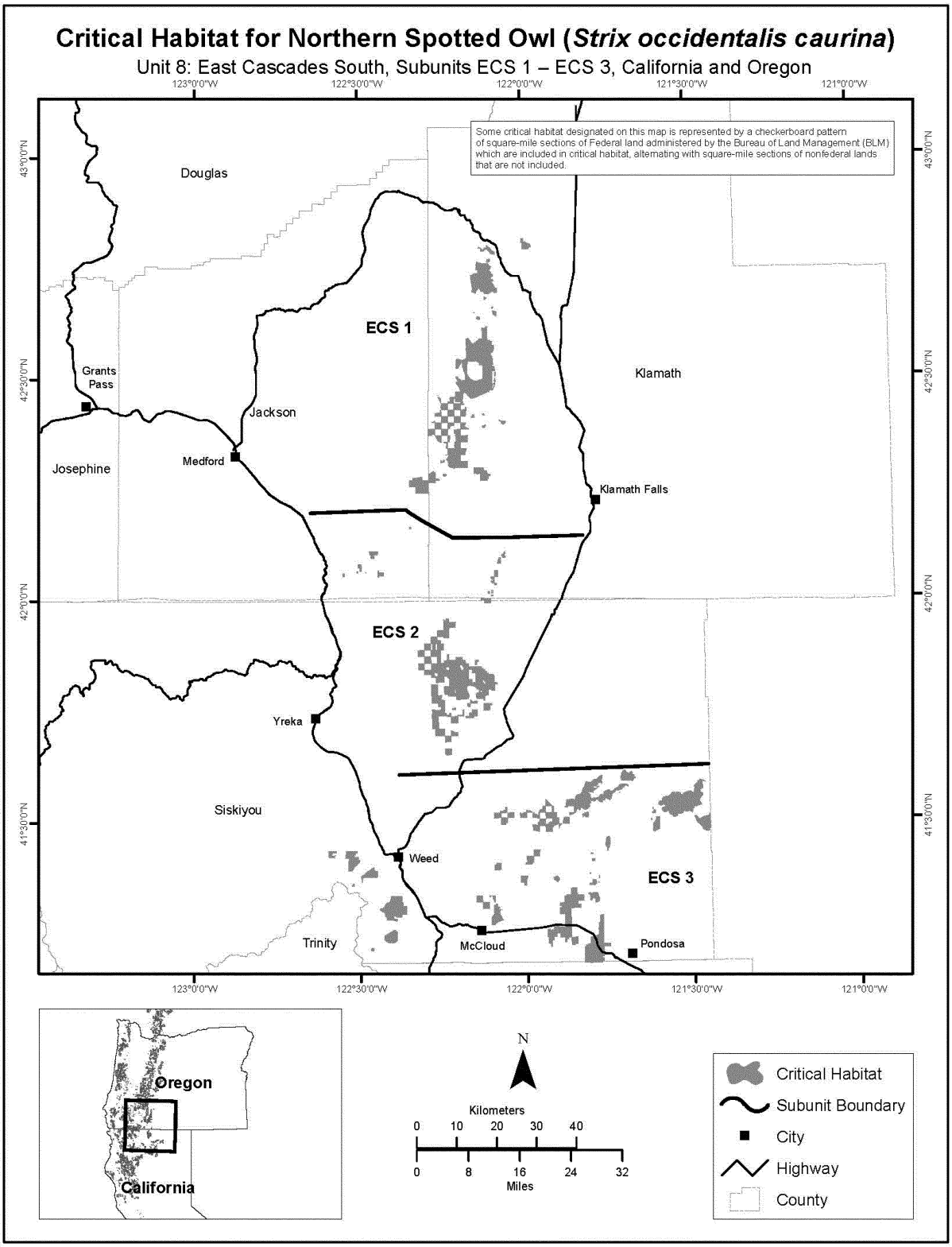


(15) Unit 7: East Cascades North, Washington and Oregon. Maps of Unit 7, East Cascades North, Washington and Oregon, follow:

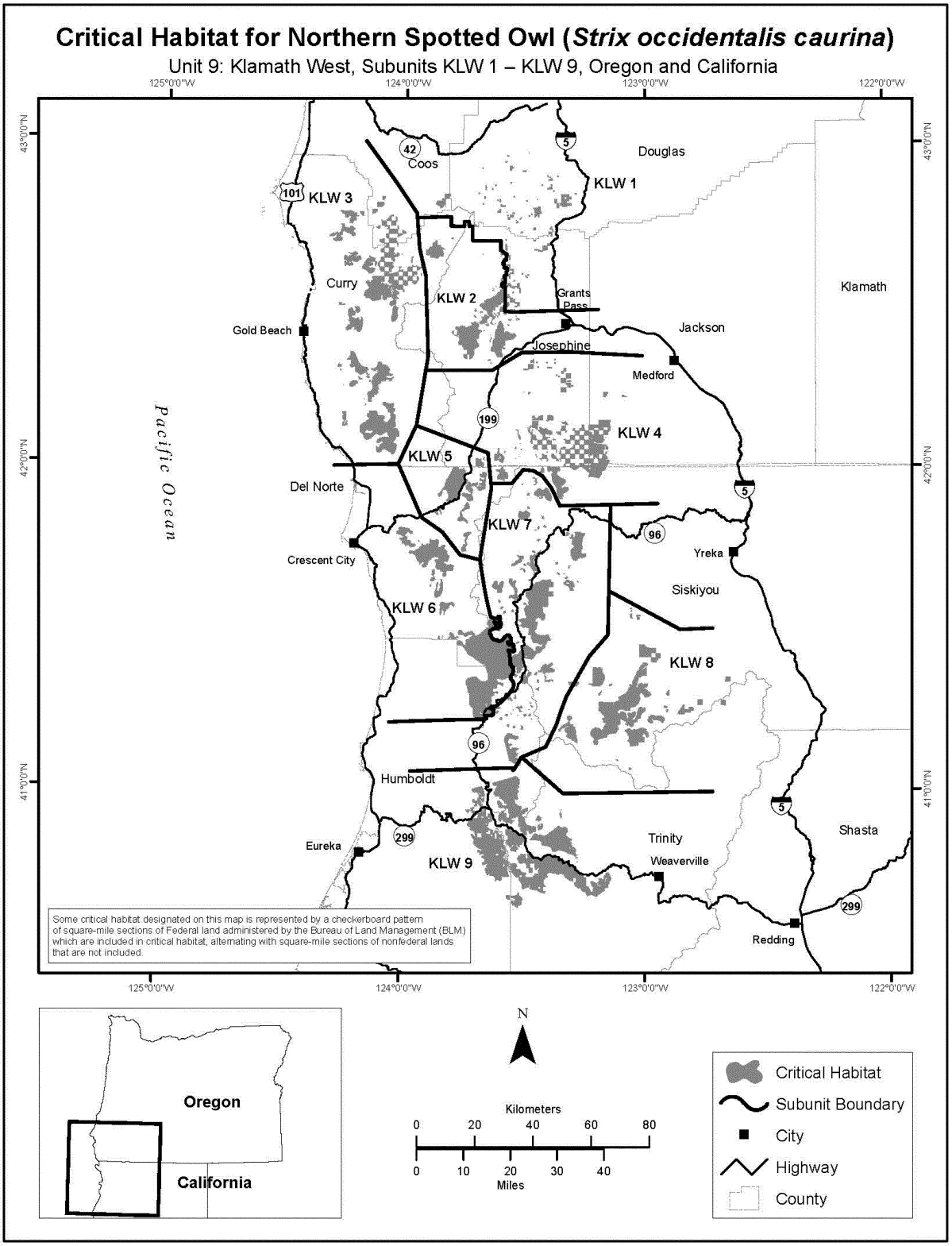



Critical Habitat for Northern Spotted Owl (Strix occidentalis caurina)
Unit 7: East Cascades North, Subunits ECN 7 – ECN 9, Oregon
124°0'0"W
123°0'0"W
122°0'0"W
121°0'0"W
45°0'0"N
44°0'0"N
43°0'0"N
Pacific Ocean
Tillamook
Washington
Clark
Skamania
Klickitat
Hillsboro
Portland
Multnomah
Hood River
The Dalles
Yamhill
Oregon City
ECN 7
Clackamas
Wasco
McMinnville
Dallas
Salem
Polk
Marion
Newport
Corvallis
Albany
Madras
Lincoln
Benton
Linn
ECN 8
Jefferson
Eugene
Bend
Lane
ECN 9
Deschutes
Douglas
Klamath
Coos
Coquille
Roseburg
Some critical habitat designated on this map is represented by a checkerboard pattern of square-mile sections of Federal land administered by the Bureau of Land Management (BLM) which are included in critical habitat, alternating with square-mile sections of nonfederal lands that are not included.
Oregon
N
Kilometers
0 20 40 60 80
0 10 20 30 40
Miles
Critical Habitat
City
Highway
County

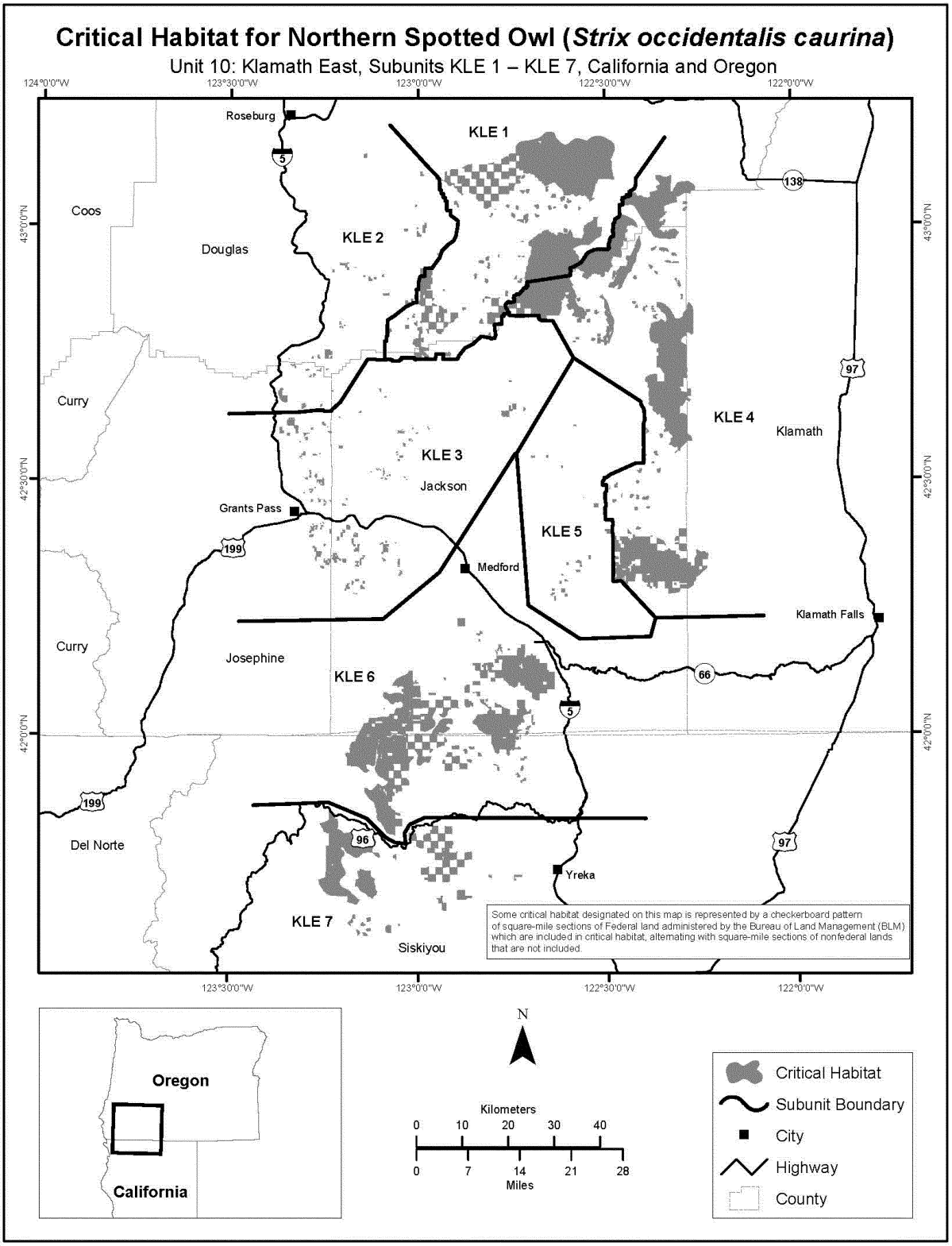
(16) Unit 8: East Cascades South, California and Oregon. Map of Unit 8, East Cascades South, California and Oregon, follows:



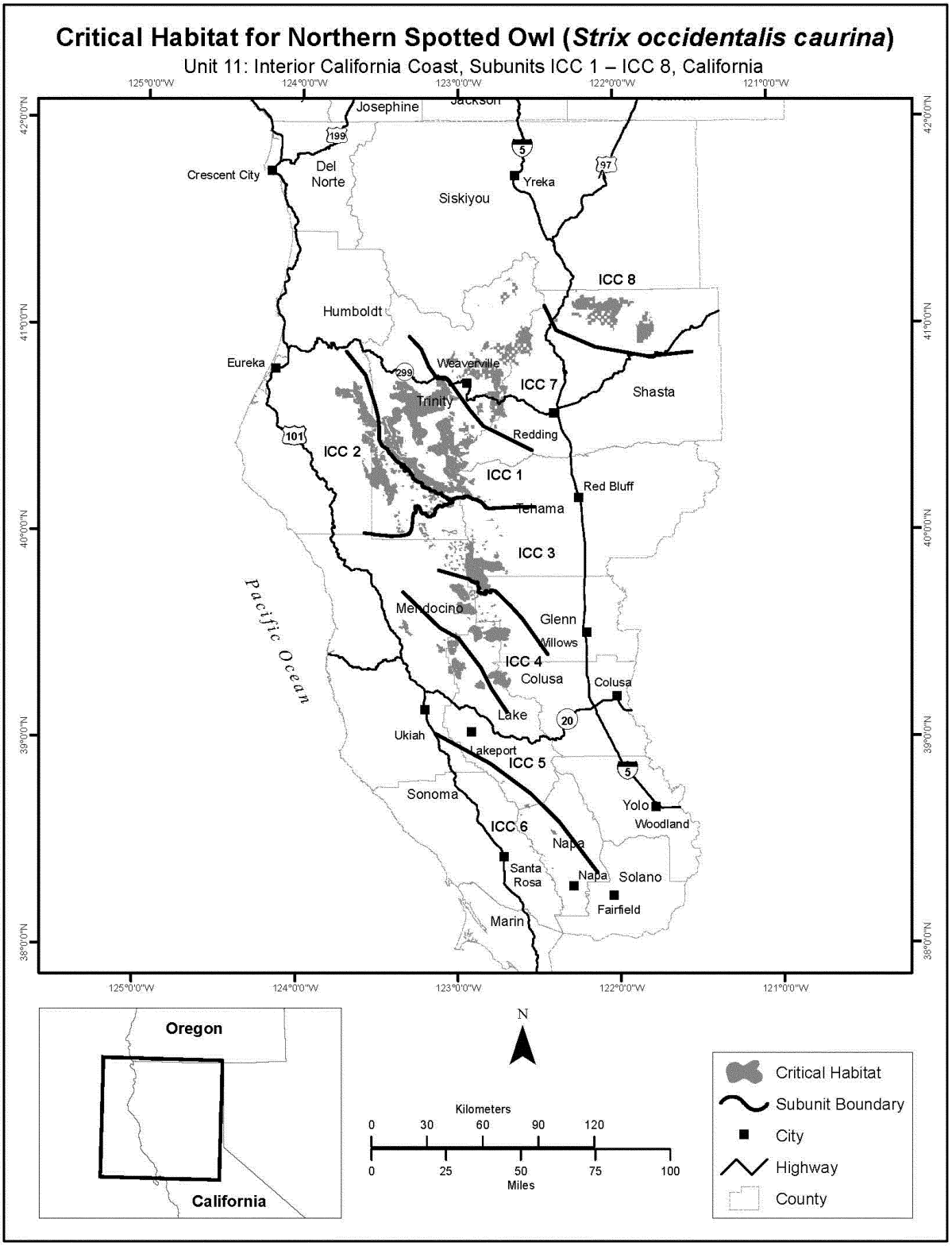
(17) Unit 9: Klamath West, Oregon and California. Map of Unit 9: Klamath West, Oregon and California, follows:



(18) Unit 10: Klamath East, California and Oregon. Map of Unit 10: Klamath East, California and Oregon, follows:



(19) Unit 11: Interior California Coast, California. Map of Unit 11: Interior California Coast, California, follows:



* * * * *

Aurelia Skipwith,

Director,

U.S. Fish and Wildlife Service.

[FR Doc. 2021–00484 Filed 1–13–21; 11:15 am]

BILLING CODE 4333–15–P

FEDERAL REGISTER

Vol. 86 Friday,

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Part XII

Department of Commerce

Bureau of Industry and Security

15 CFR Parts 730, 734, 736, and 744

Addition of Entity to the Entity List, and Addition of Entity to the Military End-User (MEU) List and Removals From the MEU List; Final Rule; Expansion of Certain End-Use and -End-User Controls and Controls on Specific Activities of U.S. Persons; Interim Final Rule

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 210111–0006]

RIN 0694–AI40

Addition of Entity to the Entity List, and Addition of Entity to the Military End-User (MEU) List and Removals From the MEU List

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding one entity to the Entity List. This one entity has been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. This entity will be listed on the Entity List under the destination of the People's Republic of China (China). In addition, this final rule amends the EAR by adding one entity to the Military End-User (MEU) List. Lastly, this final rule removes two entities from the MEU List to remove a duplicate listing.

DATES: This rule is effective January 14, 2021.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary, Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Fax: (202) 482–3911, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the Export Administration Regulations (EAR)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States. The EAR (15 CFR parts 730–774) impose additional license requirements on, and limit the availability of most license exceptions for, exports, reexports, and transfers (in-country) to listed entities. The license review policy for each listed entity is identified in the ''License review policy'' column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** notice adding entities to the Entity List. BIS places entities on the Entity List pursuant to part 744 (Control Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls) of the EAR.

The 'Military End-User' (MEU) List (supplement no. 7 to part 744 of the EAR) identifies entities that have been determined by the ERC to be 'military end users' pursuant to § 744.21 of the EAR. That section imposes additional license requirements on, and limits the availability of most license exceptions for, exports, reexports, and transfers (in-country) to listed entities on the MEU List, as specified in supplement no. 7 to part 744 and § 744.21. Entities are listed on the MEU List under the destinations of China, Russia, or Venezuela. The license review policy for each listed entity is identified in the introductory text of supplement no. 7 to part 744 and in § 744.21(b) and (e). The MEU List includes introductory text, which specifies the scope of the license requirements, limitations on the use of EAR license exceptions, and the license review policy that applies to the entities. These requirements are also reflected in § 744.21, but for ease of reference, these also included in the introductory text of the supplement.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List and the MEU List. The ERC makes all decisions to add an entry to the Entity List and MEU List by majority vote and all decisions to remove or modify an entry by unanimous vote.

ERC Entity List Decisions

Additions to the Entity List

Under § 744.11(b) (Criteria for revising the Entity List) of the EAR, entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States, and those acting on behalf of such entities, may be added to the Entity List. Paragraphs (b)(1) through (5) of § 744.11 provide an illustrative list of activities that could be considered contrary to the national security or foreign policy interests of the United States.

This rule implements the decision of the ERC to add one entity to the Entity List. This one entity will be listed on the Entity List under the destination of China. The ERC made the decision to add this one entity described below under the standard set forth in § 744.11(b) of the EAR.

The ERC determined that the one subject entity is engaging in or enabling activities contrary to U.S. national security and foreign policy interests, as follows:

The ERC determined that China National Offshore Oil Corporation Ltd. has been involved in the PRC's efforts to assert its unlawful maritime claims in the South China Sea, as well as efforts to intimidate and coerce other South China Sea coastal states from accessing and developing offshore marine resources.

Pursuant to § 744.11(b), the ERC determined that the conduct of the above-described one entity raises sufficient concerns that prior review, via the imposition of a license requirement, of exports, reexports, or transfers (in-country) of all items subject to the EAR involving this one entity, except for the exclusions from the license requirement specified in the next paragraph, and the possible issuance of license denials or the possible imposition of license conditions on shipments to this entity, will enhance BIS's ability to prevent violations of the EAR or otherwise protect U.S. national security or foreign policy interests.

For China National Offshore Oil Corporation Ltd., BIS imposes a license requirement that applies to all items subject to the EAR except for crude oil, condensates, aromatics, natural gas liquids, hydrocarbon gas liquids, natural gas plant liquids, refined petroleum products, liquefied natural gas, natural gas, synthetic natural gas, and compressed natural gas that are identified under one of thirty-seven Harmonized System (HS) codes included in the license requirement column for this entry, or for items required for the continued operation of joint ventures with persons from countries in Country Group A:1 in supplement no. 1 to part 740 of the EAR not operating in the South China Sea.

For this one entity added to the Entity List by this rule, BIS imposes a license review policy of a presumption of denial. In addition, no license exceptions are available for exports, reexports, or transfers (in-country) to the person being added to the Entity List in this rule.

For the reasons described above, this final rule adds the following one entity to the Entity List:

China

• China National Offshore Oil Corporation Ltd.

ERC MEU List Decisions

Additions to the MEU List

Under § 744.21(b) of the EAR, BIS may inform persons either individually by specific notice, through amendment to the EAR published in the **Federal Register**, or through a separate notice published in the **Federal Register**, that a license is required for specific exports, reexports, or transfers (in-country) of any item because there is an unacceptable risk of use in or diversion to a 'military end use' or 'military end user' in China, Russia, or Venezuela. Under § 744.21(b)(1) of the EAR, BIS may designate entities subject to this additional prohibition under paragraph (b) that have been determined by the ERC to be a 'military end user' pursuant to § 744.21. These entities will be added to supplement no. 7 to part 744 ('Military End-User' (MEU) List) in **Federal Register** notices published by BIS.

This rule implements the decision of the ERC to add one entity to the MEU List. This entity will be listed on the MEU List under the destination of China. The ERC made the decision to add this entity described below under the standard set forth in § 744.21 of the EAR, including the criteria for what constitutes a 'military end user' under paragraph (g) and 'military end use' under paragraph (f).

The license requirement for this entity that will be listed on the MEU List applies to the export, reexport, or transfer (in-country) of any item subject to the EAR listed in supplement no. 2 to part 744. For this one entity added to the MEU List by this rule, BIS imposes a license review policy of a presumption of denial as set forth in § 744.21(e).

No license exceptions are available for exports, reexports, or transfers (in-country) to listed entities on the MEU List for items specified in supplement no. 2 to part 744, except license exceptions for items authorized under the provisions of License Exception GOV set forth in § 740.11(b)(2)(i) and (ii) of the EAR.

The acronym ''a.k.a.'' (also known as) is used in entries on the MEU List to identify aliases, thereby assisting exporters, reexporters, and transferors in identifying entities on the MEU List.

For the reasons described above, this final rule adds the following one entity to the MEU List:

China

• Beijing Skyrizon Aviation Industry Investment Co., Ltd.

Removals From the MEU List

The ERC reviews the MEU List regularly for identifying needed modifications, as specified in supplement no. 5 to part 744 (Procedures For End-User Review Committee Entity List Decisions). Consistent with the ERC's decision on the parties included in supplement no. 5, two entities are being removed from supplement no. 7 to part 744.

This rule removes ''Korporatsiya Vsmpo Avisma OAO,'' an entity located in Russia, from the MEU List because it is a duplicate listing of ''Korporatsiya VSMPO AVISMA,'' an entity considered for inclusion on the MEU list but not included because the ERC determined it was not a 'military end user' based on the criteria in § 744.21(g) and (f).

This rule also removes ''Molot Oruzhie,'' an entity located in Russia, from the MEU List because this entity was already listed on the Entity List and therefore did not require being additionally listed on the MEU List. The entry for ''Molot Oruzhie'' was added to the Entity List on December 23, 2020 (85 FR 83799). Entities on the Entity List are not also included on the MEU List.

This final rule removes the following two entities, consisting of two entities located in Russia, from the MEU List:

Russia

• Korporatsiya Vsmpo Avisma OAO; *and*

• Molot Oruzhie.

Savings Clause

Shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on [INSERT DATE OF DISPLAY ON THE PUBLIC INSPECTION DESK], pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR).

Export Control Reform Act of 2018

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

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications, and carries a burden estimate of 42.5 minutes for a manual or electronic submission. Total burden hours associated with the PRA and OMB control number 0694–0088 are not expected to increase as a result of this rule.

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

4. Pursuant to § 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no

regulatory flexibility analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 18, 2020, 85 FR 59641 (September 22, 2020); Notice of November 12, 2020, 85 FR 72897 (November 13, 2020).

■ 2. Supplement No. 4 to part 744 is amended:

■ a. Under CHINA, PEOPLE'S REPUBLIC OF, by adding in alphabetical order an entry for ''China National Offshore Oil Corporation Ltd.''

The addition reads as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	Federal Register citation
*	*	*	*	*
CHINA, PEOPLE'S REPUBLIC OF.		* * * * * *		
	China National Offshore Oil Corporation Ltd., No. 25 Chaoyangmen North Street, Dongcheng District, Beijing, 100010, China	All items subjects to the EAR except for: —crude oil, condensates, aromatics, natural gas liquids, hydrocarbon gas liquids, natural gas plant liquids, refined petroleum products, liquefied natural gas, natural gas, synthetic natural gas, and compressed natural gas under the following Harmonized System (HS) codes: 271111, 2711210000, 2711210000, 2709, 2709002010, 2707, 27075000, 2710, 271019, 271112, 271113, 271114, 271119, 27111990, 271311, 271312, 271012250, 2901, 290511, 2701, 29109020, 29151310, 29155020, 29156050, 29159020, 29161210, 29280025, 29321910, 29362920, 29419030, 2909300000, 2917194500, 2922504500, 2924296000, 2925294500, 2928002500, 2933194350; *or* —required for the continued operation of joint ventures with persons from countries in Country Group A:1 in supplement no. 1 to part 740 of the EAR not operating in the South China Sea	Presumption of denial.	86 FR [INSERT FR PAGE NUMBER 1/15/2021].
		* * * * * *		
*	*	*	*	*

* * * * *

■ 3. Supplement No. 7 to part 744 is amended:

■ a. Under CHINA, PEOPLE'S REPUBLIC OF, by adding in alphabetical order an entry for ''Beijing Skyrizon Aviation Industry Investment Co., Ltd.;'' and

■ b. Under RUSSIA, by removing the entries for ''Korporatsiya Vsmpo Avisma OAO'' and ''Molot Oruzhie.''

The addition reads as follows:

Supplement No. 7 to Part 744—'Military End-User' (MEU) List

* * * * *

Country	Entity	Federal Register citation
CHINA, PEOPLE'S REPUBLIC OF.	* * * * * *	

Country	Entity	Federal Register citation
	Beijing Skyrizon Aviation Industry Investment Co., Ltd., a.k.a., the following one alias: —Beijing Tianjiao Aviation Industry Investment Company 21/F Tower C Zhizhen Plaza, No. 7 Zhichun Road, Haidian District, Beijing, China.	86 FR [INSERT FR PAGE NUMBER 1/15/2021].
CHINA, PEOPLE'S REPUBLIC OF.	* * * * * *	
* * * * * * *		

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2021–00995 Filed 1–14–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 730, 734, 736, and 744

[Docket No. 210112–0007]

RIN 0694–AI38

Expansion of Certain End-Use and End-User Controls and Controls on Specific Activities of U.S. Persons

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule.

SUMMARY: The Bureau of Industry and Security (BIS), Department of Commerce, is issuing this interim final rule to implement the provisions of the Export Control Reform Act of 2018 by: imposing additional license requirements under the Export Administration Regulations (EAR) for exports, reexports, and transfers (in-country), as well as specific activities of U.S. persons, in connection with certain military-intelligence end uses and end users; clarifying that license requirements under the EAR for specific activities of U.S. persons apply even when the items at issue are not subject to the EAR; establishing restrictions on transactions intended to circumvent license requirements for listed entities; and expanding the scope of activities subject to chemical and biological weapons and rocket systems and unmanned aerial vehicles end-use controls.

DATES: *Effective date:* This rule is effective March 16, 2021. *Comment date:* Comments must be received by BIS no later than March 1, 2021.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The regulations.gov ID for this rule is: BIS–2020–0044 or RIN 0694–AI38. All relevant comments (including any personally identifying information) will be made available for public inspection and copying. Follow the instructions for submitting comments.

All filers using the portal should use the name of the person or entity submitting the comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and also provide a non-confidential version of the submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. Any submissions with file names that do not begin with either a ''BC'' or a ''P'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Philip Johnson, Senior Advisor, Export Enforcement, Bureau of Industry and Security, Phone: (202) 482–3685, *Philip.Johnson@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA directs the President to control exports, reexports, and transfers (in-country); as well as the activities of U.S. persons in connection with nuclear, chemical, and biological weapons; whole plants for chemical weapons precursors; missiles; foreign maritime nuclear projects; and foreign military intelligence services. Accordingly, BIS is amending parts 730, 734, 736, and 744 of the Export Administration Regulations (EAR) (15 CFR parts 730 through 774) to implement such controls. BIS is also making certain revisions to enhance existing end-use and end-user controls under the EAR, including their enforceability.

Restrictions on Specific Activities of U.S. Persons

Section 1753(a)(2) of ECRA (50 U.S.C. 4812(a)(2)) directs the President to impose controls on the activities of U.S. persons, wherever located, relating to specific nuclear explosive devices, missiles, chemical or biological weapons, whole plants for chemical weapons precursors, foreign maritime nuclear projects, and foreign military intelligence services. Additionally, section 1754(d) of ECRA (50 U.S.C. 4813(d)) directs the Secretary of Commerce to require U.S. persons to apply for and receive a license to engage in specific activities in connection with nuclear explosive devices, missiles, chemical or biological weapons, whole plants for chemical weapons precursors, and foreign maritime nuclear projects, regardless of whether such activities occur in connection with an export, reexport, or transfer (in-country) of items subject to the EAR. Although section 1754(d)(2) of ECRA (50 U.S.C. 4813(d)(2)) does not specifically direct the Secretary of Commerce to impose a license requirement on the activities of U.S. persons in connection with foreign military intelligence services, section 1754(a)(16) of ECRA (50 U.S.C. 4813(a)(16)) authorizes the Secretary to undertake any other action not otherwise prohibited by law to carry out the authorities granted to the President

in section 1753 of ECRA (50 U.S.C. 4812), which includes restrictions on U.S. person activities in connection with foreign military intelligence services (section 1753(a)(2)(F) of ECRA (50 U.S.C. 4812(a)(2)(F))).

The EAR already restrict specific activities of U.S. persons in connection with nuclear explosive devices, missiles, chemical and biological weapons, and whole plants for chemical weapons precursors. In accordance with ECRA, BIS is expanding these existing restrictions to encompass activities of U.S. persons in connection with certain military-intelligence end uses and end users. Specifically, BIS is revising §§ 730.5 and 734.5(a) of the EAR to reflect the expanded scope of U.S. person activities subject to the EAR, as described below, which include activities supporting certain military-intelligence end uses and end users.

The general categories of exports, reexports, and transfers (in-country), as well as activities of U.S. persons, which are prohibited absent a license from BIS are summarized in the ''General Prohibitions'' found in § 736.2 of the EAR. Specifically, § 736.2(b)(7) of the EAR describes the types of U.S. person WMD proliferation activity subject to a license requirement under the EAR. In this rule, BIS is revising § 736.2(b)(7) by harmonizing the definition of ''U.S. person'' in that section with the definition of that term as set forth in § 772.1 of the EAR. Furthermore, BIS is revising § 736.2(b)(7) to broaden the prohibition, absent a license from BIS, to include specific activities of U.S. persons in support of certain military-intelligence end uses and end users pursuant to sections 1753(a)(2)(F) and 1754(a)(16) of ECRA (50 U.S.C. 4812(a)(2)(F) and 4813(a)(16)).

The license requirements that apply to specific activities of U.S. persons are described in § 744.6 of the EAR. Section 744.6 currently contains restrictions on exports, reexports, and transfers (in-country), as well as activities unrelated to exports (*e.g.,* contracts, services, and employment), when connected with certain nuclear explosive, missile, or chemical or biological weapons-related activities, or whole plants for chemical weapons precursors. Section 1754(d)(1)(A) of ECRA (50 U.S.C. 4813(d)(1)(A)) specifies that controls on the activities of U.S. persons apply even when the items at issue ''are not subject to control under this subchapter,'' (*i.e.,* are not ''subject to the EAR''). Therefore, BIS is revising § 744.6 to replace the terms ''export'' and ''reexport'' with the acts of shipping or transmitting to ensure that the controls set forth in that section apply to foreign-origin items not subject to the EAR, as set forth in ECRA.

Furthermore, BIS is revising § 744.6 to provide an illustrative list of the types of activities unrelated to the shipment, transmission, or transfer (in-country) of items that are subject to a license requirement when undertaken by U.S. persons in connection with the end uses or end users enumerated in that section. This list is derived from the list of ''Specific Unlawful Acts'' set forth in section 1760(a)(2)(E) of ECRA (50 U.S.C. 4819(a)(2)(E)). BIS is also revising § 744.6 to impose a license requirement on such activities when a U.S. person knows the activity(ies) ''will support,'' as opposed to ''will directly assist,'' any of the end uses or end users listed in that section of the EAR. BIS is making this change in accordance with section 1754(d)(1)(B) of ECRA (50 U.S.C. 4813(d)(1)(B)), which authorizes the Secretary to implement controls on ''activities that may support'' the end uses described in section 1754(d)(2) of ECRA (50 U.S.C. 4813(d)(2)); and in accordance with section 1754(a)(16) of ECRA (50 U.S.C. 4813(a)(16)), which authorizes the Secretary to ''undertake any other action as necessary to carry out this subchapter that is not otherwise prohibited by law,'' which includes implementing controls on the end uses and end users described in section 1753(a)(2) of ECRA (50 U.S.C. 4812(a)(2)).

In accordance with section s 1753(a)(2)(F) and 1754(a)(16) of ECRA (50 U.S.C. 4812(a)(2)(F) and 4813(a)(16)), BIS is also adding to § 744.6 of the EAR a new restriction on the activities of U.S. persons in support of certain military-intelligence end uses and end users. The scope of military-intelligence end uses and end users subject to control is defined in § 744.22, as explained below. In addition, BIS is expanding the destinations with respect to which the activities of U.S. persons are restricted in connection with nuclear explosive devices to include any country not listed in supplement no. 3 to part 744, for consistency with the restrictions on exports, reexports, and transfers (in-country) of items for use in nuclear explosive activities, as set forth in § 744.2(a)(1) of the EAR. Likewise, BIS is expanding the destinations with respect to which the activities of U.S. persons are restricted in connection with certain ''missile'' end uses pursuant to § 744.6 to include Cuba, a unilaterally-embargoed country listed in Country Group E:2 (see supplement no. 1 to part 740 of the EAR), but not also listed in Country Group D:4.

ECRA directs the Secretary of Commerce to impose a license requirement on specific activities of U.S. persons, ''except to the extent authorized by a statute or regulation administered by a Federal department or agency other than the Department of Commerce'' (50 U.S.C. 4813(d)(1)). To avoid overlapping license requirements across U.S. government agencies, BIS is adding to § 744.6 of the EAR a provision defining the scope of U.S. person activities requiring a license from BIS pursuant to that section to exclude any activity subject to a license requirement or general prohibition administered by another federal department or agency, to include the Departments of Energy, State, or the Treasury.

The Department of Energy administers controls on the transfer of unclassified nuclear technology and assistance to foreign atomic energy activities within the United States or abroad. Pursuant to Department of Energy regulations at 10 CFR part 810, implementing section 57.b(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2077(b)), persons may engage, directly or indirectly, in the production or development of special nuclear material outside the United States upon authorization by the Secretary of Energy.

The Department of State administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130) pursuant to the Arms Export Control Act (AECA) (22 U.S.C. 2778). The ITAR include controls on defense articles (22 CFR 120.6), which are described on the U.S. Munitions List (USML) (22 CFR 121.1). In addition, the ITAR control the performance of defense services (22 CFR 120.9), which may include the furnishing of military training to foreign units and forces, as well as the furnishing of assistance pertaining to defense articles to foreign persons, or the furnishing to foreign persons of any controlled technical data (22 CFR 120.10). The ITAR also regulate brokering activities (see 22 CFR part 129), which include any action undertaken on behalf of another to facilitate the manufacture, export, permanent import, transfer, reexport, or retransfer of a U.S. or foreign defense article or defense service enumerated on the USML and those items designated in the U.S. Munitions Import List (USMIL) (27 CFR 447.21). The USML includes, *inter alia,* nuclear weapons-related articles (Category XVI), missiles (Category IV), unmanned aerial vehicles (Category VIII), and toxicological agents and associated equipment (Category XIV). The USMIL includes, *inter alia,* nuclear weapons design and test

equipment (Category XVI), missiles (Category IV), and toxicological agents and equipment (Category XIV).

The Department of the Treasury, through the Office of Foreign Assets Control (OFAC), administers economic sanctions programs governing transactions involving U.S. persons in connection with certain sanctioned countries or entities pursuant to a number of statutes and executive orders (see, *inter alia,* 31 CFR parts 500 through 599).

Section 744.6 of the EAR does not, and is not intended to, control the activities of U.S. persons subject to the regulatory controls administered by other federal departments and agencies, to include the Department of Energy, the Department of State, and the Department of the Treasury. The purpose of § 744.6 is to control those activities of U.S. persons in connection with the end uses and end users enumerated in that section, only if those activities are not already subject to other federal regulatory controls.

Finally, other U.S. laws, including criminal statutes, may prohibit the performance of certain activities by a person subject to the jurisdiction of the United States in connection with the end uses and end users described in § 744.6 even if that person has obtained a BIS license. The issuance of a BIS license does not authorize ''U.S. persons'' to engage in any conduct that is otherwise prohibited by U.S. law, including any criminal statute.

While § 744.6 of the EAR imposes license requirements on certain transactions of items not subject to the EAR, and certain support activities, where a U.S. person is involved, BIS also notes that controls on exports, reexports, and transfers (in-country) of items subject to the EAR to nuclear-, missile-, chemical and biological weapons-, and military-intelligence-related end uses and end users are set forth in other sections of part 744, to include §§ 744.2, 744.3, 744.4, and 744.22. Certain activities of U.S. or foreign persons that facilitate exports, reexports, and transfers (in-country) that require a license pursuant to those sections, where no such license has been issued, are prohibited pursuant to § 764.2 of the EAR.

Restrictions on Military-Intelligence End Uses and End Users

This rule adds a new § 744.22 to the EAR, which imposes supplemental license requirements on the export, reexport, or transfer (in-country) of all items subject to the EAR to military-intelligence end uses and end users in China, Russia, or Venezuela; and countries listed in Country Groups E:1 and E:2 (see supplement no. 1 to part 740 of the EAR). As previously discussed, section 1753(a)(2)(F) of ECRA (50 U.S.C. 4812(a)(2)(F)) directs the President to establish controls on the activities of U.S. persons with respect to foreign military intelligence services. This rule implements such controls by revising § 744.6 of the EAR as described above. Consistent with these restrictions on the activities of U.S. persons, and in accordance with the authority granted to the President in section 1753(a)(1) of ECRA (50 U.S.C. 4812(a)(1)) and exercised by the Secretary of Commerce pursuant to section 1754(a)(2) and (a)(16) of ECRA (50 U.S.C. 4813(a)(2) and (a)(16)), BIS believes it is appropriate to impose a license requirement on exports, reexports, and transfers (in-country) of all items subject to the EAR to the same military-intelligence end uses and end users. Specifically, BIS believes controls on U.S. person activities related to military-intelligence end uses and end users described in § 744.6 of the EAR would be of limited effect if not implemented in tandem with a corresponding license requirement for exports, reexports, and transfers (in-country). Although § 744.21 of the EAR already imposes a license requirement on certain exports, reexports, and transfers (in-country) to military end uses and military end users, to include government intelligence and reconnaissance organizations, in China, Russia, or Venezuela, the restrictions in § 744.21(a) of the EAR apply only to items identified in supplement no. 2 to part 744 of the EAR, not to all items subject to the EAR. Accordingly, the addition of § 744.22 is warranted.

Paragraphs (a) and (b) of § 744.22 set forth license requirements applicable to certain military-intelligence end uses and end users, paragraph (c) of that section provides for the use of License Exception GOV (§ 740.11(b)(2)(ii) of the EAR), and paragraphs (d) and (e) outline the application procedures and review policy that apply to license applications submitted pursuant to that section. Section 744.22(f)(1) defines a ''military-intelligence end use'' and § 744.22(f)(2) defines a ''military-intelligence end user'' and sets forth an illustrative list of military-intelligence end users subject to the license requirements outlined in § 744.22. The imposition of a license requirement on exports, reexports, and transfers (in-country) for a military-intelligence end use or end user in the specified countries enhances U.S. national security by allowing prior U.S. government review of transactions involving military intelligence or reconnaissance organizations in countries subject to existing military end-use and end-user controls, sanctions, or embargoes.

Corresponding Change to Existing 'Military End Use' and 'Military End User' Controls

'Military-intelligence end users,' as defined in new § 744.22(f)(2) of the EAR are a subset of the ''government intelligence and reconnaissance organizations'' already included in the definition of 'military end user' in § 744.21(g) of the EAR. However, the license requirement in § 744.21(a) only applies with respect to items listed in supplement no. 2 to part 744 of the EAR, as opposed to all items subject to the EAR, as set forth in § 744.22(a). Accordingly, § 744.22 establishes a broader license requirement for this subset of 'military end users' already subject to license requirements under § 744.21. To avoid duplicate license requirements and facilitate compliance, BIS is amending the definition of 'military end user' in § 744.21(g) to exclude intelligence or reconnaissance organizations of the armed forces or national guard. Such intelligence or reconnaissance organizations will be subject to the broader license requirements of § 744.22; however, other government intelligence or reconnaissance organizations, which are not part of the armed services or national guard, will remain subject to the license requirements of § 744.21 of the EAR.

Restrictions on Certain Chemical and Biological Weapons End Uses

Section 744.4 of the EAR sets forth restrictions on exports, reexports, and transfers (in-country) to chemical and biological weapons end uses anywhere in the world. BIS is revising § 744.4 of the EAR, consistent with sections 1753(a)(2)(D) and 1754(d)(2)(D) of ECRA (50 U.S.C. 4812(a)(2)(D) and 4813(d)(2)(D)), to include restrictions on exports, reexports, and transfers (in-country) of any item subject to the EAR for use in the design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of a whole plant for chemical weapons precursors specified in export control classification number (ECCN) 1C350, which controls certain precursor chemicals listed in Schedules 2 and 3 of the Chemical Weapons Convention and/or subject to control by the Australia Group. The terms ''development'' and ''production'' are defined in § 772.1 of the EAR. This

expansion of controls advances U.S. WMD nonproliferation policy, as set forth in ECRA.

Activities Associated With Use

The term ''use'' is defined in § 772.1 of the EAR as ''operation, installation (including on-site installation, maintenance (checking), repair, overhaul, and refurbishing.'' Sections 744.3 and 744.4 of the EAR, respectively, impose license requirements on all items subject to the EAR when an exporter, reexporter, or transferor (in-country) knows such items will be used in the ''design, 'development,' 'production,' or use'' of certain rocket systems or unmanned aerial vehicles; or in the ''design, 'development,' 'production,' stockpiling, or use'' of chemical or biological weapons. Likewise, § 744.6 imposes a license requirement on specific activities of U.S. persons in support of the ''design, 'development,' 'production,' or use'' of nuclear explosive devices and rocket systems or unmanned aerial vehicles; or the ''design, 'development,' 'production,' stockpiling, or use'' of chemical or biological weapons. The definition of ''use'' in § 772.1 of the EAR, which appears in general technology notes on the Commerce Control List (CCL) (supplement no. 1 to part 774 of the EAR), resulted in a requirement for a WMD end use to involve all of the activities listed in that definition in order to trigger a ''use''-based license requirement under §§ 744.3, 744.4, or 744.6 of the EAR. This is inconsistent with section 1754(d)(1)(B) of ECRA (50 U.S.C. 4813(d)(1)(B)), which lists the component activities of the EAR definition of ''use'' as separate and individually-sufficient activities for end-use control purposes. Accordingly, BIS is revising each of those sections of the EAR to replace the word ''use'' with a list of its component activities, *i.e.,* ''operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing,'' to ensure that any one of those activities individually triggers a license requirement under the relevant sections of the EAR, when connected with certain WMD end uses.

Additional Prohibition on Persons Informed by BIS of Transactions Intended To Circumvent Entity List License Requirements

The Entity List (supplement no. 4 to part 744 of the EAR) imposes a supplemental license requirement, to the extent specified in each entry on the Entity List, for exports, reexports, or transfers (in-country) in which a listed entity is a party to the transaction as described in § 748.5(c) through (f) of the EAR. Entities may be added to the Entity List in accordance with the procedures set forth in supplement no. 5 to part 744 of the EAR if there is reasonable cause to believe the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities contrary to U.S. national security or foreign policy interests.

Although Entity List license requirements generally only apply to listed entities, BIS has posted guidance on its website in the form of frequently asked questions (FAQs) advising increased due diligence when proceeding with transactions involving parties co-located with, or which are subsidiaries, parent companies, or sister companies of, listed entities. In such cases, exporters, reexporters, and transferors should assess whether such entities are acting as an agent, front, or a shell company for a listed entity in order to facilitate transactions that would otherwise not be permissible, and whether the items intended for export, reexport, or transfer (in-country) may ultimately be destined to a listed entity.

In certain cases, BIS may have information indicating that a specific transaction, although not directly involving a listed entity, nevertheless poses an unacceptable risk of diversion to a listed entity. Likewise, BIS may have information that a specific entity, although not itself listed on the Entity List, is acting on behalf of a listed entity, or otherwise assisting a listed entity, in circumventing Entity List license requirements. In such cases, BIS may wish to inform an exporter, reexporter, or transferor that a license is required based on an unacceptable risk that the items in question will ultimately be used by, or diverted to, a listed entity. This is consistent with other provisions of part 744 of the EAR (*i.e.,* §§ 744.2(b), 744.3(b), 744.4(b), 744.9(b), 744.17(b), 744.21(b), and 744.22(b)), which authorize BIS to inform exporters, reexporters, or transferors of a license requirement based on an unacceptable risk of use in, or diversion to, specified end uses or end users.

Furthermore, section 1754(a)(2) and (a)(15) of ECRA (50 U.S.C. 4813(a)(2) and (a)(15)) specifically authorize the Secretary of Commerce to not only establish and maintain lists of foreign persons determined to be a threat to the national security and foreign policy of the United States, but also to inform persons, either individually by specific notice, or through amendment to the EAR, that a license is required for specific transactions. Accordingly, BIS is adding a new paragraph (c) to § 744.11 of the EAR, which authorizes BIS to inform persons that a license is required for specified transactions, or for transactions with specific parties, based on an unacceptable risk that the items in question will be ultimately used by, or diverted to, a listed entity.

Conforming Changes

BIS is also making conforming changes to § 744.1(a)(1) of the EAR to reflect the expanded scope of U.S. person controls in § 744.6, as well as new military-intelligence end-use and end-user controls in § 744.22, as implemented in this rule. In addition, BIS is adding to § 744.1(a)(1) a description of existing end-use and end-user controls in §§ 744.9, 744.17, and 744.18 of the EAR. Finally, BIS is revising § 744.1(b)(2) of the EAR to reference all provisions of part 744 that set forth ''additional prohibitions on persons informed by BIS,'' to include new §§ 744.6(c), 744.11(c), and 744.22(b), as well as existing §§ 744.9(b), 744.17(b), and 744.21(b), which were not previously listed in that section.

Request for Comments

BIS welcomes comments on the impact of this interim final rule. Instructions for the submission of comments, including comments that contain business confidential information, are found in the 'Addresses' section of this interim final rule.

Export Control Reform Act of 2018

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

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim final rule has

been designated a ''significant regulatory action,'' although not economically significant under section 3(f) of Executive Order 12866. Although this rule is a significant regulatory action, it is a regulation where the analysis demonstrates that the primary, direct benefit is national security and is, thus, exempt from the provisions of Executive Order 13771. This interim final rule will support the national security and foreign policy objectives of the United States by implementing controls on exports, reexports, and transfers (in-country) related to whole plants for chemical weapons precursors and certain military-intelligence end uses and end users, as well as the activities of U.S. persons, with respect to such military-intelligence end uses and end users. These controls are consistent with ECRA and allow the U.S. government prior review of such transactions and activities to determine whether they would be contrary to U.S. national security and foreign policy interests. Furthermore, this rule advances U.S. national security and foreign policy by expanding existing controls on U.S. person activities in support of certain nuclear explosive devices, missiles, and chemical and biological weapons to apply to items not subject to the EAR, as directed in ECRA. This rule also supports U.S. national security and foreign policy by allowing prior U.S. government review of a broader range of transactions that may be destined to various activities related to the use of rocket systems or unmanned aerial vehicles, or chemical or biological weapons. Finally, this rule allows the U.S. government to review transactions that post an unacceptable risk of use by, or diversion to, entities acting contrary to U.S. national security and foreign policy interests.

2. Notwithstanding any other provision of law, no person may be required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection of information previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 42.5 minutes for a manual or electronic submission. BIS expects this rule will increase the number of license applications required to be submitted to BIS each year by imposing licensing requirements on certain exports, reexports, and transfers (in-country), as well as activities of U.S. persons not previously subject to a licensing requirement. BIS estimates the total number of additional license applications will not exceed 40 per year, for a total increase in public burden under OMB control number 0694–0088 of no more than 29 hours per year.

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

Administrative Procedure Act and Regulatory Flexibility Act Requirements

Pursuant to section 4821 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date.

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

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, General information, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research, Science and technology, Scope of the Export Administration Regulations.

15 CFR Part 736

Exports, General prohibitions.

15 CFR Part 744

End-user and end-use based control policy, Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, parts 730, 734, 736, and 744 of the EAR (15 CFR parts 730 through 774) are amended as follows:

PART 730—GENERAL INFORMATION

■ 1. The authority citation for part 730 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p 168; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of September 18, 2020, 85 FR 59641 (September 22, 2020); Notice of November 12, 2020, 85 FR 72897 (November 13, 2020); Notice of May 7, 2020, 85 FR 27639.

■ 2. Section 730.5 is amended by revising paragraph (d) to read as follows:

§ 730.5 Coverage of more than exports.

* * * * *

(d) ''*U.S. person*'' *activities.* The EAR restrict specific activities of ''U.S. persons,'' wherever located, related to the proliferation of nuclear explosive devices, ''missiles,'' chemical or biological weapons, whole plants for chemical weapons precursors, and certain military-intelligence end uses and end users, as described in § 744.6 of the EAR.

PART 734—SCOPE OF THE EXPORT ADMINISTRATION REGULATIONS

■ 3. The authority citation for part 734 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of November 12, 2020, 85 FR 72897 (November 13, 2020).

■ 4. Section 734.5 is amended by revising paragraph (a) to read as follows:

§ 734.5 Activities of U.S. and foreign persons subject to the EAR.

* * * * *

(a) Specific activities of ''U.S. persons,'' wherever located, related to

the proliferation of nuclear explosive devices, ''missiles,'' chemical or biological weapons, whole plants for chemical weapons precursors, and certain military-intelligence end uses and end users as described in § 744.6 of the EAR.

* * * * *

PART 736—GENERAL PROHIBITIONS

■ 5. The authority citation for part 736 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of November 12, 2020, 85 FR 72897 (November 13, 2020); Notice of May 7, 2020, 85 FR 27639.

■ 6. Section 736.2 is amended by revising paragraphs (b)(7) introductory text and (7)(i) and (ii) to read as follows:

§ 736.2 General prohibitions and determination of applicability.

* * * * *

(b) * * *

(7) General Prohibition Seven—Support of proliferation activities and certain military-intelligence end uses and end users (''U.S. person'' activities)–

(i) Support of proliferation activities and certain military-intelligence end uses and end users (''U.S. person'' activities).

(A) If you are a ''U.S. person,'' as that term is defined in § 772.1 of the EAR, you may not engage in any activities prohibited by § 744.6(b) or (c) of the EAR, which prohibit, without a license from BIS, the shipment, transmission, or transfer (in-country) of items not subject to the EAR; facilitating such shipment, transmission, or transfer (in-country); or the performance of any contract, service, or employment (including, but not limited to: ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, or transporting, freight forwarding, or conducting negotiations in furtherance of) that you know or are informed by BIS will support:

(1) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of nuclear explosive devices in or by any country not listed in supplement no. 3 to part 744 of the EAR;

(2) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of ''missiles'' in or by a country listed in Country Groups D:4 or E:2;

(3) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of chemical or biological weapons in or by any country or destination worldwide;

(4) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, refurbishing, shipment, or transfer (in-country) of a whole plant to make chemical weapons precursors identified in ECCN 1C350, in or by countries other than those listed in Country Group A:3 (Australia Group); or

(5) A 'military-intelligence end use' or a 'military-intelligence end user,' as defined in § 744.22(f) of the EAR, in the People's Republic of China, Russia, or Venezuela; or a country listed in Country Groups E:1 or E:2.

(ii) [Reserved]

* * * * *

PART 744—CONTROL POLICY; END-USER AND END-USE BASED

■ 7. The authority citation for part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 18, 2020, 85 FR 59641 (September 22, 2020); Notice of November 12, 2020, 85 FR 72897 (November 13, 2020).

■ 8. Section 744.1 is amended by revising paragraphs (a)(1) and (b)(2) to read as follows:

§ 744.1 General provisions.

(a) * * *

(1) *Introduction.* In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. This part contains prohibitions against exports, reexports, and selected transfers to certain end users and end uses as introduced under General Prohibitions Five (End use/End users) and Nine (Orders, Terms, and Conditions), unless authorized by BIS. Sections 744.2, 744.3, and 744.4 prohibit exports, reexports, and transfers (in-country) of items subject to the EAR to defined nuclear, missile, and chemical and biological weapons proliferation activities. Section 744.5 prohibits exports, reexports, and transfers (in-country) of items subject to the EAR to defined nuclear maritime end-uses. Consistent with General Prohibition Seven (Support of Proliferation Activities and certain Military-Intelligence End Uses and End Users (''U.S. person'' activities)), § 744.6 prohibits specific activities by U.S. persons in support of certain nuclear, missile, chemical and biological weapons end uses, and whole plants for chemical weapons precursors, as well as certain military-intelligence end uses and military-intelligence end users. Section 744.7 prohibits exports and reexports of certain items for certain aircraft and vessels. Section 744.8 prohibits exports and reexports without authorization to certain parties who have been designated as proliferators of weapons of mass destruction or as supporters of such proliferators pursuant to Executive Order 13382. Section 744.9 sets forth restrictions on exports, reexports, and transfers (in-country) of certain cameras, systems, or related components. Section 744.10 prohibits exports and reexports of any item subject to the EAR to Russian entities, included in supplement no. 4 of this part. Section 744.11 imposes license requirements, to the extent specified in supplement no. 4 to this part on entities listed in supplement no. 4 to this part for activities contrary to the national security or foreign policy interests of the United States. Sections 744.12, 744.13, and 744.14 prohibit exports and reexports of any item subject to the EAR to persons designated as Specially Designated Global Terrorists, Specially Designated Terrorists, or Foreign Terrorist Organizations, respectively. Section 744.15 sets forth the conditions for exports, reexports, and transfers (in-country) to persons listed on the Unverified List (UVL) in supplement no. 6 to this part, the criteria for revising the UVL, as well as procedures for requesting removal or modification of a listing on the UVL. Section 744.16 sets forth the license requirements, policies and procedures for the Entity List. Section 744.17 sets forth restrictions on exports, reexports, and transfers (in-country) of microprocessors and associated ''software'' and ''technology'' for military end uses and to military end users. Section 744.18 sets forth restrictions on exports, reexports, and transfers to persons designated in or pursuant to Executive Order 13315. Section 744.19 sets forth BIS's licensing

policy for applications for exports or reexports when a party to the transaction is an entity that has been sanctioned pursuant to any of three specified statutes that require certain license applications to be denied. Section 744.20 requires a license, to the extent specified in supplement no. 4 to this part, for exports and reexports of items subject to the EAR destined to certain sanctioned entities listed in supplement no. 4 to this part. In addition, these sections include license review standards for export license applications submitted as required by these sections. It should also be noted that part 764 of the EAR prohibits exports, reexports and certain transfers of items subject to the EAR to denied parties. Section 744.21 imposes restrictions for exports, reexports and transfers (in-country) of items on the CCL for a military end use or military end user in the People's Republic of China (PRC or China), Russia, or Venezuela. Section 744.22 imposes restrictions on exports, reexports, and transfers (in-country) for a military-intelligence end use or military-intelligence end user in China, Russia, or Venezuela; or a country listed in Country Groups E:1 or E:2 (see supplement no. 1 to part 740 of the EAR).

* * * * *

(b) * * *

(2) *Determine Applicability.* Second, determine whether any of the end-use and end-user prohibitions described in this part are applicable to your planned export, reexport, shipment, transmission, transfer (in-country) or other activity. See supplement no. 1 to part 732 for guidance. For exports, reexports, shipments, transmissions, or transfers (in-country) that are in transit at the time you are informed by BIS that a license is required in accordance with §§ 744.2(b), 744.3(b), 744.4(b), 744.6(c), 744.9(b), 744.11(c), 744.17(b), 744.21(b), or 744.22(b) of the EAR, you may not proceed any further with the transaction unless you first obtain a license from BIS (see part 748 of the EAR for instructions on how to apply for a license). The provisions of § 748.4(d)(2) of the EAR shall not apply to license applications submitted pursuant to a notification from BIS that occurs while an export, reexport, or transfer (in-country) is in transit.

■ 9. Section 744.3 is amended by revising paragraphs (a)(1), (a)(2), (a)(3), (d)(2)(ii), and (d)(2)(v) to read as follows:

§ 744.3 Restrictions on certain rocket systems (including ballistic missiles, space launch vehicles and sounding rockets) and unmanned aerial vehicles (including cruise missiles, target drones and reconnaissance drones) end-uses.

(a) * * *

(1) Will be used in the design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of rocket systems or unmanned aerial vehicles capable of a range of at least 300 kilometers in or by a country listed in Country Group D:4 of supplement no. 1 to part 740 of the EAR.

(2) Will be used anywhere in the world except by governmental programs for nuclear weapons delivery of NPT Nuclear Weapons States that are also members of NATO, in the design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of rocket systems or unmanned aerial vehicles, regardless of range capabilities, for the delivery of chemical, biological, or nuclear weapons; or

(3) Will be used in the design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of any rocket systems or unmanned aerial vehicles in or by a country listed in Country Group D:4, but you are unable to determine:

* * * * *

(d) * * *

(2) * * *

(ii) The significance of the export, reexport or transfer in terms of its contribution to the design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of certain rocket systems or unmanned aerial vehicles;

* * * * *

(v) The types of assurances or guarantees against design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing for certain rocket system or unmanned aerial vehicle delivery purposes that are given in a particular case; and

* * * * *

■ 10. Section 744.4 is amended by revising paragraphs (a), (d)(1), (d)(2)(ii), and (d)(2)(iv) to read as follows:

§ 744.4 Restrictions on certain chemical and biological weapons end-uses.

(a) *General prohibition.* In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) an item subject to the EAR without a license if, at the time of export, reexport, or transfer (in-country) you know that the item will be used in the design, ''development,'' ''production,'' stockpiling, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of chemical or biological weapons in or by any country or destination, worldwide; or in the design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of a whole plant to make chemical weapons precursors specified in ECCN 1C350 in or by countries other than those listed in Country Group A:3 (Australia Group) (see supplement no. 1 to part 740 of the EAR).

* * * * *

(d) * * *

(1) Applications to export, reexport, or transfer (in-country) items subject to this section will be considered on a case-by-case basis to determine whether the export, reexport, or transfer (in-country) would make a material contribution to the design, ''development,'' ''production,'' stockpiling, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of chemical or biological weapons. When an export, reexport, or transfer (in-country) is deemed to make such a contribution, the license will be denied.

(2) * * *

(ii) The significance of the export, reexport, or transfer in terms of its contribution to the design, ''development,'' ''production,'' stockpiling, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of chemical or biological weapons;

* * * * *

(iv) The types of assurances or guarantees against the design, ''development,'' ''production,'' stockpiling, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of chemical or biological weapons; and

* * * * *

■ 11. Section 744.6 is revised to read as follows:

§ 744.6 Restrictions on specific activities of "U.S. persons."

(a) *Scope.* The general prohibitions in this section apply only to the extent that the underlying activities are not subject to a license requirement or general prohibition administered by another federal department or agency, see, for example, Assistance to Foreign Atomic Energy Activities regulations (10 CFR part 810), administered by the Department of Energy; International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130), administered by the Department of State; and certain sanctions regulations (to include, but not limited to, 31 CFR parts 500 through 599), administered by the Department of the Treasury. Accordingly, ''U.S. persons'' are required to seek a license from BIS only for the activities described in this section that are not subject to a license requirement or general prohibition administered by the Department of Energy, Department of State, Department of the Treasury, or other federal department or agency. The issuance of a license by BIS, or any other federal department or agency, does not authorize ''U.S. persons'' to engage in any activity that is otherwise prohibited by law, including criminal statutes.

(b) *General prohibitions.* No ''U.S. person'' may, without a license from BIS, 'support':

(1) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of nuclear explosive devices in or by any country not listed in supplement no. 3 to this part;

(2) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of ''missiles'' in or by a country listed in Country Groups D:4 or E:2;

(3) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of chemical or biological weapons in or by any country or destination worldwide;

(4) The design, ''development,'' ''production,'' operation, installation (including on-site installation), maintenance (checking), repair, overhaul, refurbishing, shipment, or transfer (in-country) of a whole plant to make chemical weapons precursors identified in ECCN 1C350, in or by countries other than those listed in Country Group A:3 (Australia Group); or

(5) A 'military-intelligence end use' or a 'military-intelligence end user,' as defined in § 744.22(f) of the EAR, in the People's Republic of China, Russia, or Venezuela; or a country listed in Country Groups E:1 or E:2.

(b)(6) 'Support' means:

(i) Shipping or transmitting from one foreign country to another foreign country any item not subject to the EAR you know will be used in or by any of the end uses or end users described in paragraphs (b)(1) through (5) of this section, including the sending or taking of such item to or from foreign countries in any manner;

(ii) Transferring (in-country) any item not subject to the EAR you know will be used in or by any of the end uses or end users described in paragraphs (b)(1) through (5) of this section;

(iii) Facilitating such shipment, transmission, or transfer (in-country); or

(iv) Performing any contract, service, or employment you know may assist or benefit any of the end uses or end users described in paragraphs (b)(1) through (5) of this section, including, but not limited to: Ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, transporting, freight forwarding, or conducting negotiations in furtherance of.

(c) *Additional prohibitions on ''U.S. persons'' informed by BIS.* BIS may inform ''U.S. persons,'' either individually by specific notice, through amendment to the EAR published in the **Federal Register,** or through a separate notice published in the **Federal Register,** that a license is required because an activity could involve the types of 'support' (as defined in paragraph (b)(6) of this section) to the end uses or end users described in paragraphs (b)(1) through (5) of this section. Specific notice is to be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse the ''U.S. person'' from compliance with the license requirements of paragraph (b) of this section.

(d) *Exceptions.* (1) No License Exceptions apply to the prohibitions described in paragraphs (b)(1) through (4) of this section.

(2) Notwithstanding the prohibitions in paragraph (b)(5) of this section, U.S. persons who are employees of a department or agency of the U.S. Government may 'support' a 'military-intelligence end use' or a 'military-intelligence end user,' as described in paragraph (b)(5), if the 'support' is provided in the performance of official duties in furtherance of a U.S. Government program that is authorized by law and subject to control by the President by other means. This paragraph does not authorize a department or agency of the U.S. Government to provide 'support' that is otherwise prohibited by other administrative provisions or by statute. 'Contractor support personnel' of a department or agency of the U.S. Government are eligible for this authorization when in the performance of their duties pursuant to the applicable contract or other official duties. 'Contractor support personnel' for the purposes of this paragraph (d)(2) has the same meaning given to that term in § 740.11(b)(2)(ii) of the EAR. This authorization is not available when a department or agency of the U.S. Government acts as an agent on behalf of a non-U.S. Government person.

(e) *License review standards.* (1) Applications for a U.S. person to 'support' (as defined in paragraph (b)(6) of this section) any of the end uses or end users described in paragraphs (b)(1) through (4) of this section will be denied if such support would make a material contribution to the end uses and end users described in paragraphs (b)(1) through (4) of this section.

(2) Applications for a U.S. person to 'support' (as defined in paragraph (b)(6) of this section) a 'military-intelligence end use' or a 'military-intelligence end user' as described in paragraph (b)(5) of this section will be reviewed with a presumption of denial.

■ 12. Section 744.11 is amended by adding a new paragraph (c) to read as follows:

§ 744.11 License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States.

* * * * *

(c) *Additional prohibition on persons informed by BIS.* BIS may inform persons, either individually by specific notice or through amendment to the EAR, that a license is required for:

(1) A specific export, reexport, or transfer (in-country) because there is an unacceptable risk that the export, reexport, or transfer (in-country) is intended to circumvent the license requirement imposed on an entity listed in supplement no. 4 to this part; or

(2) The export, reexport, or transfer (in-country) of specified items to a certain party because there is an unacceptable risk that the party is acting

as an agent, front, or shell company for an entity listed in supplement no. 4 to this part, or is otherwise assisting that listed entity in circumventing the license requirement set forth in that entity's entry in supplement no. 4 to this part.

■ 13. Section 744.21 is amended by revising paragraph (g) to read as follows:

§ 744.21 Restrictions on certain 'military end use' or 'military end user' in the People's Republic of China, Russia, or Venezuela.

* * * * *

(g) *Military end user.* In this section, the term 'military end user' means the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations (excluding those described in § 744.22(f)(2) of the EAR), or any person or entity whose actions or functions are intended to support 'military end uses' as defined in paragraph (f) of this section.

* * * * *

■ 14. Section 744.22 is added to read as follows:

§ 744.22 Restrictions on exports, reexports, and transfers (in-country) to certain military-intelligence end uses or end users.

(a) *General prohibition.* In addition to the license requirements for items specified on the Commerce Control List (CCL), you may not export, reexport, or transfer (in-country) any item subject to the EAR without a license from BIS if, at the time of the export, reexport, or transfer (in-country), you have ''knowledge'' that the item is intended, entirely or in part, for a 'military-intelligence end use' or a 'military-intelligence end user' in the People's Republic of China, Russia, or Venezuela; or a country listed in Country Groups E:1 or E:2 (see supplement no. 1 to part 740 of the EAR).

(b) *Additional prohibition on those informed by BIS.* BIS may inform you either individually by specific notice, through amendment to the EAR published in the **Federal Register**, or through a separate notice published in the **Federal Register**, that a license is required for specific exports, reexports, or transfers (in-country) of any item subject to the EAR because there is an unacceptable risk of use in, or diversion to, a 'military-intelligence end use' or a 'military-intelligence end user' in the People's Republic of China, Russia, or Venezuela; or a country listed in Country Group E:1 or E:2 (see supplement no. 1 to part 740 of the EAR).

(c) *License exception.* Notwithstanding the prohibitions described in paragraphs (a) and (b) of this section, you may export, reexport, or transfer (in-country) items subject to the EAR under the provision of License Exception GOV set forth in § 740.11(b)(2)(ii) of the EAR.

(d) *License application procedure.* When submitting a license application pursuant to this section, you must state in the ''additional information'' block of the application that ''this application is submitted because of the license requirement in § 744.22 of the EAR (Restrictions on exports, reexports, and transfers (in-country) to certain military-intelligence end uses or end users). In addition, either in the additional information block of the application or in an attachment to the application, you must include all known information concerning the military-intelligence end use(s) or end user(s) of the item(s). If you submit an attachment with your license application, you must reference the attachment in the ''additional information'' block of the application.

(e) *License review policy.* Applications to export, reexport, or transfer (in-country) items requiring a license pursuant to paragraphs (a) or (b) of this section will be reviewed with a presumption of denial.

(f) *Definitions.* (1) 'Military-intelligence end use' means the design, ''development,'' ''production,'' use, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, or incorporation into, items described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations), or classified under ECCNs ending in ''A018'' or under ''600 series'' ECCNs, which are intended to support the actions or functions of a 'military-intelligence end user,' as defined in this section.

(2) 'Military-intelligence end user' means any intelligence or reconnaissance organization of the armed services (army, navy, marine, air force, or coast guard); or national guard. For license requirements applicable to other government intelligence or reconnaissance organizations in China, Russia, or Venezuela, see § 744.21 of the EAR. Military-intelligence end users subject to the license requirements set forth in this § 744.22 include, but are not limited to, the following:

(i) *Cuba.* Directorate of Military Intelligence (DIM) and Directorate of Military Counterintelligence (CIM).

(ii) *China, People's Republic of.* Intelligence Bureau of the Joint Staff Department.

(iii) *Iran.* Islamic Revolutionary Guard Corps Intelligence Organization (IRGC–IO) and Artesh Directorate for Intelligence (J2).

(iv) *Korea, North.* Reconnaissance General Bureau (RGB).

(v) *Russia.* Main Intelligence Directorate (GRU).

(vi) *Syria.* Military Intelligence Service.

(vii) *Venezuela.* General Directorate of Military Counterintelligence (DGCIM).

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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